DEPARTMENT OF LABOR

Employee Benefits Security Administration

Exemptions from Certain Prohibited Transaction Restrictions

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Grant of individual exemptions.

SUMMARY: This document contains exemptions issued by the Department of Labor (the Department) from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (ERISA or the Act) and/or the Internal Revenue Code of 1986 (the Code). This notice includes the following: 2017–03, JPMorgan Chase & Co., D–11906; 2017–04, Deutsche Investment Management Americas Inc. (DIMA) and Certain Current and Future Asset Management Affiliates of Deutsche Bank AG, D–11908; 2017–05, Citigroup Inc., D–11909; 2017–06, Barclays Capital Inc., D–11910; 2017–07, UBS Assets Management (Americas) Inc.; UBS Realty Investors LLC; UBS Hedge Fund Solutions LLC; UBS O'Connor LLC; and Certain Future Affiliates in UBS's Asset Management and Wealth Management Americas Divisions, D–11907.

SUPPLEMENTARY INFORMATION: A notice was published in the **Federal Register** of the pendency before the Department of a proposal to grant such exemption. The notice set forth a summary of facts and representations contained in the application for exemption and referred interested persons to the application for a complete statement of the facts and representations. The application has been available for public inspection at the Department in Washington, DC. The notice also invited interested persons to submit comments on the requested exemption to the Department. In addition the notice stated that any interested person might submit a written request that a public hearing be held (where appropriate). The applicant has represented that it has complied with the requirements of the notification to interested persons. One request for a hearing was received by the Department. Public comments were received by the Department as described in the granted exemption.

The notice of proposed exemption was issued and the exemption is being granted solely by the Department because, effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1 (1996), transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor.

Statutory Findings

In accordance with section 408(a) of the Act and/or section 4975(c)(2) of the Code and the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644, October 27, 2011) [1] and based upon the entire record, the Department makes the following findings:

(a) The exemption is administratively feasible;

(b) The exemption is in the interests of the plan and its participants and beneficiaries; and

(c) The exemption is protective of the rights of the participants and beneficiaries of the plan.

JPMorgan Chase Co. (JPMC or the Applicant) Located in New York, New York

[Prohibited Transaction Exemption 2017–03; Exemption Application No. D–11906]

Discussion

On November 21, 2016, the Department of Labor (the Department) published a notice of proposed exemption in the **Federal Register** at 81 FR 83372, for certain entities with specified relationships to JPMC to continue to rely upon the relief provided by PTE 84–14 for a period of five years,[2] notwithstanding JPMC's criminal conviction, as described herein. The Department is granting this exemption in order to ensure that Covered Plans [3] whose assets are managed by a JPMC Affiliated QPAM or JPMC Related QPAM may continue to benefit from the relief provided by PTE 84–14. The exemption is effective from January 10, 2018 through January 9, 2023 (the Exemption Period).

No relief from a violation of any other law is provided by this exemption, including any criminal conviction described in the proposed exemption. Furthermore, the Department cautions that the relief in this exemption will terminate immediately if, among other things, an entity within the JPMC corporate structure is convicted of a crime described in Section I(g) of PTE 84–14 (other than the Conviction) during the Exemption Period. The terms of this exemption have been specifically designed to promote conduct that adheres to basic fiduciary standards under ERISA and the Code. The exemption also aims to ensure that plans and IRAs can terminate relationships in an orderly and cost effective fashion in the event a plan or IRA fiduciary determines it is prudent for the plan or IRA to sever its relationship with an entity covered by the exemption.

Written Comments

The Department invited all interested persons to submit written comments and/or requests for a public hearing with respect to the notice of proposed exemption, published in the **Federal Register** at 81 FR 83372 on November 21, 2016. All comments and requests for a hearing were due by January 20, 2017.[4] The Department received written comments from the Applicant, members of the U.S. Congress, and a number of plan and IRA clients of JPMC. After considering these submissions, the Department has determined to grant the exemption, with revisions, as described below.

Comment 1—Term of the Exemption

The Applicant requests that the Department extend the term of the exemption from five years to nine years from the Conviction Date. The Applicant states that the five year term is inconsistent with precedent and ''appears punitive.'' The Applicant further states that ''exemptions should reflect the underlying facts that necessitated the exemption [and] [h]ere, those facts are as follows: JPMC was convicted of a single crime, based solely on the misconduct of a single individual who was not employed by the Applicant's asset management businesses and who has been terminated by a firm that has dedicated and continues to dedicate significant resources to enhancing the relevant

[1] The Department has considered exemption applications received prior to December 27, 2011 under the exemption procedures set forth in 29 CFR part 2570, subpart B (55 FR 32836, 32847, August 10, 1990).

[2] 49 FR 9494 (March 13, 1984), as corrected at 50 FR 41430 (October 10, 1985), as amended at 70 FR 49305 (August 23, 2005) and as amended at 75 FR 38837 (July 6, 2010), hereinafter referred to as PTE 84–14 or the QPAM exemption.

[3] The term ''Covered Plan'' is a plan subject to Part 4 of Title 1 of ERISA (''ERISA-covered plan'') or a plan subject to Section 4975 of the Code (''IRA'') with respect to which a JPMC Affiliated QPAM relies on PTE 84–14, or with respect to which a JPMC Affiliated QPAM (or any JPMC affiliate) has expressly represented that the manager qualifies as a QPAM or relies on the QPAM class exemption (PTE 84–14). A Covered Plan does not include an ERISA-covered Plan or IRA to the extent the JPMC Affiliated QPAM has expressly disclaimed reliance on QPAM status or PTE 84–14 in entering into its contract, arrangement, or agreement with the ERISA-covered plan or IRA. See further discussion in this Preamble under the heading Comment 8—Policies and Procedures Relating to Compliance with ERISA and the Code—Section I(h)(1)(ii)–(v).

[4] The Department received additional comments from Applicant after the close of the comment period.

controls to prevent future instances of similar misconduct.'' The Applicant states that ''the exemption imposes additional and burdensome requirements on the asset management businesses of the applicant-businesses entirely uninvolved with the criminal conduct.''

Although the Applicant characterizes the conduct as involving the isolated actions of one individual, the Department does not agree with the apparent suggestion that the Applicant bears little or no responsibility for the criminal conduct. For example, JPMC's Plea Agreement contains the following statement, under the heading Other Relevant Conduct: ''the defendant [JPMC], through its currency traders and sales staff, also engaged in other currency trading and sales practices in conducting FX Spot Market transactions with customers via telephone, email, and/or electronic chat, to wit: (i) Intentionally working customers' limit orders one or more levels, or 'pips,' away from the price confirmed with the customer; (ii) including sales markups, through the use of live hand signals or undisclosed prior internal arrangements or communications, to prices given to customers that communicated with sales staff on open phone lines; (iii) accepting limit orders from customers and then informing those customers that their orders could not be filled, in whole or in part, when in fact the defendant was able to fill the order but decided not to do so because the defendant expected it would be more profitable not to do so; and (iv) disclosing non-public information regarding the identity and trading activity of the defendant's customers to other banks or other market participants, in order to generate revenue for the defendant at the expense of its customers.''

In developing this exemption, the Department also considered statements made by other regulators. The Financial Conduct Authority's (FCA) Final Notice states: ''[d]uring the Relevant Period, JPMorgan did not exercise adequate and effective control over its G10 spot FX trading business. . . . The front office failed adequately to discharge these responsibilities with regard to obvious risks associated with confidentiality, conflicts of interest and trading conduct.'' The Notice further states: ''These failings occurred in circumstances where certain of those responsible for managing front office matters were aware of and/or at times involved in behaviors described above.''

By way of further example, the Consent Order of the Office of the Comptroller of the Currency (OCC) states: ''[t]he OCC's examination findings established that the Bank [the Applicant's Corporate and Investment Banking line of business] had deficiencies in its internal controls and had engaged in unsafe or unsound banking practices with respect to the oversight and governance of the Bank's FX trading business such that the Bank failed to detect and prevent the conduct set forth in paragraph twelve (12). The deficiencies and unsafe or unsound practices include the following: (a) The Bank's oversight and governance of its FX trading business were weak and lacked adequate formal guidance to mitigate and manage risks related to market conduct in FX Trading with respect to sales, trading and supervisory employees in that business . . . .''

The Department also notes the size of relevant fines imposed by various regulators: The Department of Justice imposed a $550 million fine; The Board of Governors of the Federal Reserve Board imposed a $342 million fine; and the OCC, the Commodity Futures Trading Commission, and the FCA imposed fines of $350 million, $310 million, and £222,166,000, respectively.

This exemption is not punitive; instead, its five-year term and protective conditions reflect the Department's intent to protect Covered Plans that entrust substantial assets to a JPMC Affiliated QPAM, despite the serious misconduct and supervisory failures described above. The limited term of this exemption gives the Department the opportunity to review the adherence by the JPMC Affiliated QPAMs to the conditions set out herein. If the Applicant seeks an extension of this exemption, the Department will examine whether the compliance and oversight changes mandated by various regulatory authorities are having the desired effect on JPMC entities.

The relationship between the JPMC Affiliated QPAMs and the Applicant's Corporate and Investment Banking line of business (CIB) is substantial. The Applicant states, ''As of the date of the Applicant's application, JPMC Affiliated QPAMs managed approximately $100 billion in plan assets through collective investment trusts that use the custody and administration services of the Applicant's Corporate and Investment Banking line of business (CIB), operating through the Bank. Similarly, certain plans managed by JPMC Affiliated QPAMs through separate accounts have independently selected CIB (operating through the Bank) as their trustee and/or custodian, and transactions directed by JPMC Affiliated QPAMs on behalf of such plans would necessarily require the trustee/custodian to provide services for a direct or indirect fee.'' The Applicant also states, ''Because of all of the services CIB necessarily provides to client accounts, the wording of this proposed exemption [that excludes the business line from providing services to funds managed by the Affiliated QPAMs] is tantamount to a denial.''

Notwithstanding the above, as noted below, the Department has determined to revise this exemption to permit CIB to continue to provide services to funds managed by JPMC Affiliated QPAMs, based on the Department's determination that the conditions set forth herein are sufficiently protective of the Covered Plans, and given the type of transactions covered by this exemption and the Applicant's representations regarding the types of services provided by CIB. The Department notes that the JPMC Affiliated QPAMs' substantial and substantive dependency on the JPMC CIB when managing plan and IRA assets also supports the Department's conclusion that the conditions of the exemption are necessary and appropriate.

Comment 2—Description of Criminal Conduct—Section I

The prefatory language to Section I of the proposed exemption provides, ''*If the proposed five-year exemption is granted, certain asset managers with specified relationships to JPMC (the JPMC Affiliated QPAMs and the JPMC Related QPAMs, as defined further in Sections II(a) and II(b), respectively) will not be precluded from relying on the exemptive relief provided by Prohibited Transaction Class Exemption 84–14 (PTE 84–14 or the QPAM Exemption), notwithstanding the judgment of conviction against JPMC (the Conviction), as defined in Section II(e)), for engaging in a conspiracy to: (1) fix the price of, or (2) eliminate competition in the purchase or sale of the Euro/U.S. dollar currency pair exchanged in the Foreign Exchange (FX) Spot Market, for a period of five years beginning on the date the exemption is granted.*''

The Applicant requests that the description of the charged conduct—the clause beginning ''for engaging in a conspiracy''—be omitted. The Applicant states that this description is inaccurate and incomplete, will lead to disputes with counterparties to the detriment of plans, and will make it unlikely that plans will benefit from or be protected by this exemption.

After consideration of the Applicant's comment, the Department has revised the exemption in the manner requested by the Applicant.

Comment 3—Knowing or Tacit Approval—Sections I(a) and I(c)

Section I(a) of the proposed five-year exemption provides, ''*(a) Other than a single individual who worked for a non-fiduciary business within JPMorgan Chase Bank and who had no responsibility for, and exercised no authority in connection with, the management of plan assets, the JPMC Affiliated QPAMs and the JPMC Related QPAMs (including their officers, directors, agents other than JPMC, and employees of such QPAMs who had responsibility for, or exercised authority in connection with the management of plan assets) did not know of, did not have reason to know of, or participate in the criminal conduct that is the subject of the Conviction. For purposes of this paragraph (a), 'participate in' includes the knowing or tacit approval of the misconduct underlying the Conviction;*''

Section I(c) of the proposed exemption provides, ''*(c) The JPMC Affiliated QPAMs will not employ or knowingly engage any of the individuals that participated in the criminal conduct that is the subject of the Conviction. For the purposes of this paragraph (c), 'participated in' includes the knowing or tacit approval of the misconduct underlying Conviction;*''

The Applicant requests that the words ''or tacit'' in the phrase ''knowing or tacit approval'' be deleted in Sections I(a) and I(c). The Applicant states that the term tacit approval ''is undefined and ambiguous, and potentially encompasses a broad range of conduct that could become the subject of disputes with counterparties.''

After consideration of the Applicant's comment, the Department has revised the condition in the manner requested by the Applicant.

Comment 4—Receipt of Compensation—Section I(b)

Section I(b) of the proposed five-year exemption provides, ''(b) *Other than a single individual who worked for a non-fiduciary business within JPMorgan Chase Bank and who had no responsibility for, and exercised no authority in connection with, the management of plan assets, the JPMC Affiliated QPAMs and the JPMC Related QPAMs (including their officers, directors, and agents other than JPMC, and employees of such JPMC QPAMs) did not receive direct compensation, or knowingly receive indirect compensation in connection with the criminal conduct that is the subject of the Conviction.*''

The Applicant states that Section I(b) is not practically workable because an individual can receive compensation only if the entity he or she works for receives funds. The Applicant requests that this condition be modified to reflect that, although undefinable, a non-fiduciary business within JPMorgan Chase Bank may have indirectly received funds in connection with the criminal conduct that is the subject of the Conviction. The Applicant requests that the Department modify this condition as follows:

The JPMC Affiliated QPAMs and the JPMC Related QPAMs (including their officers, directors, and agents other than JPMC, and employees of such JPMC QPAMs who had responsibility for, or exercised authority in connection with the management of plan assets) did not receive direct compensation, or knowingly receive indirect compensation, in connection with the criminal conduct that is the subject of the Conviction, other than a non-fiduciary line of business within JPMorgan Chase Bank.

The Department has revised the condition in the manner requested by the Applicant. As revised, the condition precludes relief if any asset management personnel of JPMC received direct compensation, or knowingly received indirect compensation, in connection with the criminal conduct that is the subject of the Conviction.

Comment 5—Inclusion of ''Investment Banking Division of JPMorgan Chase Bank''—Sections I(d), I(g), and I(h)(1)(i)

Section I(d)of the proposed five-year exemption provides, ''*(d) A JPMC Affiliated QPAM will not use its authority or influence to direct an 'investment fund' (as defined in Section VI(b) of PTE 84–14), that is subject to ERISA or the Code and managed by such JPMC Affiliated QPAM, to enter into any transaction with JPMC or the Investment Banking Division of JPMorgan Chase Bank, or engage JPMC or the Investment Banking Division of JPMorgan Chase Bank to provide any service to such investment fund, for a direct or indirect fee borne by such investment fund, regardless of whether such transaction or service may otherwise be within the scope of relief provided by an administrative or statutory exemption;*''

Section I(g)of the proposed five-year exemption provides, ''*(g) JPMC and the Investment Banking Division of JPMorgan Chase Bank will not provide discretionary asset management services to ERISA-covered plans or IRAs, and will not otherwise act as a fiduciary with respect to ERISA-covered plan or IRA assets;*''

Section I(h)(1)(i) of the proposed five-year exemption provides, ''*(h)(1)(i) The asset management decisions of the JPMC Affiliated QPAM are conducted independently of JPMC's management and business activities, including the corporate management and business activities of the Investment Banking Division of JPMorgan Chase Bank;*''

The Applicant requests that these sections be revised to allow the Investment Banking Division of JPMorgan Chase Bank to provide services, including the following services, to investment funds managed by the JPMC Affiliated QPAMs: Safekeeping; settlement; administration; full service class action filing service; overdraft protection; sweep and deposit services; portfolio accounting and reporting services; payment processing services; and foreign custodial services. The Applicant states that not allowing the Investment Banking Division of JPMorgan Chase Bank to provide, or to continue to provide, these services would be harmful to more than a thousand plans.

After considering the Applicant's comment, the Department has revised the exemption in the manner requested by the Applicant such that the condition does not apply to the Investment Banking Division of JPMorgan Chase Bank. In addition, the Department has clarified that Section I(d) applies to an ''investment fund'' that is subject to ERISA or the Code and managed by such JPMC Affiliated QPAM with respect to Covered Plans. Finally, as requested by the Applicant, Section I(g) has been modified to clarify that JPMC will not violate this condition in the event that it inadvertently becomes an investment advice fiduciary and that JPMC can act as a fiduciary for plans that it sponsors for its own employees or employees of an affiliate.

Comment 6—Exercising Authority Over Plan Assets—Section I(f)

Section I(f)of the proposed five-year exemption provides, ''*(f) A JPMC Affiliated QPAM or a JPMC Related QPAM did not exercise authority over the assets of any plan subject to Part 4 of Title I of ERISA (an ERISA-covered plan) or section 4975 of the Code (an IRA) in a manner that it knew or should have known would: Further the criminal conduct that is the subject of the Conviction; or cause the JPMC QPAM or its affiliates or related parties to directly or indirectly profit from the criminal conduct that is the subject of the Conviction.*''

The Applicant requests that Section I(f) be deleted, stating that it is duplicative of Section I(b), ambiguous, and not administrable or in the interests of plans. The Applicant states that the first clause of the condition does not differ in any material way from the very first and most basic condition of the exemption: That the asset management businesses of the Affiliated QPAMs did not know of or participate in the conduct that is the subject of the Conviction. The Applicant also states that the second clause of the condition which states, ''*or cause the JPMC QPAM or its affiliates or related parties to directly or indirectly profit from the criminal conduct,*'' is confusing and repetitive of the condition in section I(b).

The Department declines to make the Applicant's requested revisions. The Department does not view Condition I(f) (which relates to exercising authority) as ambiguous or duplicative of Section I(b) (which relates to compensation). Further, Condition I(f) is consistent with the Applicant's prior representation that, ''other than a single individual who worked for a nonfiduciary business within JPMorgan Chase Bank and who had no responsibility for, and exercised no authority in connection with, the management of plan assets, the Affiliated QPAMs did not participate in the Conduct and (ii) no current or former employee of JPMC or of any Affiliated QPAM who previously has been or who subsequently may be identified by JPMC, or any U.S. or non-U.S. regulatory or enforcement agencies, as having been responsible for the Conduct will have any involvement in providing asset management services to plans and IRAs or will be an officer, director, or employee of the Applicant or of any Affiliated QPAM.'' However, for clarity, the Department has deleted the term ''related parties.'' [5]

Comment 7—Time to Implement Policies and Training—Section I(h)(1)–(2)

Section I(h) of the proposed five-year exemption provides, ''*(h)(1) Within four (4) months of the Conviction, each JPMC Affiliated QPAM must develop, implement, maintain, and follow written policies and procedures (the Policies). . . (2) Within four (4) months of the date of the Conviction, each JPMC Affiliated QPAM must develop and implement a program of training (the Training), conducted at least annually, for all relevant JPMC Affiliated QPAM asset/portfolio management, trading, legal, compliance, and internal audit personnel . . .*''

[5] See JPMC Exemption Application (May 20, 2015) at page 11.

The Applicant requests that the Department increase the development period associated with the Policies and Training Requirement (the Development Period) from four (4) months to six (6) months. The Applicant also seeks confirmation that, following the Development Period, it will have twelve (12) months to complete the Training for all relevant employees, and that it must do so again in every succeeding twelve (12) month period. In support of this request, the Applicant represents that JPMC Affiliated QPAMs manage assets for hundreds of ERISA-covered plans, through separate accounts; over a thousand plans, through collective investment trusts; and more than 160,000 IRAs, through various lines of business. The Applicant states that it may take up to six (6) months for all of these asset management staffs to satisfy the conditions set out in subparagraph(h) and then an additional twelve (12) months to accomplish all of the training. The Applicant further requests that Section I(h) be streamlined to match the requirements of PTE 2016–15.

The Department emphasizes that the JPMC QPAMs must comply with the Policies and Training requirements within both PTE 2016–15 and this exemption. To this end, the Department has revised the policies and training requirements of Section I(h) to conform with PTE 2016–15. The two exemptions now follow this timeline: (i) Each JPMC Affiliated QPAM must have developed the Policies and Training required by PTE 2016–15 by July 9, 2017; (ii) the first annual Training under PTE 2016–15 must be completed by July 9, 2018; (iii) each JPMC Affiliated QPAM must develop the Policies and Training required by this exemption, as necessary, by July 9, 2018; and (iv) the first Training under this exemption must be completed by July 9, 2019. By the end of this 30-month period, asset/portfolio management, trading, legal, compliance, and internal audit personnel who were employed from the start to the end of the period must have been trained twice.

Comment 8—Policies and Procedures Relating to Compliance With ERISA and the Code—Section I(h)(1)(ii)–(v)

Section I(h)(1)(ii)–(v) of the proposed five-year exemption provides,''*(h)(1) Within four (4) months of the Conviction, each JPMC Affiliated QPAM must develop, implement, maintain, and follow written policies and procedures (the Policies) requiring and reasonably designed to ensure that:*

. . . (ii) The JPMC Affiliated QPAM fully complies with ERISA's fiduciary duties, and with ERISA and the Code's prohibited transaction provisions, and does not knowingly participate in any violation of these duties and provisions with respect to ERISA-covered plans and IRAs;

(iii) The JPMC Affiliated QPAM does not knowingly participate in any other person's violation of ERISA or the Code with respect to ERISA-covered plans and IRAs;

(iv) Any filings or statements made by the JPMC Affiliated QPAM to regulators including, but not limited to, the Department, the Department of the Treasury, the Department of Justice, and the Pension Benefit Guaranty Corporation, on behalf of ERISA-covered plans or IRAs, are materially accurate and complete, to the best of such QPAM's knowledge at that time; [and]

(v) The JPMC Affiliated QPAM does not make material misrepresentations or omit material information in its communications with such regulators with respect to ERISA-covered plans or IRAs, or make material misrepresentations or omit material information in its communications with ERISA-covered plans and IRA clients.''

The Applicant requests that these subparagraphs be stricken as duplicative and already mandated by statute. The Applicant states that these conditions could be read to apply the fiduciary duties of ERISA to IRAs, which it claims would be overly broad, punitive, and not rationally related to asset management under the exemption. In the event the Department declines to strike the above subsections, the Applicant requests the following revisions to subsections (ii)–(v):

Subsection (ii): The Applicant requests that JPMC Affiliated QPAMs be required to comply with ERISA's fiduciary duties, ''with respect to ERISA-covered plans managed in reliance on PTE 84–14,'' and with ERISA and the Code's prohibited transaction provisions, ''as applicable, with respect to ERISA-covered plans and IRAs managed in reliance on PTE 84–14.''

Subsection (iii): The Applicant requests the removal of ''or the Code,'' and ''IRAs.'' With the Applicant's requested revision, subsection (iii) would read, ''The JPMC Affiliated QPAM does not knowingly participate in any other person's violation of ERISA with respect to ERISA-covered plans.''

Subsection (iv): The Applicant requests that the phrase, ''on behalf of ERISA-covered plans or IRAs,'' be changed to, ''on behalf of ERISA-covered plans or IRAs for which a JPMC Affiliated QPAM provides asset management or other discretionary fiduciary services in reliance on PTE 84–14.''

Subsection (v): The Applicant requests that the subparagraph be revised to, ''(v) The JPMC Affiliated QPAM does not intentionally make material misrepresentations or omit material information, to the best of such QPAM's knowledge at that time, in its communications with ERISA-covered plans and IRA clients, the assets of which are managed by such JPMC Affiliated QPAM in reliance on PTE 84–14.''

In response to the Applicant's comments, the Department has modified the Policies' requirement of adherence to the fiduciary and prohibited transaction provisions of ERISA and the Code so that the Policies expressly focus on the provisions only to the extent ''applicable'' under ERISA and the Code. In general, however, the Department has otherwise retained the stringency and breadth of the Policies requirement, which is more than justified by the compliance and oversight failures exhibited by JPMC throughout the long period of time during which the criminal misconduct persisted.

The specific elements of the Policies requirement as set forth in this exemption are essential to its protective purposes. In approving this exemption, the Department significantly relies upon conditions designed to ensure that those relying upon its terms for prohibited transaction relief will adopt a culture of compliance centered on basic fiduciary norms and standards of fair dealing, as reflected in the Policies. These standards are core protections of this exemption.

The Department has made some additional changes, however, which should not detract from the Policies' protective purpose. Thus, as requested by the Applicant, subsection (v) has been revised to contain the ''to the best of QPAM's knowledge at the time'' concept found in subsection (iv); and the applicability of subsections (iv) and (v) has been narrowed to ERISA-covered plans and IRAs with respect to which a JPMC Affiliated QPAM relies on PTE 84–14, or with respect to which a JPMC Affiliated QPAM has expressly represented that the manager qualifies as a QPAM or relies on the QPAM class exemption in its dealings with the ERISA-covered plan or IRA (hereinafter, a Covered Plan). To the extent a JPMC QPAM would prefer not to be subject to this provision, however, it may expressly disclaim reliance on QPAM status or PTE 84–14 in entering into its contract with the Covered Plan. This revision is consistent with the Department's intent to protect ERISA-covered plans and IRAs that may have hired a JPMC Affiliated QPAM based on the manager's express representation that it relies on or qualifies under PTE 84–14.

As explained in more detail below, the Department will not strike a condition merely because it is also a statutory requirement. It is the express intent of the Department to preclude relief for a JPMC affiliated QPAM that fails to meet the requirements of this exemption, including those derived from basic standards codified in statute, as applicable.

Comment 9—Correction of Violations and Failures To Comply—Section I(h)(1)(vii)

Section I(h)(1)(vii) of the proposed five-year exemption provides, ''*Any violation of, or failure to comply with an item in subparagraphs (ii) through (vi), is corrected promptly upon discovery, and any such violation or compliance failure not promptly corrected is reported, upon the discovery of such failure to promptly correct, in writing, to appropriate corporate officers, the head of compliance, and the General Counsel (or their functional equivalent) of the relevant JPMC Affiliated QPAM, the independent auditor responsible for reviewing compliance with the Policies, and an appropriate fiduciary of any affected ERISA-covered plan or IRA that is independent of JPMC; however, with respect to any ERISA-covered plan or IRA sponsored by an 'affiliate' (as defined in Section VI(d) of PTE 84–14) of JPMC or beneficially owned by an employee of JPMC or its affiliates, such fiduciary does not need to be independent of JPMC. A JPMC Affiliated QPAM will not be treated as having failed to develop, implement, maintain, or follow the Policies, provided that it corrects any instance of noncompliance promptly when discovered, or when it reasonably should have known of the noncompliance (whichever is earlier), and provided that it adheres to the reporting requirements set forth in this subparagraph (vii).*''

The Applicant cites this condition as an example of how the Department made the proposed exemption ''inexplicably'' and ''arbitrarily'' more burdensome and onerous than other such exemptions it has granted previously. More specifically, the Applicant seeks several revisions to Section I(h)(vii), stating that its notification requirements are overbroad, and that terms such as ''appropriate corporate officers'' and ''corrected promptly'' are either vague or undefined. The Applicant requests that ''subparagraphs (ii) through (vi)'' be revised to read ''subparagraphs (i) through (vi).'' The Applicant also requests that the last sentence of the subparagraph (h) be revised, because it is ''overly broad and does not meaningfully provide relief in instances where a violation or compliance failure is corrected.'' The Applicant suggests the subparagraph (h) be revised to read, ''Within sixty (60) days of discovery of any violation of, or failure to comply with, an item in subparagraphs (i) through (vi), the JPMC QPAM will formulate, in writing, a plan to address such violation or failure (a Correction Plan). To the extent any such Correction Plan is not formulated within sixty (60) days of discovery, the JPMC Affiliated QPAM will report in writing such violation of, or failure to comply with, the item in subparagraphs (i) through (vi) to the head of compliance . . . .''

In response to the Applicant's general comment, the Department has based the conditions of this exemption on both the particular facts of this case and its experience over time with previous exemptions. For the reasons set out herein, the Department has concluded that the specific conditions of this exemption are appropriate and give the Department a reasonable basis for concluding that the exemptions are appropriately protective of affected plans and IRAs. As noted above, a central aim of the exemption is to ensure that those relying upon the exemption for relief from the prohibited transaction rules will consistently act to promote a culture of fiduciary compliance, notwithstanding the conduct that violated Section I(g) of PTE 84–14.

After considering the Applicant's specific requests for revisions, however, the Department has replaced ''appropriate corporate officers'' with ''the head of compliance and the General Counsel (or their functional equivalent) of the relevant line of business that engaged in the violation or failure.'' The Department also will not condition the exemption on a requirement for notification of violations to an appropriate fiduciary of any affected ERISA-covered plan or IRA that is independent of JPMC.

However, the Department is not revising the ''subparagraphs (ii) through (vi)'' reference to include ''subparagraph (i)'' because the Department intends to preclude relief to the extent a JPMC Affiliated QPAM fails to develop, implement, maintain, and follow written policies and procedures. Clearly, it is not enough merely to develop policies and procedures, without also implementing, maintaining, and following the terms of those policies and procedures. Covered Plans do not benefit from the creation of strong policies and procedures, unless they are actually followed.

The Department has revised the term ''corrected promptly'' for consistency with the Department's intent that violations or compliance failures be corrected ''as soon as reasonably possible upon discovery or as soon after the QPAM reasonably should have known of the noncompliance (whichever is earlier).'' However, contrary to the Applicant's suggestion, the Department intends to preclude relief to the extent violations or failures are not corrected as required by the exemption. Therefore, the Department has not adopted the Applicant's proposed subparagraph (vii), which requires little more than the formulation of a correction plan, without any corresponding obligation to actually implement the plan.

Comment 10—Training Incorporated in Policies—Section I(h)(2)(i)

Section I(h)(2)(i) of the proposed five-year exemption provides, ''*. . . The Training must: (i) Be set forth in the Policies and, at a minimum, cover the Policies, ERISA and Code compliance (including applicable fiduciary duties and the prohibited transaction provisions), ethical conduct, the consequences for not complying with the conditions of this five-year exemption (including any loss of exemptive relief provided herein), and prompt reporting of wrongdoing.*''

The Applicant states that the requirement in Section I(h)(2)(i) that the Training must be ''set forth in'' the Policies is impracticable and may cause significant logistical challenges over time. Accordingly, the Applicant requests that Section I(h)(2)(i) be revised as follows:

''. . . The Training must, at a minimum, cover the Policies, ERISA and Code compliance (including applicable fiduciary duties and the prohibited transaction provisions), ethical conduct, the consequences for not complying with the conditions of this permanent exemption (including any loss of exemptive relief provided herein), and prompt reporting of wrongdoing.''

After considering this comment, the Department has revised the condition as requested by the Applicant.

Comment 11—Training by Independent Professional—Section I(h)(2)(ii)

Section I(h)(2)(ii) of the proposed five-year exemption provides, ''. . . The Training must: . . . (ii) Be conducted by an independent professional who has been prudently selected and who has appropriate technical training and proficiency with ERISA and the Code.''

The Applicant requests that Section I(h)(2)(ii) be deleted, stating that requiring an independent professional is likely to be ''counterproductive, a waste of time and resources, and less effective than using internal personnel who are familiar with Applicant's processes and staff . . . .''

Although the Department does not agree with the Applicant's characterization that hiring an appropriate independent professional, prudently-selected, would be counterproductive and a waste of resources, the Department is persuaded that appropriate JPMC personnel, prudently selected, should be allowed to conduct the training, and has revised the condition accordingly.

Comment 12—Audit—Section I(i)(1)

Section I(i)(1) of the proposed five-year exemption requires that each *JPMC Affiliated QPAM* ''submits to an audit conducted annually by an independent auditor, who has been prudently selected and who has appropriate technical training and proficiency with ERISA and the Code, to evaluate the adequacy of, and the JPMC Affiliated QPAM's compliance with, the Policies and Training described herein. The audit requirement must be incorporated in the Policies. Each annual audit must cover a consecutive twelve (12) month period starting with the twelve (12) month period that begins on the effective date of the five-year exemption, and each annual audit must be completed no later than six (6) months after the period to which the audit applies;''

The Applicant requests that the audit requirement be deleted from the exemption in its entirety. The Applicant states that requiring the audit of asset management units that were not accused of wrongdoing is unnecessary and essentially seeks to punish businesses that have not been convicted of a crime. The Applicant requests that, if the audit condition is not omitted, the annual audit should be performed by the Applicant's Internal Audit function. The Applicant also requests the removal of the requirement mandating incorporation of the audit conditions into the Policies, as the Applicant believes such inclusion serves no purpose and does not further the interest of plans. Additionally, the Applicant requests the removal of the phrase ''technical training and proficiency,'' because it is redundant and undefined.

The Department declines to delete the audit requirement in its entirety. A recurring, independent, and prudently conducted audit of the JPMC Affiliated QPAMs is critical to ensuring the QPAMs' compliance with the Policies and Training mandated by this exemption, and the adequacy of the Policies and Training. The required discipline of regular audits underpins the Department's finding that the exemption should help prevent the sort of compliance failures that led to the Conviction and is protective of Covered Plans and their participants, beneficiaries, and beneficial owners, as applicable.

The Department views the audit requirement as an integral component of the exemption, without which the Department would be unable to make its finding that the exemption is protective of Covered Plans and their participants, beneficiaries, and beneficial owners, as applicable. A recurring, independent audit of the JPMC Affiliated QPAMs is a critical means by which to verify the adequacy of, and compliance with, the Policies and Training mandated by this exemption.

This exemption's conditions are based, in part, on the Department's assessment of the seriousness and duration of the misconduct that resulted in the violation of Section I(g) of PTE 84–14, as well as the apparent inadequacy of the controls and oversight mechanisms at JPMC to prevent the misconduct. The FCA's Final Notice states: ''[d]uring the Relevant Period, JPMorgan did not exercise adequate and effective control over its G10 spot FX trading business,'' and that, ''[t]he front office failed adequately to discharge these responsibilities with regard to obvious risks associated with confidentiality, conflicts of interest and trading conduct.'' The OCC states: ''the Bank had deficiencies in its internal controls and had engaged in unsafe or unsound banking practices with respect to the oversight and governance of the Bank's FX trading business . . . .'' Accordingly, the Department declines to delete the audit requirement in its entirety.

The Department, however, recognizes that, notwithstanding JPMC's oversight failures, only a small number of individuals at JPMC directly engaged in the misconduct at issue. Thus, the United States District Court for the District of Connecticut stated, in connection with the sentencing of JP Morgan Chase & Co., that ''the conduct at issue here was engaged in by a very small number of individuals'' and ''we do not have banks who appear to have condoned conduct at any high-ranking level.'' [6] Accordingly, the Department has determined to change the audit interval under this exemption, from annual to biennial. Section I(i)(1) of the exemption, therefore, now requires that each JPMC Affiliated QPAM ''*submits* to *an audit conducted every two years by an independent auditor.*'' Each audit must cover the preceding consecutive twelve (12) month period. The first audit must cover the period from July 10, 2018 through July 9, 2019, and must be completed by January 9, 2020. The second audit must cover the period from July 10, 2020 through July 9, 2021, and must be completed by January 9, 2022. In the event that the Exemption Period is extended or a new exemption is granted, the third audit would cover the period from July 10, 2022 through July 9, 2023, and would be completed by January 9, 2024, unless the Department chose to alter the audit requirement in the new or extended exemption; [7]

The Department declines to revise Section I(i)(1) to permit the Applicant's Internal Audit Department to carry out this exemption's required audit functions, as such a revision would not be protective of Covered Plans. Auditor independence is essential to this exemption, as it allows for an impartial analysis of the JPMC Affiliated QPAMs. Permitting the Applicant's Internal Audit Department to carry out this exemption's required audit functions would be insufficiently protective of Covered Plans. The independence of the auditor is the cornerstone of the integrity of the audit process and is of primary importance to avoid conflicts of interest and any inappropriate influence on the auditor's findings. The fundamental importance of auditor independence to the integrity of the audit process is well established. For example, the United States Securities and Exchange Commission (SEC) promulgated regulations at 17 CFR 210.2–01 to ensure auditors are independent of their clients, and under 17 CFR 240.10A–2, it is unlawful for an auditor not to be independent in certain circumstances. Likewise, the Public Company Accounting Oversight Board's (PCAOB) Rule 3520 states that a public accounting firm and its associated persons must be independent of the firm's audit client. When working on an audit or attest engagement, the Association of Independent Certified Public Accountants' (AICPA) Code of Professional Conduct, Objectivity and Independence Principle (AICPA, Professional Standards, ET section 0.300.050.01) states that members should be independent in fact and appearance. Moreover, ERISA section 103(a)(3)(A) requires an accountant hired by an employee benefit plan to examine the plan's financial statements to be independent. Notwithstanding the Applicant's representations regarding the staff size and internal policies of JPMC's Internal Audit Department, serious misconduct occurred over an extended period of time at a JPMC entity.

The Department also disagrees with the Applicant's assertion that the phrase ''technical training and proficiency'' is redundant. The two terms are not synonymous, as a person may have taken technical training in a given subject matter but may not be proficient in that subject matter. The exemption requires that the auditor be both technically trained and proficient in ERISA as well as the Code. Accordingly, the Department declines to change the phrase ''technical training and proficiency'' as used in Section I(i)(1).

The Department also declines to delete the requirement that the audit conditions be incorporated in the Policies. The audit requirement provides a critical independent check on compliance with this exemption's conditions, and helps ensure that the basic protections set forth in the Policies are taken seriously. Accordingly, the specifics of the audit requirement are important components of the Policies. Their inclusion in the Policies promotes compliance and sends an important message to the institutions' employees and agents, as well as to Covered Plan clients, that compliance with the policies and procedures will be subject to careful independent review.

After consideration of the Applicant's concerns regarding the annual audit, the Department is revising the audit condition to require an audit on at least a biennial basis. The Departments notes that if the audit uncovers material deficiencies with JPMC's compliance with this exemption, then the Applicant should consider conducting an additional audit after making corrections to ensure that it remains in compliance with the exemption. In any event, the Department emphasizes that it retains the right to conduct its own investigation of compliance based on any such indicators of problems.

Comment 13—Access to Business—Section I(i)(2)

Section I(i)(2) of the proposed five-year exemption requires that ''*as permitted by law, each JPMC Affiliated QPAM and, if applicable JPMC, will grant the auditor unconditional access to its business . . .*''

The Applicant requests that the access granted by Section I(i)(2) be limited to: (1) Relevant materials reasonably necessary to conduct the audit; and (2) non-privileged materials that do not contain trade secrets. The Applicant argues that the ''unconditional access'' required by this condition is too broad and that the absence of specific exclusions could lead to confusion, dispute, and infringement on the JPMC Affiliated QPAMs' right to protect privileged communications, confidential supervisory information with other regulators (for which the privilege is held by others), irrelevant materials, and trade secrets.

In the Department's view, to ensure a thorough and robust audit, the independent auditor must be granted access to information it deems necessary to make sound conclusions. Access to such information must be within the scope of the audit engagement and denied only to the extent any disclosure is not permitted by state or federal statute. Enumerating specific restrictions on the accessibility of certain information may have a dampening effect on the auditor's ability to perform the procedures necessary to make valid conclusions and therefore undermine the effectiveness of the audit. The auditor's access to such information, however, is limited to information relevant to the auditor's objectives as specified by the terms of this exemption and to the extent disclosure is not prevented by state or federal statute, or involves communications subject to attorney client privilege. In this regard, the Department has modified Section I(i)(2) accordingly.

Comment 14—Engagement Letter—Section I(i)(3)

Section I(i)(3) of the proposed five-year exemption requires the auditor's engagement to ''*specifically require the auditor to determine whether each JPMC Affiliated QPAM has developed, implemented, maintained, and followed the Policies . . . and has developed and implemented the Training, as required herein.*''

The Applicant requests that Section I(i)(3) be deleted in its entirety, stating

[6] *See* TRANSCRIPT of Proceedings: as to JP Morgan Chase & Co. (January 5, 2017 at pages 29–30).

[7] The third audit referenced above would not have to be completed until after the Exemption Period expires. If the Department ultimately decides to grant relief for an additional period, it could decide to alter the terms of the exemption, including the audit conditions (and the timing of the audit requirements). Nevertheless, the Applicant should anticipate that the Department will insist on strict compliance with the audit terms and schedule set forth above. As it considers any new exemption application, the Department may also contact the auditor for any information relevant to its determination.

that it is unnecessarily duplicative of the substantive requirements of the exemption and that the Applicant will be bound by the conditions of the exemption, whether or not they also appear in the auditor's engagement letter.

The Department does not concur with the Applicant's request. By including a statement of the audit's intended purpose and required determinations in the auditor's agreement, the Applicant ensures that both the auditor and the JPMC Affiliated QPAMs a have clear understanding of the purpose and expectations of the audit process. Therefore, the Department declines to omit Section I(i)(3) from the exemption.

Comment 15—Auditor's Test of Operational Compliance—Section I(i)(4)

Section I(i)(4) of the proposed five-year exemption provides that, ''*[t]he auditor's engagement must specifically require the auditor to test each JPMC Affiliated QPAM's operational compliance with the Policies and Training*'' and ''*the auditor must test a sample of each QPAM's transactions involving ERISA-covered Plans and IRAs sufficient in size and nature to afford the auditor a reasonable basis to determine operational compliance with the Policies and Training.*''

The Applicant requests that Section I(i)(4) be deleted in its entirety. The Applicant argues that this Section is unnecessarily duplicative, as other conditions of the exemption govern the audit's scope, the auditor's technical skill, and the prudence of the selection process. The Applicant also argues that the second sentence of Section I(i)(4) unnecessarily intrudes upon the auditor's function and independence. Additionally, the Applicant states that auditors should be granted discretion as to when to sample transactions, as an auditor may not have the capacity to test significant data within the time periods required under this exemption.

The Department declines to make the Applicant's requested revisions with respect to Section I(i)(4). The inclusion of written audit parameters in the auditor's engagement letter is necessary both to document expectations regarding the audit work and to ensure that the auditor can responsibly perform its important work. As stated above, clearly defined audit parameters will minimize any potential for dispute between the Applicant and the auditor. It is appropriate and necessary for the exemption to require a certain amount, and type, of audit work to be performed. Similarly, given the scope and number of relevant transactions, proper sampling is necessary for the auditor to reach reasonable and reliable conclusions. Although the Department has declined to delete this section in its entirety, as requested by the Applicant, the Department has revised this condition for consistency with other conditions of this exemption which are tailored to the Department's interest in protecting Covered Plans. Therefore, the condition now applies to Covered Plans (*i.e.,* ERISA-covered plans and IRAs with respect to which the JPMC Affiliated QPAM relies on PTE 84–14 or has expressly represented that it qualifies as a QPAM or relies on the QPAM class exemption in its dealings with the ERISA-covered plan or IRA).

The Department notes that Section I(i)(4) does not specify the number of transactions that the auditor must test, but rather requires, for each QPAM, that the auditor test a sample of each such QPAM's transactions involving Covered Plans, ''sufficient in size and nature to afford the auditor a reasonable basis to determine operational compliance with the Policies and Training.''

Comment 16—Draft of the Audit Report—Section I(i)(5)

Section I(i)(5) of the proposed five-year exemption requires that ''*. . . on or before the end of the relevant period described in Section I(i)(1) for completing the audit, the auditor must issue a written report (the Audit Report) to JPMC and the JPMC Affiliated QPAM . . .*''

The Applicant requests a modification of Section I(i)(5) that would allow the Applicant sufficient time to correct any findings of noncompliance by the auditor before the issuance of the final Audit Report and its provision to the Department. The Applicant states that permitting it to review a draft of the Audit Report well in advance of its submission to the Department would allow the Applicant to implement plans to correct any violations or findings of noncompliance identified by the auditor. The Applicant states that communication with the audited entity is an appropriate audit procedure which ensures that the auditor's factual premises are correct. The Applicant also states that the time required to review the audit should be in advance of the Audit Report's submission and should not take away from the six (6) months given to complete the audit and the thirty (30) days to submit the Audit Report to the Department. The Applicant therefore requests that Section I(i)(5) contain a provision: (1) Requiring the auditor to issue a draft Audit Report to the Applicant and the JPMC Affiliated QPAMs at the end of the period for the completion of the audit, as described in Section I(i)(1); and (2) providing the Applicant and the JPMC Affiliated QPAM thirty (30) days to review such draft Audit Report. Additionally, the Applicant requests that the exemption allow the auditor to issue one consolidated Audit Report covering all the JPMC Affiliated QPAMs.

The Department agrees that it is appropriate and beneficial for the auditor and the entity being audited to communicate during the audit process. Such communication allows for a dialog regarding, among other things, factual premises, findings, and conclusions. With regard to issues of noncompliance, communication should take place as soon as possible, but in no case later than five (5) days following the discovery of such noncompliance (see Section I(i)(6)) to allow time for the Applicant to provide additional information to the auditor and correct the noncompliance. However, the Department considers a requirement directing the auditor to provide a draft Audit Report to the audited entity in all cases to be inappropriate, as it is a matter best determined by the Applicant and the auditor. The Department notes that, while contemplating the time frames for completion and submission of the Audit Report, it did take into account the auditor's procedural work and communications with the Applicant. The Applicant has not demonstrated the need for additional time to complete and submit the Audit Report. The Department therefore declines to modify Section I(i)(5) as requested by the Applicant.

Lastly, the Department has accepted the Applicant's recommendation that the auditor be allowed to issue one consolidated Audit Report and has modified Section I(i)(5) accordingly.

Comment 17—Auditor's Determination of Compliance—I(i)(5)(i)

Section I(i)(5)(i) of the proposed five-year exemption provides, in part: ''*Any determination by the auditor regarding the adequacy of the Policies and Training and the auditor's recommendations (if any) with respect to strengthening the Policies and Training of the respective JPMC Affiliated QPAM must be promptly addressed by such JPMC Affiliated QPAM, and any action taken by such JPMC Affiliated QPAM to address such recommendations must be included in an addendum to the Audit Report (which addendum is completed prior to the certification described in Section I(i)(7) below).*''

The Applicant asserts that Section I(i)(5)(i) is arbitrary, capricious, and ambiguous and requests that the term ''promptly'' be omitted from the condition because it will cause disputes over its meaning. The Applicant argues that this perceived ambiguity is problematic in this context because addressing the auditor's recommendation could be a lengthy process.

In addition, Section I(i)(5)(i) states: ''*Furthermore, the auditor must not rely on the Annual Report created by the compliance officer (the Compliance Officer) as described in Section I(m) below in lieu of independent determinations and testing performed by the auditor as required by Section I(i)(3) and (4) above.*''

The Applicant requests that this provision of Section I(i)(5) be deleted, as it imposes a counterproductive limitation on the auditor's use of the Annual Review and usurps the auditor's judgment regarding how to perform its role, and whether and when to rely upon any and all resources. The Applicant further states, that denying the auditor the opportunity to fully use its judgment as to which resources it will rely upon contradicts the underlying purpose of this exemption's broader audit condition, especially in light of the requirements relating to the auditor's selection and qualifications. Moreover, the Applicant states that the language of this condition will interfere with the workability of the exemption and its use by plans. To that end, the Applicant states that if counterparties cannot determine whether this requirement has been complied with, the exemption will not be used, to the detriment of plans.

The Department acknowledges that the Applicant's efforts to address the auditor's recommendations regarding any inadequacy in the Policies and Training identified by the auditor, may take longer to implement than the time limits mandated by the proposed exemption. Accordingly, the Department is modifying Section I(i)(5)(i) to reflect the possibility that the JPMC Affiliated QPAMs' efforts to address the auditor's recommendations regarding inadequacies in the Policies and Training identified by the auditor, may not be completed by the submission date of the Audit Report and may require a written plan to address such items. However, any noncompliance identified by the auditor must be promptly addressed. The Department does not agree that the word ''promptly'' creates inappropriate ambiguity in the condition and declines to remove the word.

The final sentence of Section I(i)(5)(i) expresses the Department's intent that the auditor not rely solely on the work of the Compliance Officer and the contents of the Annual Report in formulating its conclusions or findings. The auditor must perform its own independent testing to formulate its conclusions. This exemption does not prohibit the auditor from considering the Compliance Officer's Annual Report in carrying out its audit function, including the formulation of an audit plan. This exemption, however, does prohibit the auditor from reaching conclusions that are exclusively based upon the contents of the Compliance Officer's Annual Report. The Department has modified Section I(i)(5)(i) to more clearly reflect these views.

Included with its comment on Section I(i)(5)(i), the Applicant requests the deletion of the Compliance Officer and Annual Review requirements set out in Section I(m). The Department's response to this request is discussed below.

Comment 18—Adequacy of the Annual Review—Section I(i)(5)(ii)

Section I(i)(5)(ii) of the proposed five-year exemption provides that ''*[t]he Audit Report must include the auditor's specific determinations regarding: . . . (ii) The adequacy of the Annual Review described in Section I(m) and the resources provided to the Compliance Officer in connection with such Annual Review.*''

The Applicant asserts that requiring the auditor to assess the adequacy of the resources provided to the Compliance Officer is overreaching and should be deleted. The Applicant states that, while the auditor function requires proficiency in ERISA, it does not require sophistication or expertise on resource allocation. According to the Applicant, the question of whether the Compliance Officer has met its obligations under this exemption will be subject to the auditor's review. The Applicant states that if the auditor finds any deficiencies in the review, the Applicant will address such issues including any allocation of resources.

As discussed in detail below, the Department views the Compliance Officer and the Annual Review as integral to ensuring compliance with the exemption. An independent assessment by the auditor of the adequacy of the Annual Review is essential to providing the Department with the assurance that the Applicant and the JPMC Affiliated QPAMs have given these matters the utmost priority and have taken the actions necessary to comply with the exemption. However, the Department agrees that the QPAMs need not require the auditor to opine on the adequacy of the resources allocated to the Compliance Officer and has modified Section I(i)(5)(ii) accordingly. If, however, the auditor observes compliance issues related to the Compliance Officer or available resources, it would be appropriate for the auditor to opine on those problems.

Comment 19—Certification of the Audit—Section I(i)(7)

Section I(i)(7) of the proposed five-year exemption provides, in part, that ''*. . . the General Counsel, or one of the three most senior executive officers of the JPMC Affiliated QPAM to which the Audit Report applies, must certify in writing, under penalties of perjury, that the officer has reviewed that Audit Report and this exemption; addressed, corrected, or remedied any inadequacy identified in the Audit Report . . .*''

The Applicant requests that this condition be modified to remove ambiguity, enhance workability, and avoid aspects that could be interpreted as punitive. The Applicant claims that the requirements of Section I(i)(7) should take into account JPMC's business structure and allow the Applicant to determine which senior officers will review the Audit Report. The Applicant states that it would be preferable that an executive related to an asset/investment management business operating through the QPAM review the Audit Report. In this regard, the Applicant requests Section I(i)(7) be modified in part as follows: ''the General Counsel or one of the three most senior executives of the line of business engaged in discretionary assets management activities through the JPMC Affiliated QPAM with respect to which the Audit Report applies . . .''.

The Department concurs that a senior executive officer with knowledge of the asset management business within the QPAM should be allowed to review the Audit Report, and has modified the language of Section I(i)(7), accordingly.

The Applicant also requests that the timing of Section I(i)(7) be clarified. In this regard, the Applicant states that compliance with this condition would be impossible if, for example, a recommendation takes longer to implement than the 30-day period contemplated in Section I(i)(9) for the Audit Report to be certified and provided to the Department.

While the Department does not view Section I(i)(7) as ambiguous, the Department is aware, as stated above, that the Applicant's efforts to address the auditor's recommendations regarding inadequacies in the Policies and Training identified by the auditor may take longer to implement than the timeframe to submit the certified Audit Report. With respect to this issue, the Department did not intend to limit corrective actions to those that could only be completed prior to the submission of the Audit Report. Therefore, the Department has modified Section I(i)(7) to reflect that the senior officer may certify that a written plan to address the inadequacies regarding the Policies and Training identified in the auditor's Report is in place.

The Applicant also states that this condition should clarify that it may appropriately ''address'' an inadequacy by noting that an alternative action to the auditor's recommendation, or even no action, is a preferable means of protecting ERISA plan clients and IRAs. The Applicant states that this condition is intrusive, as it invites the auditor, through its conclusions and recommendations, to micromanage the business of the relevant JPMC QPAM. The Applicant claims that, with broad access to a JPMC Affiliated QPAM's records, the auditor could identify any number of potential inadequacies, all of which the JPM Affiliated QPAM should not be required to accept unconditionally.

As mentioned above, the Department has determined that it is necessary for the auditor to be afforded unfettered access to JPMC Affiliated QPAM records, to the extent that the analysis of such records falls within the twelve month period to which the audit relates. For the first audit required by this exemption, that period runs from January 10, 2018 through January 9, 2019. The conditions of this exemption do not prohibit the Applicant from disagreeing with the auditor with respect to whether certain practices fail to comply with the terms of this exemption. However, in those circumstances where the auditor is not persuaded to change its position on a matter the auditor considers noncompliant, the Applicant will be responsible to correct such matters. Nor do the conditions of this exemption prohibit the Applicant from disagreeing with the auditor with respect to the appropriate method for correcting or addressing issues of noncompliance. The Department would expect the Applicant and the auditor to have meaningful communications on such differences of opinion. In the event the Applicant chooses to apply a corrective method that differs from that recommended by the auditor, the Audit Report and the Addendum attached thereto should explain in detail the noncompliance, the auditor's recommended action, the corrective method chosen, and, if applicable, why the Applicant chose a corrective method different from that recommended by the auditor.

Lastly, the Applicant requests deletion of the requirement in Section I(i)(7) for certification by the senior executive officer under penalties of perjury. The Applicant argues that this requirement is unnecessary and inappropriate as this exemption already requires accuracy in communications with regulators and clients.

The Department declines to remove this requirement, which makes clear the importance of the correction process and creates a strong incentive going forward to take seriously the audit process—and compliance generally.

Comment 20—Review and Certification of Audit Report—Section I(i)(8)

Section I(i)(8) the proposed five-year exemption provides that ''*[t]he Risk Committee of JPMC's Board of Directors is provided a copy of each Audit Report; and a senior executive officer with a direct reporting line to the highest ranking legal officer of JPMC must review the Audit Report for each JPMC Affiliated QPAM . . .*''

The Applicant requests that the requirement to provide the Audit Report to the Risk Committee of JPMC's Board of Directors be omitted. The Applicant states that the Department, in imposing this condition, is acting beyond the scope of its authority. The Applicant also represents that this condition constitutes micromanaging by the Department and is inappropriate and unnecessary. The Applicant further states that this requirement does not protect plans and participants and is duplicative of other conditions contained in this exemption. The Applicant argues that a mandate by the Department concerning JPMC's internal processes for handling information is outside the scope of the exemption and does not further the statutory goal of protecting plans.

The Applicant requests that the exemption provide that the certifying reviewer be a senior executive officer. The Applicant further states that the exemption should not mandate that the certifying reviewer be a senior executive officer in the direct reporting line to the highest ranking legal officer of JPMC.

Finally, the Applicant requests the requirement in Section I(i)(8) that the certification by the senior executive officer be made under penalty of perjury be deleted, as it is unnecessary.

The Department notes that in its application and related materials, the Applicant has represented that it has established, or is in the process of establishing comprehensive changes to processes and procedures that are, in part, intended to change the culture at JPMC from the top down. As represented by the Applicant, these changes are focused on enhancements in: (1) Supervision, controls, and governance; (2) compliance risk assessment; (3) transaction monitoring and communications surveillance; (4) compliance testing; and (5) internal audit.[8]

The Department has developed this exemption to ensure that the highest levels of management are aware of on-going matters concerning JPMC, the JPMC Affiliated QPAMs, and compliance with this exemption. Requiring the provision of the Audit Report to the Board of Directors and certification by a senior executive officer in the reporting line of the highest legal compliance officer provides assurance that the highest levels of management within JPMC stay informed about JPMC's and the JPMC Affiliated QPAMs' compliance with the terms of this exemption. In the Department's view, such officials are in the best position to ensure that any inadequacy identified by the auditor is appropriately addressed and that necessary changes to corporate policy are effectuated if and where necessary. Requiring certification under penalty of perjury is consistent with the Department's longstanding view that basic requirements of compliance and integrity are fundamental to an entity's ability to qualify as a QPAM.

Comment 21—Availability of the Audit Report—Section I(i)(9)

The Applicant claims that the requirements in Section I(i)(9) that ''*each JPMC Affiliated QPAM must make its Audit Report unconditionally available for examination by any duly authorized employee or representative of the Department, other relevant regulators, and any fiduciary of an ERISA-covered plan or IRA, the assets of which are managed by such JPMC Affiliated QPAM*'' is outside the scope of the exemption and is unnecessary. The Applicant states that the availability of the Audit Report should be limited to ERISA-covered plans and IRAs for which the Applicant relies on PTE 84–14. The Applicant argues that it is overly-broad, punitive and not related to the relief provided in the exemption to extend this condition to plans and IRAs for which the Affiliated JPMC QPAMs do not rely on PTE 84–14. Additionally, the Applicant requests that the Audit Report should be made

[8] See JPMC Exemption Application (May 20, 2015) at page 12.

available upon request and that any such provision of the Audit Report may be facilitated via electronic delivery.

The Department does not agree that the condition in Section I(i)(9) is punitive. As the Applicant recognized in its application, ERISA-covered plans, IRAs, and counterparties routinely rely on QPAM status before entering into agreements with financial institutions, even if those institutions do not believe compliance with PTE 84–14 is strictly necessary for any particular transaction. Accordingly, the Department has an interest in ensuring that the conditions of this exemption broadly protect ERISA-covered plans and IRAs that have relied on QPAM status in deciding to enter into an agreement with the Applicant or the Affiliated JPMC QPAMs.

Nevertheless, the Department has revised Section I(i)(9) to clarify that the JPMC Affiliated QPAMs are required to make the documents available to any fiduciary of a Covered Plan. The Audit Report, in any event, will be incorporated into the public record attributable to this exemption, under Exemption Application Number D–11906, and, therefore, independently accessible by members of the public. Accordingly, the Department has determined to revise the condition by replacing the phrase ''an ERISA-covered plan or IRA, the assets of which are managed by such JPMC Affiliated QPAM'' with the term ''Covered Plan'' (as defined in Section II(c)). Lastly, the Department agrees that access to the Audit Report need only be upon request and such access can be electronic, and has revised the exemption accordingly.

Comment 22—Engagement Agreements—Section I(i)(10)

The Applicant claims that the requirement under Section I(i)(10)(B) which provides, ''*[e]ach JPMC Affiliated QPAM and the auditor must submit to OED . . . (B) any engagement agreement entered into with any other entity retained in connection with such QPAM's compliance with the Training or Policies conditions of this five-year exemption, no later than six (6) months after the Conviction Date (and one month after the execution of any agreement thereafter)*'' should be omitted as it is unnecessary, punitive, and not in the interest of plans or their participants. The Applicant states that the terms of engagement between the JPMC Affiliated QPAMS and the auditor and trainer should be left to the discretion of the parties to such engagement agreements. The Applicant maintains that it is intrusive to mandate that every service provider contract that relates to the Policies and the Training be provided to the Department. Additionally, the Applicant requests that the timeframe for provision of the auditor's engagement be modified to no later than six (6) months after execution of such engagement agreement.

In coordination with the Department's modification of Section I(h)(2)(ii) to remove the requirement that the Training must be conducted by an independent professional, the Department has determined to remove the requirement in Section I(i)(10)(B) to provide to the Department the engagement agreements entered into with entities retained in connection with compliance with the Training or Policies conditions. Furthermore, to remove any confusion and uncertainty regarding the timing of the submission of the auditor's engagement agreement, the Department has modified Section I(i)(10) to require that the auditor's engagement agreement be submitted to the Office of Exemption Determinations no later than two (2) months after the engagement agreement is entered into by the Applicant and the independent auditor.

Comment 23—Auditor's Workpapers—Section I(i)(11)

Section I(i)(11) the proposed five-year exemption provides that the ''*auditor must provide OED, upon request, all of the workpapers created and utilized in the course of the audit, including, but not limited to: The audit plan; audit testing; identification of any instance of noncompliance by the relevant JPMC Affiliated QPAM; and an explanation of any corrective or remedial action taken by the applicable JPMC Affiliated QPAM.*'' The Applicant states that Section I(i)(11) is duplicative and could cause the Applicant to lose the exemption due to the auditor's actions or inaction. Additionally, the Applicant notes that this condition should account for workpapers which the auditor does not want to submit to the public file on the basis of confidentiality or privacy of information. The Applicant argues that such workpapers may contain information such as client data, employee personal information, and other sensitive information. The Applicant therefore requests that the Department exempt such workpapers in a manner that does not compromise the Department's ability to review such workpapers. Finally, the Applicant claims that by stating ''all of the workpapers'' and then providing list of what ''all'' might encompass, the Department is being overzealous and duplicative.

The Department acknowledges that certain information contained in the workpapers may be confidential and proprietary, and having that information in a public file may create needless or avoidable disclosure issues. The Department has determined to modify Section I(i)(11) to remove the requirement that the auditor provide the workpapers to OED,[9] and instead require that the auditor provide access to the workpapers for the Department's review and inspection. However, given the importance of the workpapers to the Department's own review and the Applicant's contractual relationship with the auditor, the Department declines to include, as requested by the Applicant, a statement in Section I(i)(11) that a failure on behalf of the auditor to meet this condition will not violate the exemption.

Comment 24—Replacement of Auditor—Section I(i)(12)

Section I(i)(12) of the proposed five-year exemption states that: ''*JPMC must notify the Department at least thirty (30) days prior to any substitution of an auditor . . . and that JPMC demonstrate[e] to the Department's satisfaction that such new auditor is independent of JPMC, experienced in the matters that are the subject of the exemption, and capable of making the determination required by [the] exemption.*''

The Applicant requests that this Section I(i)(12) be deleted as it is inconsistent with the condition for the initial selection of an auditor and duplicative of other substantive terms of the exemption. Initially, the Applicant notes that permitting JPMC's internal audit department to perform the audit functions required under this exemption would render this condition unnecessary. The Applicant states that requiring JPMC to demonstrate the independence and qualifications of the auditor prior to a substitution serves no useful purpose, given the audit process timeline laid out under this exemption. The Applicant states that, since the exemption does not grant the Department the authority to approve the initial auditor selection, likewise the Department should not have the authority to approve the selection of a subsequent auditor. The Applicant states that many circumstances which could necessitate an auditor change would not relate to compliance with the terms of the exemption. The Applicant

[9] OED is the Office of Exemption Determinations within the Employee Benefits Security Administration agency of the United States Department of Labor.

states that if the Department's concern is the removal of a critical auditor, this condition is not rationally related to such an issue.

As explained above, the Department does not agree that the internal audit department of JPMC is the appropriate entity to perform the audit. The auditor's independence is critical to the Department's determination that the exemption protects Covered Plans. This exemption is not unique in requiring the Department be notified of changes to service providers (see, *e.g.,* the requirement of Schedule C of the Form 5500 Annual Return/Report for the Plan Administrator of certain plans to report to the Department a termination of the plan's auditor and/or enrolled actuary and to provide an explanation of the reasons for the termination, including a description of any material disputes or matters of disagreement concerning the termination). Furthermore, requiring the Applicant to notify the Department of the substitution of an auditor serves to ensure that the JPMC Affiliated QPAMs are attentive to the audit process and the protections it provides; and that the Department has the information it needs to review compliance. The Department has determined to modify Section I(i)(12) to remove the requirement for JPMC to demonstrate the independence and qualifications of the auditor, however, and requires instead that JPMC, no later than two months from the engagement of the replacement auditor, notify the Department of a change in auditor and of the reason(s) for the substitution including any material disputes between the terminated auditor and JPMC. JPMC's fiduciary obligations with respect to the selection of the auditor, as well as the significant role a credible selection plays in reducing the need for more extensive oversight by the Department, should be sufficient to safeguard the selection process.

Comments 25–26—Contracts With Plans and IRAs—Section I(j)

Section I(j) of the proposed five-year exemption provides: ''*Effective as of the effective date of this five-year exemption, with respect to any arrangement, agreement, or contract between a JPMC Affiliated QPAM and an ERISA-covered plan or IRA for which a JPMC Affiliated QPAM provides asset management or other discretionary fiduciary services, each JPMC Affiliated QPAM agrees and warrants:*

(1) To comply with ERISA and the Code, as applicable with respect to such ERISA-covered plan or IRA; to refrain from engaging in prohibited transactions that are not otherwise exempt (and to promptly correct any inadvertent prohibited transactions); and to comply with the standards of prudence and loyalty set forth in section 404 of ERISA, as applicable, with respect to each such ERISA-covered plan and IRA;

(2) To indemnify and hold harmless the ERISA-covered plan or IRA for any damages resulting from a JPMC Affiliated QPAM's violation of applicable laws, a JPMC Affiliated QPAM's breach of contract, or any claim brought in connection with the failure of such JPMC Affiliated QPAM to qualify for the exemptive relief provided by PTE 84–14 as a result of a violation of Section I(g) of PTE 84–14 other than the Conviction;

(3) Not to require (or otherwise cause) the ERISA-covered plan or IRA to waive, limit, or qualify the liability of the JPMC Affiliated QPAM for violating ERISA or the Code or engaging in prohibited transactions;

(4) Not to require the ERISA-covered plan or IRA (or sponsor of such ERISA-covered plan or beneficial owner of such IRA) to indemnify the JPMC Affiliated QPAM for violating ERISA or engaging in prohibited transactions, except for violations or prohibited transactions caused by an error, misrepresentation, or misconduct of a plan fiduciary or other party hired by the plan fiduciary who is independent of JPMC, and its affiliates;

(5) Not to restrict the ability of such ERISA-covered plan or IRA to terminate or withdraw from its arrangement with the JPMC Affiliated QPAM (including any investment in a separately managed account or pooled fund subject to ERISA and managed by such QPAM), with the exception of reasonable restrictions, appropriately disclosed in advance, that are specifically designed to ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other investors as a result of an actual lack of liquidity of the underlying assets, provided that such restrictions are applied consistently and in like manner to all such investors;

(6) Not to impose any fees, penalties, or charges for such termination or withdrawal with the exception of reasonable fees, appropriately disclosed in advance, that are specifically designed to prevent generally recognized abusive investment practices or specifically designed to ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other investors, provided that such fees are applied consistently and in like manner to all such investors; and

(7) Not to include exculpatory provisions disclaiming or otherwise limiting liability of the JPMC Affiliated QPAM for a violation of such agreement's terms, except for liability caused by an error, misrepresentation, or misconduct of a plan fiduciary or other party hired by the plan fiduciary who is independent of JPMC, and its affiliates;

(8) Within four (4) months of the date of the Conviction, each JPMC Affiliated QPAM must provide a notice of its obligations under this Section I(j) to each ERISA-covered plan and IRA for which an JPMC Affiliated QPAM provides asset management or other discretionary fiduciary services. For all other prospective ERISA-covered plan and IRA clients for which a JPMC Affiliated QPAM provides asset management or other discretionary services, the JPMC Affiliated QPAM will agree in writing to its obligations under this Section I(j) in an updated investment management agreement between the JPMC Affiliated QPAM and such clients or other written contractual agreement''.

The Applicant states that Section I(j) of the proposed exemption is overbroad, entirely inappropriate, not rationally-related to asset management, inconsistent with the Administrative Procedure Act (the APA), an attempt to create a private right of action for IRAs, and punitive; that it should be limited to ERISA-covered plans and IRAs with respect to which the Applicant relies on the QPAM Exemption; and that it is not reasonably designed to protect plans or their participants. The Applicant also requests that the condition clarify that it supersedes the analogous condition in PTE 2016–15, so as not to impose duplicative requirements, and also be modified to read as follows: ''*This subparagraph supersedes Section I(i) of PTE 2016–15, as of the date of the exemption's publication in the* **Federal Register**. *Effective as of the publication date, with respect to any arrangement, agreement, or contract between a JPMC Affiliated QPAM and an ERISA-covered plan or IRA for which a JPMC Affiliated QPAM provides asset management or other discretionary fiduciary services in reliance on PTE 84–14 . . . .*''

As explained above, ERISA-covered plans and IRAs routinely rely on QPAM status as a condition of entering into transactions with financial institutions, even with respect to transactions that do not require adherence to PTE 84–14. Indeed, the Applicant recognized this fact in its application (see, *e.g.,* Applicant's statement that ''[w]hile equity strategies rarely rely on the QPAM Exemption, plans invested in such strategies could decide to find other managers or pooled funds if the affiliated investment managers were no longer QPAMs''). In addition, it may not always be clear whether the JPMC Affiliated QPAM intends to rely upon PTE 84–14 for any particular transaction. Accordingly, it is critical to ensure that protective conditions are in place to safeguard the interests of ERISA-covered plans and IRAs that are acting in reliance on the availability of this exemption, particularly those who may not have entered into the transaction in the first place, but for the Department's grant of this exemption.

The Department has a clear interest in protecting such Covered Plans that enter into an asset management agreement with a JPMC Affiliated QPAM in reliance on the manager's qualification as a QPAM. Moreover, when a Covered Plan terminates its relationship with an asset manager, it may incur significant costs and expenses as its investments are unwound and in connection with finding a new asset manager. The Department rejects the view that it acts outside its authority by protecting ERISA-covered plans and IRAs that rely on JPMC's asset managers' eligibility for this exemption, and reemphasizes the seriousness of the criminal misconduct that caused JPMC to need this exemption. The Department may grant an exemption under Section 408(a) of ERISA or Section 4975(c)(2)(C) of the Code only to the extent the Secretary finds, among other things, that the exemption is protective of the affected plan(s) or IRA(s). As noted by regulators, personnel at JPMorgan Chase Bank, a QPAM, engaged in serious misconduct over an extended period of time at the expense of their own clients. This misconduct appears to have stemmed, in part, from deficiencies in control and oversight.

Notwithstanding the misconduct, which resulted in violation of Section I(g) of PTE 84–14, the Department has granted this exemption based, in significant part, upon the inclusion of Section I(j)(1) in the exemption, which protects Covered Plans by, among other things, requiring JPMC Affiliated QPAMs to make an express commitment to their customers to adhere to the requirements of ERISA and the Code, as applicable. As previously indicated, the Department has concluded that a culture of compliance, centered on adherence to basic standards of fair dealing as set forth in this exemption, gives the Department a compelling basis for making the required statutory findings that the exemption is in the interests of plan and IRA investors and protective of their rights. Absent such findings, the exemption would have been denied.

In response to the Applicant's comments, however, the Department has required an express commitment to comply with the fiduciary standards and prohibited transaction rules only to the extent these provisions are ''applicable'' under ERISA and the Code. This section, as modified, should serve its salutary purposes of promoting a culture of compliance and enhancing the ability of plans and IRA customers to sever their relationships with minimal injury in the event of non-compliance. This conclusion is reinforced, as well, by the limited nature of the relief granted by this exemption, which generally does not extend to transactions that involve self-dealing.

In response to the Applicant's comments, the Department also notes that nothing in ERISA or the Code prevents the Department from conditioning relief on express contractual commitments to adhere to the requirements set out herein. The QPAMs remain free to disclaim reliance on the exemption and to avoid such express contractual commitments. To the extent, however, that they hold themselves out as fiduciary QPAMs, they should be prepared to make an express commitment to their customers to adhere to the requirements of this exemption. This commitment strengthens and reinforces the likelihood of compliance, and helps ensure that, in the event of noncompliance, customers—particularly IRA customers—will be insulated from injuries caused by non-compliance. These protections also ensure that customers will be able to extricate themselves from transactions that become prohibited as a result of the QPAMs' misconduct, without fear of sustaining additional losses as a result of the QPAMs' actions. In this connection, however, the Department emphasizes that the only claims available to the QPAMs' customers pursuant to these contractual commitments are those separately provided by ERISA or other state and federal laws that are not preempted by ERISA. As before, private litigants have only those causes of action specifically authorized by laws that exist independent of this exemption.

Comment 27—Indemnity Provision—Section I(j)(2).

Section I(j)(2) of the proposed five-year exemption provides that ''*[e]ffective as of the effective date of this five-year exemption, with respect to any arrangement, agreement, or contract between a JPMC Affiliated QPAM and an ERISA covered plan or IRA for which a JPMC Affiliated QPAM provides asset management or other discretionary fiduciary services, each JPMC Affiliated QPAM agrees and warrants: . . . (2) To indemnify and hold harmless the ERISA-covered plan or IRA for any damages resulting from a JPMC Affiliated QPAM's violation of applicable laws, a JPMC Affiliated QPAM's breach of contract, or any claim brought in connection with the failure of such JPMC Affiliated QPAM to qualify for the exemptive relief provided by PTE 84–14 as a result of a violation of Section I (g) of PTE 84–14 other than the Conviction.*''

The Applicant requests that this condition be deleted because it is punitive, beyond the Department's authority, and provides for damages that are excessive and/or not reasonably related to any conduct of the JPMC Affiliated QPAMs. In addition, the Applicant represents that the condition may operate in a manner that is fundamentally unfair because it is not limited to clients who are harmed through a direct, causal link to the loss of exemptive relief provided by PTE 84–14.

Also with respect to section I(j)(2), the Applicant requests clarifying language stating that the JPMC Affiliated QPAM indemnification obligations under this exemption do not extend to damages resulting from, or caused by forces beyond the control of JPMC, including certain acts of government authorities and acts of God.

In this regard, the Applicant requests a revision of section I(j)(2) such that each JPMC Affiliated QPAM must agree and warrant to indemnify and hold harmless the ERISA-covered plan or IRA, ''*for any reasonable losses involving such arrangement, agreement or contract and resulting directly from a JPMC Affiliated QPAM's violation of ERISA, or, to the extent the JPMC Affiliated QPAM relies on the exemptive relief provided by PTE 84–14 under the arrangement, agreement or contract for any explicit transactional exit costs of any instrument with respect to which PTE 84–14 was expressly relied upon and for which no other exemption is available, resulting directly and solely from the failure of such JPMC Affiliated QPAM to qualify for the exemptive relief provided by PTE 84–14 as a result of a violation of Section I(g) of PTE 84–14, other than as a result of the Conviction.*''

As explained above, the intended purpose of this exemption is to protect

ERISA-covered plans and IRAs who entrust the JPMC Affiliated QPAMs with the management of their retirement assets. To this end, the Department believes that the protective purpose of this exemption is furthered by Section I(j)(2). The Department emphasizes that this condition is not punitive, but rather ensures that, when an ERISA-covered plan or IRA enters into an asset management agreement with a JPMC Affiliated QPAM in reliance on the manager's qualification as a QPAM, it may expect adherence to basic fiduciary norms and standards of fair dealing, notwithstanding the prior conviction. The condition also ensures that the ERISA-covered plan or IRA will be able to disengage from that relationship in the event that the terms of this exemption are violated without undue injury. Accordingly, the Department has revised the applicability of this condition to more closely reflect this interest. In particular, the condition applies only to Covered Plans. As indicated above, if the asset manager would prefer not to be subject to these provisions as exemption conditions, it may expressly disclaim reliance on QPAM status or PTE 84–14 in entering into its contract with the ERISA-covered plan or IRA (in that case, however, it could not rely on the exemption for relief). The Department has made certain further changes to this condition upon consideration of the Applicant's comment. These changes include: renumbering the condition for clarity; replacing ''applicable laws'' with clarifying language that conforms to the one-year exemption; and replacing ''any damages'' with ''actual losses resulting directly from'' certain acts or omissions of the JPMC Affiliated QPAMs. Because I(j)(2) extends only to actual losses resulting directly from the actions of the JPMC Affiliated QPAMs, it does not encompass losses solely caused by other parties, events, or acts of God.

Comment 28—Limits on Liability—Section I(j)(3) and I(j)(7).[10]

Sections I(j)(3) and I(j)(7) of the proposed five-year exemption provide that ''*[e]ffective as of the effective date of this five-year exemption, with respect to any arrangement, agreement, or contract between a JPMC Affiliated QPAM and an ERISA-covered plan or IRA for which a JPMC Affiliated QPAM provides asset management or other discretionary fiduciary services, each JPMC Affiliated QPAM agrees and warrants:*

. . . (3) Not to require (or otherwise cause) the ERISA-covered plan or IRA to waive, limit, or qualify the liability of the JPMC Affiliated QPAM for violating ERISA or the Code or engaging in prohibited transactions; [and] . . . (7) Not to include exculpatory provisions disclaiming or otherwise limiting liability of the JPMC Affiliated QPAM for a violation of such agreement's terms, except for liability caused by an error, misrepresentation, or misconduct of a plan fiduciary or other party hired by the plan fiduciary who is independent of JPMC, and its affiliates.''

The Applicant requests that these conditions be deleted because they: duplicate the statutory requirements in ERISA and the Code, which ensure that the JPMC Affiliated QPAMs remain liable to their plan or IRA clients for the asset manager's violations of the law; do not afford plans and IRAs any greater protection; and amount to unnecessary overregulation. To the extent there is a violation of a contract, the Applicant represents that adequate causes of action exist to remedy the issue.

Alternatively, the Applicant requests that, if the Department declines to amend Section I(j)(7) as requested, this Section be revised to clarify that losses caused by counterparties, trading venues, or acts of terrorism, war, etc., are carved out of the QPAM's liability.

The Department declines to delete Section I(j)(3) from the final exemption. As the Applicant points out, ERISA already precludes ERISA fiduciaries from disclaiming obligations under ERISA. See ERISA section 410 (prohibiting exculpatory clauses as void against public policy). To the extent the exemption condition prevents the JPMC Affiliated QPAMs from including contractual provisions that are void as against public policy there is no legitimate basis for objection. Such exculpatory language should not be in the governing documents in the first place and is potentially misleading because it suggests disclaimer of obligations that may not be disclaimed.

Outside the context of ERISA section 410, the provision's requirement that the JPMC Affiliated QPAMs retain accountability for adherence to the basic obligations set forth in this exemption is justified by the misconduct that led to the Conviction as discussed above, and by the need to ensure that ERISA-covered plan and IRA customers may readily obtain redress and exit contracts with JPMC Affiliated QPAMs without harm in the event of violations.

The Department has determined that Section I(j)(4), as proposed, is duplicative of the exemption's prohibition on exculpatory clauses, described below. Thus, that subsection has been deleted. Accordingly, the subsections in Section I(j) have been renumbered.

The Department has modified Section I(j)(6) (formerly (j)(7)) to clarify that the prohibition on exculpatory provisions does not extend to losses that arise from an act or event not caused by JPMC. Nothing in this section alters the prohibition on exculpatory provisions set forth in ERISA Section 410.

Comment 29—Termination and Withdrawal Restriction

Under Sections I(j)(5) and I(j)(6) of the proposed five-year exemption, the JPMC Affiliated QPAMs agree: ''*. . . (5) Not to restrict the ability of such ERISA-covered plan or IRA to terminate or withdraw from its arrangement with the JPMC Affiliated QPAM (including any investment in a separately managed account or pooled fund subject to ERISA and managed by such QPAM), with the exception of reasonable restrictions, appropriately disclosed in advance, that are specifically designed to ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other investors as a result of an actual lack of liquidity of the underlying assets, provided that such restrictions are applied consistently and in like manner to all such investors; [and] . . . (6) Not to impose any fees, penalties, or charges for such termination or withdrawal with the exception of reasonable fees, appropriately disclosed in advance, that are specifically designed to prevent generally recognized abusive investment practices or specifically designed to ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other investors, provided that such fees are applied consistently and in like manner to all such investors.*''

The Applicant represents that these conditions should be deleted because they are harmful to ERISA-covered plans and IRAs and their participants and beneficiaries, and are punitive to the Applicant. Withdrawal provisions, according to the Applicant, should be designed to protect all investors in a pooled fund or in a particular strategy. The Applicant states that the proposed restrictions here would disrupt the JPMC Affiliated QPAMs' existing relationships with and contractual obligations to their clients, notwithstanding the fact that plans and IRAs have determined that such

[10] The Department has determined that subsection (4) is duplicative of the exemption's prohibition on exculpatory clauses, described below. Thus, the subsection has been deleted.

relationships are in their best interests. The Applicant represents that lockup provisions are commonly used, designed to protect all investors in a pooled fund, and applied evenly to all investors. If conditions relating to withdrawal are not permitted, the Applicant asserts that ERISA-covered plans and IRAs will not be able to invest in their desired alternatives or strategies.

The Applicant requests that, should these conditions be retained, they be modified as follows: Under renumbered Sections I(j)(4) and (j)(5), the JPMC Affiliated QPAMs agree: ''*. . . (4) Not to restrict the ability of such ERISA-covered plan or IRA to terminate or withdraw from its arrangement with the JPMC Affiliated QPAM with respect to any investment in a separately managed account or pooled fund subject to ERISA and managed by such QPAM, with the exception of reasonable restrictions, appropriately disclosed in advance, that are specifically designed to ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other investors; [and] . . . (5) Not to impose any fees, penalties, or charges for such termination or withdrawal with the exception of reasonable fees, appropriately disclosed in advance, that are specifically designed to prevent generally recognized abusive investment practices or specifically designed to ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other investors, provided that such fees are applied consistently and in like manner to all such investors.*''

The Department has revised renumbered Section I(j)(4) in partial satisfaction of the Applicant's request. This section now provides, ''Not to restrict the ability of such Covered Plan to terminate or withdraw from its arrangement with the JPMC Affiliated QPAM with respect to any investment in a separately managed account or pooled fund subject to ERISA and managed by such QPAM, with the exception of reasonable restrictions, appropriately disclosed in advance, that are specifically designed to ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other investors. In connection with any such arrangements involving investments in pooled funds subject to ERISA entered into after the effective date of this exemption, the adverse consequences must relate to of a lack of liquidity of the underlying assets, valuation issues, or regulatory reasons that prevent the fund from promptly redeeming Covered Plan's investment, and such restrictions must be applicable to all such investors and effective no longer than reasonably necessary to avoid the adverse consequences.''

Renumbered Section I(j)(5) is consistent with the Applicant's request.

Comment 30—Updated Investment Management Agreement

Section I(j)(8) of the proposed five-year exemption provides that ''*[w]ithin four (4) months of the date of the Conviction, each JPMC Affiliated QPAM must provide a notice of its obligations under this Section I(j) to each ERISA-covered plan and IRA for which an JPMC Affiliated QPAM provides asset management or other discretionary fiduciary services. For all other prospective ERISA-covered plan and IRA clients for which a JPMC Affiliated QPAM provides asset management or other discretionary services, the JPMC Affiliated QPAM will agree in writing to its obligations under this Section I(j) in an updated investment management agreement between the JPMC Affiliated QPAM and such clients or other written contractual agreement.*''

The Applicant represents that this condition is duplicative and ''potentially inconsistent'' with PTE 2016–15, and could cause the Applicant to lose the exemption through the actions of another. The Applicant requests that the Department publish a notice of technical correction to PTE 2016–15 to eliminate the notice to clients under that exemption so that only one notice with the final obligations will be provided to clients. The Applicant states that it should not be required to issue two sets of potentially inconsistent notices to clients. Instead, once the final exemption is published in the **Federal Register**, the Applicant suggests that the condition be modified to require that the notices, and the proposed and final exemptions, be sent to clients within six (6) months. The Applicant asserts that this request will alleviate client confusion. Alternatively, the Applicant requests that the Department modify renumbered Section I(j)(7) so that it will deem any notices and mailings under PTE 2016–15 to meet the requirements of the final exemption. In addition, the Applicant requests that the Department modify renumbered Section I(j)(7) to clarify that it is limited to agreements, arrangements, or contracts in which a JPMC Affiliated QPAM provides services in reliance on PTE 84–14, and where the Applicant has a direct contractual relationship with the plan or IRA. Finally, the Applicant represents that a bilateral investment management agreement containing the obligations under Section I(j) should not be required. If the client refuses to sign an updated agreement, the Applicant states that the JPMC Affiliated QPAM unintentionally may be in violation of this condition even where it has met the substantive requirements of Section I(j). The Applicant represents that its compliance with the exemption should not depend on action by its clients. Therefore, the Applicant requests that this requirement be eliminated, and that renumbered Section I(j)(7) be revised as follows to reflect the Applicant's aforementioned changes: ''*Within six (6) months of the date of this exemption's publication in the* **Federal Register**, *each JPMC Affiliated QPAM will provide a notice of its obligations under this Section I(j) to each ERISA-covered plan and IRA for which a JPMC Affiliated QPAM provides asset management or other discretionary fiduciary services in a direct contractual relationship and in reliance on PTE 84–14 as of the date of the notice. The Applicant shall be deemed to have met this condition if, with respect to any plan or IRA client, the Applicant met the requirements of PTE 2016–15. For all other ERISA-covered plan and IRA clients (i.e., those plans and IRAs that become direct contractual clients after the time the notice described in PTE 2016–15 is provided to existing clients) for which a JPMC Affiliated QPAM provides asset management or other discretionary services in reliance on PTE 84–14, the JPMC Affiliated QPAM will provide a notice of its obligations under this Section I(j) to such clients within six (6) months after the date of publication of this exemption.*'' [11]

The Department declines to make a change to PTE 2016–15, since, among other things, the change the Applicant seeks is not a technical correction, but rather would require amending that exemption. Accordingly, the Applicant must fully comply with the terms of PTE 2016–15, including Section I(j). However, the Department has modified renumbered Section I(j)(7) for better coordination with PTE 2016–15. As modified, the exemption's text now

[11] In a letter to the Department dated March 7, 2017, the Applicant expresses similar concerns about the perceived inconsistencies, duplicative nature, and administrative challenges created by the client notification requirement in Section I(i) of PTE 2016–15 as well as in the proposed exemption. In the letter, the Applicant recommends that the notice be provided to clients *only after* the final exemption has been granted. This is consistent with the Applicant's proposed revisions to renumbered Section I(j)(7).

provides that a notice that satisfies Section I(i)(2) of that exemption will satisfy renumbered Section I(j)(7) of this exemption, unless the notice contains any language that limits, or is inconsistent with, the scope of this exemption.

As noted above, the Department has an interest in protecting an ERISA-covered plan or IRA that enters into an asset management agreement with a JPMC Affiliated QPAM in reliance on the manager's qualification as a QPAM, regardless of whether the QPAM relies on the class exemption when managing the ERISA-covered plan's or IRA's assets. The Department has revised the applicability of this condition to more closely reflect this interest, and the condition now applies to Covered Plans. The Department has also modified the condition so that a JPMC Affiliated QPAM will not violate the condition solely because a Covered Plan refuses to sign an updated investment management agreement. In addition, the JPMC Affiliated QPAM must give notice of its obligations under Section I(j) to each Covered Plan by July 9, 2018, consistent with the applicant's request for additional time to provide the notice.

Comment 31—Notice to Plan Clients—Section I(k)(1) [12]

Section I(k)(1) of the proposed five-year exemption provides that ''*[w]ithin thirty (30) days of the publication of this proposed five-year exemption in the* ***Federal Register****, each JPMC Affiliated QPAM will provide a notice of the proposed five-year exemption, along with a separate summary describing the facts that led to the Conviction (the Summary), which have been submitted to the Department, and a prominently displayed statement (the Statement) that the Conviction results in a failure to meet a condition in PTE 84–14, to each sponsor of an ERISA-covered plan and each beneficial owner of an IRA for which a JPMC Affiliated QPAM provides asset management or other discretionary services, or the sponsor of an investment fund in any case where a JPMC Affiliated QPAM acts only as a sub-advisor to the investment fund in which such ERISA-covered plan and IRA invests. In the event that this proposed five-year exemption is granted, the* ***Federal Register*** *copy of the notice of final five-year exemption must be delivered to such clients within sixty (60) days of its publication in the* ***Federal Register****, and may be delivered electronically (including by an email that has a link to the exemption). Any prospective clients for which a JPMC Affiliated QPAM provides asset management or other discretionary services must receive the proposed and final five-year exemptions with the Summary and the Statement prior to, or contemporaneously with, the client's receipt of a written asset management agreement from the JPMC Affiliated QPAM.*''

The Applicant requests that (k)(1) be changed to require each existing and prospective client with respect to which the Applicant has a direct contractual relationship and relies on the QPAM exemption, to be provided with a link to the proposed and final exemption within six (6) months after publication; and prospective clients after six (6) months should receive the proposed and final exemptions through any reasonable delivery method (such as a written notice of the applicable website where the exemptions can be found). The Applicant asserts that the provision, as proposed, is overbroad and punitive and not rationally related to the use of the QPAM Exemption. The Applicant also states that, for prospective clients, it is duplicative to provide the Summary and the copies of the proposal and final grant, which both state the same facts and will be burdensome to prospective clients due to the size of the asset management agreement.

The Department notes that the proposed exemption provides details of the facts and circumstances underlying the Conviction not found in the Summary or this exemption. One of the purposes of such a complete disclosure is to ensure that all interested parties are aware of and attentive to the complete facts and circumstances surrounding JPMC's application for exemption. Requiring the disclosure of the Summary, proposal, and grant provides the opportunity for all parties to have knowledge of these facts and circumstance. Notwithstanding this, the Department has modified the condition to clarify that disclosures may be provided electronically. Further, the notice requirement has been narrowed to ERISA-covered plans and IRAs that would benefit from this knowledge (*i.e.,* Covered Plans).

Comment 32—Notice to Non-Plan Clients—Section I(k)(2)

Section I(k)(2) of the proposed five-year exemption provides, ''*[e]ach JPMC Affiliated QPAM will provide a* ***Federal Register*** *copy of the proposed five-year exemption, a* ***Federal Register*** *copy of the final five-year exemption; the Summary; and the Statement to each: (A) Current Non-Plan Client within four (4) months of the effective date, if any, of a final five-year exemption; and (B) Future Non-Plan Client prior to, or contemporaneously with, the client's receipt of a written asset management agreement from the JPMC Affiliated QPAM. For purposes of this subparagraph (2), a Current Non-Plan Client means a client of a JPMC Affiliated QPAM that: is neither an ERISA-covered plan nor an IRA; has assets managed by the JPMC Affiliated QPAM as of the effective date, if any, of a final five-year exemption; and has received a written representation (qualified or otherwise) from the JPMC Affiliated QPAM that such JPMC Affiliated QPAM qualifies as a QPAM or qualifies for the relief provided by PTE 84–14 . . . .*''

The Applicant requests that Section (I)(k)(2) be deleted in its entirety because, in its opinion, the provision is punitive and beyond the Department's authority. The Applicant requests that any notice requirement be limited to ERISA-covered plans and IRAs that have a direct contractual relationship with a JPMC Affiliated QPAM and actually rely on PTE 84–14.

Given the breadth of the notice requirements otherwise mandated by the exemption, and its decision to restrict the requirements to those arrangements for which QPAM status plays an integral role (*i.e.,* the QPAM represents or relies upon its QPAM status), the Department has determined to delete this provision.

Comment 33—Compliance Officer—Section I(m)

Section I(m) of the proposed five-year exemption provides, in part, ''*JPMC designates a senior compliance officer (the Compliance Officer) who will be responsible for compliance with the Policies and Training requirements describe herein. The Compliance Officer must conduct an annual review (the Annual Review) to determine the adequacy and effectiveness of the implementation of the Policies and Training . . . .*''

The Applicant requests that the conditions relating to the Compliance Officer be deleted because they are punitive, inconsistent with precedent, and inconsistent with the APA. The Applicant states that the criminal conduct that necessitated the exemption did not involve in any way JPMC's asset management business, and that the QPAMs already have very robust compliance departments. The Applicant states that it is duplicative to have another layer of compliance and the condition substitutes the Department's

[12] The Department has renumbered this condition as section I(k) in this exemption.

judgment for that of the Applicant and its many other regulators. Furthermore, the Applicant states that the criminal conduct was the result of one single former FX trader, and that the inclusion of this condition is without any precedent, and is arbitrary and capricious. Finally, the Applicant states that every compliance officer is not a lawyer, and that the condition's time frames are inconsistent, and not practicable.

The Department is removing the requirement that the Compliance Officer be a legal professional (*i.e.,* a lawyer), but declines to make the Applicant's other requested changes. JPMC personnel engaged in serious misconduct that was not limited to one trader and that was caused, at least in part, by serious failures of compliance and oversight. The misconduct relevant to the development of this exemption spanned multiple years and involved repeated failures by JPMC personnel, in supervisory and oversight positions. The Department's determination to grant this exemption is based in part on the Department's view that an internal compliance officer with responsibility for the policies and procedures mandated by this exemption will provide the level of oversight necessary to ensure that such Policies and Training are properly implemented.

Comment 34—Deferred Prosecution Agreement/Non-Prosecution Agreement—Section I(o)

Section I(o) of the proposed five-year exemption provides, with respect to any Deferred Prosecution Agreement or Non-Prosecution Agreement: ''*During the effective period of the five-year exemption JPMC: (1) Immediately discloses to the Department any Deferred Prosecution Agreement (a DPA) or a Non-Prosecution Agreement (an NPA) with the U.S. Department of Justice, entered into by JPMC or any of its affiliates in connection with conduct described in Section I(g) of PTE 84–14 or section 411 of ERISA; and (2) Immediately provides the Department any information requested by the Department, as permitted by law, regarding the agreement and/or conduct and allegations that led to the agreement. After review of the information, the Department may require JPMC, its affiliates, or related parties, as specified by the Department, to submit a new application for the continued availability of relief as a condition of continuing to rely on this exemption. If the Department denies the relief requested in the new application, or does not grant such relief within twelve months of application, the relief described herein is revoked as of the date of denial or as of the expiration of the twelve month period, whichever date is earlier.*''

The Applicant requests that this condition be deleted because it is punitive, and is inconsistent with the APA, statutory authority, and the Department's own regulatory authority. The Applicant states that the condition contravenes the DOL's exemption procedure regulation at 29 CFR part 2570, which requires that the Department propose a notice of termination of an exemption for public comment. The Applicant also states that the provision could create risk and uncertainty, including uncertainty for counterparties, with respect to the very transactions that this exemption is designed to prevent from suddenly expiring. According to the Applicant, the condition itself could have the effect of causing plans to terminate such transactions at significant cost. The Applicant also suggests that parties could enter into an NPA or a DPA for investigations where a bank is not convicted, and in some cases, not even charged with, a felony. The Applicant states further that the timing and factual basis of the NPA/DPA could be distant in time or place from the current plan management operations that should be the Department's concern. Finally, the Applicant states that the provision is inconsistent with the anti-criminal provisions of Section I(g) of PTE 84–14 or section 411 of ERISA, which both require actual convictions, whereas an NPA/DPA is related to a decision by the DOJ not to prosecute.

The Department in no way intended that this condition be read as providing for an automatic revocation of this exemption, and in light of the Applicant's comments, has revised the condition accordingly. As revised, the condition simply requires that the Applicant notify the Department if and when it or any of its affiliates enter into a DPA or NPA with the U.S. Department of Justice for conduct described in section I(g) of PTE 84–14 or ERISA Section 411 and immediately provide the Department with any information requested by the Department, as permitted by law, regarding the agreement and/or conduct and allegations that led to the agreement. The Department retains the right to propose a withdrawal of the exemption pursuant to its procedures contained at 29 CFR 2570.50, should the circumstances warrant such action.

Comment 35—Right to Copies of Policies and Procedures—Section I(p)

Section I(p) of the proposed five-year exemption provides that, ''*[e]ach JPMC Affiliated QPAM, in its agreements with ERISA-covered plan and IRA clients, or in other written disclosures provided to ERISA-covered plan and IRA clients, within 60 days prior to the initial transaction upon which relief hereunder is relied, and then at least once annually, will clearly and prominently: Inform the ERISA-covered plan and IRA client that the client has the right to obtain copies of the QPAM's written Policies adopted in accordance with the exemption.*''

The Applicant requests that this condition be deleted because it is impracticable, duplicative, and punitive, and not reasonably designed to be protective of plans and their participants. The Applicant states that it has over 300 policies and procedures that touch on ERISA and the Code and it is not reasonable to require the disclosure and provision of all the policies. Furthermore, the Applicant states that it cannot provide notice sixty (60) days prior to the time that the exemption is used because that date will precede the final exemption. Finally, the Applicant states that the number of notices required to be provided to clients is overly burdensome and excessive, and will lead to confusion and clients ignoring the mailings.

The Department disagrees, in part, with the Applicant's comment. Affording ERISA covered-plan and IRA clients a means by which to review and understand the Policies implemented in connection with this exemption is a vital protection that is fundamental to this exemption's purpose. However, the Department has modified the condition so that the QPAMs, at their election, may instead provide Covered Plans disclosure that accurately describes or summarizes key components of the Policies, rather than provide the Policies in their entirety. The Department has also determined that such disclosure may be continuously maintained on a website, provided that the website link to the summary of the written Policies is clearly and prominently disclosed to those Covered Plan clients to whom this section applies. The Department also agrees with the Applicant that the timing requirement for disclosure should be revised and, accordingly, has modified the condition of Section I(p) to require notice regarding the information on the website within six months of the initial effective date of this exemption, and thereafter to the extent certain material changes are made to the Policies.

Comment 36—No-Fault Provision—Section I(q)

Section I(q) of the proposed five-year exemption provides that, ''[a] *JPMC Affiliated QPAM or a JPMC Related QPAM will not fail to meet the terms of this exemption solely because a different JPMC Affiliated QPAM or JPMC Related QPAM fails to satisfy a condition for relief described in Sections I(c), (d), (h), (i), (j), (k), (l), (n) and (p).''*

The Applicant requests that the relief provided under Section I(q) be extended to cover Sections I(e), (f), (g), and (m). The Applicant states that the failure of one JPMC Affiliated QPAM to meet these conditions should not disqualify all other JPMC Affiliated QPAMs from reliance on this exemption. The Applicant also states that the auditor's failure to fulfill its requirements under this exemption should not disqualify the JPMC Affiliated QPAMs from relying on the exemption.

The Department declines to extend the relief provided under Section I(q) to Sections I(e), (f), (g), and (m).

Section I(e) provides that any failure of a JPMC Affiliated QPAM or JPMC Related QPAM to comply with Section I(g) of PTE 84–14 arose solely from the Conviction. As set forth in the Applicant's materials, the Conviction is the sole reason a new exemption is necessary for the JPMC Affiliated QPAMs. If there were a new or additional conviction of a crime described in Section I(g) of PTE 84–14, the Department would need to assess the misconduct, its scope, and its significance. Without such an assessment, the Department could not be confident of the adequacy of the conditions set forth herein with respect to the JPMC Affiliated QPAMs and Related QPAMs. Indeed, depending on the particular facts, a subsequent criminal conviction could be strong evidence of the inadequacy of this exemption's conditions to protect Covered Plans. Further, as stated above, the Department is not obligated to grant further relief to the extent such a conviction occurs.

Section I(f) provides that no JPMC Affiliated QPAM or JPMC Related QPAM exercised authority over the assets of any ERISA-covered plan or IRA in a manner that it knew or should have known would: further the criminal conduct that is the subject of the Conviction; or cause the JPMC QPAM or its affiliates or related parties to directly or indirectly profit from the criminal conduct that is the subject of the Conviction. The Applicant has, in its application and in its response to questions raised by the Department, provided statements under penalty of perjury, that they are in compliance with this condition, and the Department relied upon those statements in granting this relief. Based on these statements, the Department determines that there is no reason to include relief from Section I(f) in Section I(q).

Section I(g) requires two specific entities, JPMC and the Investment Bank of JPMorgan Chase Bank, refrain from providing investment management services to plans. Section I(m) requires JPMC to install a Compliance Officer to undertake various compliance and reporting obligations. Thus, with respect to Sections I(g) and (m), the obligations imposed extend exclusively to JPMC and the Investment Bank of JPMorgan Chase Bank. Consequently, if the relief under I(q) were extended to Sections I(g) and I(m), it would render them virtually meaningless. There would be little or no effective penalty for the failure to comply with the conditions, as the Affiliated and Related QPAMs would remain free to rely on the exemption's terms. The Department also believes that the potential for disqualification of all JPMC Affiliated QPAMs under this agreement will serve as additional incentive for JPMC and JPMorgan Chase Bank to comply in good-faith with the provisions of Sections I(g) and (m).

Finally, except as noted in Comment 23 above, the Department accepts the Applicant's comment that failure of the auditor to comply with any of the conditions of the exemption, should not be treated as a failure by the JPMC Affiliated QPAMs to comply with the conditions of the exemption provided that such failure was not due to the actions or inactions of JPMC or its affiliates, and Section I(q) is amended, accordingly.

Comment 37—Definition of Affiliated QPAM—Section II(a)

Section II(a) of the proposed five-year exemption provides: ''*(a) The term ''JPMC Affiliated QPAM'' means a ''qualified professional asset manager''(as defined in Section VI(a) of PTE 84–14) that relies on the relief provided by PTE 84–14 and with respect to which JPMC is a current or future ''affiliate'' (as defined in Section VI(d)(1) of PTE 84–14). The term ''JPMC Affiliated QPAM'' excludes the parent entity, JPMC, the division implicated in the criminal conduct that is the subject of the Conviction.*''

The Applicant states that the last sentence of proposed Section II(a) contains an unintended error, as JPMC is not a division but is the parent company in the affiliated group.

The Department agrees with this comment and has modified the Section accordingly. The Department has reordered Section II, as described below.

Comment 38—Definition of Conviction—Section II(e)

Section II(e) of the proposed five-year exemption provides: ''*The term 'Conviction' means the judgment of conviction against JPMC for violation of the Sherman Antitrust Act, 15 U.S.C. 1, which is scheduled to be entered in the District Court for the District of Connecticut (the District Court) (Case Number 3:15-cr-79-SRU), in connection with JPMC, through one of its euro/U.S. dollar (EUR/USD) traders, entering into and engaging in a combination and conspiracy to fix, stabilize, maintain, increase or decrease the price of, and rig bids and offers for, the EUR/USD currency pair exchanged in the FX spot market by agreeing to eliminate competition in the purchase and sale of the EUR/USD currency pair in the United States and elsewhere. For all purposes under this exemption, 'conduct' of any person or entity that is the 'subject of [a] Conviction' encompasses any conduct of JPMC and/or their personnel, that is described in the Plea Agreement, (including the Factual Statement), and other official regulatory or judicial factual findings that are a part of this record.*''

The Applicant states that this definition inaccurately paraphrases the Plea Agreement and significantly expands the conduct to which JPMC was charged and pleaded guilty. The Applicant states that it is neither appropriate nor accurate for the Department to expand the definition beyond the charge that was the subject of the Plea Agreement.

After considering this comment, the Department has revised the definition accordingly.

Comment 39—Notice to Interested Persons

The Applicant requests that the Department confirm, and the Department so confirms, that the Applicant had 30 days after **Federal Register** publication of the proposal to notify interested persons.

Comment 40—Summary of Facts and Representations

The Applicant seeks certain clarifications to the Summary of Facts and Representations that the Department does not view as relevant to its determination whether to grant this exemption. Those requested clarifications may be found as part of the public record for Application No. D–11906, in a letter to the Department, dated January 20, 2017.

Comment of John Williams (December 7, 2016)

Mr. Williams comments that it is unclear ''how an entity which has been convicted of wrong-doing should be granted a 5-year exemption from regulations that it has already violated.''

The Applicant responds that Mr. Williams' statement is based on an erroneous view that the Applicant has entered into a guilty plea with the Department. With regard to the notice to interested persons, the Applicant states that Mr. Williams' comment misconstrues, and improperly conflates, the criminal proceedings and the purpose of the proposed exemption. The Applicant states that it is not seeking, and the proposed exemption does not grant, relief from regulations that have already been violated. The Applicant further states that, although the JPMC Affiliated QPAMs did not participate in or know of the misconduct, the conviction of the non-asset manager affiliate would nevertheless disqualify the uninvolved asset managers from relying on the QPAM exemption. The Department reiterates that it determined that this exemption is protective of, and in the interest of, Covered Plans given the enhanced compliance and oversight requirements it imposes on JPMC Affiliated QPAMs.

Comment of Lauri Robinson (December 12, 2016)

Ms. Robinson states that it ''is very difficult for laypersons to understand how I can be adversely affected by this,'' and requests that the Department ''make it easier to understand or elaborate on how it effects [sic] current IRAs.'' Ms. Robinson believes that the Applicant ''should have informed customers of the violation and 550 million dollar fine.''

In response, the Applicant states that, among other things, the conviction was a matter of public record as of the date on which the plea agreement was entered, and that Ms. Robinson was notified, as an interested person, in accordance with the terms of the proposed exemption.

The Department notes that each JPMC Affiliated QPAM must provide a notice of the exemption, along with a separate summary describing the facts that led to the Conviction, and a prominently displayed statement that the Conviction results in a failure to meet a condition in PTE 84–14, to each sponsor or beneficial owner of a Covered Plan, or the sponsor of an investment fund in any case where a JPMC Affiliated QPAM acts only as a sub-advisor to the investment fund in which such ERISA-covered plan and IRA invests.

Comment of Mark Levy (December 20, 2016)

Mr. Levy, who states that he owns a Chase investment account, urges the Department not to ''grant[the Applicant] a 'pass' for their wrong doing [sic],'' because ''[n]o institution should be considered 'too big' to pay its share of imposed fines/penalties.''

In response, the Applicant states that, among other things, JPMC is liable for approximately $1.9 billion in monetary penalties imposed by the Department of Justice and other regulators; and that the asset management businesses of the JPMC affiliated QPAMs had no involvement in, or knowledge of, the misconduct. The Department reiterates that this exemption is not punitive and is instead designed to protect Covered Plans.

Comment of Dan Cable (December 22, 2016)

Mr. Cable objects to the exemption in general by stating he does not believe that: (i) The Applicant is taking its criminal behavior seriously, (ii) the QPAM exemption is not customarily and routinely used, and (iii) the Applicant has not adequately demonstrated harm to clients if the exemption is not granted.

In response, the Applicant states that, among other things, the Department of Justice, the District Court, and other applicable regulators already have imposed upon the Applicant certain monetary penalties and other sanctions intended to punish the Applicant and deter future wrongdoing. The Applicant states that it has taken responsibility for the conduct that was the basis of the plea agreement, that the JPMC Affiliated QPAMs had no involvement in the conduct, and that such conduct violated neither ERISA nor the Department's regulations. As such, the Applicant states that Department should not use the exemption process to further punish these uninvolved asset managers, and that to do so would only harm the plan and IRA clients of the uninvolved JPMC Affiliated QPAMs.

The commenter also expresses concern that the training and audit requirements of the proposed exemption are inadequate. In response, the Applicant disagrees and states that these proposed requirements are imposed on entities that had no involvement in the criminal conduct and that these requirements add to pre-existing robust and comprehensive training, audit, and compliance functions — both firm-wide and specific to the asset management businesses.

The commenter also expresses concern that the JPMC Affiliated QPAMs benefited from the criminal conduct that is the subject of the Conviction. In response, the Applicant notes that the proposed exemption contains the following condition: ''(b) Other than a single individual who worked for a non-fiduciary business within JPMorgan Chase Bank and who had no responsibility for, and exercised no authority in connection with, the management of plan assets, the JPMC Affiliated QPAMs and the JPMC Related QPAMs (including their officers, directors, agents other than JPMC, and employees of such JPMC QPAMs) did not receive direct compensation, or knowingly receive indirect compensation in connection with the criminal conduct that is the subject of the Conviction.'' The Applicant states that it is able to and will comply with this condition.

The commenter expresses skepticism that the JPMC Affiliated QPAMs will not ''hire any of the crooks.'' In response, the Applicant states that the proposed exemption contains the following condition: ''The JPMC Affiliated QPAMs will not employ or knowingly engage any of the individuals that participated in the criminal conduct that is the subject of the Conviction.'' The Applicant states that it is able to and will comply with this condition.

The commenter states that the QPAM exemption is not routinely relied upon by the Applicant. According to the Applicant, practically all retirement plans expect their asset managers to use the QPAM exemption, and many counterparties expect representations from the Applicant that it applies.

Finally, the commenter states that it is unclear how a client of the JPMC Affiliated QPAMs would be harmed in the event that the Department does not grant the requested exemption. In response, the Applicant states that the loss of QPAM status for the JPMC Affiliated QPAMs would have a very substantial impact, affecting a significant number of ERISA plans and IRAs. The Applicant notes that, as of the time its application was filed, the Applicant managed approximately $65.5 billion in assets for ERISA plans, and over $12 billion in IRA assets for over 32,000 IRAs.

Comment of Sharon Bushman (December 26, 2016)

The commenter, who states she is the holder of an IRA managed by the

Applicant, states that she does not understand the notice to interested persons, and requests that no action be taken on the exemption until a full explanation is provided regarding the implications for individual clients. In response, the Applicant states that the Department fully explained the purpose and effect of the exemption in the preamble to the **Federal Register** notice.

As noted above, each JPMC Affiliated QPAM must provide a notice of the exemption, along with a separate summary describing the facts that led to the Conviction, and a prominently displayed statement that the Conviction results in a failure to meet a condition in PTE 84–14, to each sponsor or beneficial owner of a Covered Plan, or the sponsor of an investment fund in any case where a JPMC Affiliated QPAM acts only as a sub-advisor to the investment fund in which such ERISA-covered plan and IRA invests.

Comment of Cynthia Beaver (January 18, 2017)

The commenter states that she does not understand the notice to interested persons and requests clarification regarding whether she will be required to move her account if the exemption is not granted. If the exemption is granted, the commenter asks whether there will be adequate ''outside oversight'' to ensure that her account is safe.

In response, the Applicant expresses the view that the proposed exemption's conditions (taking into account the Applicant's comments with respect to the proposal) are sufficient and are designed to protect clients such as the commenter from the any adverse effects of the JPMC Affiliated QPAMs losing the QPAM exemption.

The Department notes that the exemption requires an extensive audit every two years by a qualified auditor who is independent of JPMC.

Comment—Letter From House Committee on Financial Services

The Department also received a comment letter from certain members of Congress (the Members) regarding this exemption, as well as regarding other QPAM-related proposed one year exemptions. In the letter, the Members stated that certain conditions contained in these proposed exemptions are crucial to protecting the investments of our nation's workers and retirees, referring to proposed conditions which require each bank to: (a) Indemnify and hold harmless ERISA-covered plans and IRAs for any damages resulting from the future misconduct of such bank; and (b) disclose to the Department any Deferred Prosecution Agreement or a Non-Prosecution Agreement with the U.S. Department of Justice. The Members also requested that the Department hold hearings in connection with the proposed exemptions.

The Department acknowledges the Members' concerns regarding the need for public discourse regarding proposed exemptions. To this end, the Department's procedures regarding prohibited transaction exemption requests under ERISA (the Exemption Procedures) afford interested persons the opportunity to request a hearing. Specifically, section 2570.46(a) of the Exemption Procedures provides that, ''[a]ny interested person who may be adversely affected by an exemption which the Department proposes to grant from the restrictions of section 406(b) of ERISA, section 4975(c)(1)(E) or (F) of the Code, or section 8477(c)(2) of FERSA may request a hearing before the Department within the period of time specified in the **Federal Register** notice of the proposed exemption.'' The Exemption Procedures provide that ''[t]he Department will grant a request for a hearing made in accordance with paragraph (a) of this section where a hearing is necessary to fully explore material factual issues identified by the person requesting the hearing.'' The Exemption Procedures also provide that ''[t]he Department may decline to hold a hearing where: (1) The request for the hearing does not meet the requirements of paragraph (a) of this section; (2) the only issues identified for exploration at the hearing are matters of law; or (3) the factual issues identified can be fully explored through the submission of evidence in written (including electronic) form.'' [13]

While the Members' letter raises important policy issues, it does not appear to raise specific material factual issues. The Department previously explored a wide range of legal and policy issues regarding Section I(g) of the QPAM Exemption during a public hearing held on January 15, 2015 in connection with the Department's proposed exemption involving Credit Suisse AG, and has determined that an additional hearing on these issues is not necessary.

After giving full consideration to the record, the Department has decided to grant the exemption, as described above. The complete application file (Application No. D–11906) is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N–1515, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on November 21, 2016 at 81 FR 83372.

Exemption

Section I: Covered Transactions

Certain entities with specified relationships to JPMC (hereinafter, the JPMC Affiliated QPAMs and the JPMC Related QPAMs, as defined in Sections II(g) and II(h), respectively) will not be precluded from relying on the exemptive relief provided by Prohibited Transaction Class Exemption 84–14 (PTE 84–14 or the QPAM Exemption), notwithstanding the Conviction, as defined in Section II(a), during the Exemption Period,[14] provided that the following conditions are satisfied:

(a) Other than a single individual who worked for a non-fiduciary business within JPMorgan Chase Bank and who had no responsibility for, and exercised no authority in connection with, the management of plan assets, the JPMC Affiliated QPAMs and the JPMC Related QPAMs (including their officers, directors, agents other than JPMC, and employees of such QPAMs who had responsibility for, or exercised authority in connection with the management of plan assets) did not know of, did not have reason to know of, or participate in the criminal conduct that is the subject of the Conviction. For purposes of this paragraph (a), ''participate in'' means the knowing approval of the misconduct underlying the Conviction;

(b) Apart from a non-fiduciary line of business within JPMorgan Chase Bank, the JPMC Affiliated QPAMs and the JPMC Related QPAMs (including their officers, directors, and agents other than JPMC, and employees of such JPMC QPAMs who had responsibility for, or exercised authority in connection with the management of plan assets) did not receive direct compensation, or knowingly receive indirect compensation, in connection with the criminal conduct that is the subject of the Conviction;

(c) The JPMC Affiliated QPAMs will not employ or knowingly engage any of

[13] 29 CFR part 2570, published at 76 FR 66653 (October 27, 2011).

[14] Section I(g) of PTE 84–14 generally provides relief only if ''[n]either the QPAM nor any affiliate thereof . . . nor any owner . . . of a 5 percent or more interest in the QPAM is a person who within the 10 years immediately preceding the transaction has been either convicted or released from imprisonment, whichever is later, as a result of'' certain felonies including violation of the Sherman Antitrust Act, Title 15 United States Code, Section 1.

the individuals that participated in the criminal conduct that is the subject of the Conviction. For the purposes of this paragraph (c), ''participated in'' means the knowing approval of the misconduct underlying the Conviction;

(d) At all times during the Exemption Period, no JPMC Affiliated QPAM will use its authority or influence to direct an ''investment fund'' (as defined in Section VI(b) of PTE 84–14), that is subject to ERISA or the Code and managed by such JPMC Affiliated QPAM with respect to one or more Covered Plans, to enter into any transaction with JPMC, or to engage JPMC to provide any service to such investment fund, for a direct or indirect fee borne by such investment fund, regardless of whether such transaction or service may otherwise be within the scope of relief provided by an administrative or statutory exemption;

(e) Any failure of a JPMC Affiliated QPAM or a JPMC Related QPAM to satisfy Section I(g) of PTE 84–14 arose solely from the Conviction;

(f) A JPMC Affiliated QPAM or a JPMC Related QPAM did not exercise authority over the assets of any plan subject to Part 4 of Title I of ERISA (an ERISA-covered plan) or section 4975 of the Code (an IRA) in a manner that it knew or should have known would: further the criminal conduct that is the subject of the Conviction; or cause the JPMC Affiliated QPAM, the JPMC Related QPAM, or their affiliates to directly or indirectly profit from the criminal conduct that is the subject of the Conviction;

(g) Other than with respect to employee benefit plans maintained or sponsored for its own employees or the employees of an affiliate, JPMC will not act as a fiduciary within the meaning of section 3(21)(A)(i) or (iii) of ERISA, or section 4975(e)(3)(A) and (C) of the Code, with respect to ERISA-covered plan and IRA assets; provided, however, that JPMC will not be treated as violating the conditions of this exemption solely because it acted as an investment advice fiduciary within the meaning of section 3(21)(A)(ii) or section 4975(e)(3)(B) of the Code;

(h)(1) By July 9, 2018, each JPMC Affiliated QPAM must develop, implement, maintain, and follow written policies and procedures (the Policies). The Policies must require, and must be reasonably designed to ensure that:

(i) The asset management decisions of the JPMC Affiliated QPAM are conducted independently of the corporate management and business activities of JPMC;

(ii) The JPMC Affiliated QPAM fully complies with ERISA's fiduciary duties and with ERISA and the Code's prohibited transaction provisions, as applicable with respect to each Covered Plan, and does not knowingly participate in any violation of these duties and provisions with respect to Covered Plans;

(iii) The JPMC Affiliated QPAM does not knowingly participate in any other person's violation of ERISA or the Code with respect to Covered Plans;

(iv) Any filings or statements made by the JPMC Affiliated QPAM to regulators, including, but not limited to, the Department, the Department of the Treasury, the Department of Justice, and the Pension Benefit Guaranty Corporation, on behalf of or in relation to Covered Plans are materially accurate and complete, to the best of such QPAM's knowledge at that time;

(v) To the best of the JPMC Affiliated QPAM's knowledge at the time, the JPMC Affiliated QPAM does not make material misrepresentations or omit material information in its communications with such regulators with respect to Covered Plans;

(vi) The JPMC Affiliated QPAM complies with the terms of this exemption; and

(vii) Any violation of, or failure to comply with an item in subparagraphs (ii) through (vi), is corrected as soon as reasonably possible upon discovery, or as soon after the QPAM reasonably should have known of the noncompliance (whichever is earlier), and any such violation or compliance failure not so corrected is reported, upon the discovery of such failure to so correct, in writing, to the head of compliance and the General Counsel (or their functional equivalent) of the relevant line of business that engaged in the violation or failure, and the independent auditor responsible for reviewing compliance with the Policies. A JPMC Affiliated QPAM will not be treated as having failed to develop, implement, maintain, or follow the Policies, provided that it corrects any instance of noncompliance as soon as reasonably possible upon discovery, or as soon as reasonably possible after the QPAM reasonably should have known of the noncompliance (whichever is earlier), and provided that it adheres to the reporting requirements set forth in this subparagraph (vii);

(2) By July 9, 2018, each JPMC Affiliated QPAM must develop a program of training (the Training), to be conducted at least annually, for all relevant JPMC Affiliated QPAM asset/portfolio management, trading, legal, compliance, and internal audit personnel. The first Training under this Final Exemption must be completed by all relevant JPMC Affiliated QPAM personnel by July 9, 2019 (by the end of this 30-month period, asset/portfolio management, trading, legal, compliance, and internal audit personnel who were employed from the start to the end of the period must have been trained twice: the first time under PTE 2016–15; and the second time under this exemption). The Training must:

(i) At a minimum, cover the Policies, ERISA and Code compliance (including applicable fiduciary duties and the prohibited transaction provisions), ethical conduct, the consequences for not complying with the conditions of this exemption (including any loss of exemptive relief provided herein), and prompt reporting of wrongdoing; and

(ii) Be conducted by a professional who has been prudently selected and who has appropriate technical training and proficiency with ERISA and the Code;

(i)(1) Each JPMC Affiliated QPAM submits to an audit conducted every two years by an independent auditor who has been prudently selected and who has appropriate technical training and proficiency with ERISA and the Code, to evaluate the adequacy of, and each JPMC Affiliated QPAM's compliance with, the Policies and Training described herein. The audit requirement must be incorporated in the Policies. Each audit must cover the preceding consecutive twelve (12) month period. The first audit must cover the period from July 10, 2018 through July 9, 2019, and must be completed by January 9, 2020. The second audit must cover the period from July 10, 2020 through July 9, 2021, and must be completed by January 9, 2022. In the event that the Exemption Period is extended or a new exemption is granted, the third audit would cover the period from July 10, 2022 through July 9, 2023, and would have to be completed by January 9, 2024 (unless the Department chooses to alter the biennial audit requirement in the new or extended exemption);'' [15]

(2) Within the scope of the audit and to the extent necessary for the auditor,

[15] The third audit referenced above would not have to be completed until after the Exemption Period expires. If the Department ultimately decides to grant relief for an additional period, it could decide to alter the terms of the exemption, including the audit conditions (and the timing of the audit requirements). Nevertheless, the Applicant should anticipate that the Department will insist on strict compliance with the audit terms and schedule set forth above. As it considers any new exemption application, the Department may also contact the auditor for any information relevant to its determination.

in its sole opinion, to complete its audit and comply with the conditions for relief described herein, and only to the extent such disclosure is not prevented by state or federal statute, or involves communications subject to attorney client privilege, each JPMC Affiliated QPAM and, if applicable, JPMC, will grant the auditor unconditional access to its business, including, but not limited to: its computer systems; business records; transactional data; workplace locations; training materials; and personnel. Such access is limited to information relevant to the auditor's objectives as specified by the terms of this exemption;

(3) The auditor's engagement must specifically require the auditor to determine whether each JPMC Affiliated QPAM has developed, implemented, maintained, and followed the Policies in accordance with the conditions of this exemption, and has developed and implemented the Training, as required herein;

(4) The auditor's engagement must specifically require the auditor to test each JPMC Affiliated QPAM's operational compliance with the Policies and Training. In this regard, the auditor must test, for each QPAM, a sample of such QPAM's transactions involving Covered Plans, sufficient in size and nature to afford the auditor a reasonable basis to determine such QPAM's operational compliance with the Policies and Training;

(5) For each audit, on or before the end of the relevant period described in Section I(i)(1) for completing the audit, the auditor must issue a written report (the Audit Report) to JPMC and the JPMC Affiliated QPAM to which the audit applies that describes the procedures performed by the auditor during the course of its examination. The auditor, at its discretion, may issue a single consolidated Audit Report that covers all the JPMC Affiliated QPAMs. The Audit Report must include the auditor's specific determinations regarding:

(i) The adequacy of each JPMC Affiliated QPAM's Policies and Training; each JPMC Affiliated QPAM's compliance with the Policies and Training; the need, if any, to strengthen such Policies and Training; and any instance of the respective JPMC Affiliated QPAM's noncompliance with the written Policies and Training described in Section I(h) above. The JPMC Affiliated QPAM must promptly address any noncompliance. The JPMC Affiliated QPAM must promptly address or prepare a written plan of action to address any determination by the auditor regarding the adequacy of the Policies and Training and the auditor's recommendations (if any) with respect to strengthening the Policies and Training of the respective Affiliated QPAM. Any action taken or the plan of action to be taken by the respective JPMC Affiliated QPAM must be included in an addendum to the Audit Report (such addendum must be completed prior to the certification described in Section I(i)(7) below). In the event such a plan of action to address the auditor's recommendation regarding the adequacy of the Policies and Training is not completed by the time of submission of the Audit Report, the following period's Audit Report must state whether the plan was satisfactorily completed. Any determination by the auditor that the respective JPMC Affiliated QPAM has implemented, maintained, and followed sufficient Policies and Training must not be based solely or in substantial part on an absence of evidence indicating noncompliance. In this last regard, any finding that a JPMC Affiliated QPAM has complied with the requirements under this subparagraph must be based on evidence that the particular JPMC Affiliated QPAM has actually implemented, maintained, and followed the Policies and Training required by this exemption. Furthermore, the auditor must not solely rely on the Annual Report created by the compliance officer (the Compliance Officer), as described in Section I(m) below, as the basis for the auditor's conclusions in lieu of independent determinations and testing performed by the auditor, as required by Section I(i)(3) and (4) above; and

(ii) The adequacy of the most recent Annual Review described in Section I(m);

(6) The auditor must notify the respective JPMC Affiliated QPAM of any instance of noncompliance identified by the auditor within five (5) business days after such noncompliance is identified by the auditor, regardless of whether the audit has been completed as of that date;

(7) With respect to each Audit Report, the General Counsel, or one of the three most senior executive officers of the line of business engaged in discretionary asset management services through the JPMC Affiliated QPAM with respect to which the Audit Report applies, must certify in writing, under penalty of perjury, that the officer has reviewed the Audit Report and this exemption; that such JPMC Affiliated QPAM has addressed, corrected or remedied any noncompliance and inadequacy or has an appropriate written plan to address any inadequacy regarding the Policies and Training identified in the Audit Report. Such certification must also include the signatory's determination that the Policies and Training in effect at the time of signing are adequate to ensure compliance with the conditions of this exemption, and with the applicable provisions of ERISA and the Code;

(8) The Risk Committee of JPMC's Board of Directors is provided a copy of each Audit Report; and a senior executive officer with a direct reporting line to the highest ranking legal compliance officer of JPMC must review the Audit Report for each JPMC Affiliated QPAM and must certify in writing, under penalty of perjury, that such officer has reviewed each Audit Report;

(9) Each JPMC Affiliated QPAM provides its certified Audit Report, by regular mail to: Office of Exemption Determinations (OED), 200 Constitution Avenue NW, Suite 400, Washington, DC 20210; or by private carrier to: 122 C Street NW, Suite 400, Washington, DC 20001–2109. This delivery must take place no later than thirty (30) days following completion of the Audit Report. The Audit Report will be made part of the public record regarding this exemption. Furthermore, each JPMC Affiliated QPAM must make its Audit Report unconditionally available, electronically or otherwise, for examination upon request by any duly authorized employee or representative of the Department, other relevant regulators, and any fiduciary of a Covered Plan;

(10) Each JPMC Affiliated QPAM and the auditor must submit to OED: Any engagement agreement(s) entered into pursuant to the engagement of the auditor under this exemption, no later than two (2) months after the execution of any such engagement agreement;

(11) The auditor must provide the Department, upon request, for inspection and review, access to all the workpapers created and utilized in the course of the audit, provided such access and inspection is otherwise permitted by law; and

(12) JPMC must notify the Department of a change in the independent auditor no later than two (2) months after the engagement of a substitute or subsequent auditor and must provide an explanation for the substitution or change including a description of any material disputes between the terminated auditor and JPMC;

(j) As of January 10, 2018 and throughout the Exemption Period, with respect to any arrangement, agreement, or contract between a JPMC Affiliated

QPAM and a Covered-Plan, the JPMC Affiliated QPAM agrees and warrants:

(1) To comply with ERISA and the Code, as applicable with respect to such Covered Plan; to refrain from engaging in prohibited transactions that are not otherwise exempt (and to promptly correct any inadvertent prohibited transactions); and to comply with the standards of prudence and loyalty set forth in section 404 of ERISA with respect to each such ERISA-covered plan and IRA to the extent that section is applicable;

(2) To indemnify and hold harmless the Covered Plan for any actual losses resulting directly from a JPMC Affiliated QPAM's violation of ERISA's fiduciary duties, as applicable, and of the prohibited transaction provisions of ERISA and the Code, as applicable; a breach of contract by the QPAM; or any claim arising out of the failure of such JPMC Affiliated QPAM to qualify for the exemptive relief provided by PTE 84–14 as a result of a violation of Section I(g) of PTE 84–14 other than the Conviction. This condition applies only to actual losses caused by the JPMC Affiliated QPAM's violations.

(3) Not to require (or otherwise cause) the Covered Plan to waive, limit, or qualify the liability of the JPMC Affiliated QPAM for violating ERISA or the Code or engaging in prohibited transactions;

(4) Not to restrict the ability of such Covered Plan to terminate or withdraw from its arrangement with the JPMC Affiliated QPAM with respect to any investment in a separately managed account or pooled fund subject to ERISA and managed by such QPAM, with the exception of reasonable restrictions, appropriately disclosed in advance, that are specifically designed to ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other investors. In connection with any such arrangements involving investments in pooled funds subject to ERISA entered into after the initial effective date of this exemption, the adverse consequences must relate to of a lack of liquidity of the underlying assets, valuation issues, or regulatory reasons that prevent the fund from promptly redeeming an ERISA-covered plan's or IRA's investment, and such restrictions must be applicable to all such investors and effective no longer than reasonably necessary to avoid the adverse consequences;

(5) Not to impose any fees, penalties, or charges for such termination or withdrawal with the exception of reasonable fees, appropriately disclosed in advance, that are specifically designed to prevent generally recognized abusive investment practices or specifically designed to ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other investors, provided that such fees are applied consistently and in like manner to all such investors; and

(6) Not to include exculpatory provisions disclaiming or otherwise limiting liability of the JPMC Affiliated QPAM for a violation of such agreement's terms. To the extent consistent with Section 410 of ERISA, however, this provision does not prohibit disclaimers for liability caused by an error, misrepresentation, or misconduct of a plan fiduciary or other party hired by the plan fiduciary who is independent of JPMC and its affiliates, or damages arising from acts outside the control of the JPMC Affiliated QPAM;

(7) By July 9, 2018, each JPMC Affiliated QPAM must provide a notice of its obligations under this Section I(j) to each Covered Plan. For all other prospective Covered Plans, the JPMC Affiliated QPAM will agree to its obligations under this Section I(j) in an updated investment management agreement between the JPMC Affiliated QPAM and such clients or other written contractual agreement. This condition will be deemed met for each Covered Plan that received a notice pursuant to PTE 2016–15 that meets the terms of this condition. Notwithstanding the above, a JPMC Affiliated QPAM will not violate the condition solely because a Plan or IRA refuses to sign an updated investment management agreement;

(k) By March 10, 2018, each JPMC Affiliated QPAM will provide a notice of the exemption, along with a separate summary describing the facts that led to the Conviction (the Summary), which have been submitted to the Department, and a prominently displayed statement (the Statement) that the Conviction results in a failure to meet a condition in PTE 84–14, to each sponsor and beneficial owner of a Covered Plan, or the sponsor of an investment fund in any case where a JPMC Affiliated QPAM acts as a sub-advisor to the investment fund in which such ERISA-covered plan and IRA invests. Any prospective client for which a JPMC Affiliated QPAM relies on PTE 84–14 or has expressly represented that the manager qualifies as a QPAM or relies on the QPAM class exemption must receive the proposed and final exemptions with the Summary and the Statement prior to, or contemporaneously with, the client's receipt of a written asset management agreement from the JPMC Affiliated QPAM. Disclosures may be delivered electronically.

(l) The JPMC Affiliated QPAMs must comply with each condition of PTE 84–14, as amended, with the sole exception of the violation of Section I(g) of PTE 84–14 that is attributable to the Conviction;

(m)(1) By July 9, 2018, JPMC designates a senior compliance officer (the Compliance Officer) who will be responsible for compliance with the Policies and Training requirements described herein. The Compliance Officer must conduct an annual review for each annual period beginning on January 10, 2018, (the Annual Review) [16] to determine the adequacy and effectiveness of the implementation of the Policies and Training. With respect to the Compliance Officer, the following conditions must be met:

(i) The Compliance Officer must be a professional who has extensive experience with, and knowledge of, the regulation of financial services and products, including under ERISA and the Code; and

(ii) The Compliance Officer must have a direct reporting line to the highest-ranking corporate officer in charge of legal compliance for asset management;

(2) With respect to each Annual Review, the following conditions must be met:

(i) The Annual Review includes a review of: Any compliance matter related to the Policies or Training that was identified by, or reported to, the Compliance Officer or others within the compliance and risk control function (or its equivalent) during the previous year; any material change in the relevant business activities of the JPMC Affiliated QPAMs; and any change to ERISA, the Code, or regulations related to fiduciary duties and the prohibited transaction provisions that may be applicable to the activities of the JPMC Affiliated QPAMs;

(ii) The Compliance Officer prepares a written report for each Annual Review (each, an Annual Report) that (A) summarizes his or her material activities during the preceding year; (B) sets forth any instance of noncompliance discovered during the preceding year, and any related corrective action; (C) details any change to the Policies or Training to guard against any similar instance of noncompliance occurring again; and (D) makes recommendations, as necessary, for additional training,

[16] Such Annual Review must be completed with respect to the annual periods ending January 9, 2019; January 9, 2020; January 9, 2021; January 9, 2022; and January 9, 2023.

procedures, monitoring, or additional and/or changed processes or systems, and management's actions on such recommendations;

(iii) In each Annual Report, the Compliance Officer must certify in writing that to his or her knowledge: (A) The report is accurate; (B) the Policies and Training are working in a manner which is reasonably designed to ensure that the Policies and Training requirements described herein are met; (C) any known instance of noncompliance during the preceding year and any related correction taken to date have been identified in the Annual Report; and (D) the JPMC Affiliated QPAMs have complied with the Policies and Training, and/or corrected (or is correcting) any instances of noncompliance in accordance with Section I(h) above;

(iv) Each Annual Report must be provided to appropriate corporate officers of JPMC and each JPMC Affiliated QPAM to which such report relates; the head of compliance and the General Counsel (or their functional equivalent) of the relevant JPMC Affiliated QPAM; and must be made unconditionally available to the independent auditor described in Section I(i) above;

(v) Each Annual Review, including the Compliance Officer's written Annual Report, must be completed within three (3) months following the end of the period to which it relates;

(n) Each JPMC Affiliated QPAM will maintain records necessary to demonstrate that the conditions of this exemption have been met, for six (6) years following the date of any transaction for which such JPMC Affiliated QPAM relies upon the relief in the exemption;

(o) During the Exemption Period, JPMC: (1) Immediately discloses to the Department any Deferred Prosecution Agreement (a DPA) or a Non-Prosecution Agreement (an NPA) with the U.S. Department of Justice, entered into by JPMC or any of its affiliates in connection with conduct described in Section I(g) of PTE 84–14 or section 411 of ERISA; and (2) immediately provides the Department any information requested by the Department, as permitted by law, regarding the agreement and/or conduct and allegations that led to the agreement;

(p) By July 9, 2018, each JPMC Affiliated QPAM, in its agreements with, or in other written disclosures provided to Covered Plans, will clearly and prominently inform Covered Plan clients of their right to obtain a copy of the Policies or a description (''Summary Policies'') which accurately summarizes key components of the QPAM's written Policies developed in connection with this exemption. If the Policies are thereafter changed, each Covered Plan client must receive a new disclosure within six (6) months following the end of the calendar year during which the Policies were changed.[17] With respect to this requirement, the description may be continuously maintained on a website, provided that such website link to the Policies or the Summary Policies is clearly and prominently disclosed to each Covered Plan; and

(q) A JPMC Affiliated QPAM or a JPMC Related QPAM will not fail to meet the terms of this exemption solely because a different JPMC Affiliated QPAM or JPMC Related QPAM fails to satisfy a condition for relief described in Sections I(c), (d), (h), (i), (j), (k), (l), (n) and (p); or if the independent auditor described in Section I(i) fails a provision of the exemption other than the requirement described in Section I(i)(11), provided that such failure did not result from any actions or inactions of JPMC or its affiliates.

Section II: Definitions

(a) The term ''Conviction'' means the judgment of conviction against JPMC for violation of the Sherman Antitrust Act, 15 U.S.C. 1, entered in the District Court for the District of Connecticut (the District Court) (case number 3:15–cr–79–SRU). For all purposes under this exemption, ''conduct'' of any person or entity that is the ''subject of [a] Conviction'' encompasses the conduct described in Paragraph 4(g)–(i) of the Plea Agreement filed in the District Court in case number 3:15–cr–79–SRU; and

(b) The term ''Conviction Date'' means the date of the judgment of the trial court. For avoidance of confusion, the Conviction Date is January 10, 2017, as set forth on page 3 of Dkt. 49, in case number 3:15–cr–79–SRU.

(c) The term ''Covered Plan'' means a plan subject to Part 4 of Title 1 of ERISA (''ERISA-covered plan'') or a plan subject to Section 4975 of the Code (''IRA'') with respect to which a JPMC Affiliated QPAM relies on PTE 84–14, or with respect to which a JPMC Affiliated QPAM (or any JPMC affiliate) has expressly represented that the manager qualifies as a QPAM or relies on the QPAM class exemption (PTE 84–14). A Covered Plan does not include an ERISA-covered Plan or IRA to the extent the JPMC Affiliated QPAM has expressly disclaimed reliance on QPAM status or PTE 84–14 in entering into its contract, arrangement, or agreement with the ERISA-covered plan or IRA;

(d) The terms ''ERISA-covered plan'' and ''IRA'' mean, respectively, a plan subject to Part 4 of Title I of ERISA and a plan subject to section 4975 of the Code.

(e) The term ''Exemption Period'' means January 10, 2018, through January 9, 2023;

(f) The term ''JPMC'' means JPMorgan Chase and Co., the parent entity, but does not include any subsidiaries or other affiliates;

(g) The term ''JPMC Affiliated QPAM'' means a ''qualified professional asset manager,'' as defined in Section VI(a) of PTE 84–14, that relies on the relief provided by PTE 84–14 and with respect to which JPMC is a current or future ''affiliate'' (as defined in Section VI(d)(1) of PTE 84–14). The term ''JPMC Affiliated QPAM'' excludes the parent entity, JPMC, the entity implicated in the criminal conduct that is the subject of the Conviction

(h) The term ''JPMC Related QPAM'' means any current or future ''qualified professional asset manager'' (as defined in section VI(a) of PTE 84–14) that relies on the relief provided by PTE 84–14, and with respect to which JPMC owns a direct or indirect five percent or more interest, but with respect to which JPMC is not an ''affiliate'' (as defined in Section VI(d)(1) of PTE 84–14).

Effective Date

This exemption is effective on January 10, 2018. The term of the exemption is from January 10, 2018, through January 9, 2023 (the Exemption Period).

Department's Comment: The Department cautions that the relief in this exemption will terminate immediately if, among other things, an entity within the JPMC corporate structure is convicted of a crime described in Section I(g) of PTE 84–14 (other than the Conviction) during the Exemption Period. Although JPMC could apply for a new exemption in that circumstance, the Department would not be obligated to grant the exemption. The terms of this exemption have been specifically designed to permit plans to terminate their relationships in an orderly and cost effective fashion in the event of an additional conviction or a determination that it is otherwise prudent for a plan to terminate its relationship with an entity covered by the exemption.

[17] In the event Applicant meets this disclosure requirement through Summary Policies, changes to the Policies shall not result in the requirement for a new disclosure unless, as a result of changes to the Policies, the Summary Policies are no longer accurate.

Further Information

For more information on this exemption, contact Mr. Joseph Brennan of the Department, telephone (202) 693–8456. (This is not a toll-free number.)

Deutsche Investment Management Americas Inc. (DIMA) and Certain Current and Future Asset Management Affiliates of Deutsche Bank AG (collectively, the Applicant or the DB QPAMs), Located in New York, New York

[Prohibited Transaction Exemption 2017–04; Exemption Application No. D–11908]

Discussion

On November 21, 2016, the Department of Labor (the Department) published a notice of proposed exemption in the **Federal Register** at 81 FR 83400, for certain entities with specified relationships to Deutsche Securities Korea, Co. (DSK) [18] or DB Group Services (UK) Limited (DB Group Services) [19] to continue to rely upon the relief provided by PTE 84–14 for a period of five years,[20] notwithstanding certain criminal convictions, as described herein (the Convictions).

The Department is granting this exemption to ensure that Covered Plans [21] with assets managed by an asset manager within the corporate family of Deutsche Bank AG (together with its current and future affiliates, Deutsche Bank) may continue to benefit from the relief provided by PTE 84–14. The effective date of this exemption is April 18, 2018, and the exemption is effective from April 18, 2018 through April 17, 2021 (the Exemption Period).

No relief from a violation of any other law is provided by this exemption, including any criminal conviction described in the proposed exemption. Furthermore, the Department cautions that the relief in this exemption will terminate immediately if, among other things, an entity within the Deutsche Bank corporate structure is convicted of a crime described in Section I(g) of PTE 84–14 (other than the Convictions) during the Exemption Period. The terms of this exemption are designed to promote adherence to basic fiduciary standards under ERISA and the Code. This exemption also aims to ensure that Covered Plans can terminate relationships in an orderly and cost effective fashion in the event the fiduciary of a Covered Plan determines it is prudent to terminate the relationship with a DB QPAM.

Written Comments

The Department invited all interested persons to submit written comments and/or requests for a public hearing with respect to the notice of proposed exemption, published in the **Federal Register** at 81 FR 83400 on November 21, 2016. All comments and requests for a hearing were due by January 5, 2017.[22] The Department received written comments from the Applicant, members of the U.S. Congress, and a number of plan and IRA clients of Deutsche Bank. After considering these submissions, the Department has determined to grant the exemption, with revisions, as described below.

Comment 1—Knowing or Tacit Approval—Sections I(a) and I(c)

Section I(a) of the proposed exemption provides, ''*(a) The DB QPAMs (including their officers, directors, agents other than Deutsche Bank, and employees of such DB QPAMs) did not know of, have reason to know of, or participate in the criminal conduct of DSK and DB Group Services that is the subject of the Convictions (for purposes of this Section I(a),* ''*participate in*'' *includes the knowing or tacit approval of the misconduct underlying the Convictions).*''

Section I(c) of the proposed exemption provides, ''*(c) The DB QPAMs will not employ or knowingly engage any of the individuals that participated in the criminal conduct that is the subject of the Convictions (for the purposes of this Section I(c),* ''*participated in*'' *includes the knowing or tacit approval of the misconduct underlying the Convictions).*''

The Applicant requests that the parenthetical explanation for ''participated in'' be deleted in both Section I(a) and I(c). The Applicant states that the language in both sections preceding the parentheticals is clear and unambiguous, rendering the parentheticals unnecessary. Alternatively, the Applicant requests that, should the parenthetical remain in the exemption, the Department removes the words ''or tacit'' in the phrase ''knowing or tacit approval'' in Sections I(a) and I(c). The Applicant states that the term ''is undefined and ambiguous, and potentially encompasses a broad range of conduct that could become the subject of disputes with counterparties.'' The Applicant also states that ''tacit approval'' should not be replaced with the term ''condone'' (as the Department did in paragraph (c) in the Final Temporary Exemption), as it is duplicative of and has the same meaning as ''approve''.

The Department declines to delete the parenthetical explanations in Sections I(a) and I(c). Rather, after consideration, the Department removed ''or tacit'' from both conditions so that ''participated in'' means the ''knowing approval of the misconduct underlying the Convictions.''

Comment 2—Exercising Authority Over Plan Assets—Section I(f)

Section I(f) of the proposed exemption provides, ''*(f) A DB QPAM did not exercise authority over the assets of any plan subject to Part 4 of Title I of ERISA (an ERISA-covered plan) or section 4975 of the Code (an IRA) in a manner that it knew or should have known would: further the criminal conduct that is the subject of the Convictions; or cause the QPAM, affiliates, or related parties to directly or indirectly profit from the criminal conduct that is the subject of the Convictions.*''

Deutsche Bank requests that the phrase ''related parties'' in Condition I(f) be deleted as the term ''is undefined and could lead to confusion.'' The Applicant also states that this condition may be interpreted as implicating the purchase, for a plan or IRA, of any instrument linked to a benchmark rate. Deutsche Bank requests that the Department add clarification language which ''[provides] that this condition is not violated solely because an ERISA-covered plan or IRA managed by a DB QPAM purchased, sold or held an economic interest in a security or product, the value of which was tied to a benchmark interest rate implicated in the conduct that is the subject of the Convictions.''

[18] Deutsche Securities Korea, Co. is a South Korean ''affiliate'' (as defined in Section VI(c) of PTE 84–14) of Deutsche Bank AG.

[19] DB Group Services (UK) Limited is United Kingdom-based ''affiliate'' (as defined in Section VI(c) of PTE 84–14) of Deutsche Bank AG.

[20] (49 FR 9494, March 13, 1984), as corrected at 50 FR 41430 (October 10, 1985), as amended at 70 FR 49305 (August 23, 2005) and as amended at 75 FR 38837 (July 6, 2010), hereinafter referred to as PTE 84–14 or the QPAM exemption.

[21] ''Covered Plan'' is a plan subject to Part 4 of Title 1 of ERISA (''ERISA-covered plan'') or a plan subject to section 4975 of the Code (''IRA'') with respect to which a DB QPAM relies on PTE 84–14, or with respect to which a DB QPAM (or any Deutsche Bank affiliate) has expressly represented that the manager qualifies as a QPAM or relies on the QPAM class exemption (PTE 84–14). A Covered Plan does not include an ERISA-covered plan or IRA to the extent the DB QPAM has expressly disclaimed reliance on the QPAM status or PTE 84–14 in entering into its contract, arrangement, or agreement with the ERISA-covered plan or IRA. See further discussion in this preamble under the heading Comment 5—Policies and Procedures related to DB QPAM Disclosures—Section I(h)(1)(iv)–(v).

[22] The comment period was subsequently extended by the Department to January 17, 2017. However, the Department received additional comments from the Applicant after the close of the extended comment period.

After consideration, the Department deleted the phrase ''related parties'' for clarity. However, the Department declines to make the Applicant's other requested revisions. The Department does not view Condition I(f) (which relates to exercising authority) as confusing. Further, Condition I(f) is consistent with the Applicant's prior representation that, with respect to the conviction of DB Group Services (UK) Limited (DB Group Services) for LIBOR manipulation (the US Conviction), ''[no] current or former employee of [DB Group Services] or of any affiliated QPAM who previously has been or who subsequently may be identified by [DB Group Services], Deutsche Bank AG or any U.S. or non-U.S. regulatory or enforcement agencies as having been responsible for the [LIBOR-related misconduct] will be an officer, director, or employee of any Applicant or of any other current or future affiliated QPAM; and . . . no employee of [DB Group Services] or of any affiliated QPAM who was involved in the [LIBOR-related misconduct] had any, or will have any future, involvement in the current or future affiliated QPAMs' asset management activities.'' [23] With respect to the conviction of Deutsche Securities Korea Co. (DSK) for market manipulation (the Korean Conviction), the Applicant has represented that ''Deutsche Bank's [Asset & Wealth Management] Division had no involvement whatsoever in the conduct or compliance issues that formed the basis for the LIBOR and South Korea matters . . . .'' [24]

Furthermore, the Department does not believe that the proposed carve-out for transactions involving the sale, purchase or holding of instruments tied to a benchmark interest rate is necessary. The Applicant has informed the Department that, with respect to condition I(a), the Applicant can represent the following: ''Other than certain individuals who worked for non-asset management business within DBSI and/or DBAG and [who] had no responsibility for, and exercised no authority in connection with, the management of plan assets, and are no longer employed by DBSI and DBAG, the DB QPAMs (including their officers, directors, agents other than Deutsche Bank, and employees of such DB QPAMs) did not know of, have reason to know of, or participate in the criminal conduct of DSK and DB Group Services that is the subject of the Convictions.'' [25] The Department believes that this representation obviates the need for a carve-out, regardless of whether the instrument involved in the transaction is tied to a benchmark interest rate.

In addition, the Department clarified that Section I(d) applies (a) to ''investment funds'' managed by the DB QPAM with respect to Covered Plans, and (b) at all times during the Exemption Period.

Comment 3—Restriction on Provision of Discretionary Asset Management Services—Section I(g)

Section I(g) of the proposed exemption provides, ''*(g) DSK and DB Group Services will not provide discretionary asset management services to ERISA-covered plans or IRAs, nor will otherwise act as a fiduciary with respect to ERISA-covered plan and IRA assets.*''

Deutsche Bank states that the phrase ''otherwise act as a fiduciary'' precludes DSK and DB Group Services from acting as a fiduciary in any way with respect to ERISA-covered plans and IRA assets, including under the Department's new ''Definition of the Term 'Fiduciary';'' ''Conflict of Interest Rule—Retirement Investment Advice,'' 81 FR 200946 (April 8, 2016), and including with respect to DSK's and DB Group Services' own internal plans. Deutsche Bank represents that because DSK acts as a broker-dealer and may provide investment advice, such conduct will require DSK to acknowledge that it is acting as a fiduciary once the new fiduciary rule becomes effective, and this condition would make it impossible for plans to engage DSK for any services at all. The Applicant states that, while DSK and DB Group Services should not be permitted to act as discretionary asset managers of ERISA-covered plans and IRAs because of the crimes which led to the Convictions, the Department should not preclude ERISA-covered plans or IRAs from independently engaging DSK for other services or limit the activities of any entity other than those so convicted. The Applicant requests that ''provide discretionary asset management services to ERISA-covered plans or IRAs, nor will otherwise act as a fiduciary with respect to ERISA-covered plan and IRA assets'' be replaced with ''act as fiduciaries within the meaning of ERISA Section 3(21)(A)(i) or (iii), or Code Section 4975(e)(3)(A) or (C), with respect to ERISA-covered plan and IRA assets.'' Also, the Applicant requests that the Department provide a carve-out ''with respect to employee benefit plans maintained or sponsored for their own employees or the employees of an affiliate.''

Furthermore, Deutsche Bank states that it, like many foreign banks, uses foreign service companies, like DB Group Services, to hire and pay employees who then work for, and are supervised by, other entities in the Deutsche Bank controlled group. The Applicant represents that DB Group Services provides employees to Deutsche Bank asset management affiliates, and that these employees are then responsible for the employees' training, supervision, compliance, etc., as if they were employed by such affiliates. Accordingly, Deutsche Bank requests confirmation that the fact that DB Group Services employs and pays such individual employees will not cause a DB QPAM to fail to meet this condition. Specifically, the Applicant requests that the Department qualify Section I(g) by ''[providing] that DSK and DB Group Services will not be treated as violating this condition solely because they acted as investment advice fiduciaries within the meaning of ERISA Section 3(21)(A)(ii), or Section 4975(e)(3)(B) of the Code, or because DB Group Services employees may be double-hatted, seconded, supervised or otherwise subject to the control of a DB QPAM, including in a discretionary fiduciary capacity with respect to the DB QPAM clients.''

The Department concurs with the Applicant, and has modified Section I(g) of the final exemption accordingly.

The Department has also clarified that this condition does not apply with respect to employee benefit plans maintained or sponsored for their own employees or the employees of an affiliate of DSK or DB Group Services.

Comment 4—Policies and Procedures Relating to Compliance With ERISA and the Code—Section I(h)(1)(ii)–(iii)

Sections I(h)(1)(ii)–(iii) of the proposed exemption provide, ''*(h)(1) Each DB QPAM must immediately develop, implement, maintain, and follow written policies and procedures (the Policies) requiring and reasonably designed to ensure that:*

(ii) The DB QPAM fully complies with ERISA's fiduciary duties and with ERISA and the Code's prohibited transaction provisions, and does not knowingly participate in any violation of these duties and provisions with respect to ERISA-covered plans and IRAs;

[23] See DIMA Exemption Application (April 23, 2015), at 12–13.

[24] *See* Deutsche Bank AG Submission to the Department of Labor in Further Support of Applications for Conditional Exemption (September 18, 2015), at 8.

[25] Applicant Submission to the Department (May 25, 2017), at 3.

(iii) The DB QPAM does not knowingly participate in any other person's violation of ERISA or the Code with respect to ERISA-covered plans and IRAs;''

The Applicant requests that the subparagraph I(h)(1)(iii) be stricken as duplicative. The Applicant states that the requirement that a DB QPAM ''not knowingly participate in any other person's violation'' is ''subsumed within the requirement'' that such DB QPAM ''not knowingly participate in any violation'' of the duties and provisions set forth in ERISA and the Code (including Section 405 of ERISA).

The Department declines to make this deletion. The specific elements of the Policies requirement as set forth in this exemption are essential to its protective purposes. In approving this exemption, the Department significantly relies upon conditions designed to ensure that those relying upon its terms for prohibited transaction relief will adopt a culture of compliance centered on basic fiduciary norms and standards of fair dealing, as reflected in the Policies. These standards are core protections of this exemption. The Department does not view subparagraph (iii) of Section I(h)(1), which relates to a DB QPAM's compliance with ERISA or the Code, as duplicative of subparagraph (ii), which includes also a DB QPAM's full compliance with ERISA's fiduciary duties, and with ERISA and the Code's prohibited transaction provisions. Subparagraph (ii) is based on the DB QPAM's management of assets of Covered Plans. On the other hand, subparagraph (iii) focuses on the DB QPAM's diligence in collaborating with third parties in the management of assets of Covered Plans.

The Department modified the Policies' requirement of adherence to the fiduciary and prohibited transaction provisions of ERISA and the Code in subparagraph (ii) so that the Policies expressly focus on the provisions only to the extent ''in each such case as applicable with respect to each Covered Plan . . . .'' In general, however, the Department has otherwise retained the stringency and breadth of the Policies requirement, which is more than justified by the compliance and oversight failures exhibited by Deutsche Bank throughout the long period of time during which the criminal misconduct persisted. The Department notes that it made minor revisions to reflect the fact that DB QPAMs may already have Policies under the previous exemption, in which case, they are required to ''maintain'' such Policies.

Comment 5—Policies and Procedures Related to DB QPAM Disclosures—Section I(h)(1)(iv)–(v)

Sections I(h)(1)(iv)–(v) of the proposed exemption provide, ''*(h)(1) Each DB QPAM must immediately develop, implement, maintain, and follow written policies and procedures (the Policies) requiring and reasonably designed to ensure that:*

(iv) Any filings or statements made by the DB QPAM to regulators, including but not limited to, the Department, the Department of the Treasury, the Department of Justice, and the Pension Benefit Guaranty Corporation, on behalf of ERISA-covered plans or IRAs are materially accurate and complete, to the best of such QPAM's knowledge at that time;

(v) The DB QPAM does not make material misrepresentations or omit material information in its communications with such regulators with respect to ERISA-covered plans or IRAs, or make material misrepresentations or omit material information in its communications with ERISA-covered plan and IRA clients.''

The Applicant states that Sections I(h)(1)(iv) I(h)(1)(v) are ''overlapping, duplicative and extend beyond the scope of exemptive relief'' to instances where the Applicant is not acting in reliance on PTE 84–14. The Applicant requests that the subparagraphs be limited to situations where the Applicant is relying on PTE 84–14 and this exemption. Also, Deutsche Bank states that the distinction between subparagraph (iv)'s requirement that information provided to regulators be materially accurate and complete and subparagraph (v)'s requirement that such communications may not have material misrepresentations or omissions is unclear, and suggests the reference in (v) be deleted. Finally, Deutsche Bank requests that the phrase ''to the best of such QPAM's knowledge at that time'' should appear in subparagraph (h)(1)(v) as it does in subparagraph (h)(1)(iv), but is absent from condition (h)(1)(v).

The Department notes that the Section I(h) requirement that the policies and procedures developed by the DB QPAM adhere to basic fiduciary norms is a protective measure that is necessary in light of the substantial compliance and oversight failures exhibited by Deutsche Bank throughout the long period of time during which the misconduct persisted. Notwithstanding this, the Department is revising the condition, in part, as requested by the Applicant.

Subsection (v) has been revised to contain the ''to the best of QPAM's knowledge at the time'' concept found in subsection (iv); and the applicability of subsections (iv) and (v) has been narrowed to ERISA-covered plans and IRAs with respect to which a DB QPAM relies on PTE 84–14, or with respect to which a DB QPAM has expressly represented that the manager qualifies as a QPAM or relies on the QPAM class exemption in its dealings with the ERISA-covered plan or IRA (hereinafter, a Covered Plan). To the extent a DB QPAM would prefer not to be subject to this provision, however, it may expressly disclaim reliance on QPAM status or PTE 84–14 in entering into its contract with an ERISA-covered plan or IRA, and such plan or IRA is not a Covered Plan.[26] This revision is consistent with the Department's intent to protect Covered Plans that may have hired a DB QPAM based on the understanding that the manager qualifies as a QPAM or relies on PTE 84–14.

As noted in more detail below, the Department will not strike a condition merely because it is also a statutory requirement. It is the express intent of the Department to preclude relief for a DB QPAM that fails to meet the requirements of this exemption, including those derived from basic norms codified in statute, as applicable.

Comment 6—Corrections of Violations and Failures To Comply—Section I(h)(1)(vii)

Section I(h)(1)(vii) of the proposed exemption provides, ''*(vii) Any violation of, or failure to comply with, an item in subparagraphs (ii) through (vi), is corrected promptly upon discovery, and any such violation or compliance failure not promptly corrected is reported, upon the discovery of such failure to promptly correct, in writing, to appropriate corporate officers, the head of compliance and the General Counsel (or their functional equivalent) of the relevant DB QPAM, the independent auditor responsible for reviewing compliance with the Policies, and an appropriate fiduciary of any affected ERISA-covered plan or IRA that is independent of Deutsche Bank; however, with respect to any ERISA-covered plan or IRA sponsored by an 'affiliate' (as defined in Section VI(d) of PTE 84–14) of Deutsche Bank or beneficially owned by an employee of Deutsche Bank or its affiliates, such fiduciary does not need to be independent of Deutsche Bank. A DB*

[26] Of course, neither may the QPAM rely on PTE 84–14 or this exemption with respect to any such ERISA-covered plan or IRA for which it has expressly disclaimed reliance on QPAM status or PTE 84–14.

QPAM will not be treated as having failed to develop, implement, maintain, or follow the Policies, provided that it corrects any instance of noncompliance promptly when discovered, or when it reasonably should have known of the noncompliance (whichever is earlier), and provided that it adheres to the reporting requirements set forth in this subparagraph (vii).''

The Applicant states that Section I(h)(1)(vii) extends beyond the scope necessary to ensure compliance with other requirements in condition (h). Deutsche Bank states that the reporting requirement is not needed given the ''multiple, overlapping requirements'' related to the Annual Review and the Audit Report.

Deutsche Bank also references several ''ambiguities'' in subparagraph (vii). The Applicant states that the term ''promptly'' is undefined, and, as a result, it is unclear when a violation must be corrected and when the reporting obligation is triggered. Similarly, the phrases ''appropriate corporate officers . . . of the relevant DB QPAM'' and ''appropriate fiduciary of any affected ERISA-covered plan or IRA'' are undefined. The Applicant states that the last sentence of subparagraph (vii) does not provide meaningful relief because some corrections will take longer to complete than the exemption appears to permit.

The Applicant suggests that the correction procedure provided in subparagraph (vii) should apply to any violation of or failure to comply with subparagraph (i) regarding the policy governing independence in asset management decisions as well. The Applicant further suggests that it should be allowed to correct any errors under the policy, as with the other errors. Deutsche Bank states that the Department has not explained why a failure under subparagraph (i), however inadvertent, should result in an automatic loss of the exemption.

Deutsche Bank suggests the following language: ''(vii) Within sixty (60) days of its discovery of any violation of, or failure to comply with, an item in subparagraphs (i) through (vi), such DB QPAM will formulate, in writing, a plan to address such violation or failure (a Correction Plan). To the extent any such Correction Plan is not formulated within sixty (60) days of the DB QPAM's discovery of such violation or failure, the DB QPAM will report in writing such violation or failure to the head of compliance or the General Counsel (or their functional equivalents) of the relevant line of business that engaged in such violation or failure.''

The Department has based the conditions of this exemption on both the particular facts underlying the Convictions and its experience over time with previous exemptions. For the reasons set out herein, the Department has concluded that the specific conditions of this exemption are appropriate and give the Department a reasonable basis for concluding that the exemptions are appropriately protective of affected plans and IRAs. As noted above, a central aim of the exemption is to ensure that those relying upon the exemption for relief from the prohibited transaction rules will consistently act to promote a culture of fiduciary compliance, notwithstanding the conduct that violated Section I(g) of PTE 84–14.

The Department does not agree with the Applicant's contention that the Section I(h)(1)(vii) extends beyond the scope necessary to ensure compliance with other requirements in Section I(h), or that it is duplicative of the Annual Report and Audit Report requirements. The Department considers the Policies, and the DB QPAM's compliance therewith, to be a fundamental component of exemptive relief, and this Section I(h)(1)(vii) emphasizes the importance of this compliance, including the correction process. Further the Department notes that the audits and Annual Reports are periodic and do not reflect the timeframe that this condition is intended to reflect.

Regarding the Applicant's requests for revisions, the Department is replacing ''appropriate corporate officers'' with ''the head of compliance and the General Counsel (or their functional equivalent) of the relevant DB QPAM that engaged in the violation or failure.'' The Department also will not condition the exemption on a requirement for notification of violations to an appropriate fiduciary of any affected ERISA-covered plan or IRA that is independent of Deutsche Bank.

However, the Department is not revising the ''subparagraphs (ii) through (vi)'' reference to include ''subparagraph (i)'' because the Department intends to preclude relief to the extent a DB QPAM fails to develop, implement, maintain, and follow written policies and procedures. Clearly, it is not enough merely to develop policies and procedures, without also implementing, maintaining, and following the terms of those policies and procedures. Covered Plans do not benefit from the creation of strong policies and procedures, unless they are actually followed.

The Department has revised the term ''corrected promptly'' for consistency with the Department's intent that violations or compliance failures be corrected ''as soon as reasonably possible upon discovery or as soon after the QPAM reasonably should have known of the noncompliance (whichever is sooner).'' However, the Department intends to preclude relief to the extent violations or failures are not corrected as required by the exemption. Therefore, the Department has not adopted the Applicant's proposed subparagraph (vii), which requires little more than the formulation of a correction plan, without any corresponding obligation to actually implement the plan.

Comment 7—Time to Implement Training—Section I(h)(2)

The prefatory language in Section I(h)(2) provides, ''*(2) Each DB QPAM must immediately develop and implement a program of training (the Training), conducted at least annually, for all relevant DB QPAM asset/portfolio management, trading, legal, compliance, and internal audit personnel.*''

Deutsche Bank requests that, in order to avoid confusion over whether Applicant must train the same pool of employees multiple times in a year, the Department add a clarifying proviso to this requirement, specifically, at the end of the first sentence in the prefatory language: ''(this condition in paragraph (h)(2) shall be deemed to be met with respect to any employee trained in accordance with the requirements of PTE 2016–12 or the temporary one-year exemption within the prior 12 months).'' The Applicant states that it is also subject to a similar training requirement under the temporary exemption. Deutsche Bank represents that, during the period covered by PTE 2015–15, it trained more than 1,000 of its employees.

The Department clarifies that, to the extent that the Training requirements in Section I(h)(2) of the exemption, and the corresponding requirements in PTE 2016–13 and PTE 2016–12 are consistent, such provisions should be harmonized so that the sequential exemptions do not inadvertently require multiple trainings per year. Consistent with this requested change in the prefatory language, the Department has added further clarity on the timeline with respect to the Training. The Department is specifying that ''the first Training under this Exemption must be completed by all relevant DB QPAM personnel by April 17, 2019.'' Furthermore, the Department specifies that, by April 17, 2019, asset/portfolio management, trading, legal, compliance, and internal audit personnel who were employed from April 18, 2017 through April 17, 2019 must have been trained at least twice: the first time under PTE 2016–13; and the second time under this exemption. The Department notes that it made minor revisions to reflect the fact that DB QPAMs may already have Training under the previous exemption, in which case, they are required to ''maintain.''

Comment 8—Training Set Forth in Policies—Section I(h)(2)(i)

Section I(h)(2)(i) of the proposed exemption provides, ''*(2) Each DB QPAM must immediately develop and implement a program of training (the Training), conducted at least annually, for all relevant DB QPAM asset/portfolio management, trading, legal, compliance, and internal audit personnel. The Training must:*

(i) Be set forth in the Policies and at a minimum, cover the Policies, ERISA and Code compliance (including applicable fiduciary duties and the prohibited transaction provisions), ethical conduct, the consequences for not complying with the conditions of this exemption (including any loss of exemptive relief provided herein), and prompt reporting of wrongdoing;''

The Applicant states that the requirement in Section I(h)(2)(i) that the Training must be ''set forth in'' the Policies may cause significant logistical challenges over time. The Applicant requests that the section be clarified, such that only the requirement of the Training should be set forth in the Policies.

The Department concurs with the Applicant's comment and has revised the condition accordingly.

Comment 9—Training by Independent Professional—Section I(h)(2)(ii)

Section I(h)(2)(ii) of the proposed exemption provides, ''*. . . The Training must: . . . (ii) Be conducted by an independent professional who has been prudently selected and who has appropriate technical and training and proficiency with ERISA and the Code.*''

The Applicant requests that Section I(h)(2)(ii) be deleted, stating that it is not necessary for the Department to specify who conducts the Training, what the professional's background is, how the Training is conducted or when the independent auditor is required under Section I(i)(1) to evaluate the adequacy of DB QPAMs' compliance with the Training requirement. Deutsche Bank further states that the requirement may be ''counterproductive, as the most effective trainer may be someone with detailed knowledge of the DB QPAMs' business and compliance practices that an 'independent' trainer may lack.'' Finally, Deutsche Bank states that the term ''independent professional'' is also undefined. Alternatively, Deutsche Bank suggests, the Training must ''(ii) Be conducted by an individual(s) (either in person, remotely or electronically, such as through live or recorded web-based training) who has appropriate proficiency with ERISA and the Code.''

Although the Department does not agree with the Applicant's characterization that hiring an appropriate independent professional, prudently selected, would be counterproductive, the Department is persuaded that appropriate Deutsche Bank personnel, prudently selected, should be allowed to conduct the training, and has revised the condition accordingly. The Department declines to incorporate the Applicant's requested language regarding the use of electronic or web-based methods in conducting the Training. The revised I(h)(2)(ii) now states that the Training ''[b]e conducted by a professional who has been prudently selected and who has appropriate technical training and proficiency with ERISA and the Code.''

Comment 10—Audit—Section I(i)(1)

Section I(i)(1) of the proposed exemption requires that each Deutsche Bank QPAM ''*submits to an audit conducted annually by an independent auditor, who has been prudently selected and who has appropriate technical training and proficiency with ERISA and the Code. . . .*'' Section I(i)(1) also provides that ''*[t]he audit requirement must be incorporated in the Policies . . . .*''

The Applicant requests deletion of the requirement that the audit requirement be incorporated in the Policies, as its duplication in the Policies serves no apparent purpose. The Applicant further suggests that the auditor should be given discretion to define the precise audit period under this exemption (which may be more or less than 12 months), so as to avoid a short audit period in the event that this exemption is granted before the expiration of the first audit period under the final temporary exemption. To this end, the Applicant requests the following be added to the condition: ''(provided that the first audit period hereunder may be longer or shorter than 12 months at the election of the auditor to avoid an unreasonably short audit period).'' The Applicant requests that the reference to ''appropriate technical training'' be deleted, as it appears ''duplicative of proficiency in ERISA.''

The Department does not agree with the Applicant's assertion that the phrase ''technical training and proficiency'' is duplicative. In this regard, the Department does not believe that the two terms are synonymous, as a person may have taken technical training in a given subject matter but may not be proficient in that subject matter. The exemption requires that the auditor be both technically trained and proficient in ERISA as well as the Code. Accordingly, the Department declines to change the phrase ''technical training and proficiency'' as used in Section I(i)(1).

The Department also declines to delete the requirement that the audit conditions be incorporated in the Policies. The audit requirement provides a critical independent check on compliance with this exemption's conditions, and helps ensure that the basic protections set forth in the Policies are taken seriously. Accordingly, the specifics of the audit requirement are important components of the Policies. Their inclusion in the Policies promotes compliance and sends an important message to the institutions' employees and agents, as well as to Covered Plan clients, that compliance with the policies and procedures will be subject to careful independent review.

The Department further declines to incorporate the Applicant's suggested language regarding the timeline of the audit required by the temporary exemption. The audit required under the temporary exemption covers a period from October 24, 2016 until April 17, 2018, which is not an unreasonably short audit period.

Each audit must cover the preceding 12-month period. The first audit must cover the period from April 18, 2018 through April 17, 2019, and must be completed by October 17, 2019. The second audit must cover the period from April 18, 2019 through April 17, 2020, and must be completed by October 17, 2020. In the event that the Exemption Period is extended or a new exemption is granted, the third audit would cover the period from April 18, 2020 through April 17, 2021, and would have to be completed by October 17, 2021, unless the Department chooses to alter the annual audit requirement in any potential new or extended exemption.

Comment 11—Access to Business—Section I(i)(2)

Section I(i)(2) of the proposed exemption requires that ''*as permitted by law, each DB QPAM and, if applicable Deutsche Bank, will grant the auditor unconditional access to its business . . . .*''

The Applicant requests that the access granted by Section I(i)(2) be limited to non-privileged materials relevant to the scope of exemptive relief that do not contain trade secrets. The Applicant states that, with the breadth of the ''unconditional access'' described in the proposed exemption, ''the absence of a specific limitation could lead to confusion, disputes, and infringement on DB or a DB QPAM's rights to protect its privileged communications and trade secrets or intrusion into activities falling outside the scope of exemptive relief.'' The Applicant states that the condition, as written in the proposed exemption, leaves the determination of necessity solely to the auditor. The Applicant suggests the following revised condition: ''(2) To the extent necessary for the auditor, in its sole opinion, to complete its audit and comply with the conditions for relief described herein, and as permitted by law, each DB QPAM and, if applicable, and solely to determine if the provisions of the exemption involving Deutsche Bank are met, Deutsche Bank, will grant the auditor unconditional access to its relevant business, including, but not limited to: Its relevant computer systems; relevant business records; transactional data relating to ERISA plans and IRAs managed by a DB QPAM in reliance on PTE 84–14 and this exemption; workplace locations; relevant training materials; and personnel (for avoidance of doubt, this condition does not require access to privileged, trade secret and other similarly sensitive business information).''

In the Department's view, to ensure a thorough and robust audit, the auditor must be granted access to information the auditor deems necessary for the auditor to make sound conclusions. Access to such information must be within the scope of the audit engagement and denied only to the extent any disclosure is not permitted by state or federal statute. Enumerating specific restrictions on the accessibility of certain information would have a dampening effect on the auditor's ability to perform the procedures necessary to make valid conclusions and would therefore undermine the effectiveness of the audit. The auditor's access to such information, however, is limited to information relevant to the auditor's objectives as specified by the terms of this exemption and to the extent disclosure is not prevented by state or federal statute or involves communications subject to attorney client privilege. In this regard, the Department has modified Section I(i)(2) accordingly.

Comment 12—Auditor's Test of Operational Compliance—Section I(i)(4)

Section I(i)(4) of the proposed exemption provides that, ''*[t]he auditor's engagement must specifically require the auditor to test each DB QPAM's operational compliance with the Policies and Training*'' and ''*the auditor must test a sample of each QPAM's transactions involving ERISA-covered Plans and IRAs sufficient in size and nature to afford the auditor a reasonable basis to determine operational compliance with the Policies and Training.*''

The Applicant requests that Section I(i)(4) be deleted in its entirety. The Applicant states that other conditions of the exemption govern the audit's scope, the auditor's technical skill, and the prudence of the selection process. The Applicant also states that the second sentence of Section I(i)(4) unnecessarily intrudes upon the auditor's function and independence. The Applicant asserts that the Department should defer to the judgment of the auditor whether and when to sample transactions.

The Department declines to make the Applicant's requested revision with respect to Section I(i)(4). The requirements of this exemption concerning the content of the auditor's engagement are necessary to ensure administrative feasibility and to protect Covered Plans. The inclusion of written audit parameters in the auditor's engagement letter is necessary both to document expectations regarding the audit work and to ensure that the auditor can responsibly perform its important work. As stated above, clearly defined audit parameters will minimize any potential for dispute between the Applicant and the auditor. Also, given the scope and number of relevant transactions, proper sampling is necessary for the auditor to reach reasonable and reliable conclusions. Although the Department has declined to delete this section in its entirety, as requested by the Applicant, the Department has revised this condition for consistency with other conditions of this exemption which are tailored to the Department's interest in protecting Covered Plans. Therefore, the condition now applies to Covered Plans (*i.e.,* ERISA-covered plans and IRAs with respect to which the DB QPAM relies on PTE 84–14 or has expressly represented that it qualifies as a QPAM or relies on the QPAM class exemption in its dealings with the ERISA-covered plan or IRA).

The Department notes that Section I(i)(4) does not specify the number of transactions that the auditor must test, but rather requires, for each QPAM, that the auditor test a sample of such QPAM's transactions involving Covered Plans, ''sufficient in size and nature to afford the auditor a reasonable basis to determine operational compliance with the Policies and Training.''

Comment 13—Auditor's Determination of Compliance—I(i)(5)(i)

Section I(i)(5)(i) of the proposed exemption provides, ''*(5) For each audit, on or before the end of the relevant period described in Section I(i)(1) for completing the audit, the auditor must issue a written report (the Audit Report) to Deutsche Bank and the DB QPAM to which the audit applies that describes the procedures performed by the auditor during the course of its examination. The Audit Report must include the auditor's specific determinations regarding:*

(i) The adequacy of the DB QPAM's Policies and Training; the DB QPAM's compliance with the Policies and Training; the need, if any, to strengthen such Policies and Training; and any instance of the respective DB QPAM's noncompliance with the written Policies and Training described in Section I(h) above. Any determination by the auditor regarding the adequacy of the Policies and Training and the auditor's recommendations (if any) with respect to strengthening the Policies and Training of the respective DB QPAM must be promptly addressed by such DB QPAM, and any action taken by such DB QPAM to address such recommendations must be included in an addendum to the Audit Report (which addendum is completed prior to the certification described in Section I(i)(7) below). Any determination by the auditor that the respective DB QPAM has implemented, maintained, and followed sufficient Policies and Training must not be based solely or in substantial part on an absence of evidence indicating noncompliance. In this last regard, any finding that the DB QPAM has complied with the requirements under this subsection must be based on evidence that demonstrates the DB QPAM has actually implemented, maintained, and followed the Policies and Training required by this exemption. Furthermore, the auditor must not rely on the Annual Report created by the Compliance Officer as described in Section I(m) below in lieu of independent determinations and testing performed by the auditor as required by Section I(i)(3) and (4) above.''

The Applicant requests deletion of the term ''promptly'' because it is undefined and will cause disputes over its meaning. The Applicant states that this perceived ambiguity is problematic in this context because addressing the auditor's recommendation could be a lengthy process.

In addition, the Applicant requests that Section I(i)(5) be modified because it imposes a counterproductive limitation on the auditor's use of the Annual Review and usurps the auditor's judgment regarding how to perform its role. According to the Applicant, it is ''unnecessary'' for the Department to specify how the auditor performs its work in light of the requirements relating to the auditor's selection and qualifications. The Applicant also states that denying the auditor the discretion to rely on the Annual Report undermines the protection the Annual Report gives plans, as the Annual Report may identify issues the auditor did not independently discover. To this end, the Applicant suggests the following revised sentence regarding the Auditor's use of the Annual Report: ''Furthermore, in conducting the required audit, the auditor may consider the Annual Report created by the Compliance Officer as described in Section I(m) below, as the auditor deems appropriate.''

The Department acknowledges that the Applicant's efforts to address the auditor's recommendations regarding any inadequacy in the Policies and Training identified by the auditor, may take longer to implement than the time limits mandated by the proposed exemption. Accordingly, the Department is modifying Section I(i)(5)(i) to reflect the possibility that the DB QPAMs' efforts to address the auditor's recommendations regarding inadequacies in the Policies and Training identified by the auditor, may not be completed by the submission date of the Audit Report and may require a written plan to address such items. However, any noncompliance identified by the auditor must be promptly addressed. The Department does not agree that the word ''promptly'' creates inappropriate ambiguity in the condition and declines to remove the word.

The final sentence of Section I(i)(5)(i) expresses the Department's intent that the auditor not rely solely on the work of the Compliance Officer and the contents of the Annual Report in formulating its conclusions or findings. The Auditor must perform its own independent testing to formulate its conclusions. This exemption does not prohibit the Auditor from considering the Compliance Officer's Annual Report in carrying out its audit function, including the formulation of an audit plan. This exemption, however, does prohibit the Auditor from basing its conclusions exclusively on the contents of the Compliance Officer's Annual Report. The Department has modified Section I(i)(5)(i) to more clearly reflect these views.

Included with its comment on Section I(i)(5)(i), the Applicant notes its request for the deletion of the Compliance Officer and Annual Review requirements set out in Section I(m). The Department's response to this request is discussed below.

The Department also modified Section I(i)(5) to provide that ''the auditor, at its discretion, may issue a single consolidated Audit Report which covers all the DB QPAMs.'' The Department notes the potential logistical advantage and administrative feasibility with respect to the Department's receipt of the audit report pursuant to Section I(i)(9) if there is one report encompassing all of the DB QPAMs.

Comment 14—Adequacy of the Annual Review—Section I(i)(5)(ii)

Section I(i)(5)(ii) of the proposed exemption provides that ''*[t]he Audit Report must include the auditor's specific determinations regarding: . . . (ii) The adequacy of the Annual Review described in Section I(m) and the resources provided to the Compliance Officer in connection with such Annual Review.*''

The Applicant requests deletion of the Compliance Officer and Annual Review provisions in Section I(i)(5)(ii) of the proposed exemption. If the Compliance Officer and Annual Review provisions do remain in the exemption, the Applicant requests that the Annual Report is provided to the auditor, who then can make a determination as to the adequacy of the report.

The Applicant also asserts that the proposed exemption contains multiple conditions relating to the auditor's selection and qualifications, and the auditor should be trusted in its judgment. Accordingly, the Applicant argues that the phrase ''and the resources provided to the Compliance officer in connection with such Annual Review'' should be deleted, because, according to the Applicant, resource requests by the Compliance Officer should not translate into a public debate with the Department and the auditor on whether the DB QPAMs should be allowed to use PTE 84–14. The Applicant states that this condition interferes with the administrability of the exemption and its use by plans, if counterparties cannot understand the requirement or test whether it has been complied with.

As discussed in detail below, the Department views the Compliance Officer and the Annual Review as integral to ensuring compliance with the exemption. A recurring, independent, and prudently conducted audit of the DB QPAMs is critical to ensuring the QPAMs' compliance with the Policies and Training mandated by this exemption, and the adequacy of the Policies and Training. The required discipline of regular audits underpins the Department's finding that the exemption is protective of plans and their participants, and should help prevent the sort of compliance failures that led to the Conviction. The Department agrees, however, that the auditor need not opine on the adequacy of the resources allocated to the Compliance Officer. Thus, the Department modified Section I(i)(5)(ii) accordingly. If, however, the auditor observes compliance issues related to the Compliance Officer or available resources, it would be appropriate for the auditor to opine on those problems.

Comment 15—Certification of the Audit—Section I(i)(7)

Section I(i)(7) of the proposed exemption provides, ''*(7) With respect to each Audit Report, the General Counsel, or one of the three most senior executive officers of the DB QPAM to which the Audit Report applies, must certify in writing, under penalty of perjury, that the officer has reviewed the Audit Report and this exemption; addressed, corrected, or remedied any inadequacy identified in the Audit Report; and determined that the Policies and Training in effect at the time of signing are adequate to ensure compliance with the conditions of this proposed five-year exemption and with the applicable provisions of ERISA and the Code.*''

The Applicant requests that this condition be modified to account for Deutsche Bank's business structure and permit the Applicant to decide which senior officers should review the Audit Report. Deutsche Bank requests that the reviewing individual be ''one of the three most senior officers with responsibility for the asset management business of the DB QPAM (or, to the extent no such senior officer has responsibility for the asset management business of the DB QPAM, one of the three most senior executives of the line of business engaged in discretionary asset management activities through the DB QPAM).'' Deutsche Bank further requests that the timing of this provision be clarified, as remedying issues found during the course of the Audit may prove to be a lengthier process than the

30-day certification period as required in Section I(i)(9). The Applicant states that the provision should require only that a process for remedying issues should be initiated in a timely fashion.

Deutsche Bank also requests that the condition clarify that ''addressing'' an inadequacy may constitute either accepting the auditor's recommendation, pointing out that alternative action is appropriate, or disagreeing with the auditor. The Applicant states that the auditor is not a monitor or part of the Applicant's management, and thus should not dictate how the Applicant runs its asset management business.

The Applicant also requests the following addition to the condition: ''For purposes of this condition, a DB QPAM does not fail to address a potential inadequacy identified by the auditor by proposing an alternative means of protecting relevant ERISA plan clients and IRAs.''

The Applicant further requests deletion of the requirement that the Audit Report be certified under penalty of perjury.

The Department concurs that a senior executive officer engaged in the asset management business within the QPAM should be allowed to review the Audit Report, and has modified the language of Section I(i)(7), accordingly.

While the Department does not view Section I(i)(7) as ambiguous, the Department is aware, as stated above, that the Applicant's efforts to address the auditor's recommendations may take longer to implement than the timeframe to submit the certified Audit Report. With respect to this issue, the Department did not intend to limit corrective actions to those that could only be completed prior to the submission of the Audit Report. Therefore, the Department has modified Section I(i)(7) to reflect that the senior officer may certify that a written plan to address the inadequacies regarding the Policies and Training identified in the Auditor's Report is in place.

As mentioned above, the Department has determined that it is necessary for the Auditor to be afforded unfettered access to DB QPAM records, to the extent that the analysis of such records falls within the twelve-month period to which the audit relates. For the first audit required by this exemption, that period runs from April 18, 2018 through April 17, 2019. The conditions of this exemption do not prohibit the Applicant from disagreeing with the auditor with respect to whether certain practices fail to comply with the terms of this exemption. However, in those circumstances where the auditor is not persuaded to change its position on a matter the auditor considers noncompliant, the Applicant will be responsible to correct such matters. Nor do the conditions of this exemption prohibit the Applicant from disagreeing with the auditor with respect to the appropriate method for correcting or addressing issues of noncompliance. The Department would expect the Applicant and the auditor to have meaningful communications on such differences of opinion. In the event the Applicant chooses to apply a corrective method that differs from that recommended by the Auditor, the Audit Report and the Addendum attached thereto should explain in detail the noncompliance, the auditor's recommended action, the corrective method chosen, and why the Applicant chose a corrective method different from that recommended by the Auditor. The Department declines to remove the requirement for certification by the senior executive officer under penalty of perjury, which makes clear the importance of the correction process and creates a strong incentive to take seriously the audit process and compliance generally.

Comment 16—Review and Certification of Audit Report—Section I(i)(8)

Section I(i)(8) of the proposed exemption provides, ''*(8) The Risk Committee of Deutsche Bank's Board of Directors is provided a copy of each Audit Report; and a senior executive officer with a direct reporting line to the highest ranking legal compliance officer of Deutsche Bank must review the Audit Report for each DB QPAM and must certify in writing, under penalty of perjury, that such officer has reviewed each Audit Report.*''

In its comment, Deutsche Bank requests that the condition be revised to conform with Deutsche Bank's corporate structure. Specifically, the Applicant states that Deutsche Bank's Audit Committee would be an appropriate recipient of the Audit Report given Deutsche Bank's current structure. The Applicant represents that ''the Audit Committee supports the Supervisory Board in, among other things, the following matters: Monitoring the financial accounting process; the effectiveness of the risk management system, particularly of the internal control system and the internal audit system; the auditing of the financial statements, especially with regard to the auditor's independence and the additional services provided by the auditor; and the Management Board's prompt remediation—through suitable measures—of the deficiencies identified by the auditor. Furthermore, the Audit Committee is informed about special audits, substantial complaints and other exceptional measures on the part of bank regulatory authorities.''

The Applicant requests flexibility in determining which committee should review the Audit Report in the event of future corporate restructuring or transferring of responsibility. Deutsche Bank requests the following addition to the condition: ''another committee as reasonably selected by the Supervisory Board.''

Finally, the Applicant requests the requirement in Section I(i)(8) that the certification by the senior executive officer be made under penalty of perjury be deleted, as it is unnecessary.

The Department is revising Section I(i)(8) of the exemption to require that ''[t]he Audit Committee of Deutsche Bank's Supervisory Board is provided a copy of each Audit Report; and a senior executive officer with a direct reporting line to the highest ranking compliance officer of Deutsche Bank must review the Audit Report for each DB QPAM and must certify in writing, under penalty of perjury, that such officer has reviewed each Audit Report.'' Furthermore, the Department agrees to allow for flexibility in choosing the committee. In this regard, the exemption now requires notice to the Department prior to any change in the committee that receives the Audit Report.

The Department has developed this exemption to ensure that the highest levels of management are aware of ongoing matters concerning Deutsche Bank, the DB QPAMs, and compliance with this exemption. Requiring the provision of the Audit Report to the Audit Committee and certification by a senior executive officer in the reporting line of the highest legal compliance officer provides assurance that the highest levels of management within Deutsche Bank stay informed about Deutsche Bank's and the DB QPAMs' compliance with the terms of this exemption. In the Department's view, such officials are in the best position to ensure that any inadequacy identified by the auditor is appropriately addressed and that necessary changes to corporate policy are made if and where necessary. Requiring certification under penalty of perjury is consistent with the Department's longstanding view that basic requirements of compliance and integrity are fundamental to an entity's ability to qualify as a QPAM.

Comment 17—Availability of the Audit Report—Section I(i)(9)

Section I(i)(9) of the proposed exemption provides, ''*(9) Each DB*

QPAM provides its certified Audit Report, by regular mail to: The Department's Office of Exemption Determinations (OED), 200 Constitution Avenue NW, Suite 400, Washington, DC 20210, or by private carrier to: 122 C Street NW, Suite 400, Washington, DC 20001–2109, no later than 45 days following its completion. The Audit Report will be part of the public record regarding this exemption. Furthermore, each DB QPAM must make its Audit Report unconditionally available for examination by any duly authorized employee or representative of the Department, other relevant regulators, and any fiduciary of an ERISA-covered plan or IRA, the assets of which are managed by such DB QPAM;''

The Applicant states that the availability of the Audit Report should be limited to ERISA-covered plans and IRAs for which the Applicant relies on PTE 84–14. The Applicant argues that it is overly-broad, punitive and not related to the relief provided in the exemption to extend this condition to plans and IRAs for which the DB QPAMs do not rely on PTE 84–14.

The Department does not agree that the condition in Section I(i)(9) is punitive. As the Applicant recognized in its application, ERISA-covered plans, IRAs, and counterparties routinely rely on QPAM status before entering into agreements with financial institutions, even if those institutions do not believe compliance with PTE 84–14 is strictly necessary for any particular transaction. Accordingly, the Department has an interest in ensuring that the conditions of this exemption broadly protect ERISA-covered plans and IRAs that have relied on QPAM status in deciding to enter into an agreement with the Applicant or the DB QPAMs.

Nevertheless, the Department has revised Section I(i)(9) to clarify that the DB QPAMs are required to make the documents available to any fiduciary of a Covered Plan. The Audit Report, in any event, will be incorporated into the public record attributable to this exemption, under Exemption Application Number D–11908, and, therefore, independently accessible by members of the public. Accordingly, the Department has determined to revise the condition by replacing the phrase ''an ERISA-covered plan or IRA, the assets of which are managed by such DB QPAM'' with the term ''Covered Plan'' (as defined in Section II(b)). Lastly, the Department is modifying the condition such that access to the Audit Report need only be upon request and such access can be electronic, and has revised the exemption accordingly.

Comment 18—Engagement Agreements—Section I(i)(10)

Section I(i)(10) of the proposed exemption provides, ''*(10) Each DB QPAM and the auditor must submit to OED: (A) Any engagement agreement(s) entered into pursuant to the engagement of the auditor under this exemption; and (B) any engagement agreement entered into with any other entity retained in connection with such QPAM's compliance with the Training or Policies conditions of this proposed exemption, no later than six (6) months after the effective date of this exemption (and one month after the execution of any agreement thereafter).*''

The Applicant requests deletion of clause (B) related to engagement agreements entered into with respect to the Training or Policies conditions. Deutsche Bank cites the multiple conditions in the exemption for the qualifications of the trainer, the contents of the Policies, and the auditor's review of the adequacy of the Training and Policies, and submits that this condition duplicates part of the auditor's role and is burdensome. The Applicant states that this condition as written could require filing of numerous consultant and service provider engagement letters associated with developing the Training and Policies. The Applicant asserts that there is no reason for the Department to see and review, and make available to the public, every service provider contract that could relate to policies, procedures or training. The Applicant further requests that any engagement agreements submitted to the Department be redacted to protect confidential business terms.

In coordination with the Department's modification of Section I(h)(2)(ii) to remove the requirement that the Training must be conducted by an independent professional, the Department has determined to remove the requirement in Section I(i)(10)(B) to provide to the Department the engagement agreements entered into with entities retained in connection with compliance with the Training or Policies conditions.

Furthermore, to remove any confusion and uncertainty regarding the timing of the submission of the auditor's engagement agreement, the Department has modified Section I(i)(10) to require that the auditor's engagement agreement be submitted to the Office of Exemption Determinations no later than two (2) months after the execution of any such engagement agreement.

Comment 19—Auditor's Workpapers—Section I(i)(11)

Section I(i)(11) of the proposed exemption provides, ''*(11) The auditor must provide OED, upon request, all of the workpapers created and utilized in the course of the audit, including, but not limited to: the audit plan; audit testing; identification of any instance of noncompliance by the relevant DB QPAM; and an explanation of any corrective or remedial action taken by the applicable DB QPAM.*''

The Applicant requests that this language be limited to ensure that any confidential or otherwise sensitive business information is redacted prior to any disclosure of the workpapers in a public file. The Applicant cites the sensitive information to which the auditor will have access, such as client information, marketing data, personal information of the QPAM's employees, and other business details. The Applicant states that the condition can be limited to allow the auditor, and OED,[27] to inspect such information without it being disclosed in the public record. Furthermore, the Applicant requests for all of the provisions in the exemption that relate to the auditor to make it clear that Applicant will not lose the benefit of the exemption for failures of the auditor. The Applicant requests that the Department either not include the workpapers as part of the public file, or provide that ''any confidential business or personal information of the DB QPAMs, Deutsche Bank, and their clients (or the officers, directors, employees or agents thereof) reflected in the workpapers, including, without limitation, client communications, shall be redacted, and provided further that nothing herein shall be deemed to limit any authority the Department may otherwise have to inspect such information without making it part of the public file.''

The Department acknowledges that certain information contained in the workpapers may be confidential and proprietary, and having that information in a public file may create needless or avoidable disclosure issues. The Department has determined to modify Section I(i)(11) to remove the requirement that the auditor provide the workpapers to OED, and instead require that the auditor provide access to the workpapers for the Department's review and inspection. However, given the importance of the workpapers to the Department's own review and the

[27] OED is the Office of Exemption Determinations within the Employee Benefits Security Administration agency of the United States Department of Labor.

Applicant's contractual relationship with the auditor, the Department declines to include, as requested by the Applicant, a statement in Section I(i)(11) that a failure on behalf of the auditor to meet this condition will not violate the exemption.

Comment 20—Replacement of the Auditor—Section I(i)(12)

Section I(i)(12) of the proposed exemption provides, ''*(12) Deutsche Bank must notify the Department at least 30 days prior to any substitution of an auditor, except that no such replacement will meet the requirements of this paragraph unless and until Deutsche Bank demonstrates to the Department's satisfaction that such new auditor is independent of Deutsche Bank, experienced in the matters that are the subject of the exemption and capable of making the determinations required of this exemption.*''

The Applicant requests that this condition be deleted, as the exemption requires the auditor to satisfy multiple conditions with respect to qualifications, and it serves no useful purpose to require the Applicant to demonstrate that the auditor satisfies such additional standards before substitution, particularly given the timeline of the audit process. The Applicant states that the Department has not required its approval of the initial choice of auditor. The Applicant states that there is a multitude of possible reasons that an auditor would need to be replaced, including the auditor being unable to complete an audit timely.

This exemption is not unique in requiring the Department be notified of changes to service providers (See, *e.g.,* the requirement of Schedule C of the Form 5500 Annual Return/Report for the Plan Administrator of certain plans to report to the Department a termination of the plan's auditor and/or enrolled actuary and to provide an explanation of the reasons for the termination, including a description of any material disputes or matters of disagreement concerning the termination). Furthermore, requiring the Applicant to notify the Department of the substitution of an auditor serves to ensure that the DB QPAMs are attentive to the audit process and the protections it provides; and that the Department has the information it needs to review compliance. However, the Department has determined to modify Section I(i)(12) to remove the requirement for Deutsche Bank to demonstrate the independence and qualifications of the auditor, and requires instead that Deutsche Bank, no later than two months from the engagement of a substitute or subsequent auditor, notify the Department of a change in auditor and of the reason(s) for the substitution including any material disputes between the terminated auditor and Deutsche Bank.

Comment 21—Contracts with ERISA-Covered Plans and IRAs—Section I(j)

The prefatory language to Section I(j) of the proposed exemption provides, ''(*j) Effective as of the effective date of this exemption, with respect to any arrangement, agreement, or contract between a DB QPAM and an ERISA-covered plan or IRA for which a DB QPAM provides asset management or other discretionary fiduciary services, each DB QPAM agrees and warrants:*''

In its comment, Deutsche Bank requests that this condition be limited to ERISA-covered plans and IRAs with respect to which the Applicant relies on PTE 84–14 and this exemption. Deutsche Bank states that extending this provision to ERISA-covered plans and IRAs for which the DB QPAMs do not rely on it is overly broad, punitive, and not related to asset management or the scope of the exemptive relief.

As explained above, Plans and IRAs routinely rely on QPAM status as a condition of entering into transactions with financial institutions, even with respect to transactions that do not require adherence to PTE 84–14. As the Applicant represented to the Department on December 24, 2015, ''plan investors may rely on the availability of the QPAM exemption even for pooled funds intended to qualify for an exception under the Department's plan asset regulation. The QPAM exemption provides a broad, effective back-stop against non-exempt prohibited transactions in the event a pooled fund inadvertently ceases to meet the conditions of that exception.'' In addition, it may not always be clear whether the DB QPAM intends to rely upon PTE 84–14 for any particular transaction. Accordingly, it is critical to ensure that protective conditions are in place to safeguard the interests of ERISA-covered plans and IRAs that are acting in reliance on the availability of this exemption, particularly those who may not have entered into the transaction in the first place, but for the Department's grant of this exemption.

The Department has a clear interest in protecting such ERISA-covered plans and IRAs that enter into an asset management agreement with a Deutsche Bank asset manager in reliance on the manager's qualification as a QPAM. Moreover, when an ERISA-covered plan or IRA terminates its relationship with an asset manager, it may incur significant costs and expenses as its investments are unwound and in connection with finding a new asset manager. The Department has revised this condition for consistency with its interest in protecting ERISA-covered plans and IRAs that rely upon QPAM status. Therefore, the Department has substituted the term ''Covered Plan'' for ''an ERISA-covered plan or IRA for which a DB QPAM provides asset management or other discretionary fiduciary services'' to memorialize this interest so that the condition now applies to ERISA-covered plans and IRAs only when the Deutsche Bank asset manager relies on PTE 84–14 or has expressly represented that it qualifies as a QPAM or relies on the QPAM class exemption in its dealings with the ERISA-covered plan or IRA.

To the extent a DB QPAM would prefer not to be subject to these conditions, however, it may expressly disclaim reliance on QPAM status or PTE 84–14 in entering into its contract with the ERISA-covered plan or IRA.

Comment 22—Contracts with ERISA-Covered Plans and IRAs—Section I(j)(1)

Section I(j)(1) of the proposed exemption provides, ''*(j) Effective as of the effective date of this exemption, with respect to any arrangement, agreement, or contract between a DB QPAM and an ERISA-covered plan or IRA for which a DB QPAM provides asset management or other discretionary fiduciary services, each DB QPAM agrees and warrants:*

(1) To comply with ERISA and the Code, as applicable with respect to such ERISA-covered plan or IRA; to refrain from engaging in prohibited transactions that are not otherwise exempt (and to promptly correct any inadvertent prohibited transactions); and to comply with the standards of prudence and loyalty set forth in section 404 of ERISA with respect to each such ERISA-covered plan and IRA;''

In its comment, Deutsche Bank requests that Section I(j)(1) be deleted, as it constitutes an attempt to provide a private right of action for IRAs that Congress did not require. The Applicant states that the provision imposes legal requirements on IRAs, such as duties of prudence and loyalty, that Congress did not require; for plans subject to ERISA, this provision is entirely duplicative of the private right of action in ERISA. The Applicant states that the exemption proposes to change the enforcement of ERISA and the Code for all asset management clients and to create private rights of action above and beyond ERISA and the Code. The

Applicant states that this exemption did not arise out of a violation of ERISA, and the Department's grant or denial of an exemption is not aimed at punishing institutions for criminal conduct under laws other than ERISA, especially when they have already been punished under those other laws.

If this provision is not deleted, the Applicant requests that ''promptly'' be deleted for similar reasons as noted earlier, and that the condition be revised as follows: ''(1) To comply with ERISA and the Code, as applicable, with respect to such ERISA-covered plan or IRA, [and] to refrain from engaging in prohibited transactions that are not otherwise exempt (and to correct any inadvertent prohibited transactions).''

The Department rejects the view that it acts outside its authority by protecting ERISA-covered plans and IRAs that rely on Deutsche Bank's asset managers' eligibility for this exemption, and reemphasizes the seriousness of the criminal misconduct that created the need for this exemption. The Department may grant an exemption under section 408(a) of ERISA or section 4975(c)(2)(C) of the Code only to the extent the Secretary finds, among other things, that the exemption is protective of the affected ERISA-covered plan(s) and/or IRA(s) (*i.e.,* the Covered Plans). As noted in the exemption application, personnel at Deutsche Bank, including at different Deutsche Bank divisions acting as QPAMs, engaged in serious misconduct over an extended period of time. This misconduct appears to have stemmed, in part, from deficiencies in control and oversight.

Notwithstanding the misconduct, which resulted in violations of Section I(g) of PTE 84–14, the Department has determined that this exemption is protective of Covered Plans and in the interest of participants, beneficiaries, and beneficial owners of such Covered Plans. The Department made this determination based, in significant part, upon the protections of Section I(j) that require DB QPAMs to make an express commitment to Covered Plans to adhere to the requirements of ERISA and the Code, as applicable. As previously indicated, the Department has concluded that a culture of compliance, centered on adherence to basic standards of fair dealing as set forth in this exemption, gives the Department a compelling basis for making the required statutory findings that the exemption is in the interest of, and protects the rights of, participants, beneficiaries, and beneficial owners of Covered Plans. Absent such findings, the exemption would have been denied.

The Department does not accept the view that an exemption may not contain a condition, such as an obligation to adhere to basic fiduciary norms of prudence and loyalty, to the extent that it duplicates a statutory requirement. Nothing in the ERISA or the Code suggests that the Department is forbidden, in exercising its discretion to craft protective exemption conditions, from basing its conditions on protective conditions that Congress itself has adopted in related contexts. Nor has the Department created any new causes of action through this exemption. As before, private litigants would have only those causes of action specifically authorized by laws that exist independent of this exemption.

The Department declines to delete the term ''promptly'' for the same reasons as noted previously. Furthermore, for the reasons set forth above, the Department has modified the clause ''and to comply with the standards of prudence and loyalty set forth in section 404 of ERISA with respect to each such ERISA-covered plan and IRA.'' Instead, with respect to this clause, the Department has required an express commitment to comply with the fiduciary standards and prohibited transaction rules only to the extent these provisions are ''applicable'' under ERISA and the Code. The revised terms, together with this exemption's limited relief (*e.g.,* this exemption generally does not extend to transactions that involve self-dealing) should serve to promote a culture of compliance and protect Covered Plans and their participants, beneficiaries, and beneficial owners.

In response to the Applicant's comments, the Department also notes that nothing in ERISA or the Code prevents the Department from conditioning relief on express contractual commitments to adhere to the requirements set out herein. The DB QPAMs remain free to disclaim reliance on the exemption and to avoid such express contractual commitments. To the extent, however, that they hold themselves out as fiduciary QPAMs, they should be prepared to make an express commitment to their customers to adhere to the requirements of this exemption. This commitment strengthens and reinforces the likelihood of compliance, and helps ensure that, in the event of noncompliance, Covered Plans are insulated from injuries caused by noncompliance. These protections also ensure that Covered Plans are able to extricate themselves from transactions that become prohibited as a result of the QPAMs' misconduct, without fear of sustaining additional losses as a result of the QPAMs' actions. In this connection, however, the Department emphasizes that the only claims available to the QPAMs' Covered Plans customers pursuant to these contractual commitments are those separately provided by ERISA or other state and federal laws that are not preempted by ERISA.

Comment 23—Indemnity and Limits on Liability—Sections I(j)(2), (3), (6), and (7)

Sections I(j)(2), (3), (6) and (7) of the proposed exemption provide, ''*(j) Effective as of the effective date of this exemption, with respect to any arrangement, agreement, or contract between a DB QPAM and an ERISA-covered plan or IRA for which a DB QPAM provides asset management or other discretionary fiduciary services, each DB QPAM agrees and warrants:*

(2) Not to require (or otherwise cause) the ERISA-covered plan or IRA to waive, limit, or qualify the liability of the DB QPAM for violating ERISA or the Code or engaging in prohibited transactions;

(3) Not to require the ERISA-covered plan or IRA (or sponsor of such ERISA-covered plan or beneficial owner of such IRA) to indemnify the DB QPAM for violating ERISA or engaging in prohibited transactions, except for violations or prohibited transactions caused by an error, misrepresentation, or misconduct of a plan fiduciary or other party hired by the plan fiduciary who is independent of Deutsche Bank;

(6) Not to include exculpatory provisions disclaiming or otherwise limiting liability of the DB QPAM for a violation of such agreement's terms, except for liability caused by an error, misrepresentation, or misconduct of a plan fiduciary or other party hired by the plan fiduciary who is independent of Deutsche Bank and its affiliates; and

(7) To indemnify and hold harmless the ERISA—covered plan or IRA for any damages resulting from a violation of applicable laws, a breach of contract, or any claim arising out of the failure of such DB QPAM to qualify for the exemptive relief provided by PTE 84–14 as a result of a violation of Section I(g) of PTE 84–14 other than the Convictions;''

In its comment, the Applicant requests that the indemnity required by Section I(j)(7) be deleted as it may operate in a manner that is fundamentally unfair. The Applicant views the indemnity provision as not being limited to clients who are harmed through a direct, causal link to the loss of the exemptive relief provided by PTE 84–14. According to the Applicant, the condition appears to protect plans and

IRAs against damages well beyond those provided under Section 409(a) of ERISA, for all sort of harms, including those (i) that arise from violations and breaches by third parties, (ii) that arise only tenuously from the manager's conduct, (iii) that may be grossly unreasonable in amount, (iv) for claims without merit and (v) for claims in connection with accounts that do not rely on the relief provided by PTE 84–14.

The Applicant requests that, if the Department decides to retain the provision, the Department should expressly tie the indemnity to damages with a proximate, causal connection to relevant conduct of the manager. The Applicant provides the following revisions: ''(7) To indemnify and hold harmless the ERISA-covered plan or IRA for any reasonable damages involving such arrangement, agreement or contract and resulting directly from a violation of ERISA by such DB QPAM, or, to the extent the DB QPAM relies on the exemptive relief provided by PTE 84–14 and this exemption under the arrangement, agreement or contract, the failure of such DB QPAM to qualify for the exemptive relief provided by PTE 84–14 and this exemption as a result of a violation of Section I(g) of PTE 84–14 other than as a result of the Convictions. This condition does not require indemnification for indirect, special, consequential or punitive damages.''

The Applicant contends that the other provisions enumerated above extend beyond the scope of relief and contain duplicative requirements, both internally and with respect to requirements that are already in ERISA. The Applicant states that the broad indemnity in subsection (7) substantively provides all of the protections contained in subsections (2), (3) and (6) (*i.e.,* if the client is to be indemnified, it is confusing and unnecessary to restate that protection multiple times in multiple ways). The Applicant further states that if Section I(j)(7) remains, Sections I(j) (2), (3) and (6) should be deleted. Alternatively, if the Department decides to delete Section I(j)(7), while retaining Sections I(j)(3) and (6), Section I(j)(2) should be deleted because it is subsumed within the more detailed and qualified condition in Section I(j)(3).

The Department has determined that Section I(j)(3), as proposed, is duplicative of the exemption's prohibition on exculpatory clauses, described below, and has deleted subsection (j)(3). The Department has made certain further changes to this condition upon consideration of the Applicant's comment. These changes include: Renumbering the condition for clarity; replacing ''applicable laws'' with clarifying language that conforms to the one-year exemption; replacing ''any damages'' with ''actual losses resulting directly from'' certain acts or omissions of the DB QPAMs; and adding language which affirms that the obligations under this condition do not extend to damages caused by acts that are beyond the control of the DB QPAMS. However, with respect to the indemnification clause, now renumbered Section I(j)(2), the purpose of this exemption is to protect Covered Plans. Section I(j)(2) is essential to achieving that purpose. The Department emphasizes that this condition is not punitive, but rather ensures that, a Covered Plan may expect a DB QPAM to adhere to basic fiduciary norms and standards of fair dealing, notwithstanding the Convictions. The condition also ensures that Covered Plans have the ability to disengage from a relationship with a DB QPAM without undue injury if Deutsche Bank violates the terms of this exemption. Accordingly, the Department has revised the applicability of this condition to more closely reflect this interest. In particular, the condition applies to Covered Plans. As indicated above, if the asset manager would prefer not to be subject to these provisions as exemption conditions, it may expressly disclaim reliance on QPAM status or PTE 84–14 in entering into its contract with an ERISA-covered plan or IRA (in that case, however, it could not rely on the exemption for relief).

The Department also modified former Section I(j)(6) (now I(j)(2)) to clarify that the prohibition on exculpatory provisions does not extend to losses that arise from an act or event not caused by Deutsche Bank. Nothing in this section alters the prohibition on exculpatory provisions set forth in ERISA Section 410.

The Department declines to delete former Section I(j)(2), now (j)(3), from the final exemption. As the Applicant points out, ERISA already precludes ERISA fiduciaries from disclaiming obligations under ERISA. See ERISA section 410 (prohibiting exculpatory clauses as void against public policy). To the extent the exemption condition prevents the DB QPAMs from including contractual provisions that are void as against public policy there is no legitimate basis for objection. Such exculpatory language should not be in the governing documents in the first place and is potentially misleading because it suggests disclaimer of obligations that may not be disclaimed.

Outside the context of ERISA section 410, the provision's requirement that the DB QPAMs retain accountability for adherence to the basic obligations set forth in this exemption is justified by the misconduct that led to the Convictions as discussed above, and by the need to ensure that Covered Plan customers may readily obtain redress and exit contracts with DB QPAMs without harm in the event of violations.

Comment 24—Termination and Withdrawal Restrictions—Sections I(j)(4) and (5)

Sections I(j)(4) and (5) of the proposed exemption provide, ''*(j) Effective as of the effective date of this exemption, with respect to any arrangement, agreement, or contract between a DB QPAM and an ERISA-covered plan or IRA for which a DB QPAM provides asset management or other discretionary fiduciary services, each DB QPAM agrees and warrants:*

(4) Not to restrict the ability of such ERISA-covered plan or IRA to terminate or withdraw from its arrangement with the DB QPAM (including any investment in a separately managed account or pooled fund subject to ERISA and managed by such QPAM), with the exception of reasonable restrictions, appropriately disclosed in advance, that are specifically designed to ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other investors as a result of an actual lack of liquidity of the underlying assets, provided that such restrictions are applied consistently and in like manner to all such investors;

(5) Not to impose any fees, penalties, or charges for such termination or withdrawal with the exception of reasonable fees, appropriately disclosed in advance, that are specifically designed to prevent generally recognized abusive investment practices or specifically designed to ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other investors, provided that such fees are applied consistently and in like manner to all such investors;''

In its comment, the Applicant requests that Sections I(j)(4) and (5) be deleted entirely. The Applicant states that lockup provisions in facilitating the investment strategies are used to protect all investors in a pooled fund and applied evenhandedly to all investors. However, the Applicant states, the conditions would provide ERISA-covered plan and IRA clients investing in the fund with an advantage, to the detriment of public plans and other investors. The Applicant states that the conditions are unnecessary. If the Department declines to delete the provisions, the Applicant requests that they be revised to allow restrictions related to liquidity issues as well as those related to ensuring compliance with regulatory requirements, addressing valuation issues, and permitting the fund to pursue the investors' chosen investment strategy. Specifically, with respect to subsection (j)(4), the Applicant requests that the language ''as a result of an actual lack of liquidity of the underlying assets'' be stricken from the condition. Furthermore, with respect to subsection (j)(5), the Applicant requests that ''prevent generally recognized abusive investment practices or specifically designed to'' be removed.

The Department declines to delete Sections I(j)(4) and (5) from this exemption. The Department has revised subsection (j)(4) to further clarify the Department's intent, but refuses to remove the concept entirely. Therefore, the Department has replaced ''as a result of an actual lack of liquidity of the underlying assets, provided that such restrictions are applied consistently and in like manner to all such investors'' with ''In connection with any such arrangements involving investments in pooled funds subject to ERISA entered into after the effective date of this exemption, the adverse consequences must relate to of a lack of liquidity of the underlying assets, valuation issues, or regulatory reasons that prevent the fund from promptly redeeming an ERISA-covered plan's or IRA's investment, and such restrictions must be applicable to all such investors and effective no longer than reasonably necessary to avoid the adverse consequences.'' Finally, the Department declines to make the Applicant's requested change to subsection I(j)(5).

Comment 25—Updated Investment Management Agreement—Section I(j)(8)

Section I(j)(8) of the proposed exemption provides, ''*(8) Within four (4) months of the effective date of this proposed exemption, each DB QPAM must provide a notice of its obligations under this Section I(j) to each ERISA-covered plan and IRA for which the DB QPAM provides asset management or other discretionary fiduciary services. For all other prospective ERISA-covered plan and IRA clients for which a DB QPAM provides asset management or other discretionary fiduciary services, the DB QPAM must agree in writing to its obligations under this Section I(j) in an updated investment management agreement or advisory agreement between the DB QPAM and such clients or other written contractual agreement.*''

The Applicant states that the provision is overly broad because it is not limited to ERISA-covered plans and IRAs for which DB QPAMs rely on PTE 84–14 and this exemption. The Applicant requests that this provision be limited to such ERISA-covered plan and IRA clients. The Applicant states that the four-month notice period is too short, and requests the Department extend the notice period to at least six months.

The Applicant also requests that the Department provide a carve-out such that the Applicant does not need to provide any notices under this provision to existing clients to which it provided notice under Section I(j) of PTE 2016–13, assuming that the notice required in the current provision here is substantially similar to that required under PTE 2016–13. To this end, the Applicant requests the following language be added to this condition: ''(For avoidance of doubt, notices provided to existing clients under Section I(j) of PTE 2016–13 will be deemed to satisfy this requirement).''

Furthermore, the Applicant states that a bilateral management agreement containing the obligations under Section I(j) should not be mandated. The Applicant states that the DB QPAM would be in violation of this condition if a client refuses to sign the updated agreement. The Applicant asserts that its compliance with the exemption should not depend on action by its clients. Accordingly, the Applicant requests that this requirement be eliminated, and that this condition instead require the DB QPAMS to ''provide a written notice of its obligations under this Section I(j)'' to its prospective ERISA-covered plan and IRA clients.

The Department has modified Section I(j)(8), now renumbered as Section I(j)(7), for better coordination with PTE 2016–13. As modified, the exemption's text now provides that a notice that satisfies Section I(i)(2) of PTE 2016–13 will satisfy renumbered Section I(j)(7) of this exemption, unless the notice contains any language that limits, or is inconsistent with, the scope of this exemption. Additionally, the time period for providing the notice is now six months, although the Department has specified the exact six-month deadline for such notice, which is October 17, 2018.

As noted above, the Department has an interest in protecting an ERISA-covered plan or IRA that enters into an asset management agreement with a Deutsche Bank asset manager in reliance on the manager's qualification as a QPAM, regardless of whether the QPAM relies on the class exemption when managing the ERISA-covered plan's or IRA's assets. The Department has revised the applicability of this condition to more closely reflect this interest, and the condition now applies to ERISA-covered plans and IRAs for which a DB QPAM expressly represents that the manager qualifies as a QPAM or relies on the QPAM class exemption. The condition does not apply to an ERISA-covered plan or IRA with respect to which the Deutsche Bank asset manager has expressly disclaimed reliance on QPAM status or PTE 84–14 in entering into its contract with the ERISA-covered plan or IRA. The Department has also modified the condition such that a DB QPAM will not violate the condition solely because a Covered Plan refuses to sign an updated investment management agreement.

Comment 26—Notice to Plan Clients—Section I(k)(1)

Section I(k)(1) of the proposed exemption provides that, ''*(k)(1) Notice to ERISA-covered plan and IRA clients. Within fifteen (15) days of the publication of this proposed exemption in the* ***Federal Register****, each DB QPAM will provide a notice of the proposed exemption, along with a separate summary describing the facts that led to the Convictions (the Summary), which have been submitted to the Department, and a prominently displayed statement (the Statement) that each Conviction separately results in a failure to meet a condition in PTE 84–14, to each sponsor of an ERISA-covered plan and each beneficial owner of an IRA for which a DB QPAM provides asset management or other discretionary fiduciary services, or the sponsor of an investment fund in any case where a DB QPAM acts only as a sub-advisor to the investment fund in which such ERISA-covered plan and IRA invests. In the event that this proposed exemption is granted, the* ***Federal Register*** *copy of the notice of final exemption must be delivered to such clients within sixty (60) days of its publication in the* ***Federal Register****, and may be delivered electronically (including by an email that has a link to the exemption). Any prospective clients for which a DB QPAM provides asset management or other discretionary fiduciary services must receive the proposed and final exemptions with the Summary and the Statement prior to, or contemporaneously with, the client's* *receipt of a written asset management agreement from the DB QPAM.*''

In its comment, the Applicant contends that this condition should be limited to ERISA-covered plans and IRAs with respect to which the Applicant relies on PTE 84–14 and this exemption, as not applying such a limitation is overly broad, punitive, and not related to the use of this exemption. Furthermore, the Applicant states it should not be required to provide to clients a separate summary of facts in addition to the notice of the proposed exemption, which contains the facts and representations set forth in the preamble and ''is a far more fulsome and complete explanation.'' The Applicant requests that the condition make clear that the condition may be satisfied through other documentation, such as a subscription agreement. The Applicant further requests flexibility with respect to the fifteen-day time-period for providing the notice, suggesting the following language be added: ''or such longer period as agreed to with the Department.'' The Applicant also requests that ''the client's receipt of a written asset management agreement'' be replaced with ''the client's signing of a written asset management agreement (or other written documentation).''

The Department notes that the proposed exemption provides details of the facts and circumstances underlying the conviction not found in the Summary or the final grant. One of the purposes of such a complete disclosure is to ensure that all interested parties are aware of and attentive to the complete facts and circumstances surrounding Deutsche Bank's application for exemption. In this regard, these parties include clients that receive an asset management agreement, which is why the Department is not revising the provision in the manner requested. Requiring the disclosure of the Summary, proposal, and this final grant provides the opportunity for all parties to have knowledge of these facts and circumstances. Notwithstanding this, the Department has modified the condition to clarify that disclosures may be provided electronically. Further, the Department is narrowing the notice requirement to each ''sponsor and beneficial owner of a Covered Plan.'' Notice does not need to be given to a client with respect to whom a DB QPAM has expressly disclaimed reliance on QPAM status or reliance on PTE 84–14.

With respect to the Applicant's requested change regarding the timeframe, the Department believes that requiring that delivery be completed in 60 days following the publication of this exemption in the **Federal Register** provides sufficient time for the Applicant to prepare the Summary and effect delivery. The Department has moved this 60-day requirement to the beginning of Section I(k) by specifying a specific date upon which notice should be completed, June 17, 2018.

Comment 27—Notice to Non-Plan Clients—Section I(k)(2)

Section I(k)(2) of the proposed exemption provides, ''*[e]ach DB QPAM will provide a **Federal Register** copy of the proposed exemption, a **Federal Register** copy of the final exemption; the Summary; and the Statement to each: (A) Current Non-Plan Client within four (4) months of the effective date, if any, of a final exemption; and (B) Future Non-Plan Client prior to, or contemporaneously with, the client's receipt of a written asset management agreement, or other written contractual agreement, from the DB QPAM. For purposes of this subparagraph (2), a Current Non-Plan Client means a client of a DB QPAM that: Is neither an ERISA-covered plan nor an IRA; has assets managed by the DB QPAM as of the effective date, if any, of a final exemption; and has received a written representation (qualified or otherwise) from the DB QPAM that such DB QPAM qualifies as a QPAM or qualifies for the relief provided by PTE 84–14. For purposes of this subparagraph (2), a Future Non-Plan Client means a prospective client of a DB QPAM that: Is neither an ERISA-covered plan nor an IRA; has assets managed by the DB QPAM after the effective date, if any, of a final exemption; and has received a written representation (qualified or otherwise) from the DB QPAM that such DB QPAM qualifies as a QPAM or qualifies for the relief provided by PTE 84–14.*''

The Applicant requested that Section I(k)(2) be deleted in its entirety. Given the breadth of the notice requirement otherwise mandated by the exemption, and its decision to restrict the requirement to those arrangements for which QPAM status plays an integral role (*i.e.,* the DB QPAM represents or relies upon its QPAM status), the Department has determined to delete this provision.

Comment 28—Compliance Officer—Section I(m)

Section I(m) of the proposed exemption outlines the requirements associated with appointment of a Compliance Officer and an accompanying Annual Review.

In its comment, Deutsche Bank argues that Section I(m) is duplicative of the audit, unfair and punitive. The Applicant states that no conduct by the DB QPAMs merits a separate Annual Review dedicated to ERISA. The Applicant asserts that the provision assumes facts unsupported by the record, namely: (1) That DB QPAMs will not comply with ERISA or the Code and applicable exemptions; (2) that their existing compliance structure, even when enhanced by the conditions of this exemption and earlier ones, are insufficient; and (3) that the auditor is either incapable of adequately testing the DB QPAMs' compliance with ERISA, the Code and applicable exemptions or the auditor cannot be trusted to conduct this testing. The Applicant states that this provision also appears in none of the earlier individual exemptions that allowed applicants to rely on PTE 84–14 notwithstanding a criminal conviction violating Section I(g) of PTE 84–14. The Applicant asserts that the inclusion of this condition treats the Applicant unfairly and is inconsistent with the Administrative Procedure Act and Section 408(a) of ERISA and Section 4975 of the Code.

Deutsche Bank states that, if the Department declines to delete Section I(m), the provision should be modified so as to not interfere with the auditor, reduce the time that auditor has to complete its work or impose on the DB QPAMs duplicative or irrelevant and, therefore, unnecessary conditions. Furthermore, the Applicant states that Department should not require the Compliance Officer to complete substantially similar work that it expects of the auditor in a substantially shorter timeframe. The Applicant states that the Compliance Officer should report to an officer with familiarity with asset management, not some unrelated business. The Applicant asserts that the Annual Review should be concerned only with the subject matter of this exemption, such as material compliance with ERISA and the Code, and not gauge the adequacy of the resources provided to the Compliance Officer.

The Department discusses the Applicant's overarching concerns with Section I(m) in response to the individual changes to specific provisions below.

Section I(m)(1)(ii) of the proposed exemption states, in relevant part, ''*(1) Deutsche Bank designates a senior compliance officer (the Compliance Officer) who will be responsible for compliance with the Policies and Training requirements described herein. The Compliance Officer must conduct an annual review (the Annual Review) to determine the adequacy and effectiveness of the implementation of* *the Policies and Training. With respect to the Compliance Officer, the following conditions must be met:*

(ii) The Compliance Officer must have a direct reporting line to the highest-ranking corporate officer in charge of legal compliance that is independent of Deutsche Bank's other business lines;''

With respect to subsection I(m)(1)(ii), the Applicant requests that ''of legal compliance that is independent of Deutsche Bank's other business lines'' be replaced with ''of compliance for asset management.'' The Department has made changes in line with the Applicant's request, but has not removed the word ''legal.''

Section I(m)(2) of the proposed exemption states, ''*(2) With respect to each Annual Review, the following conditions must be met:*

(i) The Annual Review includes a review of: Any compliance matter related to the Policies or Training that was identified by, or reported to, the Compliance Officer or others within the compliance and risk control function (or its equivalent) during the previous year; any material change in the business activities of the DB QPAMs; and any change to ERISA, the Code, or regulations related to fiduciary duties and the prohibited transaction provisions that may be applicable to the activities of the DB QPAMs;''

With respect to this section, the Applicant requests: substituting ''Any *material* compliance matter'' for ''Any compliance matter''; deletion of ''or others within the compliance and risk control function (or its equivalent);'' and clarification that the Annual Review encompass ''any material change in the business activities of the DB QPAMs that may impact their compliance with ERISA or Section 4975 of the Code.''

The Department declines to add the word ''material'' due to the focused scope of the Annual Review on the Policies and Training required under this exemption. The Department also declines to delete the phrase ''or others within the compliance and risk control function (or its equivalent)'' because it is important that all relevant compliance matters be properly accounted for, not simply those that make their way to the Compliance Officer. The Department has added the word ''relevant'' to clarify that any changes to the QPAM's business activities should be relevant to the scope and coverage of this exemption.

Section I(m)(2)(ii) of the proposed exemption states, ''*The Compliance Officer prepares a written report for each Annual Review (each, an Annual Report) that (A) summarizes his or her material activities during the preceding year; (B) sets forth any instance of noncompliance discovered during the preceding year, and any related corrective action; (C) details any change to the Policies or Training to guard against any similar instance of noncompliance occurring again; and (D) makes recommendations, as necessary, for additional training, procedures, monitoring, or additional and/or changed processes or systems, and management's actions on such recommendations;*''

With respect to this section, the Applicant suggests that the Annual Report ''(A) summarizes his or her material activities in connection with any compliance matter related to the Policies or Training during the preceding year; (B) sets forth any material instance of noncompliance related to the Policies or Training discovered during the preceding year, and any related corrective action; (C) details any material change to the Policies or Training to guard against any similar instance of noncompliance occurring again; and (D) makes recommendations, as necessary, for additional training, procedures, monitoring, or additional and/or changed processes or systems relating to the Policies or Training, and management's actions on such recommendations.''

The Department declines to make these changes because Section (m)(1) properly sets out the scope of the Annual Review in that it is meant ''to determine the adequacy and effectiveness of the implementation of the Policies and Training.'' Any additional requirements outlined with respect to the Annual Review should be handled accordingly.

Section I(m)(2)(iii) of the proposed exemption states, ''*In each Annual Report, the Compliance Officer must certify in writing that to his or her knowledge: (A) The report is accurate; (B) the Policies and Training are working in a manner which is reasonably designed to ensure that the Policies and Training requirements described herein are met; (C) any known instance of noncompliance during the preceding year and any related correction taken to date have been identified in the Annual Report; (D) the DB QPAMs have complied with the Policies and Training in all respects, and/or corrected any instances of noncompliance in accordance with Section I(h) above; and (E) Deutsche Bank has provided the Compliance Officer with adequate resources, including, but not limited to, adequate staffing;*

With respect to this section, the Applicant requests that ''certify in writing'' be replaced with ''state,'' that ''any known instances of noncompliance'' be ''related to the Policies or Training,'' and that the review of whether ''Deutsche Bank has provided the Compliance Officer with adequate resources, including, but not limited to, adequate staffing'' be deleted.

The Department has deleted paragraph (E) regarding staffing and resources, as requested by the Applicant, but has not made the other requested changes because these provisions are properly limited in scope to the Policies and Training as outlined in Section I(m)(1).

Section I(m)(2)(v) of the proposed exemption states, ''*Each Annual Review, including the Compliance Officer's written Annual Report, must be completed at least three (3) months in advance of the date on which each audit described in Section I(i) is scheduled to be completed;*''

With respect to this section, the Applicant requests that the Annual Review, including the Annual Report, be completed ''at least one (1) month in advance of the date on which each audit described in Section I(i) is scheduled to be completed.''

The Department has modified this section slightly so that it is no longer tied to completion of the audit, but rather the end of the period to which the Annual Report and Annual Review relates.

Comment 29—Deferred Prosecution Agreement/Non-Prosecution Agreement—Section I(p)

Section I(p) of the proposed exemption provides, ''*(p)(1) During the effective period of this exemption, Deutsche Bank immediately discloses to the Department any Deferred Prosecution Agreement (a DPA) or Non-Prosecution Agreement (an NPA) entered into by Deutsche Bank or any of its affiliates with the U.S Department of Justice, in connection with conduct described in Section I(g) of PTE 84–14 or section 411 of ERISA; and (2) Immediately provides the Department any information requested by the Department, as permitted by law, regarding such agreement and/or conduct and allegations that led to the agreement. After review of the information, the Department may require Deutsche Bank or its affiliates, as specified by the Department, to submit a new application for the continued availability of relief as a condition of continuing to rely on this exemption. If the Department denies the relief requested in the new application,* *or does not grant such relief within twelve (12) months of the application, the relief described herein is revoked as of the date of denial or as of the expiration of the twelve month period, whichever date is earlier;*''

In its comment, the Applicant requests that the Department delete Section I(p). The Applicant asserts that the condition does not meet the requirements of either the Administrative Procedure Act or the Department's own regulations, specifically with regards to withdrawal or revocation of an exemption. The Applicant also takes issue with the substance of the Department's proposed informal termination. Specifically, according to the Applicant, its inclusion in the exemption raises the risk of an immediate loss of exemptive relief and related uncertainty in connection with thousands of transactions and investments with respect to its plan asset clients.

Deutsche Bank also contends that the timing of NPAs and DPAs is uncertain, as the activities under investigation also may be remote, historical, or unrelated to DB QPAMs' activities. The Applicant notes that the condition does not build in any notice to plan fiduciaries, counterparties, or other parties in interest that rely on QPAM, and as such is not administrable or protective of plans.

The Applicant asserts that Section I(p) is inconsistent with the anti-criminal rules of Section I(g) of PTE 84–14 and Section 411 of ERISA as neither NPAs nor DPAs rise to the level of convictions. Moreover, this condition establishes a precedent to be inserted into every one of these matters—regardless of how attenuated the conduct is from plans and participants, and even if it is clearly in the interest of plans and participants to keep the individual QPAM exemption in place, and not to have uncertainty around this outcome.

The Applicant suggests revisions if the Department declines to delete the condition. Specifically, the Applicant seeks to clarify that the Applicant will ''[provide] the Department any non-privileged information requested by the Department, as permitted by law, regarding such agreement and/or conduct and allegations that led to the agreement.'' Furthermore, the Applicant seeks deletion of the following: ''After review of the information, the Department may require Deutsche Bank or its affiliates, as specified by the Department, to submit a new application for the continued availability of relief as a condition of continuing to rely on this exemption. If the Department denies the relief requested in the new application, or does not grant such relief within twelve (12) months of the application, the relief described herein is revoked as of the date of denial or as of the expiration of the twelve month period, whichever date is earlier.''

The Department in no way intended the condition to be read as providing for an automatic revocation of this exemption and, in light of the Applicant's comments, has revised the condition accordingly. As revised, the condition simply requires that the Applicant notify the Department if and when it or any of its affiliates enter into a DPA or NPA with the U.S. Department of Justice for conduct described in section I(g) of PTE 84–14 or ERISA section 411 and immediately provide the Department with any information requested by the Department, as permitted by law, regarding the agreement and/or conduct and allegations that led to the agreement. The Department retains the right to propose a withdrawal of the exemption pursuant to its procedures contained at 29 CFR 2570.50, should the circumstances warrant such action.

Regarding the Applicant's comment that the timing and factual basis of the NPA or DPA could be far removed or distant in time or place from current plan management operations, the Department notes that entering into a DPA or NPA may reflect conduct that could have sustained a criminal conviction, and such conduct would be relevant to the Department's determination whether to allow an entity to continue to rely on this exemption or to grant a subsequent exemption when this exemption expires. Such agreements are not entered into lightly and can stem from misconduct that reflects directly on the parties' willingness and ability to adhere to the standards set forth herein. Similarly, such agreement can have a direct bearing on the efficacy of the affected institution's policies and procedures in preventing misconduct, such as the policies and procedures mandated by this exemption.

The Department declines to specify that the DB QPAMs need only provide ''non-privileged information'' upon request by the Department. As stated above, the Department will evaluate the conduct underlying the new DPA or NPA and will review all relevant information.

Comment 30—Right to Copies of Policies and Procedures—Section I(q)

Section I(q) of the proposed exemption provides, ''*(q) Each DB QPAM, in its agreements with ERISA-covered plan and IRA clients, or in other written disclosures provided to ERISA-covered plan and IRA clients, within 60 days prior to the initial transaction upon which relief hereunder is relied, and then at least once annually, will clearly and prominently inform the ERISA-covered plan and IRA client that the client has the right to obtain copies of the QPAM's written Policies adopted in accordance with this exemption.*''

In its comment, the Applicant states that there are difficulties in informing ERISA-covered plan and IRA clients within sixty (60) days prior to the period the exemption is relied on because the Applicant intends to rely on the exemptive relief provided hereunder as soon as possible to ensure efficient trading on behalf of ERISA plan and IRA clients. The Applicant requests that the initial informing of clients be ''prior to or concurrently with the initial transaction upon which relief hereunder is relied.'' The Applicant also states that the annual notification requirements represent another duplicative and overlapping notice requirement to clients, which are burdensome and potentially confusing to clients, and requests that the annual notification requirement be deleted. The Applicant argues that providing the client with the exemption notice, which in turn informs the client that it can request and receive the policies and procedures upon request should obviate the need for additional mailings.

Affording ERISA-covered plan and IRA clients a means by which to review and understand the Policies implemented in connection with this exemption is a vital protection that is fundamental to this exemption's purpose. However, the Department has modified the condition so that the QPAMs, at their election, may instead provide Covered Plans disclosure that accurately describes or summarizes key components of the Policies, rather than the policies in their entirety. The Department has also determined that such disclosure may be continuously maintained on a website, provided that the website link to the summary of the written Policies is clearly and prominently disclosed to those ERISA-covered plan and IRA clients to whom this section applies. The Department also agrees with the Applicant that the timing requirement for disclosure should be revised and, accordingly, has modified Section I(q) to require notice regarding the information on the website within 6 months of the effective date of this exemption (by October 17, 2018), and thereafter to the extent certain material changes are made to the Policies.

Comment 31—Definition of Convictions—Section II(a)

Section II(a) of the proposed exemption provides, ''*(a) The term 'Convictions' means (1) the judgment of conviction against DB Group Services, in Case 3:15–cr–00062–RNC to be entered in the United States District Court for the District of Connecticut to a single count of wire fraud, in violation of 18 U.S.C. 1343, and (2) the judgment of conviction against DSK entered on January 25, 2016, in Seoul Central District Court, relating to charges filed against DSK under Articles 176, 443, and 448 of South Korea's Financial Investment Services and Capital Markets Act for spot/futures-linked market price manipulation. For all purposes under this exemption, 'conduct' of any person or entity that is the 'subject of [a] Conviction' encompasses any conduct of Deutsche Bank and/or their personnel, that is described in the Plea Agreement (including the Factual Statement thereto), Court judgments (including the judgment of the Seoul Central District Court), criminal complaint documents from the Financial Services Commission in Korea, and other official regulatory or judicial factual findings that are a part of this record,*''

In its comment, the Applicant states that this definition inaccurately paraphrases the Plea Agreement and Seoul Central District Court decision and significantly expands the conduct with respect to both the Conviction and the Korean Conviction. The Applicant requests that the language ''any conduct of Deutsche Bank and/or their personnel, that is described in the Plea Agreement (including the Factual Statement thereto), Court judgments (including the judgment of the Seoul Central District Court), criminal complaint documents from the Financial Services Commission in Korea, and other official regulatory or judicial factual findings that are part of this record'' be replaced with ''the factual allegations described in Paragraph 13 of the Plea Agreement filed in the District Court in Case Number 3:15-cr-00062–RNC, and in the 'Criminal Acts' section pertaining to 'Defendant DSK' in the Decision of the Seoul Central District Court.''

After considering this comment, the Department has revised the definition to be consistent with the definition of ''Convictions'' in the temporary exemption.

Comments 32 and 38—Definition of DB QPAM—Section II(b)

Section II(b) of the proposed exemption provides, ''*(a) The term 'DB QPAM' means a 'qualified professional asset manager' (as defined in Section VI(a) of PTE 84–14) that relies on the relief provided by PTE 84–14 and with respect to which DSK or DK Group Services is a current or future 'affiliate' (as defined in Section VI(d) of PTE 84–14). For purposes of this exemption, Deutsche Bank Securities, Inc. (DBSI), including all entities over which it exercises control; and Deutsche Bank AG, including all of its branches, are excluded from the definition of a DB QPAM*'' (footnote omitted).

In its comment, the Applicant requests that the reference to Section VI(d) of PTE 84–14 be specified as Section VI(d)(1) because Deutsche Bank is seeking relief only for control ''affiliates'' as defined in Section VI(d)(1). The Department agrees this is the intended scope of relief and has revised the definition accordingly.

The Applicant requests that Deutsche Bank Services Inc. (DBSI) be permitted to act as a QPAM. However, as noted in the proposal to this exemption, Deutsche Bank had previously advised the Department that ''[t]he DB QPAMs (including their officers, directors, agents other than Deutsche Bank, and employees of such DB QPAMs) did not know of, have reason to know of, or participate in the criminal conduct of DSK that is the subject of the Conviction.'' Then, in a letter to the Department dated July 15, 2016, Deutsche Bank raised the possibility that an individual (John Ripley), while employed at DBSI, may have known or had reason to know of the criminal conduct of DSK that is the subject of the Korean Conviction. Similarly, the Applicant further noted that, with respect to the LIBOR-related misconduct, ''certain sell side employees of DBSI, the dual registrant, may have known about the conduct that is the subject of the plea agreement.''

For nearly nine months, following the publication of PTE 2015–15, the Applicant failed to raise with the Department the ''interpretive'' issue regarding whether an individual or individuals employed at DBSI may have known or had reason to know of the criminal conduct at DSK, notwithstanding the previous representation, and whether DBSI was still eligible to act as a QPAM. Consequently, the Department is not persuaded that DBSI should be permitted to act as a QPAM.

The Applicant also suggests that, while the Definition of QPAM could be revised to preclude relief for DSK and DB Group Services, Deutsche Bank AG should be permitted to act as a QPAM, stating that Deutsche Bank AG and its branches were not convicted of a crime, and excluding those entities is unfair given the scope of relief provided to other banks subject to a disqualifying conviction. The Applicant, however, has not demonstrated that the exemption's existing conditions would adequately protect affected ERISA-covered plans and IRAs to the extent Deutsche Bank AG is permitted to act as a QPAM. Accordingly, the Department has not revised the exemption as requested.

Comments 33, 35–37, 40—Summary of Facts and Representations

The Applicant seeks certain factual updates and clarifications and statements regarding the Summary of Facts and Representations. The Department notes that the factual updates and clarifications may be found as part of the public record for Application No. D–11908, in its comment letter to the Department, dated January 17, 2017.

Comment 34—DBSI

The preamble to the proposed exemption states: ''In a letter to the Department dated July 15, 2016, Deutsche Bank raised the possibility that an individual [John Ripley], while employed at DBSI, may have known or had reason to know of the criminal conduct of DSK that is the subject of the Korean Conviction.'' (footnote omitted). The preamble also states that DB did not raise any ''interpretive questions regarding Section I(a) of PTE 2015–15, or express any concerns regarding DBSI's possible noncompliance, during the comment period for PTE 2015–15,'' and that ''a period of approximately nine months passed before Deutsche Bank raised an interpretive question regarding Section I(a) of PTE 2015–15.''

In its comment letter, the Applicant contests the suggestion of the statements above that Deutsche Bank had failed to previously disclose Mr. Ripley's knowledge of the conduct and his employment with DBSI to the Department. The Applicant asserts that it identified Mr. Ripley both as an employee of DBSI and a subject of the Korean case on numerous prior occasions, as far back as 2011. The Department referenced these disclosures by identifying Mr. Ripley, his employment at DBSI, and his involvement in the case in the proposed exemption on behalf of Deutsche Bank

AG related to exemption application no. D–11696, at 80 FR 51314 (August 24, 2015) (the DSK Proposal). The Applicant contends that it did not raise any interpretative question on Section I(a) of PTE 2015–15 earlier because Deutsche Bank assumed that the Department would not impose an exemption condition that the Department knew Deutsche Bank could not meet.

The Department acknowledges the disclosures by the Applicant regarding Mr. Ripley, his employment at DBSI, and his alleged role in the conduct underlying the Korean Conviction. However, the Department emphasizes that, despite the references to Mr. Ripley in the DSK Proposal and the proposed condition I(a) that the ''[t]he DB QPAMs (including their officers, directors, agents other than Deutsche Bank, and employees of such DB QPAMs) did not know of, have reason to know of, or participate in the criminal conduct of DSK that is the subject of the Conviction,'' the Applicant did not submit a comment highlighting this concern. The Department notes that, pursuant to the DSK Proposal, the Applicant had seven (7) days to submit a comment. It did not do so. Furthermore, following the grant of PTE 2015–15, if the Applicant believed that the Department had included ''an exemption condition that . . . [Deutsche Bank] could not meet,'' the Applicant could have asked the Department for clarification at any time. The Department further notes that, at the time of the grant of PTE 2015–15, the Department was processing Exemption Application no. D–11956, and was in regular contact with the Applicant regarding that submission. In fact, a tentative denial conference was held on November 9, 2015, between representatives of the Department and the Applicant, pursuant to a tentative denial letter dated July 16, 2015. In addition to the tentative denial conference, the Applicant submitted substantial information in support of the application, and to address the Department's concerns raised both in the letter and at the November 9, 2015, conference. However, the Applicant did not raise this potential concern for approximately nine months and elaborated in the July 15, 2016 letter referenced in the summary of facts and representations in the proposed exemption.

In the July 15, 2016, letter, the Applicant further noted that, with respect to the LIBOR-related misconduct, ''certain sell side employees of DBSI, the dual registrant, may have known about the conduct that is the subject of the plea agreement.'' In a follow-up submission to the Department dated August 19, 2016, the Applicant represented that ''[to] the best of the Applicant's knowledge, no person employed by DBSI was determined to be responsible for the LIBOR misconduct, although one person who worked for the Bank may have been dual hatted to DBSI prior to 2008.''

Comments 39, 41, 42—Technical Corrections in the Operative Language

In Section II(i) of the exemption, formerly Section II(g) in the proposed exemption, the Department has replaced the term ''Factual Statement'' with ''Agreed Statement of Facts.'' The Department has also replaced the term ''action'' with ''charge.'' Finally, the Department has deleted the phrase ''related to the manipulation of the London Interbank Offered Rate (LIBOR).'' The Department notes that the modified Section II(i) in the exemption is consistent with Section II(g) in the temporary exemption.

The Department has modified both the prefatory language of Section I and Section II(e) of the exemption to reflect the fact that the full name of DB Group Services is ''DB Group Services (UK) Limited.''

The Department has further modified the prefatory language of Section I to reflect the correct date of the Korean Conviction as January 25, 2016.

The Department also notes that the defined terms in Section II have been reordered in their entirety so that they now appear in alphabetical order.

Comment 43—Term of the Exemption

In its comment, the Applicant requests that the Department extend the term of the exemption to the remaining 9 years. The Applicant states that the conduct underlying the Convictions was isolated and limited to business not related to Deutsche Bank's asset management business, which is separate from the business of both DB Group Services and DSK. The Applicant further states that the Department historically has granted ten-year exemptions for cases involving serious criminal conduct and the present exemption should be disposed of in a like manner. The Applicant notes that the differences in the standards seem ''arbitrary, and unrelated to the conduct,'' as ''the Department has departed from its historic practice of granting exemptions for similar circumstances with similar conditions.'' The Applicant states that the Department has not provided an explanation for the conditions new to this exemption ''other than its belief that crimes are serious.'' The Applicant states that ''the exemption is not a proper place to further punish Applicant and it should not be treated more harshly than prior applicants.'' Rather, the Applicant represents that it has entered into agreements with prosecutors and regulators and paid fines to address the subject misconduct. The Applicant asserts that ''[t□he exemption process is not an appropriate place to re-examine those resolutions.''

The Applicant further states: ''ERISA was not violated here, and the asset management and wealth management businesses were not implicated in the criminal proceedings. It is thus unfortunate that the Department has chosen to impose conditions that suggest that the DB affiliated asset managers have violated some provision of ERISA that requires punitive conditions moving forward. There is simply no reason that Applicant should not receive the traditional ten-year exemption that the Department has historically granted to applicants for QPAM exemptions.'' The Applicant states that the crimes did not occur in asset management. Rather, the Applicant states that ''[t]he auditor's report, which will be available to plan fiduciaries and to the Department, will be a sufficient indicator of the DB QPAMs' compliance with the exemption, without requiring reapplication after 5 years.''

Although the Applicant characterizes the conduct as unrelated to Deutsche Bank's asset management business, the Department does not agree with the apparent suggestion that the Applicant bears little or no responsibility for the criminal conduct, or that the misconduct amounted to mere isolated instances. This exemption was developed based on the Department's view that the misconduct relevant to the Convictions occurred at Deutsche Bank entities. With respect to the Korean Conviction, the record includes the Decision by the Seoul Central District Court (the Korean Court) dated January 25, 2016. The Korean Court decision notes: ''Defendant DSK could have anticipated and prevented in advance its officers and employees' violation of the [Korean Financial Investment Services and Capital Markets Act] in light of the size of its business, the number of its officers and employees, and its past experiences of engaging in the financial investment business in Korea.''

With respect to the US Conviction, the record includes the Plea Agreement between the DOJ and DB Group Services and the accompanying Agreed Statement of Facts, as well as the

Deferred Prosecution Agreement entered into by Deutsche Bank AG. The Plea Factual Statement states: ''From at least 2003 through at least 2010, [Deutsche Bank] derivatives traders engaged in a scheme to defraud [Deutsche Bank's] counterparties by secretly attempting to manipulate and manipulating U.S. Dollar, Yen, and Pound Sterling LIBOR, as well as EURIBOR [IBOR]. They carried out this scheme by attempting to manipulate and manipulating the various IBOR submissions. These derivatives traders requested that the [Deutsche Bank] IBOR submitters send in benchmark interest rates that would benefit the traders' trading positions, rather than rates that complied with the definitions of the IBORs. These derivatives traders either requested a particular IBOR contribution for a particular tenor and currency, or requested that the rate submitter contribute a higher, lower, or unchanged rate for a particular tenor and currency . . . In the instances when the published benchmark interest rates were manipulated in [Deutsche Bank's] favor due to [Deutsche Bank's] manipulation of its own or other banks' submissions, that manipulation benefitted DB derivatives traders, or minimized their losses, to the detriment of counterparties located in Connecticut and elsewhere, at least with respect to the particular transactions comprising the trading positions that the traders took into account in making their requests to the rate submitters. Certain [Deutsche Bank] pool and MMD derivatives traders who tried to manipulate LIBOR and EURIBOR submissions understood the features of the derivatives products tied to these benchmark interest rates; accordingly, they understood that to the extent they increased their profits or decreased their losses in certain transactions from their efforts to manipulate rates, their counterparties would suffer corresponding adverse financial consequences with respect to those particular transactions. The derivatives traders did not inform their counterparties that the traders were engaging in efforts to manipulate the IBORs to which the profitability of their trades was tied.'' The Plea Factual Statement further states that ''[t]his deceptive scheme involved efforts by [DB Group Services] derivatives traders to manipulate hundreds of IBORs.''

The Deferred Prosecution Agreement further notes: ''Although Deutsche Bank's cooperation was often helpful, Deutsche Bank's cooperation also fell short in some important respects. First, Deutsche Bank was slow to cooperate fully with the Department's investigation. For example, Deutsche Bank did not timely produce certain information, including key information related to Deutsche Bank's Euro traders. As another example, in a telephone conversation, two executive level managers discussed knowing that the Department asked for relevant information and that the information had been withheld from the Department and other U.S. authorities while acknowledging they probably would have to give the information to the European Union. Second, Deutsche Bank was not, by comparison to previously settling institutions, proactive in its investigation and disclosure. For example, Deutsche Bank's conduct included interbank coordination between it and other institutions, but it was the other institutions, not Deutsche Bank, that provided that information to the Department. Third, Deutsche Bank's investigation was hampered by numerous unintentional but significant mistakes in the preservation, collection, and production of documents, audio, and data. For example, Deutsche Bank destroyed thousands of hours of potentially responsive audio recordings due to the negligent execution of certain discovery holds. As another example, Deutsche Bank discovered an important communications platform more than two years after receiving the Department's initial request for information, which platform contained some of the most explicit documents. Fourth, Deutsche Bank caused the Department to be misinformed that the bank was not permitted to provide to the Department a report by Deutsche Bank's primary domestic regulator, BaFin, that discussed shortcomings in Deutsche Bank's internal investigation of IBOR related misconduct.''

In developing this exemption, the Department also considered statements made by other regulators. The United Kingdom's Financial Conduct Authority's (FCA) Final Notice states: ''The lack of appropriate systems to retrieve recorded Trader telephone calls and to map trading books and trades constituted a serious failure on the part of Deutsche Bank to [organize] and control its affairs responsibly and effectively, and to manage risks adequately . . . These failings demonstrate that there was a lack of appreciation within Deutsche Bank of the need to ensure systems are suitable for risk management and compliance purposes, enabling appropriate and timely investigations of potential Trader misconduct. The shortcomings of these particular systems came to light during the course of the Authority's investigation, but these systems issues would have been equally problematic in relation to any internal or regulatory agency enquiries or investigations concerning the possible misconduct of individual Traders.''

The Consent Order of the New York State Department of Financial Services states that, ''[the] culture within the Bank valued increased profits with little regard to the integrity of the market.''

The Consent Order of the United States Commodities Futures Trading Commission (CFTC) with Deutsche Bank states that, ''Deutsche Bank engaged in this wrongful conduct even after the [CFTC] Division of Enforcement requested in April 2010 that Deutsche Bank conduct an internal investigation of its U.S. Dollar LIBOR submission practices. In fact, Deutsche Bank did not make meaningful improvements in its internal controls until mid-2011 and did not formalize a policy about conflicts of interest among traders and submitters relating to benchmark submissions until February, 2013.''

The Department also notes the size of relevant fines imposed by various regulators: the Seoul Central District Court imposed a fine of KRW 43,695,371,124 on Deutsche Bank and KRW 1,183,362,400 on DSK; the Department of Justice imposed a $150 million fine on DB Group Services and a $625 million penalty on Deutsche Bank; the New York State Department of Financial Services imposed a penalty of $600 million; and the CFTC and the FCA imposed fines of $800 million and £226.8 million, respectively.

After deliberating on all the considerations above, the Department decided the appropriate term for this exemption is three years. This exemption is not punitive. In the Department's view, the 3-year term of this exemption and its numerous protective conditions reflect the Department's intent to protect Covered Plans that entrust substantial assets with a Deutsche Bank asset manager, following serious misconduct, supervisory failures, and two criminal convictions. The limited term of this exemption gives the Department the opportunity to review the adherence by the DB QPAMs to the conditions set out herein. The Department has decided it is necessary to limit the term of relief to facilitate the Department's ability to ensure that the circumstances that allowed the prior bad conduct to occur have been adequately addressed. Because two separate convictions within the Deutsche Bank corporate structure create the need for this exemption, the Department has concluded that future review of the relief provided by this exemption should occur within a shorter timeframe.

The Applicants may apply for an additional extension when they believe appropriate. Before granting an extension, however, the Department expects to carefully consider the efficacy of this exemption and any public comments on additional extensions, particularly including comments on how well the exemption has or has not worked to safeguard the interests of Covered Plans. If the Applicant seeks an extension of this exemption, the Department will examine whether the compliance and oversight changes mandated by various regulatory authorities are having their desired effect on Deutsche Bank entities.

Section I(r)

The Department, in order to avoid inadvertent violations of the exemption that are outside the Applicant's control, has determined to modify Section I(r) such that a failure of the auditor to comply with any of the conditions in Section I(i) of the exemption, except for subsection I(i)(11), should not be treated as a failure by the DB QPAMs to comply with the conditions of the exemption provided that such failure was not due to the actions or inactions of Deutsche Bank or its affiliates, and Section I(r) is amended, accordingly.

Comment—Letter From House Committee on Financial Services

The Department also received a comment letter from certain members of Congress (the Members) regarding this exemption, as well as regarding other QPAM-related proposed one-year exemptions. In the letter, the Members recognized that certain conditions contained in these proposed exemptions are crucial in protecting the investments of workers and retirees. In particular, they referred to proposed conditions which require each bank to: (a) Indemnify and hold harmless ERISA-covered plans and IRAs for any damages resulting from the future misconduct of such bank; and (b) disclose to the Department any Deferred Prosecution Agreement or a Non-Prosecution Agreement with the U.S. Department of Justice. The Members also requested that the Department hold hearings in connection with the proposed exemptions.

The Department acknowledges the Members' concerns regarding the need for public discourse regarding proposed exemptions. To this end, the Department's procedures regarding prohibited transaction exemption requests under ERISA (the Exemption Procedures) afford interested persons the opportunity to request a hearing. Specifically, section 2570.46(a) of the Exemption Procedures provides that, ''[a]ny interested person who may be adversely affected by an exemption which the Department proposes to grant relief from the restrictions of section 406(b) of ERISA, section 4975(c)(1)(E) or (F) of the Code, or section 8477(c)(2) of FERSA may request a hearing before the Department within the period of time specified in the **Federal Register** notice of the proposed exemption.'' The Exemption Procedures provide that ''[t]he Department will grant a request for a hearing made in accordance with paragraph (a) of this section where a hearing is necessary to fully explore material factual issues identified by the person requesting the hearing.'' The Exemption Procedures also provide that ''[t]he Department may decline to hold a hearing where: (1) The request for the hearing does not meet the requirements of paragraph (a) of this section; (2) the only issues identified for exploration at the hearing are matters of law; or (3) the factual issues identified can be fully explored through the submission of evidence in written (including electronic) form.'' [28]

While the Members' letter raises policy issues, it does not appear to raise specific material factual issues. The Department previously explored a wide range of legal and policy issues regarding Section I(g) of the QPAM Exemption during a public hearing held on January 15, 2015 in connection with the Department's proposed exemption involving Credit Suisse AG, and has determined that an additional hearing on these issues is not necessary.

Public Comments

The Department received three comments from two members of the public.

One commenter, Theo Allen, objects to the Department's proposed exemption on the basis that President Trump owes ''hundreds of millions of dollars of debt to Deutsche Bank'' and in his view, that debt should be ''divested'' before the exemption is granted.

Arthur Lipson of Western Investment LLC (Western) submitted two comment letters regarding the proposed exemption. The first letter states that Western is a shareholder in two closed-end funds managed by Deutsche Bank affiliates. He states that these funds are not subject to ERISA but are subject to the Investment Company Act of 1940, as amended. Mr. Lipson objects to a recent election of the closed-end fund trustees. Western sued the funds in connection with that election.

Mr. Lipson's second letter additionally states that Deutsche Bank should not be granted an exemption unless it ensures ''compliance with the principle of directorial accountability in the funds that it manages.''

Conclusion

After giving full consideration to the record, the Department has decided to grant the exemption, as described above. The complete application file (Application No. D–11908) is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N–1515, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on November 21, 2016 at 81 FR 83400.

Exemption

Section I: Covered Transactions

Certain entities with specified relationships to Deutsche Bank AG (hereinafter, the DB QPAMs, as defined in Section II(d)) will not be precluded from relying on the exemptive relief provided by Prohibited Transaction Class Exemption 84–14 (PTE 84–14 or the QPAM Exemption), notwithstanding: (1) The ''Korean Conviction'' against Deutsche Securities Korea Co., a South Korean affiliate of Deutsche Bank AG (hereinafter, DSK, as defined in Section II(f)), entered on January 25, 2016; and (2) the ''US Conviction'' against DB Group Services (UK) Limited, an affiliate of Deutsche Bank based in the United Kingdom (hereinafter, DB Group Services, as further defined in Section II(e)), during the Exemption Period,[29] provided that the following conditions are satisfied:

(a) The DB QPAMs (including their officers, directors, agents other than Deutsche Bank, and employees of such QPAMs) did not know of, have reason to know of, or participate in the

[28] 29 CFR part 2570, published at 76 FR 66653 (October 27, 2011).

[29] Section I(g) of PTE 84–14 generally provides relief only if ''[n]either the QPAM nor any affiliate thereof . . . nor any owner . . . of a 5 percent or more interest in the QPAM is a person who within the 10 years immediately preceding the transaction has been either convicted or released from imprisonment, whichever is later, as a result of'' certain felonies including fraud.

criminal conduct of DSK and DB Group Services that is the subject of the Convictions. For purposes of this paragraph I(a), ''participate in'' means the knowing approval of the misconduct underlying the Convictions;

(b) The DB QPAMs (including their officers, directors, and agents other than Deutsche Bank, and employees of such DB QPAMs) did not receive direct compensation, or knowingly receive indirect compensation, in connection with the criminal conduct that is the subject of the Convictions;

(c) The DB QPAMs will not employ or knowingly engage any of the individuals that participated in the criminal conduct that is the subject of the Convictions. For the purposes of this paragraph (c), ''participated in'' means the knowing approval of the misconduct underlying the Convictions;

(d) At all times during the Exemption Period, no DB QPAM will use its authority or influence to direct an ''investment fund'' (as defined in Section VI(b) of PTE 84–14), that is subject to ERISA or the Code and managed by such DB QPAM with respect to one or more Covered Plans, to enter into any transaction with DSK or DB Group Services, or to engage DSK or DB Group Services to provide any service to such investment fund, for a direct or indirect fee borne by such investment fund, regardless of whether such transaction or service may otherwise be within the scope of relief provided by an administrative or statutory exemption;

(e) Any failure of the DB QPAMs to satisfy Section I(g) of PTE 84–14 arose solely from the Convictions;

(f) A DB QPAM did not exercise authority over the assets of any plan subject to Part 4 of Title I of ERISA (an ERISA-covered plan) or section 4975 of the Code (an IRA) in a manner that it knew or should have known would: Further the criminal conduct that is the subject of the Convictions; or cause the QPAM or their affiliates to directly or indirectly profit from the criminal conduct that is the subject of the Convictions;

(g) Other than with respect to employee benefit plans maintained or sponsored for its own employees or the employees of an affiliate, DSK and DB Group Services will not act as fiduciaries within the meaning of section 3(21)(A)(i) or (iii) of ERISA, or section 4975(e)(3)(A) and (C) of the Code, with respect to ERISA-covered plan and IRA assets; provided, however, that DSK and DB Group Services will not be treated as violating the conditions of this exemption solely because they acted as investment advice fiduciaries within the meaning of section 3(21)(A)(ii) of ERISA, or section 4975(e)(3)(B) of the Code, or because DB Group Services employees may be double-hatted, seconded, supervised or otherwise subject to the control of a DB QPAM, including in a discretionary fiduciary capacity with respect to the DB QPAM clients;

(h)(1) Each DB QPAM must continue to maintain or immediately implement and follow written policies and procedures (the Policies). The Policies must require, and must be reasonably designed to ensure that:

(i) The asset management decisions of the DB QPAM are conducted independently of the corporate management and business activities of DB Group Services and DSK;

(ii) The DB QPAM fully complies with ERISA's fiduciary duties and with ERISA and the Code's prohibited transaction provisions, in each such case as applicable with respect to each Covered Plan, and does not knowingly participate in any violation of these duties and provisions with respect to Covered Plans;

(iii) The DB QPAM does not knowingly participate in any other person's violation of ERISA or the Code with respect to Covered Plans;

(iv) Any filings or statements made by the DB QPAM to regulators, including, but not limited to, the Department, the Department of the Treasury, the Department of Justice, and the Pension Benefit Guaranty Corporation, on behalf of or in relation to Covered Plans, are materially accurate and complete, to the best of such QPAM's knowledge at that time;

(v) To the best of the DB QPAM's knowledge at the time, the DB QPAM does not make material misrepresentations or omit material information in its communications with such regulators with respect to ERISA-covered plans or IRAs with respect to Covered Plans;

(vi) The DB QPAM complies with the terms of this exemption; and

(vii) Any violation of, or failure to comply with an item in subparagraphs (ii) through (vi), is corrected as soon as reasonably possible upon discovery, or as soon after the QPAM reasonably should have known of the noncompliance (whichever is earlier), and any such violation or compliance failure not so corrected is reported, upon the discovery of such failure to so correct, in writing, to the head of compliance and the General Counsel (or their functional equivalent) of the relevant DB QPAM that engaged in the violation or failure, and the independent auditor responsible for reviewing compliance with the Policies. A DB QPAM will not be treated as having failed to develop, implement, maintain, or follow the Policies, provided that it corrects any instance of noncompliance as soon as reasonably possible upon discovery, or as soon as reasonably possible after the QPAM reasonably should have known of the noncompliance (whichever is earlier), and provided that it adheres to the reporting requirements set forth in this subparagraph (vii);

(2) Each DB QPAM must develop and implement a program of training (the Training), to be conducted at least annually, for all relevant DB QPAM asset/portfolio management, trading, legal, compliance, and internal audit personnel. The first Training under this Final Exemption must be completed by all relevant DB QPAM personnel by April 18, 2019 (by the end of this 30-month period, asset/portfolio management, trading, legal, compliance, and internal audit personnel who were employed from the start to the end of the period must have been trained twice: the first time under PTE 2016–13; and the second time under this exemption). The Training must:

(i) At a minimum, cover the Policies, ERISA and Code compliance (including applicable fiduciary duties and the prohibited transaction provisions), ethical conduct, the consequences for not complying with the conditions of this exemption (including any loss of exemptive relief provided herein), and prompt reporting of wrongdoing; and

(ii) Be conducted by a professional who has been prudently selected and who has appropriate technical training and proficiency with ERISA and the Code;

(i)(1) Each DB QPAM submits to an audit conducted annually by an independent auditor, who has been prudently selected and who has appropriate technical training and proficiency with ERISA and the Code, to evaluate the adequacy of, and each DB QPAM's compliance with, the Policies and Training described herein. The audit requirement must be incorporated in the Policies. Each annual audit must cover the preceding consecutive twelve (12) month period. The first audit must cover the period from April 18, 2018 through April 17, 2019, and must be completed by October 17, 2019. The second audit must cover the period from April 18, 2019 through April 17, 2020, and must be completed by October 17, 2020. In the event that the Exemption Period is extended or a new exemption is granted, the third audit would cover the period from April 18, 2020 through April 17, 2021, and would have to be completed by October 17, 2021 (unless the Department chooses to alter the annual audit requirement in the new or extended exemption); [30]

(2) Within the scope of the audit and to the extent necessary for the auditor, in its sole opinion, to complete its audit and comply with the conditions for relief described herein, and only to the extent such disclosure is not prevented by state or federal statute, or involves communications subject to attorney client privilege, each DB QPAM and, if applicable, Deutsche Bank, will grant the auditor unconditional access to its business, including, but not limited to: its computer systems; business records; transactional data; workplace locations; training materials; and personnel. Such access is limited to information relevant to the auditor's objectives as specified by the terms of this exemption;

(3) The auditor's engagement must specifically require the auditor to determine whether each DB QPAM has developed, implemented, maintained, and followed the Policies in accordance with the conditions of this exemption, and has developed and implemented the Training, as required herein;

(4) The auditor's engagement must specifically require the auditor to test each DB QPAM's operational compliance with the Policies and Training. In this regard, the auditor must test, for each QPAM, a sample of such QPAM's transactions involving Covered Plans, sufficient in size and nature to afford the auditor a reasonable basis to determine such QPAM's operational compliance with the Policies and Training;

(5) For each audit, on or before the end of the relevant period described in Section I(i)(1) for completing the audit, the auditor must issue a written report (the Audit Report) to Deutsche Bank and the DB QPAM to which the audit applies that describes the procedures performed by the auditor during the course of its examination. The auditor, at its discretion, may issue a single consolidated Audit Report that covers all the DB QPAMs. The Audit Report must include the auditor's specific determinations regarding:

(i) The adequacy of each DB QPAM's Policies and Training; each DB QPAM's compliance with the Policies and Training; the need, if any, to strengthen such Policies and Training; and any instance of the respective DB QPAM's noncompliance with the written Policies and Training described in Section I(h) above. The DB QPAM must promptly address any noncompliance. The DB QPAM must promptly address or prepare a written plan of action to address any determination of inadequacy by the auditor regarding the adequacy of the Policies and Training and the auditor's recommendations (if any) with respect to strengthening the Policies and Training of the respective QPAM. Any action taken or the plan of action to be taken by the respective DB QPAM must be included in an addendum to the Audit Report (such addendum must be completed prior to the certification described in Section I(i)(7) below). In the event such a plan of action to address the auditor's recommendation regarding the adequacy of the Policies and Training is not completed by the time of submission of the audit report, the following period's audit report, must state whether the plan was satisfactorily completed. Any determination by the auditor that the respective DB QPAM has implemented, maintained, and followed sufficient Policies and Training must not be based solely or in substantial part on an absence of evidence indicating noncompliance. In this last regard, any finding that a DB QPAM has complied with the requirements under this subparagraph must be based on evidence that the particular DB QPAM has actually implemented, maintained, and followed the Policies and Training required by this exemption. Furthermore, the auditor must not solely rely on the Annual Report created by the compliance officer (the Compliance Officer), as described in Section I(m) below as the basis for the auditor's conclusions in lieu of independent determinations and testing performed by the auditor as required by Section I(i)(3) and (4) above;

(ii) The adequacy of the most recent Annual Review described in Section I(m);

(6) The auditor must notify the respective DB QPAM of any instance of noncompliance identified by the auditor within five (5) business days after such noncompliance is identified by the auditor, regardless of whether the audit has been completed as of that date;

(7) With respect to each Audit Report, the General Counsel, or one of the three most senior executive officers of the line of business engaged in discretionary asset management services through the DB QPAM with respect to which the Audit Report applies, must certify in writing, under penalty of perjury, that the officer has reviewed the Audit Report and this exemption; that such DB QPAM has addressed, corrected, or remedied any noncompliance and inadequacy or has an appropriate written plan to address any inadequacy regarding the Policies and Training identified in the Audit Report. Such certification must also include the signatory's determination that the Policies and Training in effect at the time of signing are adequate to ensure compliance with the conditions of this exemption, and with the applicable provisions of ERISA and the Code;

(8) The Audit Committee of Deutsche Bank's Supervisory Board is provided a copy of each Audit Report; and a senior executive officer with a direct reporting line to the highest ranking legal compliance officer of Deutsche Bank must review the Audit Report for each DB QPAM and must certify in writing, under penalty of perjury, that such officer has reviewed each Audit Report. Deutsche Bank must provide notice to the Department in the event of a switch in the committee to which the Audit Report will be provided;

(9) Each DB QPAM provides its certified Audit Report, by regular mail to: Office of Exemption Determinations (OED), 200 Constitution Avenue NW, Suite 400, Washington, DC 20210; or by private carrier to: 122 C Street NW, Suite 400, Washington, DC 20001–2109. This delivery must take place no later than thirty (30) days following completion of the Audit Report. The Audit Report will be made part of the public record regarding this exemption. Furthermore, each DB QPAM must make its Audit Report unconditionally available, electronically or otherwise, for examination upon request by any duly authorized employee or representative of the Department, other relevant regulators, and any fiduciary of a Covered Plan;

(10) Each DB QPAM and the auditor must submit to OED any engagement agreement(s) entered into pursuant to the engagement of the auditor under this exemption, no later than two (2) months after the execution of any such engagement agreement;

(11) The auditor must provide the Department, upon request, for inspection and review, access to all the workpapers created and utilized in the course of the audit, provided such access and inspection is otherwise permitted by law; and

[30] The third audit referenced above would not have to be completed until after the Exemption Period expires. If the Department ultimately decides to grant relief for an additional period, it could decide to alter the terms of the exemption, including the audit conditions (and the timing of the audit requirements). Nevertheless, the Applicant should anticipate that the Department will insist on strict compliance with the audit terms and schedule set forth above. As it considers any new exemption application, the Department may also contact the auditor for any information relevant to its determination.

(12) Deutsche Bank must notify the Department of a change in the independent auditor no later than two (2) months after the engagement of a substitute or subsequent auditor and must provide an explanation for the substitution or change including a description of any material disputes between the terminated auditor and Deutsche Bank;

(j) As of April 18, 2018 and throughout the Exemption Period, with respect to any arrangement, agreement, or contract between a DB QPAM and a Covered Plan, the DB QPAM agrees and warrants:

(1) To comply with ERISA and the Code, as applicable with respect to such Covered Plan; to refrain from engaging in prohibited transactions that are not otherwise exempt (and to promptly correct any inadvertent prohibited transactions); and to comply with the standards of prudence and loyalty set forth in section 404 of ERISA, with respect to each such ERISA-covered plan and IRA to the extent that section is applicable;

(2) To indemnify and hold harmless the Covered Plan for any actual losses resulting directly from a DB QPAM's violation of ERISA's fiduciary duties, as applicable, and of the prohibited transaction provisions of ERISA and the Code, as applicable; a breach of contract by the QPAM; or any claim arising out of the failure of such DB QPAM to qualify for the exemptive relief provided by PTE 84–14 as a result of a violation of Section I(g) of PTE 84–14 other than the Convictions. This condition applies only to actual losses caused by the DB QPAM's violations.

(3) Not to require (or otherwise cause) the Covered Plan to waive, limit, or qualify the liability of the DB QPAM for violating ERISA or the Code or engaging in prohibited transactions;

(4) Not to restrict the ability of such Covered Plan to terminate or withdraw from its arrangement with the DB QPAM with respect to any investment in a separately managed account or pooled fund subject to ERISA and managed by such QPAM, with the exception of reasonable restrictions, appropriately disclosed in advance, that are specifically designed to ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other investors. In connection with any such arrangements involving investments in pooled funds subject to ERISA entered into after the effective date of this exemption, the adverse consequences must relate to of a lack of liquidity of the underlying assets, valuation issues, or regulatory reasons that prevent the fund from promptly redeeming an ERISA-covered plan's or IRA's investment, and such restrictions must be applicable to all such investors and effective no longer than reasonably necessary to avoid the adverse consequences;

(5) Not to impose any fees, penalties, or charges for such termination or withdrawal with the exception of reasonable fees, appropriately disclosed in advance, that are specifically designed to prevent generally recognized abusive investment practices or specifically designed to ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other investors, provided that such fees are applied consistently and in like manner to all such investors; and

(6) Not to include exculpatory provisions disclaiming or otherwise limiting liability of the DB QPAM for a violation of such agreement's terms. To the extent consistent with Section 410 of ERISA, however, this provision does not prohibit disclaimers for liability caused by an error, misrepresentation, or misconduct of a plan fiduciary or other party hired by the plan fiduciary who is independent of Deutsche Bank, and its affiliates, or damages arising from acts outside the control of the DB QPAM;

(7) By October 17, 2018, each DB QPAM must provide a notice of its obligations under this Section I(j) to each Covered Plan. For all other prospective Covered Plans, the DB QPAM will agree to its obligations under this Section I(j) in an updated investment management agreement between the DB QPAM and such clients or other written contractual agreement. This condition will be deemed met for each Covered Plan that received a notice pursuant to PTE 2016–13 that meets the terms of this condition. Notwithstanding the above, a DB QPAM will not violate the condition solely because a Plan or IRA refuses to sign an updated investment management agreement;

(k) By June 17, 2018, each DB QPAM will provide a notice of the exemption, along with a separate summary describing the facts that led to the Convictions (the Summary), which have been submitted to the Department, and a prominently displayed statement (the Statement) that the Convictions result in a failure to meet a condition in PTE 84–14, to each sponsor and beneficial owner of a Covered Plan, or the sponsor of an investment fund in any case where a DB QPAM acts as a sub-advisor to the investment fund in which such ERISA-covered plan and IRA invests. Any prospective client for which a DB QPAM relies on PTE 84–14 or has expressly represented that the manager qualifies as a QPAM or relies on the QPAM class exemption must receive the proposed and final exemptions with the Summary and the Statement prior to, or contemporaneously with, the client's receipt of a written asset management agreement from the DB QPAM. Disclosures may be delivered electronically.

(l) The DB QPAMs must comply with each condition of PTE 84–14, as amended, with the sole exceptions of the violations of Section I(g) of PTE 84–14 that are attributable to the Convictions;

(m)(1) By October 17, 2018, Deutsche Bank designates a senior compliance officer (the Compliance Officer) who will be responsible for compliance with the Policies and Training requirements described herein. The Compliance Officer must conduct an annual review for each annual period beginning on April 18, 2018, (the Annual Review) [31] to determine the adequacy and effectiveness of the implementation of the Policies and Training. With respect to the Compliance Officer, the following conditions must be met:

(i) The Compliance Officer must be a legal professional who has extensive experience with, and knowledge of, the regulation of financial services and products, including under ERISA and the Code; and

(ii) The Compliance Officer must have a direct reporting line to the highest-ranking corporate officer in charge of legal compliance for asset management;

(2) With respect to each Annual Review, the following conditions must be met:

(i) The Annual Review includes a review of: Any compliance matter related to the Policies or Training that was identified by, or reported to, the Compliance Officer or others within the compliance and risk control function (or its equivalent) during the previous year; any material change in the relevant business activities of the DB QPAMs; and any change to ERISA, the Code, or regulations related to fiduciary duties and the prohibited transaction provisions that may be applicable to the activities of the DB QPAMs;

(ii) The Compliance Officer prepares a written report for each Annual Review (each, an Annual Report) that (A) summarizes his or her material activities

[31] Such Annual Review must be completed with respect to the annual periods ending April 17, 2019; April 17, 2020; and April 17, 2021.

during the preceding year; (B) sets forth any instance of noncompliance discovered during the preceding year, and any related corrective action; (C) details any change to the Policies or Training to guard against any similar instance of noncompliance occurring again; and (D) makes recommendations, as necessary, for additional training, procedures, monitoring, or additional and/or changed processes or systems, and management's actions on such recommendations;

(iii) In each Annual Report, the Compliance Officer must certify in writing that to his or her knowledge: (A) The report is accurate; (B) the Policies and Training are working in a manner which is reasonably designed to ensure that the Policies and Training requirements described herein are met; (C) any known instance of noncompliance during the preceding year and any related correction taken to date have been identified in the Annual Report; and (D) the DB QPAMs have complied with the Policies and Training, and/or corrected (or is correcting) any instances of noncompliance in accordance with Section I(h) above;

(iv) Each Annual Report must be provided to appropriate corporate officers of Deutsche Bank and each DB QPAM to which such report relates; the head of compliance and the General Counsel (or their functional equivalent) of the relevant DB QPAM; and must be made unconditionally available to the independent auditor described in Section I(i) above;

(v) Each Annual Review, including the Compliance Officer's written Annual Report, must be completed within three (3) months following the end of the period to which it relates;

(n) Deutsche Bank disgorged all of its profits generated by the spot/futures-linked market manipulation activities of DSK personnel that led to the Conviction against DSK entered on January 25, 2016, in Seoul Central District Court;

(o) Each DB QPAM will maintain records necessary to demonstrate that the conditions of this exemption have been met, for six (6) years following the date of any transaction for which such DB QPAM relies upon the relief in the exemption;

(p) During the Exemption Period, Deutsche Bank: (1) Immediately discloses to the Department any Deferred Prosecution Agreement (a DPA) or a Non-Prosecution Agreement (an NPA) with the U.S. Department of Justice, entered into by Deutsche Bank or any of its affiliates in connection with conduct described in Section I(g) of PTE 84–14 or section 411 of ERISA; and (2) immediately provides the Department any information requested by the Department, as permitted by law, regarding the agreement and/or conduct and allegations that led to the agreement;

(q) By October 17, 2018, each DB QPAM, in its agreements with, or in other written disclosures provided to Covered Plans, will clearly and prominently inform Covered Plan clients of their right to obtain a copy of the Policies or a description (Summary Policies) which accurately summarizes key components of the QPAM's written Policies developed in connection with this exemption. If the Policies are thereafter changed, each Covered Plan client must receive a new disclosure within six (6) months following the end of the calendar year during which the Policies were changed.[32] With respect to this requirement, the description may be continuously maintained on a website, provided that such website link to the Policies or the Summary Policies is clearly and prominently disclosed to each Covered Plan; and

(r) A DB QPAM will not fail to meet the terms of this exemption, solely because a different DB QPAM fails to satisfy a condition for relief described in Sections I(c), (d), (h), (i), (j), (k), (l), (o), and (q); or if the independent auditor described in Section I(i) fails a provision of the exemption other than the requirement described in Section I(i)(11), provided that such failure did not result from any actions or inactions of Deutsche Bank or its affiliates.

Section II: Definitions

(a) The term ''Convictions'' means (1) the judgment of conviction against DB Group Services, in case number 3:15–cr–00062–RNC to be entered in the United States District Court for the District of Connecticut to a single count of wire fraud, in violation of 18 U.S.C. 1343, and (2) the judgment of conviction against DSK entered on January 25, 2016, in Seoul Central District Court, relating to charges filed against DSK under Articles 176, 443, and 448 of South Korea's Financial Investment Services and Capital Markets Act for spot/futures-linked market price manipulation. For all purposes under this exemption, ''conduct'' of any person or entity that is the ''subject of [a] Conviction'' encompasses the factual allegations described in Paragraph 13 of the Plea Agreement filed in the District Court in case number 3:15–cr–00062–RNC, and in the ''Criminal Acts'' section pertaining to ''Defendant DSK'' in the Decision of the Seoul Central District Court.

(b) The term ''Covered Plan'' is a plan subject to Part 4 of Title 1 of ERISA (''ERISA-covered plan'') or a plan subject to Section 4975 of the Code (''IRA'') with respect to which a DB QPAM relies on PTE 84–14, or with respect to which a DB QPAM (or any Deutsche Bank affiliate) has expressly represented that the manager qualifies as a QPAM or relies on the QPAM class exemption (PTE 84–14). A Covered Plan does not include an ERISA-covered Plan or IRA to the extent the DB QPAM has expressly disclaimed reliance on QPAM status or PTE 84–14 in entering into its contract, arrangement, or agreement with the ERISA-covered plan or IRA.

(c) The term ''DB Group Services'' means DB Group Services (UK) Limited, an ''affiliate'' of Deutsche Bank (as defined in Section VI(c) of PTE 84–14) based in the United Kingdom.

(d) The term ''DB QPAM'' means a ''qualified professional asset manager'' (as defined in Section VI(a)[33] of PTE 84–14) that relies on the relief provided by PTE 84–14 and with respect to which DSK or DB Group Services is a current or future ''affiliate'' (as defined in Section VI(d)(1) of PTE 84–14). For purposes of this exemption, Deutsche Bank Securities, Inc. (DBSI), including all entities over which it exercises control; and Deutsche Bank AG, including all of its branches, are excluded from the definition of a DB QPAM.

(e) The term ''Deutsche Bank'' means Deutsche Bank AG but, unless indicated otherwise, does not include its subsidiaries or affiliates.

(f) The term ''DSK'' means Deutsche Securities Korea Co., a South Korean ''affiliate'' of Deutsche Bank (as defined in Section VI(c) of PTE 84–14).

(g) The terms ''ERISA-covered plan'' and ''IRA'' mean, respectively, a plan subject to Part 4 of Title I of ERISA and a plan subject to section 4975 of the Code.

(h) The term ''Exemption Period'' means April 18, 2018, through April 17, 2021.

(i) The term ''Plea Agreement'' means the Plea Agreement (including the

[32] In the event the Applicant meets this disclosure requirement through Summary Policies, changes to the Policies shall not result in the requirement for a new disclosure unless, as a result of changes to the Policies, the Summary Policies are no longer accurate.

[33] In general terms, a QPAM is an independent fiduciary that is a bank, savings and loan association, insurance company, or investment adviser that meets certain equity or net worth requirements and other licensure requirements that has acknowledged in a written management agreement that it is a fiduciary with respect to each plan that has retained the QPAM.

Agreed Statement of Facts), dated April 23, 2015, between the Antitrust Division and Fraud Section of the Criminal Division of the U.S. Department of Justice (the DOJ) and DB Group Services resolving the charge brought by the DOJ in case number 3:15–cr–00062–RNC against DB Group Services for wire fraud in violation of Title 18, United States Code, Section 1343.

Effective Date

The effective date of this exemption is April 18, and the exemption will be effective from April 18, 2018, through April 17, 2021 (the Exemption Period).

Department's Comment: The Department cautions that the relief in this exemption will terminate immediately if an entity within the Deutsche Bank corporate structure is convicted of a crime described in Section I(g) of PTE 84–14 (other than the Convictions) during the Exemption Period. Although Deutsche Bank could apply for a new exemption in that circumstance, the Department would not be obligated to grant the exemption. The terms of this exemption have been specifically designed to permit plans to terminate their relationships in an orderly and cost effective fashion in the event of an additional conviction or a determination that it is otherwise prudent for a plan to terminate its relationship with an entity covered by the exemption.

Further Information

For more information on this exemption, contact Mr. Scott Ness of the Department, telephone (202) 693–8561. (This is not a toll-free number.)

Citigroup Inc. (Citigroup or the Applicant) Located in New York, New York

[Prohibited Transaction Exemption 2017–05; Exemption Application No. D–11909]

Discussion

On November 21, 2016, the Department of Labor (the Department) published a notice of proposed exemption in the **Federal Register** at 81 FR 83416, for certain entities with specified relationships to Citigroup to continue to rely upon the relief provided by PTE 84–14 for a period of five years,[34] notwithstanding Citicorp's criminal conviction, as described herein. The Department is granting this exemption in order to ensure that Covered Plans [35] whose assets are managed by a Citigroup Affiliated QPAM or Citigroup Related QPAM may continue to benefit from the relief provided by PTE 84–14. This exemption is effective from January 10, 2018 through January 9, 2023 (the Exemption Period).

No relief from a violation of any other law is provided by this exemption, including any criminal conviction described in the proposed exemption. Furthermore, the Department cautions that the relief in this exemption will terminate immediately if, among other things, an entity within the Citigroup corporate structure is convicted of a crime described in Section I(g) of PTE 84–14 (other than the Conviction) during the Exemption Period. The terms of this exemption have been specifically designed to promote conduct that adheres to basic fiduciary standards under ERISA and the Code. The exemption also aims to ensure that plans and IRAs can terminate relationships in an orderly and cost-effective fashion in the event a plan or IRA fiduciary determines it is prudent for the plan or IRA to sever its relationship with an entity covered by the exemption.

Written Comments

The Department invited all interested persons to submit written comments and/or requests for a public hearing with respect to the notice of proposed exemption, published in the **Federal Register** at 81 FR 83416 on November 21, 2016. All comments and requests for a hearing were due by March 1, 2017.[36] The Department received written comments from the Applicant, members of the U.S. Congress, and a number of plan and IRA clients of Citigroup. After considering these submissions, the Department has determined to grant the exemption, with revisions, as described below.

Term of the Exemption and Conditions

The Applicant requests that the exemption's term and underlying conditions be revised to conform with certain exemptions issued by the Department prior to 2014. The Applicant cites 16 individual exemptions granted by the Department prior to 2014 involving financial institutions that could not satisfy Section I(g) of PTE 84–14 (the Pre-2014 Exemptions) because of criminal convictions. The Applicant states that the conditions included within the Pre-2014 Exemptions remained materially unchanged during this time. The Applicant additionally cites PTE 2015–06 and 2015–14 (the 2015 Exemptions) which, like the Pre-2014 Exemptions, permitted certain financial institutions to continue to rely upon the relief provided by PTE 84–14, notwithstanding judgments of conviction against such institutions.

The Applicant states that, with respect to the 2015 Exemptions, the Department adopted certain additional conditions not previously included in the Pre-2014 Exemptions, including: (1) Shortening the period of relief from 10 years to 5 years; (2) particularized requirements relating to policies, procedures, and annual training; and (3) an annual audit requirement. The Applicant states that the public record underlying the 2015 Exemptions does not present any demonstrated deficiency with respect to the Pre-2014 Exemptions that warranted the adoption of these additional conditions in the 2015 Exemptions. Nor, according to the Applicant, are the 2015 Exemptions' additional conditions explained by any change in relevant laws or guidance, or any distinction between the conduct that gave rise to the need for the 2015 Exemptions compared to the conduct that gave rise to the need for the Pre-2014 Exemptions.

The Applicant also cites a Presidential Memorandum and two Executive Orders: (1) Presidential Memorandum on Fiduciary Duty Rule, dated February 3, 2017; (2) Presidential Executive Order on Core Principles for Regulating the United States Financial System, dated February 3, 2017; and (3) Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs, dated January 30, 2017 (the Executive Orders). The Applicant states that these Executive Orders suggest a compelling reason for the Department to revert to the approach reflected in the Pre-2014 Exemptions.

The Applicant further states that the individual exemptions granted by the Department in connection with criminal convictions fall into two different categories. In one category, the applicant's underlying misconduct is integral to corporate business activity.

[34] (49 FR 9494, March 13, 1984), as corrected at 50 FR 41430 (October 10, 1985), as amended at 70 FR 49305 (August 23, 2005) and as amended at 75 FR 38837 (July 6, 2010), hereinafter referred to as PTE 84–14 or the QPAM Exemption.

[35] ''Covered Plan'' is a plan subject to Part 4 of Title 1 of ERISA (''ERISA-covered plan'') or a plan subject to Section 4975 of the Code (''IRA''), with respect to which a Citigroup Affiliated QPAM relies on PTE 84–14, or with respect to which a Citigroup Affiliated QPAM (or any Citigroup affiliate) has expressly represented that the manager qualifies as a QPAM or relies on the QPAM class exemption (PTE 84–14). A Covered Plan does not include an ERISA-covered Plan or IRA to the extent the Citigroup Affiliated QPAM has expressly disclaimed reliance on QPAM status or PTE 84–14 in entering into its contract, arrangement, or agreement with the ERISA covered plan or IRA.

[36] The Department received additional comments from the Applicant, however, after the close of the comment period.

In the other category, according to the Applicant, the applicant's underlying misconduct is non-integral and isolated to a small number of employees. The Applicant states that the conduct underlying this exemption resembles the facts underlying those exemptions in which misconduct was non-integral and isolated to a small number of employees, as it was ''limited to one London-based euro/U.S. dollar trader and the unit he worked in was distant and separate from the Applicant's businesses that rely on PTE 84–14.''

The Applicant states that, taken together and considered against the historical backdrop of the individual exemptions and Executive Orders summarized above, there are compelling reasons for the Department to revert to the approach reflected in the Pre-2014 Exemptions, including: (1) Extending the exemption from a 5-year term to a 9-year term, and (2) eliminating the independent audit and compliance officer requirements under the exemption. The Applicant states that the Department's past practice for these types of exemptions has been to provide for ten-year relief and that the rationale for abbreviating the term in this exemption does not appear to be connected to the nature or severity of the misconduct at issue.

The Department declines to extend the term of this exemption to ten years. Although the Applicant characterizes the conduct as involving the isolated actions of one individual, the Department does not agree with the apparent suggestion that the Applicant bears little or no responsibility for the criminal conduct. In considering the misconduct, the Department did not limit its analysis to the acts of the single trader identified by the Applicant. The Department also considered the period of time during which the misconduct persisted, the compliance and supervisory mechanisms within Citigroup that failed to detect and prevent the misconduct, and certain other relevant misconduct identified in Citicorp's Plea Agreement.

Citicorp's Plea Agreement identifies misconduct that extended beyond the isolated acts of the single London-based euro/U.S. dollar trader. For example, Citicorp's Plea Agreement contains the following statement under the heading Other Relevant Conduct: ''the defendant [Citicorp], through its currency traders and sales staff, also engaged in other currency trading and sales practices in conducting FX Spot Market transactions with customers via telephone, email, and/or electronic chat, to wit: (i) Intentionally working customers' limit orders one or more levels, or ''pips,'' away from the price confirmed with the customer; (ii) including sales markup, through the use of live hand signals or undisclosed prior internal arrangements or communications, to prices given to customers that communicated with sales staff on open phone lines; (iii) accepting limit orders from customers and then informing those customers that their orders could not be filled, in whole or in part, when in fact the defendant was able to fill the order but decided not to do so because the defendant expected it would be more profitable not to do so; and (iv) disclosing non-public information regarding the identity and trading activity of the defendant's customers to other banks or other market participants, in order to generate revenue for the defendant at the expense of its customers.''

In developing this exemption, the Department also considered statements made by regulators concerning the compliance and supervisory mechanisms within Citigroup that failed to detect and prevent the misconduct. For example, the Financial Conduct Authority's (FCA) Final Notice to Citibank N.A., states: ''[d]uring the Relevant Period, Citi did not exercise adequate and effective control over its G10 spot FX trading business,'' and, ''[t]hese failings occurred in circumstances where certain of those responsible for managing front office matters were aware of and/or at times involved in behaviours described above.'' The Notice further states: ''They also occurred despite the fact that risks around confidentiality were highlighted when in August 2011 Citi became aware that a trader in its FX business outside London had inappropriately shared confidential client information in a chat room with a trader at another firm.''

By way of further example, the Consent Order of the Office of the Comptroller of the Currency (OCC) states: ''[t]he OCC's examination findings established that the Bank had deficiencies in its internal controls and had engaged in unsafe or unsound banking practices with respect to the oversight and governance of the Bank's FX Trading such that the Bank failed to detect and prevent the conduct. . . .'' The OCC's Consent Order also states that, ''deficiencies and unsafe or unsound practices include the following: (a) The Bank's compliance risk assessment lacked sufficient granularity and failed to identify the risks related to market conduct in FX Trading with respect to sales, trading and supervisory employees in that business; (b) The Bank's transaction monitoring and communications surveillance were inadequate to detect potential Employee market misconduct in FX Trading. . . .''

With respect to the severity of the misconduct, the Department notes the magnitude of the relevant fines imposed by various regulators, which include: $925 million by the Department of Justice; $342 million by the Board of Governors of the Federal Reserve; $350 million by the OCC; $310 million by the Commodity Futures Trading Commission; and £225,575,000 by the FCA.

The Department also notes that this exemption's five-year term and protective conditions reflect the Department's intent to protect Covered Plans that entrust substantial assets to a Citigroup Affiliated QPAM, despite the serious nature of the misconduct and the compliance and oversight failures exhibited by Citigroup throughout the extended period of time during which the criminal misconduct persisted. The term of this exemption gives the Department the opportunity to review the adherence by the Citigroup Affiliated QPAMs' to the conditions set out herein. If the Applicant seeks to extend this exemption beyond this five year term, the Department will examine whether the compliance and oversight changes mandated by the various regulatory authorities are having the desired effect on the Citigroup entities.

Description of Criminal Conduct—Sections I and II(e)

The prefatory language to Section I of the proposed five-year exemption provides that, ''*the Citigroup Affiliated QPAMs and the Citigroup Related QPAMs, as defined in Sections II(f) and II(g), respectively, will not be precluded from relying on the exemptive relief provided by Prohibited Transaction Class Exemption 84–14 (PTE 84–14 or the QPAM Exemption), notwithstanding the judgment of conviction against Citicorp (the Conviction), as defined in Section II(a)), for engaging in a conspiracy to: (1) Fix the price of, or (2) eliminate competition in the purchase or sale of the euro/U.S. dollar currency pair exchanged in the Foreign Exchange (FX) Spot Market, for a period of five years beginning on the date the exemption is granted.*''

Section II(e) of the proposed five year exemption provides that, in relevant part, ''*[t]he term 'Conviction' means the judgment of conviction against Citigroup for violation of the Sherman Antitrust Act, 15 U.S.C. 1, which is scheduled to be entered in the District Court for the District of Connecticut (the District Court) (Case Number 3:15–cr–78–SRU), in connection with Citigroup, through one of its euro/U.S. dollar*

(EUR/USD) traders, entering into and engaging in a combination and conspiracy to fix, stabilize, maintain, increase or decrease the price of, and rig bids and offers for, the EUR/USD currency pair exchanged in the FX spot market by agreeing to eliminate competition in the purchase and sale of the EUR/USD currency pair in the United States and elsewhere. For all purposes under this five-year, 'conduct' of any person or entity that is the 'subject of [a] Conviction' encompasses any conduct of Citigroup and/or their personnel, that is described in the Plea Agreement, (including the Factual Statement), and other official regulatory or judicial factual findings that are a part of this record.''

The Applicant incorporates by reference its comment letter submitted to the Department in connection with PTE 2016–14 (PTE 2016–14 Comment Letter),[37] in which the Applicant requested that references to the Conviction be limited to the actual judgment of conviction against Citicorp. The Applicant states that the references to the Conviction in the prefatory language of Section I and Section II would cause confusion for Plans and counterparties transacting with Plans. The Applicant also requests that the Department revise Section II(e) by replacing ''Citigroup'' with ''Citicorp,'' as Citicorp was the entity charged in connection with the Plea Agreement.

After consideration of the Applicant's comment, the Department has revised the exemption to provide that ''[t]he term 'Conviction' means the judgment of conviction against Citicorp for violation of the Sherman Antitrust Act, 15 U.S.C. 1, entered in the District Court for the District of Connecticut (the District Court) (case number 3:15–cr–78–SRU). For all purposes under this exemption, 'conduct' of any person or entity that is the 'subject of [a] Conviction' encompasses the conduct described in Paragraph 4(g)–(i) of the Plea Agreement filed in the District Court in case number 3:15–cr–78–SRU.'' The Department has also revised Section II(e) by replacing ''Citigroup'' with ''Citicorp.'' The Department has also renumbered the definition of Conviction as Section II(a) in the final exemption.

Knowing or Tacit Approval—Sections I(a) and I(c)

Section I(a) of the proposed five-year exemption provides, ''*(a) Other than a single individual who worked for a non-fiduciary business within Citigroup's Markets and Securities Services business, and who had no responsibility for, and exercised no authority in connection with, the management of plan assets, the Citigroup Affiliated QPAMs and the Citigroup Related QPAMs (including their officers, directors, agents other than Citicorp, and employees of such QPAMs who had responsibility for, or exercised authority in connection with the management of plan assets) did not know of, did not have reason to know of, or participate in the criminal conduct that is the subject of the Conviction (for purposes of this paragraph (a), 'participate in' includes the knowing or tacit approval of the misconduct underlying the Conviction).*''

With regard to Section I(a), the Applicant requests the deletion of the parenthetical, which reads, ''(for purposes of this paragraph (a), 'participate in' includes the knowing or tacit approval of the misconduct underlying the Conviction).''[38] The Department declines to delete this definition of ''participate in,'' but has replaced ''knowing or tacit approval,'' with ''knowing approval.''

Section I(c) of the proposed exemption provides, ''*(c) The Citigroup Affiliated QPAMs will not employ or knowingly engage any of the individuals that participated in the criminal conduct that is the subject of the Conviction (for the purposes of this paragraph (c), 'participated in' includes the knowing or tacit approval of the misconduct underlying Conviction).*''

With regard to Section I(c), the Applicant requests that the definition of ''participated in'' be changed from, ''the knowing or tacit approval of the misconduct underlying the Conviction'' to, ''approving or condoning the misconduct underlying the Conviction.''

After consideration of the Applicant's comment, the Department has revised Section I(c) in a manner that is consistent with Section I(a), as described above. Accordingly, the relevant part of Section I(c) now reads, ''For the purposes of this paragraph (c), 'participated in' means the knowing approval of the misconduct underlying the Conviction.''

Receipt of Compensation—Section I(b)

Section I(b) of the proposed five-year exemption provides, ''*(b) Other than a single individual who worked for a non-fiduciary business within Citigroup's Markets and Securities Services business, and who had no responsibility for, and exercised no authority in connection with, the management of plan assets, the Citigroup Affiliated QPAMs and the Citigroup Related QPAMs (including their officers, directors, and agents other than Citigroup, and employees of such Citigroup QPAMs) did not receive direct compensation, or knowingly receive indirect compensation in connection with the criminal conduct that is the subject of the Conviction.*''

The Applicant requests the replacement of ''Citigroup'' with ''Citicorp'' in the phrase, ''*(including their officers, directors, and agents other than Citigroup. . . .*'' After considering the Applicant's comment, the Department has revised the exemption in the manner requested by the Applicant.

Use of Authority or Influence—Section I(d)

Section I(d) of the proposed exemption provides that, ''*(d) A Citigroup Affiliated QPAM will not use its authority or influence to direct an 'investment fund' (as defined in Section VI(b) of PTE 84–14), that is subject to ERISA or the Code and managed by such Citigroup Affiliated QPAM, to enter into any transaction with Citicorp or the Markets and Securities Services business of Citigroup, or to engage Citicorp or the Markets and Securities Services business of Citigroup, to provide any service to such investment fund, for a direct or indirect fee borne by such investment fund, regardless of whether such transaction or service may otherwise be within the scope of relief provided by an administrative or statutory exemption.*''

In the PTE 2014 Comment Letter, the Applicant represented that a sudden cessation of services by the Markets and Securities Services Business of Citigroup to affected plans, such as agency securities lending services, would be disruptive to such plans. In this regard, the Applicant seeks deletion of the condition's reference to ''the Markets and Securities Services Business of Citigroup.''

After considering the Applicant's comment, the Department has revised the exemption in the manner requested by the Applicant such that the condition does not apply to the Markets and Securities Services Business of Citigroup. The Department has also revised Section I(d) by clarifying that it applies to, ''an 'investment fund'. . . . managed by such Citigroup Affiliated QPAM with respect to Covered Plans.'' This modification to Section I(d) reflects the Department's interest in ensuring

[37] See Citigroup PTE 2016–14 Comment Letter, dated November 25, 2016.

[38] Certain of the Applicant's requested revisions, including its requested revision with respect to Section I(a), are reflected in a red-lined draft attachment which the Applicant provided to the Department with its comment letter.

that the conditions included herein broadly protect Covered Plans.

Provision of Asset Management Services—Section I(g)

Section I(g) of the proposed exemption provides that ''*(g) Citicorp and the Markets and Securities Services Business of Citigroup will not provide discretionary asset management services to ERISA-covered plans or IRAs, or otherwise act as a fiduciary with respect to ERISA-covered plan or IRA assets.*''

In the PTE 2016–14 Comment Letter, the Applicant represented that the function of the Markets and Securities Services Business of Citigroup may be deemed to involve fiduciary conduct and that requiring those services to be terminated suddenly would be disruptive to affected plans. The Applicant therefore seeks the deletion of the condition's reference to the Markets and Securities Services Business of Citigroup.

The Applicant also requests that Section I(g) be revised to read, ''Other than with respect to employee benefit plans maintained or sponsored for their own employees or the employees of an affiliate, Citicorp will not act as a fiduciary within the meaning of ERISA Section 3(21)(A)(i) or (iii), or Code Section 4975(e)(3)(A) or (C), with respect to ERISA-covered plan and IRA assets; in accordance with this provision, Citicorp will not be treated as violating the conditions of this exemption solely because they acted as investment advice fiduciaries within the meaning of ERISA Section 3(21)(A)(ii) or Section 4975(e)(3)(B) of the Code.''

After considering the Applicant's comment regarding disruption and damages to affected ERISA-covered plans and IRAs, the Department has revised the exemption in the manner requested by the Applicant. Additionally, the Department has revised Section I(g) to clarify that Citigroup will not violate this condition in the event that it inadvertently becomes an investment advice fiduciary or acts as a fiduciary for plans that it sponsors for its own employees or employees of an affiliate.

Policies and Procedures Relating to Compliance with ERISA and the Code—Section I(h)(1)–(2)

Section I(h) of the proposed five-year exemption provides that, ''*(h)(1) Within four (4) months of the Conviction, each Citigroup Affiliated QPAM must develop, implement, maintain, and follow written policies and procedures (the Policies) . . . (2) Within four (4) months of the date of the Conviction, each Citigroup Affiliated QPAM must develop and implement a program of training (the Training), conducted at least annually, for all relevant Citigroup Affiliated QPAM asset/portfolio management, trading, legal, compliance, and internal audit personnel. . . .*''

The Applicant requests that the Department increase the development period associated with the Policies and Training Requirements (the Development Period) from four (4) months to six (6) months from the date of the Conviction. The Applicant also requests clarification that a Citigroup Affiliated QPAM's obligation to ''develop'' the Policies and Training under this section can be satisfied to the extent that such Citigroup Affiliated QPAM has developed Policies and Training independent of this exemption, including Policies and Training developed in connection with PTE 2016–14. The Applicant further requests that the Department clarify that the Applicant shall have up to twelve (12) months to train all relevant employees following the Development Period, and that such Training will then be conducted at least annually, in accordance with Section I(h)(2).

The Department emphasizes that the Citigroup QPAMs must comply with the Policies and Training requirements within both PTE 2016–14 and this exemption. To this end, the Department has revised the policies and training requirements of Section I(h) to conform with PTE 2016–14. The two exemptions now follow this timeline: (i) Each Citigroup Affiliated QPAM must have developed the Policies and Training required by PTE 2016–14 by July 9, 2017; (ii) the first annual Training under PTE 2016–14 must be completed by July 9, 2018; (iii) each Citigroup Affiliated QPAM must develop the Policies and Training required by this exemption, as necessary, by July 9, 2018; and (iv) the first Training under this exemption must be completed by July 9, 2019. By the end of this 30-month period, asset/portfolio management, trading, legal, compliance, and internal audit personnel who were employed from the start to the end of the period must have been trained twice.

In addition, Section I(h)(1)(i) of the proposed five-year exemption provides that the Policies must be reasonably designed to ensure that: ''*(i) The asset management decisions of the Citigroup Affiliated QPAM are conducted independently of the corporate management and business activities, including the corporate management and business activities of the Markets and Securities Services business of Citigroup.*''

The Applicant requests the deletion of the condition's reference to the Markets and Securities Services Business of Citigroup. In the PTE 2016–14 Comment letter, the Applicant stated that such revision is necessary in order to avoid disruption to affected plans and IRAs. The Department concurs with this comment, and has revised the condition to state that, ''[t]he Policies must require, and must be reasonably designed to ensure that: (i) The asset management decisions of the Citigroup Affiliated QPAM are conducted independently of the corporate, management, and business activities of Citigroup.''

Section I(h)(1)(ii) of the proposed five-year exemption provides that the Policies must be reasonably designed to ensure that: ''*(ii) The Citigroup Affiliated QPAM fully complies with ERISA's fiduciary duties, and with ERISA and the Code's prohibited transaction provisions, and does not knowingly participate in any violation of these duties and provisions with respect to ERISA-covered plans and IRAs.*''

The Department has determined to revise Section I(h)(1)(ii) to clarify this exemption's expectations regarding the substance of the Policies. In this regard, the Department has added the term, ''as applicable with respect to each Covered Plan,'' following the phrase, ''ERISA's fiduciary duties, and with ERISA and the Code's prohibited transaction provisions.''

Section I(h)(1)(iv) of the proposed five-year exemption provides that the Policies must be reasonably designed to ensure that: ''*(iv) Any filings or statements made by the Citigroup Affiliated QPAM to regulators, including, but not limited to, the Department, the Department of the Treasury, the Department of Justice, and the Pension Benefit Guaranty Corporation, on behalf of ERISA-covered plans or IRAs, are materially accurate and complete, to the best of such QPAM's knowledge at that time.*''

The Department has determined to revise Section I(h)(1)(iv) to better coordinate with the other conditions of this exemption. In this regard, the Department has revised the condition to read, ''. . . . on behalf of or in relation to Covered Plans. . . .''

Section I(h)(1)(v) of the proposed five-year exemption provides that the Policies must be reasonably designed to ensure that: ''*(v) The Citigroup Affiliated QPAM does not make material misrepresentations or omit material information in its communications with* *such regulators with respect to ERISA-covered plans or IRAs, or make material misrepresentations or omit material information in its communications with ERISA-covered plans and IRA clients.*''

The Department has revised Section I(h)(1)(v) in the same manner as it revised Section I(h)(1)(iv). The Department has also revised Section I(h)(1)(v) by adding the following language to the beginning of the section: ''To the best of the Citigroup Affiliated QPAM's knowledge at the time. . . .''

Incorporating the Training into the Policies—Section I(h)(2)(i)

Section I(h)(2)(i) of the proposed five-year exemption provides, ''. . . *The Training must: (i) Be set forth in the Policies and, at a minimum, cover the Policies, ERISA and Code compliance (including applicable fiduciary duties and the prohibited transaction provisions), ethical conduct, the consequences for not complying with the conditions of this five-year exemption (including any loss of exemptive relief provided herein), and prompt reporting of wrongdoing.*''

The Department has revised Section I(h)(2)(i) by removing the requirement that the Training must be set forth in the Policies. As revised, Section I(h)(2)(i) provides that the Training must, ''(i) At a minimum, cover the Policies, ERISA and Code compliance (including applicable fiduciary duties and the prohibited transaction provisions), ethical conduct, the consequences for not complying with the conditions of this exemption (including any loss of exemptive relief provided herein), and prompt reporting of wrongdoing.''

Training by Independent Professional—Section I(h)(2)(ii)

Section I(h)(2)(ii) of the proposed five-year exemption provides that the Training must, ''*(ii) Be conducted by an independent professional who has been prudently selected and who has appropriate technical and training and proficiency with ERISA and the Code.*''

The Applicant requests that the requirement that the professional be ''independent'' be omitted, on the basis that the ''independence'' of the trainer will not enhance the quality or effectiveness of the training, and may in fact detract from it. In this regard, the Applicant states that the training will be monitored by the Compliance Officer, subject to annual review by the Compliance Officer (the Annual Review), and audited by the independent auditor. The Applicant states that a professional trainer who is familiar with the Applicant's operations, culture, and management is less likely to be independent, but is more likely to be effective in its role. The Applicant also states that the compliance and audit functions mandated under this exemption will provide adequate safeguards that are sufficient to address any concern arising from a lack of independence on the part of the professional trainer. In sum, the Applicant requests that it be permitted to implement the required training within the context of its own existing training regime.

Although the Department disagrees with the Applicant's assertion that hiring a prudently-selected, independent professional may in fact detract from the quality and effectiveness of the training required under this exemption, the Department is persuaded that Citigroup personnel who are prudently-selected and have appropriate technical training and proficiency with ERISA and the Code may conduct the training. The Department has revised the condition accordingly.

Audit Requirement—Section I(i).

Section I(i)(1) of the proposed five-year exemption provides that, ''*(i)(1) Each Citigroup Affiliated QPAM submits to an audit conducted annually by an independent auditor, who has been prudently selected and who has appropriate technical training and proficiency with ERISA and the Code, to evaluate the adequacy of, and the Citigroup Affiliated QPAM's compliance with, the Policies and Training described herein.*''

As stated above, the Applicant requests that the audit requirement be deleted from the exemption in its entirety. In support of its request, the Applicant states that the audit requirement is burdensome, costly, and redundant. The Applicant also states that it has comprehensive compliance and internal audit departments, and that these departments should be responsible for carrying out the audit requirements under this exemption.

The Department declines to delete the audit requirement in its entirety. A recurring, independent, and prudently-conducted audit of the Citigroup Affiliated QPAMs is critical to ensuring the QPAMs' compliance with the Policies and Training mandated by this exemption, and the adequacy of the Policies and Training. The required discipline of regular audits underpins the Department's finding that the exemption is protective of Covered Plans, their participants, beneficiaries, and beneficial owners, as applicable. Strong independent audits should help prevent the sort of compliance failures that led to the Conviction.

The Department views the audit requirement as an integral component of the exemption, without which the Department would be unable to make its finding that the exemption is protective of Covered Plans and their participants, beneficiaries, and beneficial owners, as applicable. This exemption's conditions are based, in part, on the Department's assessment of the seriousness and duration of the misconduct that resulted in the violation of Section I(g) of PTE 84–14, as well as the apparent inadequacy of control and oversight mechanisms at Citigroup to prevent the misconduct. The Department, however, recognizes that, notwithstanding Citigroup's oversight failures, only a small number of individuals at Citigroup directly engaged in the misconduct at issue. Thus, the United States District Court for the District of Connecticut stated, in connection with the sentencing of Citicorp, that: ''the conduct at issue here was engaged in by a very small number of individuals,'' and that, ''we do not have banks who appear to have condoned conduct at any high-ranking level.'' [39]

Accordingly, the Department has determined to change the audit interval under this exemption from annual to biennial. Section I(i)(1) of the exemption, therefore, now requires that each Citigroup Affiliated QPAM submit ''to *an audit conducted every two years by an independent auditor.*'' *Each* audit must cover the preceding consecutive twelve (12) month period. The first audit must cover the period from July 10, 2018 through July 9, 2019, and must be completed by January 9, 2020. The second audit must cover the period from July 10, 2020 through July 9, 2021, and must be completed by January 9, 2022. In the event that the Exemption Period is extended or a new exemption is granted, the third audit would cover the period from July 10, 2022 through July 9, 2023, and would be completed by January 9, 2024, unless the Department chose to alter the audit requirement in the new or extended exemption.[40]

[39] See TRANSCRIPT of Proceedings: as to Citicorp (January 5, 2017 at pages 29–30).

[40] The third audit referenced above would not have to be completed until after the Exemption Period expires. If the Department ultimately decides to grant relief for an additional period, it could decide to alter the terms of the exemption, including the audit conditions (and the timing of the audit requirements). Nevertheless, the Applicant should anticipate that the Department will insist on strict compliance with the audit terms and schedule set forth above. As it considers any new exemption application, the Department may also contact the auditor for any information relevant to its determination.

The Departments notes that if the audit uncovers material deficiencies with Citigroup's compliance with this exemption, then the Applicant should consider conducting an additional audit after making corrections to ensure that it remains in compliance with the exemption. In any event, the Department emphasizes that it retains the right to conduct its own investigation of compliance based on any such indicators of problems.

The Department declines to revise Section I(i) in a manner that would permit the Applicant's Internal Audit Department to carry out this exemption's required audit functions. Permitting the Applicant's internal audit department to carry out this exemption's required audit functions would be insufficiently protective of Covered Plans. Auditor independence is essential to this exemption, as it allows for an impartial analysis of the Citigroup Affiliated QPAMs. The independence of the auditor is the cornerstone of the integrity of the audit process and is of primary importance to avoid conflicts of interest and any inappropriate influence on the auditor's findings.

The fundamental importance of auditor independence to the integrity of the audit process is well established. For example, the United States Securities and Exchange Commission (SEC) promulgated regulations at 17 CFR 210.2–01 to ensure that auditors are independent of their clients, and under 17 CFR 240.10A–2, it is unlawful for an auditor not to be independent in certain circumstances. Likewise, the Public Accounting Oversight Board's (PCAOB) Rule 3520 states that a public accounting firm and its associated persons must be independent of the firm's audit clients. The Association of Independent Certified Public Accountants' (AICPA) Code of Professional Conduct, Objectivity and Independence Principle (AICPA, Professional Standards, ET section 0.300.050.01) requires members working on an audit or attest engagement to be independent, in fact and appearance. Moreover, ERISA section 103(a)(3)(A) requires an accountant hired by an employee benefit plan to examine the plan's financial statements to be independent.

Entities Subject to Audit—Section I(i)

Section I(i)(1) of the proposed five-year exemption provides, ''*(i)(1) Each Citigroup Affiliated QPAM submits to an audit conducted annually by an independent auditor. . . .*''

The Applicant requests that only the particular Citigroup Affiliated QPAMs and Citigroup Related QPAMs actually relying upon PTE 84–14 and this exemption when providing services to, or engaging in transactions as an agent for, their clients, should be subject to the audit requirement under this exemption, and not every entity within the Citigroup-affiliated group that could be eligible to be a ''qualified professional asset manager,'' as defined in PTE 84–14. The Applicant also requests that Section I(i)(1) be revised to state that the Citigroup entities subject to the audit requirement are Citigroup Affiliated QPAM's, ''which the Applicant has identified in a certificate signed by the officer who will review and certify the Audit Report (as defined in Section I(i)(5)) pursuant to Section I(i)(8).'' In support of its request, the Applicant states that the purpose of the independent audit is to ensure that Citigroup entities relying upon PTE 84–14 are in compliance with the conditions of PTE 84–14 and the conditions of this exemption. The Applicant also states that it would identify the relevant entities to the independent auditor in a certificate signed by the compliance officer who will review the Audit Report.

The Department has determined to revise Section I(i)(1) in the manner requested by the Applicant. The Department acknowledges that the independent auditor will need to be provided with the identities of the Citigroup Affiliated QPAMs to be audited and that the Applicant is best positioned to provide such information. The Department notes that Section I(i) requires the audit of each Citigroup entity that relies upon QPAM status, or expressly represents to ERISA-covered plan or IRA clients that it qualifies as a QPAM.

Auditor Information Access—Section I(i)(2)

Section I(i)(2) of the proposed five-year exemption provides, ''*(i)(2) To the extent necessary for the auditor, in its sole opinion, to complete its audit and comply with the conditions for relief described herein, and as permitted by law, each Citigroup Affiliated QPAM and, if applicable, Citigroup, will grant the auditor unconditional access to its business, including, but not limited to: its computer systems; business records; transactional data; workplace locations; training materials; and personnel*.''

The Applicant requests that the phrase ''as permitted by law'' be clarified by the addition of the following proviso: ''provided, that the auditor shall not have access to any privileged information or confidential supervisory information.'' The Applicant states that certain privileged or confidential supervisory information which would be ''permitted by law'' to be shared with the auditor could result in the loss of the attorney-client or other privilege, or regulatory interest in maintaining confidentiality. The Applicant states that the purposes of the independent audit can be fully accomplished without requiring the Applicant to bear such costs. The Applicant also states that relevant privileges, and in particular, the attorney-client privilege, are based on important policy interests that routinely are thought to outweigh other critically important legal and social interests.

In the Department's view, to ensure a thorough and robust audit, the independent auditor must be granted access to information it deems necessary to make sound conclusions. The auditor's access to such information must be within the scope of the audit engagement and denied only to the extent that such disclosure is not permitted by state or federal statute. Designating specific restrictions on information accessibility may hinder the auditor's ability to perform the procedures necessary to make informed conclusions, thus undermining the effectiveness of the audit. The auditor's access to such information, however, is limited to information relevant to the auditor's objectives as specified by the terms of this exemption and to the extent disclosure is not prevented by state or federal statute or involves communications subject to attorney client privilege. In this regard, the Department has modified Section I(i)(2) accordingly.

Audit Transaction Sampling—Section I(i)(4)

Section I(i)(4) of the proposed five-year exemption provides, ''*(4) The auditor's engagement must specifically require the auditor to test each Citigroup Affiliated QPAM's operational compliance with the Policies and Training. In this regard, the auditor must test a sample of each QPAM's transactions involving ERISA-covered plans and IRAs sufficient in size and nature to afford the auditor a reasonable basis to determine the operational compliance with the Policies and Training.*''

The Applicant requests that the Department clarify that audit ''samples'' pursuant to this condition need only apply to transactions undertaken in reliance on PTE 84–14. The Applicant states that the purpose of the independent audit is to confirm compliance with the conditions required under the exemption and permit the Applicant to continue to utilize PTE 84–14 on behalf of Covered Plans.

The Department has revised this condition for consistency with other conditions of this exemption which are tailored to the Department's interest in protecting Covered Plans. Therefore, the condition now applies only to Covered Plans. The Department additionally notes that Section I(i)(4) does not specify the number of transactions that the auditor must test, but rather requires, for each QPAM, that the auditor test a sample of each such QPAM's transactions involving Covered Plans, ''sufficient in size and nature to afford the auditor a reasonable basis to determine operational compliance with the Policies and Training.''

Audit Report—Section I(i)(5)

Section I(i)(5) of the proposed five-year exemption provides that, ''*[f]or each audit, on or before the end of the relevant period described in Section I(i)(1) for completing the audit, the auditor must issue a written report (the Audit Report) to Citigroup and the Citigroup Affiliated QPAM to which the audit applies that describes the procedures performed by the auditor during the course of its examination. The Audit Report must include the auditor's specific determinations regarding:*

(i) The adequacy of the Citigroup Affiliated QPAM's Policies and Training; the Citigroup Affiliated QPAM's compliance with the Policies and Training; the need, if any, to strengthen such Policies and Training; and any instance of the respective Citigroup Affiliated QPAM's noncompliance with the written Policies and Training described in Section I(h) above. Any determination by the auditor regarding the adequacy of the Policies and Training and the auditor's recommendations (if any) with respect to strengthening the Policies and Training of the respective Citigroup Affiliated QPAM must be promptly addressed by such Citigroup Affiliated QPAM, and any action taken by such Citigroup Affiliated QPAM to address such recommendations must be included in an addendum to the Audit Report (which addendum is completed prior to the certification described in Section I(i)(7) below). Any determination by the auditor that the respective Citigroup Affiliated QPAM has implemented, maintained, and followed sufficient Policies and Training must not be based solely or in substantial part on an absence of evidence indicating noncompliance. In this last regard, any finding that the Citigroup Affiliated QPAM has complied with the requirements under this subsection must be based on evidence that demonstrates the Citigroup Affiliated QPAM has actually implemented, maintained, and followed the Policies and Training required by this five-year exemption. Furthermore, the auditor must not solely rely on the Annual Report created by the compliance officer (the Compliance Officer) as described in Section I(m) below as the basis for the auditor's conclusions in lieu of independent determinations and testing performed by the auditor as required by Section I(i)(3) and (4) above; and

(ii) The adequacy of the Annual Review described in Section I(m) and the resources provided to the Compliance Officer in connection with such Annual Review.''

To improve consistency between the audit conditions of this exemption, the Department has modified Section I(i)(5) to clarify that the auditor may issue one consolidated Audit Report covering all the Citigroup QPAMS for the period of time being audited. The Department also acknowledges that the Citigroup Affiliated QPAMs' efforts to address the auditor's recommendations regarding any inadequacy in the Policies and Training identified by the auditor may take longer to implement than the time limits mandated by the proposed exemption. Accordingly, the Department is modifying Section I(i)(5)(i) to reflect the possibility that the Citigroup Affiliated QPAMs' efforts to address the auditor's recommendations regarding any inadequacy in the Policies and Training may not be completed by the submission date of the Audit Report and may involve a written plan to address such items. However, any noncompliance identified by the auditor must be promptly addressed.

The revised Section also requires that if such a written plan of action to address the auditor's recommendation as to the adequacy of the Polices and Training is not completed by the submission of the Audit Report, the following period's Audit Report must state whether the plan was satisfactorily completed. Additionally, the Department has modified the final sentence in Section I(i)(5)(i) to more clearly express the Department's intent that the auditor must not rely solely on the work of the Compliance Officer and the Compliance Officer's Annual Report in formulating its conclusions or findings. The auditor must perform its own independent testing to formulate its conclusions. This exemption does not prohibit the auditor from considering the Compliance Officer's Annual Report in carrying out its audit function, including its formulation of an audit plan. This exemption, however, does prohibit the auditor from reaching conclusions that are exclusively based upon the contents of the Compliance Officer's Annual Report.

Finally, while an independent assessment by the auditor of the adequacy of the Annual Review is essential to providing the Department with the assurance that the Applicant and the Citigroup QPAMs have given these matters the utmost priority and have taken the necessary actions to comply with the exemption, the Department has determined that the auditor should not be responsible for opining on the adequacy of the resources allocated to the Compliance Officer and has modified Section I(i)(5)(ii) accordingly. If, however, the auditor observes compliance issues related to the Compliance Officer or available resources, it would be appropriate for the auditor to opine on those problems.

Certification of Audit Report—Section I(i)(7)–(8)

Section I(i)(7) of the proposed five-year exemption provides that, ''*(7) With respect to each Audit Report, the General Counsel, or one of the three most senior executive officers of the Citigroup Affiliated QPAM to which the Audit Report applies, must certify in writing, under penalty of perjury, that the officer has reviewed the Audit Report and this exemption; addressed, corrected, or remedied any inadequacy identified in the Audit Report; and determined that the Policies and Training in effect at the time of signing are adequate to ensure compliance with the conditions of this proposed five-year exemption, and with the applicable provisions of ERISA and the Code.*''

Section I(i)(8) of the proposed five-year exemption provides, ''*(i)(8) The Risk Committee of Citigroup's Board of Directors is provided a copy of each Audit Report; and a senior executive officer with a direct reporting line to the highest ranking legal compliance officer of Citigroup must review the Audit Report for each Citigroup Affiliated QPAM and must certify in writing, under penalty of perjury, that such officer has reviewed each Audit Report.*''

With respect to Section I(i)(7), the Applicant requests clarification that the certifying official who must ''certify in writing, under penalty of perjury, that the officer has reviewed the Audit Report and this exemption. . . .'' should be the general counsel or one of the three most senior executive officers of the Citigroup Affiliated QPAM itself (and not of the ultimate parent of the Citigroup-affiliated corporate group, Citigroup Inc.).

With respect to Section I(i)(8), the Applicant requests that, ''a senior executive officer with a direct reporting line to the highest ranking legal compliance officer of Citigroup,'' be revised to, ''a senior executive officer of Citigroup or one of its affiliates who reports directly to, or reports to another executive who reports directly to, the highest ranking compliance officer of Citigroup. . . .''

The Department agrees that the obligation under Section I(i)(7) to review the Audit Report and identify and remedy deficiencies may be carried out by the general counsel or one of the three most senior executive officers of the Citigroup Affiliated QPAM itself. The Department also agrees that the obligation under Section I(i)(8) to review the Audit Report may be carried out by a senior executive officer of Citigroup or one of its affiliates who reports directly to, or reports to another executive who reports directly to, the highest ranking compliance officer of Citigroup. The Department has revised Sections I(i)(7) and (8) accordingly.

Additionally, to coordinate with the revisions applied to Section I(i)(5), as discussed above, the Department has revised Section I(i)(7) to acknowledge that the Applicant's efforts to address the auditor's recommendations regarding inadequacies in the Policies and Training may take longer to implement than the required timeframe for submission of the certified Audit Report. In this regard, the Department did not intend to limit the Applicant's ability to implement corrective measures by requiring that such efforts be completed prior to the submission of the Audit Report. Therefore, the Department has modified Section I(i)(7) to reflect that the senior executive officer may certify that a written plan to address the inadequacies regarding the Policies and Training identified in the auditor's report is in place.

Availability of the Audit Report—Section I(i)(9)

Section I(i)(9) of the proposed exemption provides in part, ''*. . . each Citigroup Affiliated QPAM must make its Audit Report unconditionally available for examination by any duly authorized employee or representative of the Department, other relevant regulators, and any fiduciary of an ERISA-covered plan or IRA, the assets of which are managed by such Citigroup Affiliated QPAM in reliance of PTE 84–14.*''

Throughout this exemption, the Department has discussed its interest in ensuring that the conditions included herein broadly protect ERISA-covered plans and IRAs that enter into an asset management agreement with a Citigroup Affiliated QPAM in reliance on such QPAM's qualification under PTE 84–14. However, the Department recognizes that, under certain circumstances, extending the Applicant's disclosure obligations beyond the plan and IRA clients that this exemption is designed to protect does not contribute to this exemption's intended purpose. With regard to Section I(i)(9), the Department has adopted revisions which require the Citigroup Affiliated QPAMs to make the Audit Report available to any fiduciary of a Covered Plan. Accordingly, the Department has revised this condition by replacing the phrase ''an ERISA-covered plan or IRA, the assets of which are managed by such Citigroup Affiliated QPAM'' with the term ''Covered Plan'' (as defined in Section II(b)). Lastly, the Department has revised Section I(i)(9) to require that access to the Audit Report need only be provided upon request and such access can be electronic. The Department notes that the Audit Report, in any event, will be incorporated into the public record attributable to this exemption, under Exemption Application Number D–11909, and, therefore, independently accessible by members of the public.

Engagement Agreements—Section I(i)(10)

Section I(i)(10) of the proposed exemption provides that ''*[e]ach Citigroup Affiliated QPAM and the auditor must submit to OED: (A) any engagement agreement(s) entered into pursuant to the engagement of the auditor under this exemption; and (B) any engagement agreement entered into with any other entity retained in connection with such QPAM's compliance with the Training or Policies conditions of this five-year exemption, no later than six (6) months after the Conviction Date (and one month after the execution of any agreement thereafter).*''

In coordination with the Department's modification of Section I(h)(2)(ii), which permits prudently-selected Citigroup personnel to conduct the training, the Department has determined to remove the Section I(i)(10)(B) requirement for Citigroup Affiliated QPAMs and the auditor to provide the Department with engagement agreements entered into with entities retained in connection with the Training or Policies conditions. Furthermore, to remove any confusion and uncertainty regarding the timing of the submission of the auditor's engagement agreement, the Department has modified Section I(i)(10) to require that the auditor's engagement agreement be submitted to the Office of Exemption Determinations no later than two (2) months after the engagement agreement is entered into by the Applicant and the independent auditor.

Audit Workpapers—Section I(i)(11)

Section I(i)(10) of the proposed exemption requires ''*[t]he auditor must provide OED, upon request, all of the workpapers created and utilized in the course of the audit, including, but not limited to: The audit plan; audit testing; identification of any instance of noncompliance by the relevant Citigroup Affiliated QPAM; and an explanation of any corrective or remedial action taken by the applicable Citigroup Affiliated QPAM.*''

The Department acknowledges that certain information contained in the audit workpapers may be confidential and proprietary, and that the inclusion of such information in the public file may create avoidable disclosure issues. The Department has modified Section I(i)(11) to remove the requirement that the auditor provide the workpapers to OED,[41] and instead require that the auditor provide access to the workpapers for the Department's review and inspection.

Substitution of the Auditor—Section I(i)(12)

Section I(i)(12) of the proposed exemption provides ''*Citigroup must notify the Department at least thirty (30) days prior to any substitution of an auditor, except that no such replacement will meet the requirements of this paragraph unless and until Citigroup demonstrates to the Department's satisfaction that such new auditor is independent of Citigroup, experienced in the matters that are the subject of the exemption, and capable of making the determinations required of this exemption.*''

The Department has revised this condition for consistency with its interest in protecting Covered Plans. As revised, Section I(i)(12) now requires that Citigroup, no later than two (2) months following the engagement of a replacement auditor, must notify the Department of the auditor substitution and the reason(s) for the substitution, including any material disputes between the terminated auditor and Citigroup. The Department has also

[41] OED is the Office of Exemption Determinations within the Employee Benefits Security Administration agency of the United States Department of Labor.

revised Section I(i)(12) to remove the requirement for Citigroup to demonstrate the independence and qualifications of the auditor. Citigroup's fiduciary obligations with respect to the selection of the auditor, as well as the significant role a credible selection plays in reducing the need for more extensive oversight by the Department, should be sufficient to safeguard the selection process.

Contractual Commitments to Covered Plans—Section I(j)

Section I(j) of the proposed five-year exemption provides, ''*(j) Effective as of the effective date of this five-year exemption, with respect to any arrangement, agreement, or contract between a Citigroup Affiliated QPAM and an ERISA-covered plan or IRA for which a Citigroup Affiliated QPAM provides asset management or other discretionary fiduciary services, each Citigroup Affiliated QPAM agrees and warrants:*

(1) To comply with ERISA and the Code, as applicable with respect to such ERISA-covered plan or IRA; to refrain from engaging in prohibited transactions that are not otherwise exempt (and to promptly correct any inadvertent prohibited transactions); and to comply with the standards of prudence and loyalty set forth in section 404 of ERISA, as applicable, with respect to each such ERISA-covered plan and IRA;

(2) To indemnify and hold harmless the ERISA-covered plan or IRA for any damages resulting from a Citigroup Affiliated QPAM's violation of applicable laws, a Citigroup Affiliated QPAM's breach of contract, or any claim brought in connection with the failure of such Citigroup Affiliated QPAM to qualify for the exemptive relief provided by PTE 84–14 as a result of a violation of Section I(g) of PTE 84–14 other than the Conviction;

(3) Not to require (or otherwise cause) the ERISA-covered plan or IRA to waive, limit, or qualify the liability of the Citigroup Affiliated QPAM for violating ERISA or the Code or engaging in prohibited transactions;

(4) Not to require the ERISA-covered plan or IRA (or sponsor of such ERISA-covered plan or beneficial owner of such IRA) to indemnify the Citigroup Affiliated QPAM for violating ERISA or engaging in prohibited transactions, except for violations or prohibited transactions caused by an error, misrepresentation, or misconduct of a plan fiduciary or other party hired by the plan fiduciary who is independent of Citigroup, and its affiliates;

(5) Not to restrict the ability of such ERISA-covered plan or IRA to terminate or withdraw from its arrangement with the Citigroup Affiliated QPAM (including any investment in a separately managed account or pooled fund subject to ERISA and managed by such QPAM), with the exception of reasonable restrictions, appropriately disclosed in advance, that are specifically designed to ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other investors as a result of an actual lack of liquidity of the underlying assets, provided that such restrictions are applied consistently and in like manner to all such investors;

(6) Not to impose any fees, penalties, or charges for such termination or withdrawal with the exception of reasonable fees, appropriately disclosed in advance, that are specifically designed to prevent generally recognized abusive investment practices or specifically designed to ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other investors, provided that such fees are applied consistently and in like manner to all such investors;

(7) Not to include exculpatory provisions disclaiming or otherwise limiting liability of the Citigroup Affiliated QPAM for a violation of such agreement's terms, except for liability caused by an error, misrepresentation, or misconduct of a plan fiduciary or other party hired by the plan fiduciary which is independent of Citigroup, and its affiliates; and

(8) Within four (4) months of the date of the Conviction, each Citigroup Affiliated QPAM must provide a notice of its obligations under this Section I(j) to each ERISA-covered plan and IRA for which a Citigroup Affiliated QPAM provides asset management or other discretionary fiduciary services. For all other prospective ERISA-covered plan and IRA clients for which a Citigroup Affiliated QPAM provides asset management or other discretionary services, the Citigroup Affiliated QPAM will agree in writing to its obligations under this Section I(j) in an updated investment management agreement between the Citigroup Affiliated QPAM and such clients or other written contractual agreement.''

The Applicant states that the creation of new contractual rights as contemplated under Section I(j) is inappropriate and unnecessary for the protection of ERISA-covered plan and IRA clients. The Applicant states that Section (j) would require the creation of new contractual commitments in favor of ERISA-covered Plan and IRA clients that would be substantially similar to the contractual commitments contemplated by the Best Interest Contract Exemption (the ''BIC Exemption'') published in the **Federal Register** on April 18, 2016. The Applicant states that the proposed extension of these BIC Exemption provisions to this exemption is inappropriate, because the BIC Exemption is intended to address circumstances in which a fiduciary may have a conflict of interest, while this exemption would apply only in contexts in which no such conflict exists. The Applicant further states that, under the circumstances, it is appropriate at a minimum for Section I(j) of the exemption to be revised to provide that in no circumstance shall the contractual commitments required therein extend beyond the contractual commitments required to be made to a fiduciary seeking to rely on the BIC Exemption, if any, as the BIC Exemption is in effect from time to time.

The Applicant also requests that the requirements of Section I(j) be limited to services that are rendered to Plan clients in reliance on PTE 84–14. Accordingly, the Applicant requests that Section I(j) should be clarified by adding the phrase, ''in reliance on PTE 84–14,'' immediately following the phrase, ''asset management or other discretionary fiduciary services,'' in the leading paragraph and in two other places in Section I(j)(8). The Applicant states that the effect of the Exemption is to permit the Applicant to continue to use PTE 84–14 and that imposing conditions relating to conduct that is not connected to the relief being provided exceeds the statutory mandate of Section 408(a).

The Department may grant an exemption under Section 408(a) of ERISA or Section 4975(c)(2)(C) of the Code only to the extent the Secretary finds, among other things, that the exemption is protective of the affected plan(s) or IRA(s). Notwithstanding the misconduct, which resulted in violation of Section I(g) of PTE 84–14, the Department has granted this exemption based, in significant part, upon the inclusion of Section I(j), which protects Covered Plans by, among other things, requiring the Citigroup Affiliated QPAMs to make express commitments to adhere to the requirements of ERISA and the Code, as applicable.

As previously indicated, the Department has concluded that a culture of compliance, centered on adherence to basic standards of fair dealing as set forth in this exemption, gives the Department a compelling basis for making the required statutory findings that the exemption is in the interests of plan and IRA investors and protective of their rights. Absent such findings, the exemption would have been denied.

The Department has required an express commitment to comply with the fiduciary standards and prohibited transaction rules only to the extent these provisions are ''applicable'' under ERISA and the Code. This section, as modified, should serve its salutary purposes of promoting a culture of compliance and enhancing the ability of plans and IRA customers to sever their relationships with minimal injury in the event of non-compliance. This conclusion is reinforced, as well, by the limited nature of the relief granted by this exemption, which generally does not extend to transactions that involve self-dealing.

The Department notes that nothing in ERISA or the Code prevents the Department from conditioning relief on express contractual commitments to adhere to the requirements set out herein. The QPAMs remain free to disclaim reliance on the exemption and to avoid such express contractual commitments. To the extent, however, that they hold themselves out as fiduciary QPAMs, they should be prepared to make an express commitment to their customers to adhere to the requirements of this exemption. This commitment strengthens and reinforces the likelihood of compliance, and helps ensure that, in the event of noncompliance, customers, including IRA customers, will be insulated from injuries caused by non-compliance.

These protections also ensure that customers will be able to extricate themselves from transactions that become prohibited as a result of the QPAMs' misconduct, without fear of sustaining additional losses as a result of the QPAMs' actions. In this connection, however, the Department emphasizes that the only claims available to the QPAMs' customers pursuant to these contractual commitments are those separately provided by ERISA or other state and federal laws that are not preempted by ERISA. As before, private litigants have only those causes of action specifically authorized by laws that exist independent of this exemption.

As explained above, ERISA-covered plans and IRAs routinely rely on QPAM status as a condition of entering into transactions with financial institutions, even with respect to transactions that do not require adherence to PTE 84–14. In addition, it may not always be clear whether a Citigroup Affiliated QPAM intends to rely upon PTE 84–14 for any particular transaction. Accordingly, it is critical to ensure that protective conditions are in place to safeguard the interests of ERISA-covered plans and IRAs that are acting in reliance on the availability of this exemption, particularly with respect to plans and IRAs that may not have entered into a transaction in the first place, but for the Department's grant of this exemption.

The Department has revised this condition for consistency with its interest in protecting Covered Plans. The condition now applies to ERISA-covered plans and IRAs only when the Citigroup Affiliated QPAM relies on PTE 84–14 or has expressly represented that it qualifies as a QPAM or relies on the QPAM class exemption in its dealings with the ERISA-covered plan or IRA (*i.e.,* a Covered Plan). To the extent a Citigroup QPAM would prefer not to be subject to these conditions, however, it may expressly disclaim reliance on QPAM status or PTE 84–14 in entering into its contract with the ERISA-covered plan or IRA.

Contractual Commitments—Section I(j)(1)

Section I(j)(1) of the proposed five-year exemption provides that each Citigroup Affiliated QPAM agrees and warrants: ''*(1) To comply with ERISA and the Code, as applicable with respect to such ERISA-covered plan or IRA; to refrain from engaging in prohibited transactions that are not otherwise exempt (and to promptly correct any inadvertent prohibited transactions); and to comply with the standards of prudence and loyalty set forth in section 404 of ERISA, as applicable, with respect to each such ERISA-covered plan and IRA.*''

The Applicant requests the phrase, ''as applicable'' be moved to follow the phrase, ''. . . .with respect to such ERISA-covered plan or IRA.'' The Department has determined to revise Section I(j)(1) by adding ''to the extent that Section is applicable,'' following the phrase, ''with respect to each such ERISA-covered plan and IRA'' at the end of the condition. As written, the text expressly focuses on provisions of ERISA and the Code only to the extent those provisions are applicable to the conduct at issue.

Indemnity Provision—Section I(j)(2)

Section I(j)(2) of the proposed five-year exemption provides that each Citigroup Affiliated QPAM agrees and warrants: ''*(2) To indemnify and hold harmless the ERISA-covered plan or IRA for any damages resulting from a Citigroup Affiliated QPAM's violation of applicable laws, a Citigroup Affiliated QPAM's breach of contract, or any claim brought in connection with the failure of such Citigroup Affiliated QPAM to qualify for the exemptive relief provided by PTE 84–14 as a result of a violation of Section I(g) of PTE 84–14 other than the Conviction.*''

The Applicant requests that Section I(j)(2) be revised to read: ''To indemnify and hold harmless the ERISA-covered plan or IRA for any damages resulting from a violation of ERISA's fiduciary duties and of ERISA and the Code's prohibited transaction provisions, a breach of contract, or any claim arising out of the failure of such Citigroup Affiliated QPAM to qualify for the exemptive relief provided by PTE 84–14 as a result of a violation of Section I(g) of PTE 84–14 other than the Conviction;''

As explained above, the intended purpose of this exemption is to protect Covered Plans that entrust the Citigroup Affiliated QPAMs with the management of their retirement assets. To this end, the Department believes that the protective purpose of this exemption is furthered by Section I(j)(2). This condition ensures that, when a Covered Plan enters into an asset management agreement with a Citigroup Affiliated QPAM in reliance on the manager's qualification as a QPAM, it may expect adherence to basic fiduciary norms and standards of fair dealing, notwithstanding the prior conviction. This condition also ensures that the Covered Plan will be able to disengage from that relationship without undue injury in the event that the terms of this exemption are violated.

Accordingly, the Department has revised the applicability of this condition to more closely reflect this interest. In particular, the condition applies to Covered Plans. As indicated above, if the asset manager would prefer not to be subject to these provisions as exemption conditions, it may expressly disclaim reliance on QPAM status or PTE 84–14 in entering into its contract with an ERISA-covered plan or IRA (in that case, however, it could not rely on the exemption for relief). The Department has made certain further changes to this condition, which include: Replacing ''applicable laws'' with clarifying language that conforms to PTE 2016–14; and replacing ''any damages'' with ''actual losses resulting directly from'' certain acts or omissions of the Citigroup Affiliated QPAMs. Because I(j)(2) extends only to actual losses resulting directly from the actions of the Citigroup Affiliated QPAMs, it does not encompass losses solely caused by other parties, events, or acts of God.

Contractual Commitments—Section I(j)(4)

Section I(j)(4) of the proposed five-year exemption provides that each Citigroup Affiliated QPAM agrees and warrants: ''*(4) Not to require the ERISA-covered plan or IRA (or sponsor of such ERISA-covered plan or beneficial owner of such IRA) to indemnify the Citigroup Affiliated QPAM for violating ERISA or engaging in prohibited transactions, except for violations or prohibited transactions caused by an error, misrepresentation, or misconduct of a plan fiduciary or other party hired by the plan fiduciary who is independent of Citigroup, and its affiliates.*''

The Department has determined that Section I(j)(4), as proposed, is duplicative of the exemption's prohibition on exculpatory clauses under Section I(j)(7). The Department therefore has deleted Section I(j)(4)and renumbered the subsequent subsections in Section I(j) accordingly.

Contractual Commitments—Section I(j)(5) [42]

Section I(j)(5) of the proposed five-year exemption provides that each Citigroup Affiliated QPAM agrees and warrants: ''*(5) Not to restrict the ability of such ERISA-covered plan or IRA to terminate or withdraw from its arrangement with the Citigroup Affiliated QPAM (including any investment in a separately managed account or pooled fund subject to ERISA and managed by such QPAM), with the exception of reasonable restrictions, appropriately disclosed in advance, that are specifically designed to ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other investors as a result of an actual lack of liquidity of the underlying assets, provided that such restrictions are applied consistently and in like manner to all such investors.*''

The Applicant requests that I(j)(5) be revised by replacing, ''including'' with ''with respect to,'' and replacing, ''as a result of an actual lack of liquidity of the underlying assets, provided that such restrictions are applied consistently and in like manner to all such investors;'' with ''in connection with any such arrangements involving investments in pooled funds subject to ERISA entered into after the Conviction Date, the adverse consequences must relate to a lack of liquidity of the pooled fund's underlying assets, valuation issues, or regulatory reasons that prevent the fund from immediately redeeming an ERISA-covered plan's or IRA's investment, and such restrictions are applicable to all such investors and effective no longer than reasonably necessary to avoid the adverse consequences.''

The Department has modified this condition (renumbered in this exemption as Section I(j)(4)) to clarify the circumstances under which reasonable restrictions are necessary to protect the remaining investors in a pooled fund and to also clarify that, in any such event, the restrictions must be reasonable and last no longer than reasonably necessary to remedy the adverse consequences. The revised and renumber Section I(j)(4) provides, ''Not to restrict the ability of such Covered Plan to terminate or withdraw from its arrangement with the Citigroup Affiliated QPAM with respect to any investment in a separately managed account or pooled fund subject to ERISA and managed by such QPAM, with the exception of reasonable restrictions, appropriately disclosed in advance, that are specifically designed to ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other investors. In connection with any such arrangements involving investments in pooled funds subject to ERISA entered into after the effective date of this exemption, the adverse consequences must relate to of a lack of liquidity of the underlying assets, valuation issues, or regulatory reasons that prevent the fund from promptly redeeming an ERISA-covered plan's or IRA's investment, and such restrictions must be applicable to all such investors and effective no longer than reasonably necessary to avoid the adverse consequences.''

Limits on Liability—Section I(j)(7)

Section I(j)(7) of the proposed five-year exemption provides that each Citigroup Affiliated QPAM agrees and warrants: ''*(j)(7) Not to include exculpatory provisions disclaiming or otherwise limiting liability of the Citigroup Affiliated QPAM for a violation of such agreement's terms, except for liability caused by an error, misrepresentation, or misconduct of a plan fiduciary or other party hired by the plan fiduciary which is independent of Citigroup, and its affiliates.*''

The Department has modified Section I(j)(6) (formerly (j)(7)) to clarify that the prohibition on exculpatory provisions does not extend to losses that arise from an act or event not caused by Citigroup, and that nothing in this section alters the prohibition on exculpatory provisions set forth in ERISA Section 410.

Notice and Updated Investment Management Agreement—Section I(j)(8)

Section I(j)(8) of the proposed five-year exemption provides that, ''*(j)(8) Within four (4) months of the date of the Conviction, each Citigroup Affiliated QPAM must provide a notice of its obligations under this Section I(j) to each ERISA-covered plan and IRA for which a Citigroup Affiliated QPAM provides asset management or other discretionary fiduciary services. For all other prospective ERISA-covered plan and IRA clients for which a Citigroup Affiliated QPAM provides asset management or other discretionary services, the Citigroup Affiliated QPAM will agree in writing to its obligations under this Section I(j) in an updated investment management agreement between the Citigroup Affiliated QPAM and such clients or other written contractual agreement.*''

The Applicant requests that Section I(j)(8) be revised to extend the applicable notification period from 4 months to 6 months. The Applicant also requests that I(j)(8) be limited to ERISA-covered plans and IRAs for which a Citigroup Affiliated QPAM provides asset management or other discretionary fiduciary services ''*in reliance on PTE 84–14.*''

As noted above, the Department has an interest in protecting an ERISA-covered plan or IRA that enters into an asset management agreement with a Citigroup Affiliated QPAM in reliance on the manager's qualification as a QPAM, regardless of whether the QPAM relies on the class exemption when managing such ERISA-covered plan's or IRA's assets. The Department has revised the applicability of this condition to more closely reflect this interest, and the condition now applies only to Covered Plans. The Department has also modified the condition so that a Citigroup Affiliated QPAM will not violate the condition solely because a Covered Plan refuses to sign an updated investment management agreement. In addition, the Department has revised Section I(j)(8) to provide that the Citigroup Affiliated QPAM must provide notice to each Covered Plan by July 9, 2018.

[42] The Department has renumbered this section as Section I(j)(4) in this final exemption.

Notice to Covered Plan Clients—Section I(k)(1)[43]

Section I(k)(1) of the proposed five-year exemption provides, in relevant part that, ''*Within fifteen (15) days of the publication of this proposed five-year exemption in the* ***Federal Register****, each Citigroup Affiliated QPAM will provide a notice of the proposed five-year exemption, along with a separate summary describing the facts that led to the Conviction (the Summary), which have been submitted to the Department, and a prominently displayed statement (the Statement) that the Conviction results in a failure to meet a condition in PTE 84–14,. . . . In the event that this proposed five-year exemption is granted, the* ***Federal Register*** *copy of the notice of final five-year exemption must be delivered to such clients within sixty (60) days of its publication in the* ***Federal Register***''

The Applicant requests that Section I(k)(1) be revised to read, in relevant part, ''Each Citigroup Affiliated QPAM has provided a notice of the proposed five-year exemption, along with a separate summary describing the facts that led to the Conviction (the Summary). . . . In addition, the **Federal Register** copy of the notice of final five-year exemption must be delivered to such clients within sixty (60) days of its publication in the **Federal Register**. . . .''

The Department notes that the proposed exemption provides details of the facts and circumstances underlying the Conviction not found in the Summary or the final grant. One of the purposes of such a complete disclosure is to ensure that all interested parties are aware of, and attentive to, the complete facts and circumstances surrounding Citigroup's application for exemption. Requiring the disclosure of the Summary, proposal, and grant provides the opportunity for all parties to have knowledge of these facts and circumstance.

Notwithstanding this, the Department has modified the condition to clarify that disclosures under this condition may be provided electronically. Further, the notice requirement under this condition has been narrowed to ERISA-covered plans and IRAs that would benefit from this knowledge (*i.e.,* Covered Plans).

Notice to Non-Plan Clients—Section I(k)(2)

Section I(k)(2) of the proposed five-year exemption provides, in relevant part that, ''*Each Citigroup Affiliated QPAM will provide a* ***Federal Register*** *copy of the proposed five-year exemption, a* ***Federal Register*** *copy of the final five-year exemption; the Summary; and the Statement to each: (A) Current Non-Plan Client within four (4) months of the effective date, if any, of a final five-year exemption; and (B) Future Non-Plan Client prior to, or contemporaneously with, the client's receipt of a written asset management agreement from the Citigroup Affiliated QPAM.*''

Given the breadth of the notice requirements otherwise mandated by the exemption, and the decision to restrict such requirements to arrangements for which QPAM status plays an integral role (*i.e.,* the QPAM represents or relies upon its QPAM status), the Department has determined to delete this provision.

Compliance Officer—Section I(m)

Section I(m)(1) of the proposed five-year exemption provides, ''*(m)(1) Citigroup designates a senior compliance officer (the Compliance Officer) who will be responsible for compliance with the Policies and Training requirements described herein. . . (i) The Compliance Officer must be a legal professional with extensive experience with, and knowledge of, the regulation of financial services and products, including under ERISA and the Code; and (ii) The Compliance Officer must have a direct reporting line to the highest-ranking corporate officer in charge of legal compliance that is independent of Citigroup's other business lines.*''

As stated above, the Applicant requests that the compliance officer requirement of Section I(m) be deleted from the exemption in its entirety. In support of its request, the Applicant states that this requirement is burdensome, costly, and redundant. The Applicant states that it has comprehensive compliance and internal audit departments that should be responsible for developing and implementing the necessary policies and procedures under this exemption.

The Department declines to eliminate the compliance officer requirement under this exemption. Citigroup personnel engaged in serious misconduct that was caused, at least in part, by compliance and oversight failure. The Department's determination to grant this exemption is based in part on the view that an internal compliance officer with responsibility for the Policies and Training mandated by this exemption will provide the level of oversight necessary to ensure that such Policies and Training are properly developed and implemented throughout the term of this exemption.

The Applicant also requests that Section I(m)(1) be clarified by deleting the word ''legal'' from the phrase ''legal compliance'' in clause (ii). In this regard, the Applicant states that the Citigroup's compliance function is separate from its legal function. The Applicant also requests that Section I(m) be revised to clarify that the Compliance Officer will be a senior compliance officer of Citigroup Inc. or one of its affiliates, and that such senior compliance officer will be an officer who reports directly to, or reports to another compliance officer who reports directly to, Citigroup Inc.'s highest ranking compliance officer (whose title is currently Global Chief Compliance Officer of Citigroup Inc.).

After consideration of the Applicant's comment, the Department has revised Section I(m)(1) in the manner requested by the Applicant.

Deferred Prosecution/Non-Prosecution Agreements—Section I(o)

Section I(o) of the proposed five-year exemption provides, ''*(o) During the effective period of the five-year exemption, Citigroup: (1) Immediately discloses to the Department any Deferred Prosecution Agreement (a DPA) or a Non-Prosecution Agreement (an NPA) with the U.S. Department of Justice, entered into by Citigroup or any of its affiliates in connection with conduct described in Section I(g) of PTE 84–14 or section 411 of ERISA; and (2) Immediately provides the Department any information requested by the Department, as permitted by law, regarding the agreement and/or conduct and allegations that led to the agreement. The Department may, following its review of that information, require Citigroup or a party specified by the Department, to submit a new application for the continued availability of relief as a condition of continuing to rely on this exemption. If the Department denies the relief requested in that application, or does not grant such relief within twelve (12) months of the application, the relief described herein would be revoked as of the date of denial or as of the expiration of the twelve month period, whichever date is earlier.*''

The Applicant requests that Section I(o)(2) be revised to read substantially the same as Section I(l) of PTE–2016–14, subject to the following additional changes. The Applicant requests the replacement of the word ''immediately'' with ''promptly'' in subsections (1) and (2); the insertion of the word ''reasonably'' before the phrase

[43] The Department has renumbered this section as Section I(k) in this final exemption.

''requested by the Department'' in subsection (2); and the deletion of the final sentence of subsection (2), which reads ''If the Department denies the relief requested in that application, or does not grant such relief within twelve (12) months of the application, the relief described herein would be revoked as of the date of denial or as of the expiration of the twelve month period, whichever date is earlier.''

The Department in no way intended that this condition be read as providing for an automatic revocation of this exemption, and in light of the Applicant's comments, has revised the condition accordingly. As revised, the condition requires that the Applicant notify the Department if and when it, or any of its affiliates enter into a DPA or NPA with the U.S. Department of Justice for conduct described in section I(g) of PTE 84–14 or ERISA section 411; and immediately provide, upon request by the Department, any information, as permitted by law, regarding the agreement and/or conduct and allegations that led to the agreement. The Department, however, retains the right to propose a withdrawal of the exemption pursuant to its procedures contained at 29 CFR 2570.50, should circumstances warrant such action.

Right to Copies of Policies and Procedures—Section I(p)

Section I(p) of the proposed five-year exemption provides that, ''*[e]ach Citigroup Affiliated QPAM, in its agreements with ERISA-covered plan and IRA clients, or in other written disclosures provided to ERISA-covered plan and IRA clients, within 60 days prior to the initial transaction upon which relief hereunder is relied, and then at least once annually, will clearly and prominently: Inform the ERISA-covered plan and IRA client that the client has the right to obtain copies of the QPAM's written Policies adopted in accordance with the exemption.*''

Ensuring that ERISA covered-plan and IRA clients have a means by which to review and understand the Policies implemented in connection with this exemption is a vital protection that is fundamental to this exemption's purpose. The Department has modified Section I(p) to provide that the Citigroup Affiliated QPAMs, at their election, may provide Covered Plans with a disclosure that accurately describes or summarizes key components of the Policies. As revised, Section I(p) does not require the Citigroup Affiliated QPAMs to provide the Policies in their entirety. The Department has also determined that such disclosure may be continuously maintained on a website, provided that a website link to the summary of the written Policies is clearly and prominently disclosed to those Covered Plan clients to whom this section applies. The Department has also modified Section I(p) to require that the Citigroup Affiliated QPAMs provide notice regarding the information on the website within 60 days of the effective date of this exemption, and thereafter to the extent certain material changes are made to the Policies.

New Definition of Citcorp

In the PTE 2016–14 Comment Letter, the Applicant requested that the Department add a definition for the term ''Citicorp'' to read as: ''The term 'Citicorp' means, a financial services holding company organized and existing under the laws of Delaware and does not include any subsidiaries or other affiliates.'' After consideration of the Applicant's comment, the Department has added a new Section II(e) to this exemption defining Citicorp in the manner requested by the Applicant.

Summary of Facts and Representations

The Applicant seeks certain clarifications to the Summary of Facts and Representations which the Department does not view as relevant to its determination whether to grant this exemption. Those requested clarifications may be found as part of the public record for Application No. D–11909, in a letter to the Department, dated February 28, 2017.

Letter From House Committee on Financial Services

The Department also received a comment letter from certain members of Congress (the Members) regarding this exemption, as well as other QPAM-related proposed one year exemptions. In the letter, the Members stated that certain conditions contained in these proposed exemptions are crucial to protecting the investments of our nation's workers and retirees, referring to proposed conditions which require each bank to: (a) Indemnify and hold harmless ERISA-covered plans and IRAs for any damages resulting from the future misconduct of such bank; and (b) disclose to the Department any Deferred Prosecution Agreement or a Non-Prosecution Agreement with the U.S. Department of Justice. The Members also requested that the Department hold hearings in connection with the proposed exemptions.

The Department acknowledges the Members' concerns regarding the need for public discourse regarding proposed exemptions. To this end, the Department's procedures regarding prohibited transaction exemption requests under ERISA (the Exemption Procedures) afford interested persons the opportunity to request a hearing. Specifically, section 2570.46(a) of the Exemption Procedures provides that, ''[a]ny interested person who may be adversely affected by an exemption which the Department proposes to grant from the restrictions of section 406(b) of ERISA, section 4975(c)(1)(E) or (F) of the Code, or section 8477(c)(2) of FERSA may request a hearing before the Department within the period of time specified in the **Federal Register** notice of the proposed exemption.'' The Exemption Procedures provide that ''[t]he Department will grant a request for a hearing made in accordance with paragraph (a) of this section where a hearing is necessary to fully explore material factual issues identified by the person requesting the hearing.'' The Exemption Procedures also provide that ''[t]he Department may decline to hold a hearing where: (1) The request for the hearing does not meet the requirements of paragraph (a) of this section; (2) the only issues identified for exploration at the hearing are matters of law; or (3) the factual issues identified can be fully explored through the submission of evidence in written (including electronic) form.'' [44]

While the Members' letter raises important policy issues, it does not appear to raise specific material factual issues. The Department previously explored a wide range of legal and policy issues regarding Section I(g) of the QPAM Exemption during a public hearing held on January 15, 2015 in connection with the Department's proposed exemption involving Credit Suisse AG, and has determined that an additional hearing on these issues is not necessary.

Comments From Interested Persons

The Department also received comment letters from certain interested persons. With respect to each, the commenter sought a further explanation regarding the proposed exemption.

After giving full consideration to the record, the Department has decided to grant the exemption, as described above. The complete application file (Application No. D–11909) is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N–1515, U.S. Department of Labor, 200

[44] 29 CFR part 2570, published at 76 FR 66653, October 27, 2011.

Constitution Avenue NW, Washington, DC 20210.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on November 21, 2016 at 81 FR 83416.

Exemption

Section I: Covered Transactions

Certain entities with specified relationships to Citigroup (hereinafter, the Citigroup Affiliated QPAMs and the Citigroup Related QPAMs, as defined in Sections II(f) and II(g), respectively) will not be precluded from relying on the exemptive relief provided by Prohibited Transaction Class Exemption 84–14 (PTE 84–14 or the QPAM Exemption), notwithstanding the Conviction, as defined in Section II(a), during the Exemption Period,[45] provided that the following conditions are satisfied:

(a) Other than a single individual who worked for a non-fiduciary business within Citigroup's Markets and Securities Services business, and who had no responsibility for, and exercised no authority in connection with, the management of plan assets, the Citigroup Affiliated QPAMs and the Citigroup Related QPAMs (including their officers, directors, agents other than Citicorp, and employees of such QPAMs who had responsibility for, or exercised authority in connection with the management of plan assets) did not know of, did not have reason to know of, or participate in the criminal conduct that is the subject of the Conviction. For purposes of this paragraph (a), ''participate in'' means the knowing approval of the misconduct underlying the Conviction;

(b) Other than a single individual who worked for a non-fiduciary business within Citigroup's Markets and Securities Services Business, and who had no responsibility for, and exercised no authority in connection with, the management of plan assets, the Citigroup Affiliated QPAMs and the Citigroup Related QPAMs (including their officers, directors, and agents other than Citicorp, and employees of such Citigroup QPAMs) did not receive direct compensation, or knowingly receive indirect compensation in connection with the criminal conduct that is the subject of the Conviction;

(c) The Citigroup Affiliated QPAMs will not employ or knowingly engage any of the individuals that participated in the criminal conduct that is the subject of the Conviction. For the purposes of this paragraph (c), ''participated in'' means the knowing approval of the misconduct underlying the Conviction;

(d) At all times during the Exemption Period, no Citigroup Affiliated QPAM will use its authority or influence to direct an ''investment fund'' (as defined in Section VI(b) of PTE 84–14), that is subject to ERISA or the Code and managed by such Citigroup Affiliated QPAM in reliance on PTE 84–14, or with respect to which a Citigroup Affiliated QPAM has expressly represented to an ERISA-covered plan or IRA with assets invested in such ''investment fund'' that it qualifies as a QPAM or relies on PTE 84–14, to enter into any transaction with Citicorp, or to engage Citicorp to provide any service to such investment fund, for a direct or indirect fee borne by such investment fund, regardless of whether such transaction or service may otherwise be within the scope of relief provided by an administrative or statutory exemption;

(e) Any failure of a Citigroup Affiliated QPAM or a Citigroup Related QPAM to satisfy Section I(g) of PTE 84–14 arose solely from the Conviction;

(f) A Citigroup Affiliated QPAM or a Citigroup Related QPAM did not exercise authority over the assets of any plan subject to Part 4 of Title I of ERISA (an ERISA-covered plan) or section 4975 of the Code (an IRA) in a manner that it knew or should have known would: Further the criminal conduct that is the subject of the Conviction; or cause the Citigroup Affiliated QPAM, the Citigroup Related QPAM, or their affiliates to directly or indirectly profit from the criminal conduct that is the subject of the Conviction;

(g) Other than with respect to employee benefit plans maintained or sponsored for its own employees or the employees of an affiliate, Citicorp will not act as a fiduciary within the meaning of section 3(21)(A)(i) or (iii) of ERISA, or section 4975(e)(3)(A) and (C) of the Code, with respect to ERISA-covered plan and IRA assets; provided, however, that Citicorp will not be treated as violating the conditions of this exemption solely because it acted as an investment advice fiduciary within the meaning of section 3(21)(A)(ii) or section 4975(e)(3)(B) of the Code;

(h)(1) By July 9, 2018, each Citigroup Affiliated QPAM must develop, implement, maintain, and follow written policies and procedures (the Policies). The Policies must require, and must be reasonably designed to ensure that:

(i) The asset management decisions of the Citigroup Affiliated QPAM are conducted independently of the corporate management and business activities of Citigroup;

(ii) The Citigroup Affiliated QPAM fully complies with ERISA's fiduciary duties, and with ERISA and the Code's prohibited transaction provisions, as applicable with respect to each Covered Plan, and does not knowingly participate in any violation of these duties and provisions with respect to Covered Plans;

(iii) The Citigroup Affiliated QPAM does not knowingly participate in any other person's violation of ERISA or the Code with respect to Covered Plans;

(iv) Any filings or statements made by the Citigroup Affiliated QPAM to regulators, including, but not limited to, the Department, the Department of the Treasury, the Department of Justice, and the Pension Benefit Guaranty Corporation, on behalf of or in relation to Covered Plans, are materially accurate and complete, to the best of such QPAM's knowledge at the time;

(v) To the best of the Citigroup Affiliated QPAM's knowledge at the time, the Citigroup Affiliated QPAM does not make material misrepresentations or omit material information in its communications with such regulators with respect to Covered Plans;

(vi) The Citigroup Affiliated QPAM complies with the terms of this exemption; and

(vii) Any violation of, or failure to comply with an item in subparagraphs (ii) through (vi), is corrected as soon as reasonably possible upon discovery, or as soon after the QPAM reasonably should have known of the noncompliance (whichever is earlier), and any such violation or compliance failure not so corrected is reported, upon the discovery of such failure to so correct, in writing, to the head of compliance and the General Counsel (or their functional equivalent) of the relevant line of business that engaged in the violation or failure, and the independent auditor responsible for reviewing compliance with the Policies. A Citigroup Affiliated QPAM will not be treated as having failed to develop, implement, maintain, or follow the Policies, provided that it corrects any instance of noncompliance as soon as reasonably possible upon discovery, or as soon as reasonably possible after the QPAM reasonably should have known

[45] Section I(g) of PTE 84–14 generally provides that ''[n]either the QPAM nor any affiliate thereof . . . nor any owner . . . of a 5 percent or more interest in the QPAM is a person who within the 10 years immediately preceding the transaction has been either convicted or released from imprisonment, whichever is later, as a result of'' certain felonies including violation of the Sherman Antitrust Act, Title 15 United States Code, Section 1.

of the noncompliance (whichever is earlier), and provided that it adheres to the reporting requirements set forth in this subparagraph (vii);

(2) By July 9, 2018, each Citigroup Affiliated QPAM must develop a program of training (the Training), to be conducted at least annually, for all relevant Citigroup Affiliated QPAM asset/portfolio management, trading, legal, compliance, and internal audit personnel. The first Training under this Final Exemption must be completed by all relevant Citigroup Affiliated QPAM personnel by July 9, 2019 (by the end of this 30-month period, asset/portfolio management, trading, legal, compliance, and internal audit personnel who were employed from the start to the end of the period must have been trained twice: The first time under PTE 2016–15; and the second time under this exemption). The Training must:

(i) At a minimum, cover the Policies, ERISA and Code compliance (including applicable fiduciary duties and the prohibited transaction provisions), ethical conduct, the consequences for not complying with the conditions of this exemption (including any loss of exemptive relief provided herein), and prompt reporting of wrongdoing; and

(ii) Be conducted by a professional who has been prudently selected and who has appropriate technical training and proficiency with ERISA and the Code;

(i)(1) Each Citigroup Affiliated QPAM, which the Applicant has identified in a certificate signed by the officer who will review and certify the Audit Report (as defined in Section I(i)(5)) pursuant to Section I(i)(8), submits to an audit conducted every two years by an independent auditor who has been prudently selected and who has appropriate technical training and proficiency with ERISA and the Code, to evaluate the adequacy of, and each Citigroup Affiliated QPAM's compliance with, the Policies and Training described herein. The audit requirement must be incorporated in the Policies. Each audit must cover the preceding consecutive twelve (12) month period. The first audit must cover the period from July 10, 2018 through July 9, 2019, and must be completed by January 9, 2020. The second audit must cover the period from July 10, 2020 through July 9, 2021, and must be completed by January 9, 2022. In the event that the Exemption Period is extended or a new exemption is granted, the third audit would cover the period from July 10, 2022 through July 9, 2023, and would have to be completed by January 9, 2024 (unless the Department chooses to alter the biennial audit requirement in the new or extended exemption);

(2) Within the scope of the audit and to the extent necessary for the auditor, in its sole opinion, to complete its audit and comply with the conditions for relief described herein, and only to the extent such disclosure is not prevented by state or federal statute, or involves communications subject to attorney client privilege, each Citigroup Affiliated QPAM and, if applicable, Citigroup, will grant the auditor unconditional access to its business, including, but not limited to: Its computer systems; business records; transactional data; workplace locations; training materials; and personnel. Such access is limited to information relevant to the auditor's objectives as specified by the terms of this exemption;

(3) The auditor's engagement must specifically require the auditor to determine whether each Citigroup Affiliated QPAM has developed, implemented, maintained, and followed the Policies in accordance with the conditions of this exemption, and has developed and implemented the Training, as required herein;

(4) The auditor's engagement must specifically require the auditor to test each Citigroup Affiliated QPAM's operational compliance with the Policies and Training. In this regard, the auditor must test, for each QPAM, a sample of such QPAM's transactions involving Covered Plans, sufficient in size and nature to afford the auditor a reasonable basis to determine such QPAM's operational compliance with the Policies and Training;

(5) For each audit, on or before the end of the relevant period described in Section I(i)(1) for completing the audit, the auditor must issue a written report (the Audit Report) to Citigroup and the Citigroup Affiliated QPAM to which the audit applies that describes the procedures performed by the auditor during the course of its examination. The auditor, at its discretion, may issue a single consolidated Audit Report that covers all the Citigroup Affiliated QPAMs. The Audit Report must include the auditor's specific determinations regarding:

(i) The adequacy of each Citigroup Affiliated QPAM's Policies and Training; each Citigroup Affiliated QPAM's compliance with the Policies and Training; the need, if any, to strengthen such Policies and Training; and any instance of the respective Citigroup Affiliated QPAM's noncompliance with the written Policies and Training described in Section I(h) above. The Citigroup Affiliated QPAM must properly address any noncompliance. The Citigroup Affiliate must promptly address or prepare a written plan of action to address any determination by the auditor regarding the adequacy of the Policies and Training and the auditor's recommendations (if any) with respect to strengthening the Policies and Training of the respective Citigroup Affiliated QPAM. Any action taken or the plan of action to be taken by the respective Citigroup Affiliated QPAM must be included in an addendum to the Audit Report (such addendum must be completed prior to the certification described in Section I(i)(7) below). In the event such a plan of action to address the auditor's recommendation regarding the adequacy of the Policies and Training is not completed by the time of submission of the Audit Report, the following period's Audit Report must state whether the plan was satisfactorily completed. Any determination by the auditor that the respective Citigroup Affiliated QPAM has implemented, maintained, and followed sufficient Policies and Training must not be based solely or in substantial part on an absence of evidence indicating noncompliance. In this last regard, any finding that a Citigroup Affiliated QPAM has complied with the requirements under this subsection must be based on evidence that the particular Citigroup Affiliated QPAM has actually implemented, maintained, and followed the Policies and Training required by this exemption. Furthermore, the auditor must not solely rely on the Annual Report created by the compliance officer (the Compliance Officer), as described in Section I(m) below, as the basis for the auditor's conclusions in lieu of independent determinations and testing performed by the auditor, as required by Section I(i)(3) and (4) above; and

(ii) The adequacy of the most recent Annual Review described in Section I(m);

(6) The auditor must notify the respective Citigroup Affiliated QPAM of any instance of noncompliance identified by the auditor within five (5) business days after such noncompliance is identified by the auditor, regardless of whether the audit has been completed as of that date;

(7) With respect to each Audit Report, the General Counsel, or one of the three most senior executive officers of the Citigroup Affiliated QPAM to which the Audit Report applies, must certify in writing, under penalty of perjury, that the officer has reviewed the Audit Report and this exemption; that such Citigroup Affiliated QPAM has

addressed, corrected or remedied any noncompliance and inadequacy or has an appropriate written plan to address any inadequacy regarding the Policies and Training identified in the Audit Report. Such certification must also include the signatory's determination that the Policies and Training in effect at the time of signing are adequate to ensure compliance with the conditions of this exemption, and with the applicable provisions of ERISA and the Code;

(8) The Risk Management Committee of Citigroup's Board of Directors is provided a copy of each Audit Report; and a senior executive officer of Citigroup or one of its affiliates who reports directly to, or reports to another executive who reports directly to, the highest ranking compliance officer of Citigroup must review the Audit Report for each Citigroup Affiliated QPAM and must certify in writing, under penalty of perjury, that such officer has reviewed each Audit Report;

(9) Each Citigroup Affiliated QPAM provides its certified Audit Report, by regular mail to: Office of Exemption Determinations (OED), 200 Constitution Avenue NW, Suite 400, Washington, DC 20210, or by private carrier to: 122 C Street NW, Suite 400, Washington, DC 20001–2109. This delivery must take place no later than thirty (30) days following completion of the Audit Report. The Audit Report will be made part of the public record regarding this exemption. Furthermore, each Citigroup Affiliated QPAM must make its Audit Report unconditionally available, electronically or otherwise, for examination upon request by any duly authorized employee or representative of the Department, other relevant regulators, and any fiduciary of a Covered Plan;

(10) Each Citigroup Affiliated QPAM and the auditor must submit to OED: Any engagement agreement(s) entered into pursuant to the engagement of the auditor under this exemption, no later than two (2) months after the execution of any such engagement agreement;

(11) The auditor must provide the Department, upon request, for inspection and review, access to all the workpapers created and utilized in the course of the audit, provided such access and inspection is otherwise permitted by law; and

(12) Citigroup must notify the Department of a change in the independent auditor no later than two (2) months after the engagement of a substitute or subsequent auditor and must provide an explanation for the substitution or change including a description of any material disputes between the terminated auditor and Citigroup;

(j) As of January 10, 2018, and throughout the Exemption Period, with respect to any arrangement, agreement, or contract between a Citigroup Affiliated QPAM and a Covered Plan, the Citigroup Affiliated QPAM agrees and warrants:

(1) To comply with ERISA and the Code, as applicable with respect to such Covered Plan; to refrain from engaging in prohibited transactions that are not otherwise exempt (and to promptly correct any inadvertent prohibited transactions); and to comply with the standards of prudence and loyalty set forth in section 404 of ERISA with respect to each such ERISA-covered plan and IRA to the extent that section is applicable;

(2) To indemnify and hold harmless the Covered Plan for any actual losses resulting directly from a Citigroup Affiliated QPAM's violation of ERISA's fiduciary duties, as applicable, and the prohibited transaction provisions of ERISA and the Code, as applicable; a breach of contract by the QPAM; or any claim arising out of the failure of such Citigroup Affiliated QPAM to qualify for the exemptive relief provided by PTE 84–14 as a result of a violation of Section I(g) of PTE 84–14 other than the Conviction. This condition applies only to actual losses caused by the Citigroup Affiliated QPAM's violations;

(3) Not to require (or otherwise cause) the Covered Plan to waive, limit, or qualify the liability of the Citigroup Affiliated QPAM for violating ERISA or the Code or engaging in prohibited transactions;

(4) Not to restrict the ability of such Covered Plan to terminate or withdraw from its arrangement with the Citigroup Affiliated QPAM with respect to any investment in a separately managed account or pooled fund subject to ERISA and managed by such QPAM, with the exception of reasonable restrictions, appropriately disclosed in advance, that are specifically designed to ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other investors. In connection with any such arrangements involving investments in pooled funds subject to ERISA entered into after the effective date of this exemption, the adverse consequences must relate to of a lack of liquidity of the underlying assets, valuation issues, or regulatory reasons that prevent the fund from promptly redeeming an ERISA-covered plan's or IRA's investment, and such restrictions must be applicable to all such investors and effective no longer than reasonably necessary to avoid the adverse consequences;

(5) Not to impose any fees, penalties, or charges for such termination or withdrawal with the exception of reasonable fees, appropriately disclosed in advance, that are specifically designed to prevent generally recognized abusive investment practices or specifically designed to ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other investors, provided that such fees are applied consistently and in like manner to all such investors;

(6) Not to include exculpatory provisions disclaiming or otherwise limiting liability of the Citigroup Affiliated QPAM for a violation of such agreement's terms. To the extent consistent with Section 410 of ERISA, however, this provision does not prohibit disclaimers for liability caused by an error, misrepresentation, or misconduct of a plan fiduciary or other party hired by the plan fiduciary who is independent of Citigroup, and its affiliates, or damages arising from acts outside the control of the Citigroup Affiliated QPAM;

(7) By July 9, 2018, each Citigroup Affiliated QPAM must provide a notice of its obligations under this Section I(j) to each Covered Plan. For all other prospective Covered Plans, the Citigroup Affiliated QPAM will agree to its obligations under this Section I(j) in an updated investment management agreement between the Citigroup Affiliated QPAM and such clients or other written contractual agreement. This condition will be deemed met for each Covered Plan that received a notice pursuant to PTE 2016–14 that meets the terms of this condition. Notwithstanding the above, a Citigroup Affiliated QPAM will not violate the condition solely because a Plan or IRA refuses to sign an updated investment management agreement;

(k) By March 10, 2018, each Citigroup Affiliated QPAM will provide a notice of the exemption, along with a separate summary describing the facts that led to the Conviction (the Summary), which have been submitted to the Department, and a prominently displayed statement (the Statement) that the Conviction results in a failure to meet a condition in PTE 84–14, to each sponsor and beneficial owner of a Covered Plan, or the sponsor of an investment fund in any case where a Citigroup Affiliated QPAM acts as a sub-advisor to the investment fund in which such ERISA-covered plan and IRA invests. Any prospective clients for which a Citigroup Affiliated QPAM relies on PTE 84–14 or has expressly represented that the manager qualifies as a QPAM or relies on the QPAM class exemption must receive the proposed and final exemptions with the Summary and the Statement prior to, or contemporaneously with, the client's receipt of a written asset management agreement from the Citigroup Affiliated QPAM. Disclosures may be delivered electronically.

(l) The Citigroup Affiliated QPAMs must comply with each condition of PTE 84–14, as amended, with the sole exception of the violation of Section I(g) of PTE 84–14 that is attributable to the Conviction;

(m)(1) By July 9, 2018, Citigroup designates a senior compliance officer (the Compliance Officer) who will be responsible for compliance with the Policies and Training requirements described herein. The Compliance Officer must conduct an annual review for each annual period beginning on January 10, 2018 (the Annual Review) [46] to determine the adequacy and effectiveness of the implementation of the Policies and Training. With respect to the Compliance Officer, the following conditions must be met:

(i) The Compliance Officer must be a professional who has extensive experience with, and knowledge of, the regulation of financial services and products, including under ERISA and the Code; and

(ii) The Compliance Officer must be a senior compliance officer of Citigroup Inc. or one of its affiliates, and such senior compliance officer will be an officer who reports directly to, or reports to another compliance officer who reports directly to, Citigroup Inc.'s highest ranking compliance officer (whose title is currently Global Chief Compliance Officer of Citigroup Inc.);

(2) With respect to each Annual Review, the following conditions must be met:

(i) The Annual Review includes a review of: Any compliance matter related to the Policies or Training that was identified by, or reported to, the Compliance Officer or others within the compliance and risk control function (or its equivalent) during the previous year; any material change in the relevant business activities of the Citigroup Affiliated QPAMs; and any change to ERISA, the Code, or regulations related to fiduciary duties and the prohibited transaction provisions that may be applicable to the activities of the Citigroup Affiliated QPAMs;

(ii) The Compliance Officer prepares a written report for each Annual Review (each, an Annual Report) that (A) summarizes his or her material activities during the preceding year; (B) sets forth any instance of noncompliance discovered during the preceding year, and any related corrective action; (C) details any change to the Policies or Training to guard against any similar instance of noncompliance occurring again; and (D) makes recommendations, as necessary, for additional training, procedures, monitoring, or additional and/or changed processes or systems, and management's actions on such recommendations;

(iii) In each Annual Report, the Compliance Officer must certify in writing that to his or her knowledge: (A) The report is accurate; (B) the Policies and Training are working in a manner which is reasonably designed to ensure that the Policies and Training requirements described herein are met; (C) any known instance of noncompliance during the preceding year and any related correction taken to date have been identified in the Annual Report; and (D) the Citigroup Affiliated QPAMs have complied with the Policies and Training and/or corrected (or is correcting) any instances of noncompliance in accordance with Section I(h) above;

(iv) Each Annual Report must be provided to appropriate corporate officers of Citigroup and each Citigroup Affiliated QPAM to which such report relates; the head of compliance and the General Counsel (or their functional equivalent) of the relevant Citigroup Affiliated QPAM; and must be made unconditionally available to the independent auditor described in Section I(i) above;

(v) Each Annual Review, including the Compliance Officer's written Annual Report, must be completed within three (3) months following the end of the period to which it relates;

(n) Each Citigroup Affiliated QPAM will maintain records necessary to demonstrate that the conditions of this exemption have been met, for six (6) years following the date of any transaction for which such Citigroup Affiliated QPAM relies upon the relief in the exemption;

(o) During the Exemption Period, Citigroup: (1) Immediately discloses to the Department any Deferred Prosecution Agreement (a DPA) or a Non-Prosecution Agreement (an NPA) with the U.S. Department of Justice, entered into by Citigroup or any of its affiliates in connection with conduct described in Section I(g) of PTE 84–14 or section 411 of ERISA; and (2) immediately provides the Department any information requested by the Department, as permitted by law, regarding the agreement and/or conduct and allegations that led to the agreement;

(p) By July 9, 2018, each Citigroup Affiliated QPAM, in its agreements with, or in other written disclosures provided to Covered Plans, will clearly and prominently inform Covered Plan clients of their right to obtain a copy of the Policies or a description (''Summary Policies'') which accurately summarizes key components of the QPAM's written Policies developed in connection with this exemption. If the Policies are thereafter changed, each Covered Plan client must receive a new disclosure within six (6) months following the end of the calendar year during which the Policies were changed.[47] With respect to this requirement, the description may be continuously maintained on a website, provided that such website link to the Policies or the Summary Policies is clearly and prominently disclosed to each Covered Plan; and

(q) A Citigroup Affiliated QPAM or a Citigroup Related QPAM will not fail to meet the terms of this exemption, solely because a different Citigroup Affiliated QPAM or Citigroup Related QPAM fails to satisfy a condition for relief described in Sections I(c), (d), (h), (i), (j), (k), (l), (n) and (p); or if the independent auditor described in Section I(i) fails a provision of the exemption other than the requirement described in Section I(i)(11), provided that such failure did not result from any actions or inactions of Citigroup or its affiliates.

Section II: Definitions

(a) The term ''Conviction'' means the judgment of conviction against Citicorp for violation of the Sherman Antitrust Act, 15 U.S.C. 1, entered in the District Court for the District of Connecticut (the District Court) (Case Number 3:15-cr-78–SRU). For all purposes under this exemption, ''conduct'' of any person or entity that is the ''subject of [a] Conviction'' encompasses the conduct described in Paragraph 4(g)-(i) of the Plea Agreement filed in the District Court in Case Number 3:15-cr-78–SRU;

(b) The term ''Covered Plan'' is a plan subject to Part 4 of Title 1 of ERISA (''ERISA-covered plan'') or a plan

[46] Note that such Annual Review must be completed with respect to the annual periods ending January 9, 2019; January 9, 2020; January 9, 2021; January 9, 2022; and January 9; 2023.

[47] In the event Applicant meets this disclosure requirement through Summary Policies, changes to the Policies shall not result in the requirement for a new disclosure unless, as a result of changes to the Policies, the Summary Policies are no longer accurate.

subject to Section 4975 of the Code (''IRA'') with respect to which a Citigroup Affiliated QPAM relies on PTE 84–14, or with respect to which a Citigroup Affiliated QPAM (or any Citigroup affiliate) has expressly represented that the manager qualifies as a QPAM or relies on the QPAM class exemption (PTE 84–14). A Covered Plan does not include an ERISA-covered Plan or IRA to the extent the Citigroup Affiliated QPAM has expressly disclaimed reliance on QPAM status or PTE 84–14 in entering into its contract, arrangement, or agreement with the ERISA-covered plan or IRA.

(c) The terms ''ERISA-covered plan'' and ''IRA'' mean, respectively, a plan subject to Part 4 of Title I of ERISA and a plan subject to section 4975 of the Code.

(d) The term ''Exemption Period'' means January 10, 2018, through January 9, 2023.

(e) The term ''Citicorp'' means Citicorp, a financial services holding company organized and existing under the laws of Delaware and does not include any subsidiaries or other affiliates.

(f) The term ''Citigroup Affiliated QPAM'' means a ''qualified professional asset manager'' (as defined in Section VI(a) of PTE 84–14) that relies on the relief provided by PTE 84–14 and with respect to which Citigroup is a current or future ''affiliate'' (as defined in Section VI(d)(1) of PTE 84–14). The term ''Citigroup Affiliated QPAM'' excludes Citicorp, the entity implicated in the criminal conduct that is the subject of the Conviction.

(g) The term ''Citigroup Related QPAM'' means any current or future ''qualified professional asset manager'' (as defined in section VI(a) of PTE 84–14) that relies on the relief provided by PTE 84–14, and with respect to which Citigroup owns a direct or indirect five percent or more interest, but with respect to which Citigroup is not an ''affiliate'' (as defined in Section VI(d)(1) of PTE 84–14).

Effective Date

This exemption is effective on January 10, 2018. The term of the exemption is from January 10, 2018, through January 9, 2023 (the Exemption Period).

Department's Comment: The Department cautions that the relief in this exemption would terminate immediately if an entity within the Citigroup corporate structure is convicted of a crime described in Section I(g) of PTE 84–14 (other than the Conviction) during the effective period of the exemption. While such an entity could apply for a new exemption in that circumstance, the Department would not be obligated to grant the exemption. The terms of this exemption have been specifically designed to permit plans to terminate their relationships in an orderly and cost effective fashion in the event of an additional conviction or a determination that it is otherwise prudent for a plan to terminate its relationship with an entity covered by the proposed exemption.

Further Information

For more information on this exemption, contact Mr. Joseph Brennan of the Department, telephone (202) 693–8456. (This is not a toll-free number.)

Barclays Capital Inc. (BCI or the Applicant) Located in New York, New York

[Prohibited Transaction Exemption 2017–06; Exemption Application No. D–11910]

Discussion

On November 21, 2016, the Department of Labor (the Department) published a notice of proposed exemption in the **Federal Register** at 81 FR 83427, for certain entities with specified relationships to Barclays PLC (BPLC) to continue to rely upon the relief provided by PTE 84–14 for a period of five years,[48] notwithstanding BPLC's criminal conviction, as described herein. The Department is granting this exemption in order to ensure that Covered Plans[49] whose assets are managed by a Barclays Affiliated QPAM or Barclays Related QPAM may continue to benefit from the relief provided by PTE 84–14. This exemption is effective from January 10, 2018 through January 9, 2023 (the Exemption Period).

No relief from a violation of any other law is provided by this exemption, including any criminal conviction described in the proposed exemption.

[48] (49 FR 9494, March 13, 1984), as corrected at 50 FR 41430 (October 10, 1985), as amended at 70 FR 49305 (August 23, 2005) and as amended at 75 FR 38837 (July 6, 2010), hereinafter referred to as PTE 84–14 or the QPAM Exemption.

[49] ''Covered Plan'' is a plan subject to Part 4 of Title 1 of ERISA (''ERISA-covered plan'') or a plan subject to section 4975 of the Code (''IRA'') with respect to which a Barclays Affiliated QPAM relies on PTE 84–14, or with respect to which a Barclays Affiliated QPAM (or any BPLC affiliate) has expressly represented that the manager qualifies as a QPAM or relies on the QPAM class exemption (PTE 84–14). A Covered Plan does not include an ERISA-covered Plan or IRA to the extent the Barclays Affiliated QPAM has expressly disclaimed reliance on QPAM status or PTE 84–14 in entering into its contract, arrangement or agreement with the ERISA-covered plan or IRA. See further discussion in this Preamble under the heading Comments 9, 10 & 11—Policies and Procedures Relating to Compliance with ERISA and the Code—Section (I)(ii)–(v).

Furthermore, the Department cautions that the relief in this exemption will terminate immediately if, among other things, an entity within the BPLC corporate structure is convicted of a crime described in Section I(g) of PTE 84–14 (other than the Conviction) during the Exemption Period. The terms of this exemption have been specifically designed to promote conduct that adheres to basic fiduciary standards under ERISA and the Code. The exemption also aims to ensure that plans and IRAs can terminate relationships in an orderly and cost effective fashion in the event a plan or IRA fiduciary determines it is prudent for the plan or IRA to sever its relationship with an entity covered by the exemption.

Written Comments

The Department invited all interested persons to submit written comments and/or requests for a public hearing with respect to the notice of proposed exemption, published in the **Federal Register** at 81 FR 83427 on November 21, 2016.[50] All comments and requests for a hearing were due by January 5, 2017. The Department received written comments from the Applicant and members of the U.S. Congress. After considering these submissions, the Department has determined to grant the exemption, with revisions, as described below.

Comment 1—Confirmation of the Comment Period Deadline

The Applicant requests that the Department confirm that the reference in the preamble to the proposed exemption to comments being due within 30 days was unintentional and the deadline for comments was January 5, 2017. The Department so confirms.

Comment 2—Term of the Exemption

The Applicant requests that the Department extend the term of the exemption from five years to ten years from the Conviction Date, as defined in Section II(e). The Applicant states that the five-year term is inconsistent with precedent and that the ''conduct that is the subject of BPLC's conviction was described by the Department of Justice (DOJ) as 'limited to a small part of [BPLC's] operations;' it involved only two traders; and it did not involve any of BPLC's asset management units.'' The Applicant further states that the limitation to five years is especially problematic given that the DOJ plea

[50] The Department received additional comments from Applicant, however, after the close of the comment period.

agreement with BPLC marked the first time that DOJ awarded a sentencing credit for a company's compliance and remediation efforts and that DOJ singled out BPLC for recognition and credit for its significant improvements to its compliance program and its ''dramatic steps to change its corporate culture.'' In addition, the Applicant states that DOJ called BPLC ''a leader in its efforts toward remediation'' and highlighted its ''extraordinary dedication'' to timely reporting of potential misconduct before it was under any reporting obligation, and that DOJ also lauded BPLC's cooperation during the investigative phase, which it characterized as ''uniquely helpful'' and ''of critical importance.''

Although the Applicant characterizes the conduct as involving the isolated actions of two individuals, the Department does not agree with the apparent suggestion that the Applicant bears little or no responsibility for the criminal conduct. For example, the Department considered BPLC's Plea Agreement, which includes the following statement, under the heading Other Relevant Conduct: ''The defendant, through its currency traders and sales staff, also engaged in other currency trading and sales practices in conducting FX Spot Market transactions with customers via telephone, email, and/or electronic chat, to wit: (*i*) Intentionally working customers' limit orders one or more levels, or 'pips,' away from the price confirmed with the customer; (ii) including sales markup, through the use of live hand signals or undisclosed prior internal arrangements or communications, to prices given to customers that communicated with sales staff on open phone lines; (iii) accepting limit orders from customers and then informing those customers that their orders could not be filled, in whole or in part, when in fact the defendant was able to fill the order but decided not to do so because the defendant expected it would be more profitable not to do so; and (iv) disclosing non-public information regarding the identity and trading activity of the defendant's customers to other banks or other market participants, in order to generate revenue for the defendant at the expense of its customers.''

In developing this exemption, the Department also considered relevant statements from regulators. For example, the Financial Conduct Authority's (FCA) Final Notice states that, ''[d]uring the Relevant Period, Barclays did not exercise adequate and effective control over its FX business. . . . The front office failed adequately to discharge these responsibilities with regard to obvious risks associated with confidentiality, conflicts of interest and trading conduct.'' The Notice further states: ''These failings occurred in circumstances where certain of those responsible for managing front office matters were aware of and/or at times involved in behaviours described above.''

By way of further example, the Order of the Commodities Futures Trading Commission (CFTC) states: ''Barclays failed to adequately assess the risks associated with its FX traders participating in the fixing of certain FX benchmark rates. Barclays also lacked adequate internal controls in order to prevent its FX traders from engaging in improper communications with certain FX traders at other banks. Barclays lacked sufficient policies, procedures and training specifically governing participation in the trading around the FX benchmark rates and had inadequate policies pertaining to, or insufficient oversight of, its FX traders' use of chat rooms or other electronic messaging.''

The Department also notes the size of relevant fines imposed by various regulators: The Department of Justice imposed a $710 million fine; the Board of Governors of the Federal Reserve Board imposed a $342 million fine; and the Department of Financial Services, the Commodity Futures Trading Commission, and the FCA imposed fines of $485 million, $400 million, and £284,432,000, respectively.

This exemption is not punitive. Instead, its five-year term and protective conditions reflect the Department's intent to protect Covered Plans that entrust substantial assets to a Barclays Affiliated QPAM, despite the serious misconduct and supervisory failures described above. The limited term of this exemption gives the Department the opportunity to review the adherence by the Barclays Affiliated QPAMs to the conditions set out herein. If the Applicant seeks an extension of this exemption, the Department will examine whether the compliance and oversight changes mandated by various regulatory authorities are having their desired effect on BPLC entities.

Comment 3—Conditions Unrelated to PTE 84–14 and Imposition of Onerous Requirements

The Department addresses this general comment more fully below in response to certain specific issues that are related to this general comment.

Comment 4—Description of Criminal Conduct—Section I

The prefatory language to Section I of the proposed exemption provides, ''*If the proposed five-year exemption is granted, certain asset managers with specified relationships to BPLC (the Barclays Affiliated QPAMs and the Barclays Related QPAMs, as defined further in Sections II(a) and II(b), respectively) will not be precluded from relying on the exemptive relief provided by Prohibited Transaction Class Exemption 84–14 (PTE 84–14 or the QPAM Exemption),*[51] *notwithstanding the judgment of conviction against BPLC (the Conviction), as defined in Section II(c)),*[52] *for engaging in a conspiracy to: (1) Fix the price of, or (2) eliminate competition in the purchase or sale of the euro/U.S. dollar currency pair exchanged in the Foreign Exchange (FX) Spot Market, for a period of five years beginning on the date the exemption is granted.*''

The Applicant requests that the description of the charged conduct—the clause beginning ''for engaging in a conspiracy''—be omitted. The Applicant states that this description is inaccurate and incomplete, will lead to disputes with counterparties to the detriment of plans, and will make it unlikely that plans will benefit from or be protected by this exemption.

After consideration of the Applicant's comment, the Department has clarified the exemption's description of BPLC's criminal conduct.

Comment 5—Knowing or Tacit Approval—Sections I(a) and I(c)

Section I(a) of the proposed five-year exemption provides, ''*(a) Other than certain individuals who: Worked for a non-fiduciary business within BCI; had no responsibility for, and exercised no authority in connection with, the management of plan assets; and are no longer employed by BPLC, the Barclays Affiliated QPAMs and the Barclays Related QPAMs (including their officers, directors, agents other than BPLC, and employees of such QPAMs who had responsibility for, or exercised authority in connection with the management of plan assets) did not know of, did not have reason to know of, or participate in the criminal conduct that is the subject of the Conviction (for purposes*

[51] 49 FR 9494 (March 13, 1984), as corrected at 50 FR 41430 (October 10, 1985), as amended at 70 FR 49305 (August 23, 2005), and as amended at 75 FR 38837 (July 6, 2010).

[52] Section I(g) of PTE 84–14 generally provides that ''[n]either the QPAM nor any affiliate thereof . . . nor any owner . . . of a 5 percent or more interest in the QPAM is a person who within the 10 years immediately preceding the transaction has been either convicted or released from imprisonment, whichever is later, as a result of'' certain felonies including violation of the Sherman Antitrust Act, Title 15 United States Code, Section 1.

of this paragraph (a), ''*participate in*'' *includes the knowing or tacit approval of the misconduct underlying the Conviction).*''

Section I(c) of the proposed exemption provides, ''*(c) A Barclays Affiliated QPAM will not employ or knowingly engage any of the individuals that participated in the criminal conduct that is the subject of the Conviction (for purposes of this paragraph (c),* ''*participated in*'' *includes the knowing or tacit approval of the misconduct underlying the Conviction).*''

The Applicant requests that the words ''or tacit'' in the phrase ''knowing or tacit approval'' be deleted in Sections I(a) and I(c). The Applicant states that the term ''tacit approval'' ''is undefined and ambiguous, and potentially encompasses a broad range of conduct that could become the subject of disputes with counterparties.'' In addition, the Applicant states that the reference to the individuals being ''no longer employed by BPLC'' in Section I(a) implies that the individuals referenced in this condition were employed directly by BPLC. However, the Applicant states that, as outlined in Applicant's December 6, 2016 letter to the Department, the two individuals referenced in Paragraph 4(g) of the Plea Agreement were employed by a service company subsidiary of a BPLC subsidiary. The Applicant suggests that Section I(a) be revised to read, ''*Other than certain individuals who: Worked for a nonfiduciary business of a BPLC subsidiary; had no responsibility for, and exercised no authority in connection with, the management of plan assets; and are no longer employed by the BPLC subsidiary, the Barclays Affiliated QPAMs (including their officers, directors, agents other than BPLC, and employees of such QPAMs who had responsibility for, or exercised authority in connection with the management of plan assets) did not know of, have reason to know of, or participate in the criminal conduct that is the subject of the Conviction (for purposes of this paragraph (a),* ''*participate in*'' *includes the knowing approval of the misconduct underlying the Conviction).*''

With respect to Condition I(a), after consideration of the Applicant's comment, the Department has removed ''or tacit'' in the phrase ''knowing or tacit approval'' and removed the phrase ''no longer employed by BPLC,'' and accepted the Applicant's suggested revision to replace ''BCI'' with ''BPLC subsidiary'' where remaining in the condition. However, the Department has not accepted the Applicant's suggestion to remove ''Barclays Related QPAMs'' from the condition. The Department intends to preclude relief to the extent a Barclays Related QPAM violates this condition. With respect to Condition I(c), the Department has revised the exemption in the manner requested by the Applicant.

Comment 6—Inclusion of BCI—Sections I(d), I(g), and I(h)(1)(i)

Section I(d) of the proposed five-year exemption provides, ''*A Barclays Affiliated QPAM will not use its authority or influence to direct an* ''*investment fund,*'' *(as defined in Section VI(b) of PTE 84–14) that is subject to ERISA or the Code and managed by such Barclays Affiliated QPAM to enter into any transaction with BPLC or BCI, or engage BPLC to provide any service to such investment fund, for a direct or indirect fee borne by such investment fund, regardless of whether such transaction or service may otherwise be within the scope of relief provided by an administrative or statutory exemption.*''

Section I(g) of the proposed five-year exemption provides, ''*(g) BPLC and BCI will not provide discretionary asset management services to ERISA-covered plans or IRAs, nor will otherwise act as a fiduciary with respect to ERISA-covered plan or IRA assets.*''

Section I(h)(1)(i) of the proposed five-year exemption provides, ''*(h)(1)(i) The asset management decisions of the Barclays Affiliated QPAM are conducted independently of the corporate management and business activities of BPLC and BCI.*''

The Applicant requests removal of the reference to ''BCI'' in this Section I(d), Section I(g), and Section I(h)(1)(i). Among other things, the Applicant states that as BCI is not the party to the Conviction, and therefore, the inclusion of BCI in this condition goes beyond the underlying Conviction. In addition, the Applicant states that, as noted in its December 6, 2016 letter to the Department, the two individuals referenced in Paragraph 4(g) of the Plea Agreement were employed by a service company subsidiary of a different BPLC subsidiary and were not ''dual-hatted'' to BCI. Further, the Applicant states that BCI was, and in the future is likely to be, the primary U.S. registered investment adviser of the Barclays Group, and any future investment management mandates would likely be undertaken by BCI. Thus, the Applicant states that not permitting an Affiliated QPAM to enter into a transaction with BCI is tantamount to a denial of the exemption. The Applicant also states that this condition would prevent BCI or its parent entity from purchasing an asset manager and merging the asset manager into BCI, and would also prevent BCI from developing new lines of business providing asset management or securities lending businesses to plans.

In response, the Department notes that the condition was developed based on a representation from the Applicant in a letter dated November 2, 2015. In that letter the Applicant stated that, ''the Investment Bank division, where such conduct arose, and the Wealth and Investment Management division both operated through BCI, one of the QPAMs, at the time of the criminal conduct; however, as also noted above and discussed in the Application, the Wealth and Investment Management activities of BCI were operated separately from the Investment Bank division and the activities of the Investment Bank division that gave rise to the criminal conduct, and as such, it is important to distinguish the Wealth and Investment Management employees from the other BCI employees. The 'Wealth and Investment Management employees' were specifically mentioned because there were Investment Bank division employees of BCI who were involved in the criminal conduct that is the subject of the Plea Agreement.''

Notwithstanding this, given the conditions required herein as discussed below, the Department has determined to revise the exemption in the manner requested by the Applicant, and has also clarified that paragraph (d) applies to an ''investment fund'' that is subject to ERISA or the Code and managed by such Barclays Affiliated QPAM with respect to Covered Plans.

Comment 7—Exercising Authority Over Plan Assets—Section I(f)

Section I(f) of the proposed five-year exemption provides, ''*(f) A Barclays Affiliated QPAM or a Barclays Related QPAM did not exercise authority over the assets of any plan subject to Part 4 of Title I of ERISA (an ERISA-covered plan) or section 4975 of the Code (an IRA) in a manner that it knew or should have known would: Further the criminal conduct that is the subject of the Conviction; or cause the Barclays Affiliated QPAM or the Barclays Related QPAM or its affiliates or related parties to directly or indirectly profit from the criminal conduct that is the subject of the Conviction.*''

The Applicant requests that the words ''related parties'' in the phrase ''Barclays Affiliated QPAM or the Barclays Related QPAM, or its affiliates or related parties'' be deleted, stating that the term ''related parties'' is undefined and could lead to confusion.

For clarity, the Department has deleted the term ''related parties.''

Comment 8—See Comment 6 Re: Section I(g)

Section I(g) of the proposed five-year exemption provides, ''*(g) BPLC and BCI will not provide discretionary asset management services to ERISA-covered plans or IRAs, nor will otherwise act as a fiduciary with respect to ERISA-covered plan or IRA assets.*''

The Applicant requests removal of the reference to ''BCI'' in this Section I(g), and for the reasons discussed above, the Department has determined to revise the exemption in the manner requested by the Applicant. Additionally, the Department modified this condition to clarify that BPLC will not violate this condition in the event that it inadvertently becomes an investment advice fiduciary and that BPLC can act as a fiduciary for plans that it sponsors for its own employees or employees of an affiliate.

Comments 9, 10 & 11—Policies and Procedures Relating to Compliance With ERISA and the Code—Section I(h)(1)(ii)–(v)

Section I(h)(1)(ii)–(iii) of the proposed five-year exemption provides, ''*(h)(1) Prior to a Barclays Affiliated QPAM's engagement by any ERISA-covered plan or IRA for discretionary asset management services, where the QPAM represents that it qualifies as a QPAM, the Barclays Affiliated QPAM must develop, implement, maintain, and follow written policies and procedures (the Policies) requiring and reasonably designed to ensure that: . . . .*

(ii) The Barclays Affiliated QPAM fully complies with ERISA's fiduciary duties and with ERISA and the Code's prohibited transaction provisions, and does not knowingly participate in any violation of these duties and provisions with respect to ERISA-covered plans and IRAs; and

(iii) The Barclays Affiliated QPAM does not knowingly participate in any other person's violation of ERISA or the Code with respect to ERISA-covered plans and IRAs;''

(iv) Any filings or statements made by the Barclays Affiliated QPAM to regulators including, but not limited to, the Department, the Department of the Treasury, the Department of Justice, and the Pension Benefit Guaranty Corporation, on behalf of ERISA-covered plans or IRAs, are materially accurate and complete, to the best of such QPAM's knowledge at that time; [and]

(v) The Barclays Affiliated QPAM does not make material misrepresentations or omit material information in its communications with such regulators with respect to ERISA-covered plans or IRAs, or make material misrepresentations or omit material information in its communications with ERISA-covered plans and IRA clients.''

The Applicant requests that these subparagraphs be stricken as duplicative and already mandated by statute. The Applicant states that these conditions should apply only with regard to filings or statements made on behalf of ERISA-covered plans or IRAs in connection with accounts for which the Barclays Affiliated QPAM relies on the relief provided by PTE 84–14. The Applicant states that the conditions should be tailored to PTE 84–14 in all instances.

Subsection (iii): The Applicant requests that Section I(h)(1)(iii) be stricken. The Applicant states that, to the extent that Subsection I(h)(1)(iii) is intended to capture violations of ERISA or the Code that are not described in the preceding Subsection (such as ERISA disclosure requirements), such violations would not be within the scope of relief provided by the proposed exemption.

Subsection (iv): The Applicant suggests that the condition be revised to read, ''*(iv) Any filings or statements made by the Barclays Affiliated QPAM to regulators, including, but not limited to, the Department, the Department of the Treasury, the Department of Justice, and the Pension Benefit Guaranty Corporation, on behalf of ERISA-covered plans or IRAs for which the Barclays Affiliated QPAM provides asset management or other discretionary fiduciary services in reliance on PTE 84–14, are materially accurate and complete, to the best of such QPAM's knowledge at that time.*''

Subsection (v): The Applicant requests that the condition in Section I(h)(1)(v) incorporate language similar to Section I(h)(1)(iv), which provides that the condition extends ''to the best of such QPAM's knowledge at that time.''

The requirement of Section I(h) that the policies and procedures developed by the Barclays Affiliated QPAM reflect basic fiduciary norms is a protective measure that is amply justified by the substantial compliance and oversight failures that resulted in the Conviction and fines, and in the need for this exemption, as detailed above. Accordingly, the Department has substantially retained the condition. It has, however, revised the condition's scope to better match the Department's protective intent. In particular, subsection (v) has been revised to contain the ''to the best of such QPAM's knowledge at that time'' concept found in Subsection (iv); and the applicability of Subsections (iv) and (v) has been limited to Covered Plans. This revision is consistent with the Department's intent to protect ERISA-covered Plans and IRAs that may hire a Barclays Affiliated QPAM based on the manager's express representation that it relies on or qualifies under PTE 84–14.

As noted in more detail below, the Department will not strike a condition merely because the condition is also a statutory requirement. It is the express intent of the Department to preclude relief for a Barclays Affiliated QPAM that fails to meet the requirements of this exemption, including those derived from basic standards codified in statute, as applicable.

The Department does not view subparagraph (iii) of Section I(h)(1), which relates to compliance with ERISA or the Code, as duplicative of subparagraph (ii), which relates to compliance with, and knowing violations of, certain provisions of ERISA or the Code. However, the Department has modified the Policies' requirement of adherence to the fiduciary and prohibited transaction provisions of ERISA and the Code so that the Policies expressly focus on the provisions only to the extent those provisions are ''applicable'' under ERISA and the Code.

Comment 12—Correction of Violations and Failures to Comply—Section I(h)(1)(vii)

Section I(h)(1)(vii) of the proposed five-year exemption provides that, ''*(h)(1)* Prior to a Barclays Affiliated QPAM's engagement by any ERISA-covered plan or IRA for discretionary asset management services, where the QPAM represents that it qualifies as a QPAM, the Barclays Affiliated QPAM must develop, implement, maintain, and follow written policies and procedures (the Policies) requiring and reasonably designed to ensure that: . . .

(vii) Any violation of, or failure to comply with, an item in subparagraphs (ii) through (vi), is corrected promptly upon discovery, and any such violation or compliance failure not promptly corrected is reported, upon the discovery of such failure to promptly correct, in writing, to appropriate corporate officers, the head of compliance, and the General Counsel (or their functional equivalent) of the relevant Barclays Affiliated QPAM, the independent auditor responsible for reviewing compliance with the Policies, and an appropriate fiduciary of any affected ERISA-covered plan or IRA that

is independent of BPLC; however, with respect to any ERISA-covered plan or IRA sponsored by an 'affiliate' (as defined in Section VI(d) of PTE 84–14) of BPLC or beneficially owned by an employee of BPLC or its affiliates, such fiduciary does not need to be independent of BPLC. A Barclays Affiliated QPAM will not be treated as having failed to develop, implement, maintain, or follow the Policies, provided that it corrects any instance of noncompliance promptly when discovered, or when it reasonably should have known of the noncompliance (whichever is earlier), and provided that it adheres to the reporting requirements set forth in this subparagraph (vii).''

The Applicant cites this condition as an example of how the Department made the proposed exemption ''inexplicably'' and ''arbitrarily'' more burdensome and onerous than other such exemptions it has granted previously. More specifically, the Applicant seeks several revisions to Section I(h)(vii), stating that its notification requirements are overbroad and that the terms such as ''promptly,'' ''appropriate corporate officers'' and ''appropriate fiduciary'' are either vague or undefined. The Applicant requests that the ''subparagraphs (ii) through (vi)'' reference be revised to ''subparagraphs (i) through (vi),'' and that the language be revised to provide that this condition is satisfied where the issue is reported to the corporate officers specifically identified in the condition and, if the plan reporting provision is not removed, to a plan fiduciary that satisfies the requirement that it be independent of BPLC, other than with respect to the Applicant's own plans. The Applicant requests also that the last sentence of the subparagraph be revised since it ''does not meaningfully provide relief in instances where a violation or compliance failure is corrected.''

The Applicant suggests the condition in Section I(h)(1)(vii) be revised to read, ''*(vii) Any violation of, or failure to comply with, an item in subparagraphs (i) through (vi), is corrected (or plans to correct are initiated) upon discovery, and any such violation or compliance failure not corrected (or a correction process initiated) is reported, upon the discovery of such failure to initiate correction efforts, in writing, to the head of compliance and the General Counsel (or their functional equivalent) of the relevant Barclays Affiliated QPAM. A Barclays Affiliated QPAM will not be treated as having failed to develop, implement, maintain, or follow the Policies, provided that it takes corrective action as to any instance of noncompliance when discovered, or when it reasonably should have known of the noncompliance (whichever is earlier), and provided that it adheres to the reporting requirements set forth in this subparagraph (vii).*''

In response to the Applicant's general comment, the Department has based the conditions of this exemption on both the particular facts of this case and its experience over time with previous exemptions. For the reasons set out herein, the Department has concluded that the specific conditions of this exemption are appropriate and give the Department a reasonable basis for concluding that the conditions are appropriately protective of affected plans and IRAs. As noted above, a central aim of the exemption is to ensure that those relying upon the exemption for relief from the prohibited transaction rules will consistently act to promote a culture of fiduciary compliance, notwithstanding the conduct that violated Section I(g) of PTE 84–14.

After considering the Applicant's specific requests for revisions, however, the Department has replaced ''appropriate corporate officers'' with ''the head of compliance and the General Counsel (or their functional equivalent) of the relevant line of business that engaged in the violation or failure.'' The Department also will not condition the exemption on a requirement for notification of violations to an appropriate fiduciary of any affected Covered Plan that is independent of BPLC.

However, the Department is not revising the ''subparagraphs (ii) through (vi)'' reference to include ''subparagraph (i)'' because the Department intends to preclude relief to the extent a Barclays Affiliated QPAM fails to develop, implement, maintain, and follow written policies and procedures. Clearly, it is not enough merely to develop policies and procedures, without also implementing, maintaining, and following the terms of those policies and procedures. Covered Plans do not benefit from the creation of strong policies and procedures, unless they are actually followed.

The Department has revised the term ''promptly'' for consistency with the Department's intent that violations or compliance failures be corrected ''as soon as reasonably possible upon discovery or as soon after the QPAM reasonably should have known of the noncompliance (whichever is earlier).'' However, contrary to the Applicant's suggestion, the Department intends to preclude relief to the extent violations or failures are not corrected as required by the exemption. Therefore, the Department has not adopted the Applicant's proposed subparagraph (vii), which requires little more than a plan for corrective action, without any corresponding obligation to actually implement the action.

Comment 13—Training Incorporated in Policies—Section I(h)(2)(i)

Section I(h)(2)(i) of the proposed five-year exemption provides, ''. . . *The Training must: (i) Be set forth in the Policies and, at a minimum, cover the Policies, ERISA and Code compliance (including applicable fiduciary duties and the prohibited transaction provisions), ethical conduct, the consequences for not complying with the conditions of this five-year exemption (including any loss of exemptive relief provided herein), and prompt reporting of wrongdoing.*''

The Applicant requests that the requirement in Section I(h)(2)(i) that the Training must ''[b]e set forth in the Policies'' be deleted. The Applicant states that the requirement could present logistical challenges as a Barclays Affiliated QPAM may update its Training and its Policies at different points in time. The Applicant further states that requiring that the former be incorporated into the latter merely increases the logistical burden and serves no useful purpose.

After considering this comment, the Department has determined to revise the condition to address the Applicant's concerns that it could present logistical challenges.

Accordingly, the Department has revised the subsection to read that the Training must: ''*At a minimum, cover the Policies, ERISA and Code compliance (including applicable fiduciary duties and the prohibited transaction provisions), ethical conduct, the consequences for not complying with the conditions of this exemption (including any loss of exemptive relief provided herein), and prompt reporting of wrongdoing.*''

Comment 14—Training by Independent Professional—Section I(h)(2)(ii)

Section I(h)(2)(ii) of the proposed five-year exemption provides, ''*The Training must: . . . (ii) Be conducted by an independent professional who has been prudently selected and who has appropriate technical training and proficiency with ERISA and the Code.*''

The Applicant requests that Section I(h)(2)(i) be deleted, stating that requiring an ''independent professional'' to conduct the training is likely to be ''counterproductive, as the most effective trainer may be someone with detailed knowledge of the Barclays Affiliated QPAM's business and compliance practices that an 'independent' trainer may lack.'' Moreover, the Applicant states that the term ''independent professional'' is undefined, leading to potential confusion and disputes. Further, the Applicant states that the term ''technical training'' is duplicative of ''proficiency'' and is undefined. Therefore, the Applicant suggests eliminating that term, and requests that Section I(h)(2)(ii) be revised to read, ''*Be conducted by an individual with significant understanding and familiarity with asset management and trading practices and who has appropriate proficiency with ERISA and the Code.*''

The Department has partially accepted the Applicant's request as to the suggested revision so that ''independent professional'' has been replaced with ''individual with significant understanding and familiarity with asset management and trading practices'' but has not removed the requirement that such person be prudently selected. Additionally, the Department disagrees with the Applicant's assertion that the phrase ''technical training and proficiency'' is duplicative. In the Department's view, the two terms are not synonymous, as a person may have taken technical training in a given subject matter but may not be proficient in that subject matter.

Further, while the Department does not agree with the Applicant's characterization that hiring an appropriate independent professional, prudently selected, would be ''counterproductive,'' the Department is persuaded that appropriate Barclays personnel, who are prudently selected, should be allowed to conduct the training, and has revised the condition accordingly.

Comment 15—Audit—Section I(i)(1)

Section I(i)(1) of the proposed five-year exemption requires that each ''*Barclays Affiliated QPAM submits to an audit conducted annually by an independent auditor, who has been prudently selected and who has appropriate technical training and proficiency with ERISA and the Code, to evaluate the adequacy of, and the Barclays Affiliated QPAM's compliance with, the Policies and Training described herein. The audit requirement must be incorporated in the Policies. Each annual audit must cover a consecutive twelve (12) month period starting with the twelve (12) month period that begins on the date that a Barclays Affiliated QPAM is first engaged by any ERISA-covered plan or IRA for discretionary asset management services reliant on PTE 84–14, and each annual audit must be completed no later than six (6) months after the period to which the audit applies.*''

The Applicant requests that the requirement that the audit requirement be incorporated in the Policies be deleted because it is already a condition of exemptive relief and incorporation into the Policies is, therefore, ''duplicative'' and appears to serve no useful purpose. In addition, the Applicant represents that the timing of the audit should factor into the timing of the proposed one-year exemption. The Applicant states that it is possible that the ''date that a Barclays Affiliated QPAM is first engaged'' could come before the effective date of the permanent exemption, rendering the timing unclear, and that the condition should clarify that the audit period will commence only after the effective date of this exemption. Further, the Applicant requests the elimination of the phrase ''technical training,'' because the term ''technical training'' is duplicative of ''proficiency'' and is undefined.

The Department declines to make certain of the Applicant's requested revisions. The Department views the audit requirement as an integral component of the exemption, without which the Department would be unable to make its finding that the exemption is protective of Covered Plans and their participants, beneficiaries, and beneficial owners, as applicable. A recurring, independent audit of the Barclays Affiliated QPAMs is a critical means by which to verify the adequacy of, and compliance with the Policies and Training mandated by this exemption.

The Department disagrees with the Applicant's assertion that the phrase ''technical training and proficiency'' is duplicative. In the Department's view, the two terms are not synonymous, as a person may have taken technical training in a given subject matter but may not be proficient in that subject matter. The exemption requires that the auditor be both technically trained and proficient in ERISA as well as the Code. Accordingly, the Department declines to change the phrase ''technical training and proficiency'' as used in Section I(i)(1).

The Department also declines to delete the requirement that the audit conditions be incorporated in the Policies. The audit requirement provides a critical independent check on compliance with this exemption's conditions, and helps ensure that the basic protections set forth in the Policies are taken seriously. Accordingly, the specifics of the audit requirement are important components of the Policies. Their inclusion in the Policies promotes compliance and sends an important message to the institutions' employees and agents, as well as to Covered Plan clients, that compliance with the policies and procedures will be subject to careful independent review.

After consideration of the Applicant's concerns regarding the annual audit, the Department is revising the audit condition to require an audit on a biennial basis. The Department notes that if the audit uncovers material deficiencies with the Applicant's compliance with this exemption, then the Applicant should consider conducting an additional audit after making corrections to ensure that it remains in compliance with the exemption. In any event, the Department emphasizes that it retains the right to conduct its own investigation of compliance based on any indicators of problems. Finally, the Department has clarified the audit timing requirements.

Comment 16—Access to Business—Section I(i)(2)

Section I(i)(2) of the proposed five-year exemption requires that ''*as permitted by law, each Barclays Affiliated QPAM and, if applicable, BPLC, will grant the auditor unconditional access to its business. . . .*''

The Applicant requests that the access granted by Section I(i)(2) be limited to non-privileged materials that do not contain trade secrets. The Applicant represents that the existing limitations can be read not to exclude such materials and, given the breadth of the ''unconditional access'' described, the absence of a specific limitation could lead to confusion, disputes, and infringement on a Barclays Affiliated QPAM's rights to protect its privileged communications and trade secrets. The Applicant suggests that the language read, ''as permitted by law, each Barclays Affiliated QPAM and, if applicable and solely to determine if the provisions of the exemption involving BPLC are met, BPLC will grant the auditor unconditional access to its business. . . .''

In the Department's view, to ensure a thorough and robust audit, the auditor must be granted access to information the auditor deems necessary for the auditor to make sound conclusions. Access to such information must be within the scope of the audit engagement and denied only to the extent any disclosure is not permitted by state or federal statute. Enumerating specific restrictions on the accessibility of certain information may have a dampening effect on the auditor's ability to perform the procedures necessary to make valid conclusions and would therefore undermine the effectiveness of the audit. The auditor's access to such information, however, is limited to information relevant to the auditor's objectives as specified by the terms of the exemption and to the extent disclosure is not prevented by state or federal statute or involves communications subject to attorney client privilege. In this regard, the Department has modified Section I(i)(2) accordingly.

The Department has modified Section I(i)(2) so that it begins with the phrase ''Within the scope of the audit.''

Comment 17—Engagement Letter—Section I(i)(3)

Section I(i)(3) of the proposed five-year exemption requires the auditor's engagement to ''specifically require the auditor to determine whether each Barclays Affiliated QPAM has developed, implemented, maintained, and followed the Policies in accordance with the conditions of this five-year exemption, if granted, and has developed and implemented the Training, as required herein.''

The Applicant requests that Section I(i)(3) be deleted in its entirety, stating that it is duplicative of the requirements in Section I(i)(1) of the exemption, which also sets forth requirements as to the auditor's skill and the prudence of the selection process. Further, the Applicant suggests that it serves no useful purpose to mandate that the engagement letter repeat the requirements of the exemption and that such level of detail in the engagement is unnecessary in light of the detailed requirements of the exemption.

The Department does not concur with the Applicant's request. By including a statement of the audit's intended purpose and required determinations in the auditor's agreement, the Applicant ensures that both the auditor and the Barclays Affiliated QPAMs have a clear understanding of the purpose and expectations of the audit process. Therefore, the Department declines to omit Section I(i)(3) from the exemption.

Comment 18—Auditor's Test of Operational Compliance—Section I(i)(4)

Section I(i)(4) of the proposed five-year exemption provides that, ''*[t]he* auditor's engagement must specifically require the auditor to test each Barclays Affiliated QPAM's operational compliance with the Policies and Training. In this regard, the auditor must test a sample of each QPAM's transactions involving ERISA-covered plans and IRAs sufficient in size and nature to afford the auditor a reasonable basis to determine the operational compliance with the Policies and Training.''

The Applicant requests that Section I(i)(4) be deleted in its entirety or, in the alternative, that the second sentence of the condition be deleted. As noted above, the Applicant states that Section I(i)(1) sets forth the scope of the audit and contains requirements as to the auditor's technical skill and the prudence of the selection process. The Applicant suggests that, in light of these requirements, a condition mandating how the auditor must perform the audit is unnecessary. The Applicant states that there are only two firms that hold themselves out as having the capacity to handle these audits, and neither is a regular audit firm that can test significant data in the very short time frames provided in these exemptions. The Applicant represents that the Department should leave to the independent judgment of the auditor whether and when to sample transactions. The Applicant suggests that, if the subsection is not deleted, the condition in this subsection should read, ''(4) The auditor's engagement must specifically require the auditor to test each Barclays Affiliated QPAM's operational compliance with the Policies and Training.''

The Department declines to make the Applicant's requested deletion or revision with respect to Section I(i)(4). The inclusion of written audit parameters in the auditor's engagement letter is necessary both to document expectations regarding the audit work and to ensure that the auditor can responsibly perform its important work. As stated above, clearly defined audit parameters will minimize any potential for dispute between the Applicant and the auditor. It is appropriate and necessary for the exemption to require a certain amount, and type, of audit work to be performed. Similarly, given the scope and number of relevant transactions, proper sampling is critical to ensuring the auditor's ability to reach reasonable conclusions.

The Department notes that Section I(i)(4) does not specify the number of transactions that the auditor must test, but rather requires, for each QPAM, that the auditor test a sample of each QPAM's transactions involving Covered Plans, ''sufficient in size and nature to afford the auditor a reasonable basis to determine operational compliance with the Policies and Training.'' The Department has revised this provision, however, by limiting its applicability to Covered Plans.

Comment 19—Auditor's Determination of Compliance—I(i)(5)(i)

Section I(i)(5)(i) of the proposed five-year exemption provides: ''*I(i)(5): For each audit, on or before the end of the relevant period described in Section I(i)(1) for completing the audit, the auditor must issue a written report (the Audit Report) to BPLC and the Barclays Affiliated QPAM to which the audit applies that describes the procedures performed by the auditor during the course of its examination. The Audit Report must include the auditor's specific determinations regarding:*

(i) The adequacy of the Barclays Affiliated QPAM's Policies and Training; the Barclays Affiliated QPAM's compliance with the Policies and Training; the need, if any, to strengthen such Policies and Training; and any instance of the respective Barclays Affiliated QPAM's noncompliance with the written Policies and Training described in Section I(h) above. Any determination by the auditor regarding the adequacy of the Policies and Training and the auditor's recommendations (if any) with respect to strengthening the Policies and Training of the respective Barclays Affiliated QPAM must be promptly addressed by such Barclays Affiliated QPAM, and any action taken by such Barclays Affiliated QPAM to address such recommendations must be included in an addendum to the Audit Report (which addendum is completed prior to the certification described in Section I(i)(7) below). Any determination by the auditor that the respective Barclays Affiliated QPAM has implemented, maintained, and followed sufficient Policies and Training must not be based solely or in substantial part on an absence of evidence indicating noncompliance. In this last regard, any finding that the Barclays Affiliated QPAM has complied with the requirements under this Subsection must be based on evidence that demonstrates the Barclays Affiliated QPAM has actually implemented, maintained, and followed the Policies and Training required by this five-year exemption. Furthermore, the auditor must not rely on the Annual Report created by the compliance officer (the Compliance Officer) as described in Section I(m) below in lieu of independent determinations and testing performed by the auditor as required by Section I(i)(3) and (4) above.''

The Applicant states that compliance with this provision and other provisions involving the auditor are within the control of the auditor rather than the Applicant, and that a violation of this provision should therefore not result in Applicant losing the exemption. The Applicant requests that, if the condition is not deleted or reworded as suggested, the Department should add the following proviso to the end of subparagraphs I(i)(4), I(i)(6) and I(i)(11): ''Any failure of the auditor to meet the conditions associated with the Audit Report shall not be deemed a violation of the exemption.''

In addition, the Applicant requests that the requirement that an auditor's recommendations be ''promptly'' addressed be deleted. The Applicant states that the term ''promptly'' is undefined and that the ambiguity is particularly problematic in this context as addressing an auditor's recommendation could be a lengthy process (updating computerized trading systems, for example, could take months).

Moreover, the Applicant states that the requirement that the auditor address the adequacy of the Annual Review required in Section I(m) is counterproductive and requests that this provision of Section I(i)(5) be deleted because ''the DOJ has singled out Barclays' extensive efforts to strengthen its already extensive internal controls.'' The Applicant further states that the Department should not mandate how the auditor performs its work in light of the conditions in the proposed exemption relating to the auditor's selection and qualifications. (*See* Subsection I(i)(1)). The Applicant states there is no reason to treat BPLC or the Barclays Affiliated QPAMs as recalcitrant entities and to impose conditions that the Department has not imposed in past cases as to applicants with extensive crimes or faulty internal processes. Moreover, the Applicant states that the language of this condition will interfere with the workability of the exemption and its use by plans. To that end, the Applicant states that if counterparties cannot understand the requirement or test whether it has been complied with, the exemption will not be used, to the detriment of plans and in violation of the statutory standard in section 408(a) of ERISA and Code section 4975. Therefore, the Applicant requests that the condition instead read:

''*I(i)(5): For each audit, on or before the end of the relevant period described in Section I(i)(1) for completing the audit, the auditor must issue a written report (the Audit Report) to BPLC and the Barclays Affiliated QPAM to which the audit applies that describes the procedures performed by the auditor during the course of its examination. Any failure of the auditor to meet the conditions associated with the Audit Report shall not be deemed a violation of the exemption. The Audit Report must include the auditor's specific determinations regarding:*

(i) The adequacy of the Barclays Affiliated QPAM's Policies and Training; the Barclays Affiliated QPAM's compliance with the Policies and Training; the need, if any, to strengthen such Policies and Training; and any instance of the respective Barclays Affiliated QPAM's noncompliance with the written Policies and Training described in Section I(h) above. Any determination by the auditor regarding the adequacy of the Policies and Training and the auditor's recommendations (if any) with respect to strengthening the Policies and Training of the respective Barclays Affiliated QPAM must be addressed by such Barclays Affiliated QPAM, and any action taken by such Barclays Affiliated QPAM to address such recommendations must be included in an addendum to the Audit Report (which addendum is completed prior to the certification described in Section I(i)(7) below). Any determination by the auditor that the respective Barclays Affiliated QPAM has implemented, maintained, and followed sufficient Policies and Training should be based on evidence that demonstrates the Barclays Affiliated QPAM has actually implemented, maintained, and followed the Policies and Training required by this permanent exemption.''

The Department acknowledges that the Applicant's efforts to address the auditor recommendations regarding any inadequacy in the Policies and Training identified by the auditor, may take longer to implement than the time limits mandated by the proposed exemption. Accordingly, the Department is modifying Section I(i)(5)(i) to reflect the possibility that the Barclays Affiliated QPAMs' efforts to address the auditor's recommendations regarding inadequacies in the Policies and Training identified by the auditor, may not be completed by the submission date of the Audit Report and may require a written plan to address such items. However, any noncompliance identified by the auditor must be promptly addressed. The Department does not agree that the word ''promptly'' creates ambiguity in the condition and declines to remove the word. However, the Department has revised the exemption such that, with the exception of Section I(i)(11), the failure of the auditor to meet the conditions associated with the Audit Report shall not be deemed a violation of the exemption.

The final sentence of Section I(i)(5)(i) expresses the Department's intent that the auditor must not rely solely on the work of the Compliance Officer and the Annual Report in formulating its conclusions or findings. The auditor must perform its own independent testing to formulate its conclusions. This exemption does not prohibit the auditor from considering the Compliance Officer's Annual Report in carrying out its audit function, including its formulation of an audit plan. This exemption, however, does prohibit the auditor from reaching conclusions that are exclusively based upon the contents of the Compliance Officer's Annual Report.

The Department emphasizes that it is not mandating how the auditor performs its work. By the express terms of this exemption, the Auditor retains discretion as to how to perform an audit that complies with this exemption. The audit conditions are critical to the Department's determination to grant this exemption. As noted above, the Department believes the audit conditions are amply justified by the substantial compliance and oversight failures that resulted in the Conviction and fines, and in the need for this exemption as detailed above.

The Department has modified Section I(i)(5)(i) to more clearly reflect these views.

Comment 20—Adequacy of the Annual Review—Section I(i)(5)(ii)

Section I(i)(5)(ii) of the proposed five-year exemption provides that ''*[t]he Audit Report must include the auditor's specific determinations regarding: . . . (ii) The adequacy of the Annual Review described in Section I(m) and the resources provided to the Compliance Officer in connection with such Annual Review.*''

The Applicant requests deletion of this condition. The Applicant states that the requirement that the auditor investigate the details of resources provided to the Compliance Officer is intrusive on the operation of the business. The Applicant further states that, assuming the Annual Report required by Subsection I(m)(2)(ii) remains part of the exemption, the auditor can assess the adequacy of the report itself. In addition, the Applicant states that the proposed exemption contains multiple conditions relating to the auditor's selection and qualifications, and that, in light of these conditions, the auditor should be trusted to exercise appropriate judgment.

As discussed in detail below, the Department views the Compliance officer and the Annual Review as integral to ensuring compliance with the exemption. An independent assessment by the auditor of the adequacy of the Annual Review is essential to providing the Department with the assurance that the Applicant and the Barclays Affiliated QPAMs have given these matters the utmost priority and have taken the actions necessary to comply with the exemption. However, the Department agrees that the QPAMs need not require the auditor to opine on the adequacy of the resources allocated to the Compliance Officer and has modified Section I(i)(5)(ii) accordingly. If, however, the auditor observes compliance issues related to the Compliance Officer or available resources, it would be appropriate to opine on these problems.

Comment 21—Auditor Notification to QPAM of Noncompliance—Section I(i)(6)

Section I(i)(6) provides that ''*[t]he auditor must notify the respective Barclays Affiliated QPAM of any instance of noncompliance identified by the auditor within five (5) business days after such noncompliance is identified by the auditor, regardless of whether the audit has been completed as of that date.*''

The Applicant requests that this condition be deleted. The Applicant states that there is no reason why the QPAM needs this information within five business days and no indication is given as to what it is to do with the information once it has it. The Applicant also states that the auditor should be trusted to exercise discretion as to the timing of notification regarding instances of noncompliance, and asserts that requiring identification of every such instance, however technical the misstep, could be counter-productive, consume significant amounts of the auditor's time, and in light of the very limited number of available auditors, cause many financial institutions needing audits to fail to meet the deadlines imposed by these exemptions simply because a qualified auditor is not available. Further, the Applicant states that compliance with this provision is within the control of the auditor rather than the Applicant. If the condition is not deleted, the Applicant suggests that the condition read:

''The auditor must notify the respective Barclays Affiliated QPAM of any instance of noncompliance identified by the auditor within five (5) business days after such noncompliance is identified by the auditor, regardless of whether the audit has been completed as of that date. Any failure of the auditor to meet this condition shall not be deemed a violation of the exemption.''

In the Department's view, it is important that notice of noncompliance be forthcoming and prompt. Accordingly, the Department declines to delete the condition. The Department also declines to include a statement in Section I(i)(6) that a failure on behalf of the auditor to meet this condition will not violate the exemption. However, the Department, as discussed below, has modified Section I(q) to address this issue.

Comment 22—Certification of the Audit—Section I(i)(7)

Section I(i)(7) of the proposed five-year exemption provides, ''*[w]ith respect to each Audit Report, the General Counsel or one of the three most senior executive officers of the Barclays Affiliated QPAM to which the Audit Report applies, must certify in writing, under penalty of perjury, that the officer has: Reviewed the Audit Report and this exemption, if granted; addressed, corrected, or remedied any inadequacy identified in the Audit Report; and determined that the Policies and Training in effect at the time of signing are adequate to ensure compliance with the conditions of this proposed five-year exemption, if granted, and with the applicable provisions of ERISA and the Code.*''

The Applicant requests that the timing of Section I(i)(7) be clarified. In this regard, the Applicant states that the certification must be completed within thirty days (see Subsection I(i)(9)), but that it may take longer to remedy identified issues. The Applicant states that this condition should clarify that ''addressing'' an inadequacy means, not only accepting the auditor's recommendations, but can include pointing out alternative action, or even no action, is a preferable means of protecting ERISA plan clients and IRAs. In addition, the Applicant represents that the condition should reflect that the individual providing the certification may not be responsible for addressing, correcting, or remedying any inadequacy, and should clarify that the certification need only state that ''the officer has caused the process for such addressing, correcting, or remedying to commence.''

While the Department does not view Section I(i)(7) as ambiguous, the Department acknowledges that the Applicant's efforts to address the auditor's recommendations regarding inadequacies in the Policies and Training identified by the auditor, may take longer to implement than the timeframe to submit the certified Audit Report. The Department did not intend to limit corrective actions to those that could only be completed prior to the submission of the Audit Report. Therefore, the Department has modified Section I(i)(7) to reflect that the senior officer may certify that a written plan to address the inadequacies regarding the Policies and Training identified in the auditor's Report is in place.

Further, the conditions of this exemption do not prohibit the Applicant from disagreeing with the auditor with respect to whether certain practices rise to the level of noncompliance with the terms of this exemption. However, in those circumstances where the auditor is not persuaded to change its position on a matter the auditor considers noncompliant, the Applicant will be responsible to correct such matters. Nor do the conditions of this exemption prohibit the Applicant from disagreeing with the auditor with respect to the appropriate method for correcting or addressing issues of noncompliance. The Department expects the Applicant and the auditor to have meaningful communications on any such differences of opinion. In the event the Applicant chooses to apply a corrective method that differs from that recommended by the auditor, the Audit Report and the Addendum attached thereto should explain in detail the noncompliance, the auditor's recommended action, the corrective method chosen, and, if applicable, why the Applicant chose a corrective method different from that recommended by the auditor. Finally, while the individual providing the certification may not be responsible for directly addressing, correcting, or remedying any inadequacy, such individual is responsible for ensuring that such process has indeed addressed, corrected or remedied the identified inadequacy.

Comment 23—Review and Certification of Audit Report—Section I(i)(8)

Section I(i)(8) the proposed five-year exemption provides that ''*[t]he Risk Committee of BPLC's Board of Directors is provided a copy of each Audit Report; and a senior executive officer with a direct reporting line to the highest ranking legal compliance officer of BPLC must review the Audit Report for each Barclays Affiliated QPAM and must certify in writing, under penalty of perjury, that such officer has reviewed each Audit Report.*''

The Applicant requests that the requirement to provide the Audit Report to the Risk Committee of BPLC's Board of Directors be deleted. The Applicant states that mandating the internal process by which information is handled within the financial institution is beyond the scope of exemptive relief and is an unwarranted intrusion into the corporate governance processes of BPLC and the Barclays Affiliated QPAMs that does not advance the statutory goals set forth in ERISA section 408 and Code section 4975.

In addition, the Applicant states that the reference to the ''highest ranking legal compliance officer'' is unclear because BPLC does not have an officer that appears to satisfy the description. The Applicant assumes that the reference is either to the highest ranking legal officer or the highest ranking compliance officer.

The Department notes that in its application and related materials, the Applicant has represented that it has established, or is in the process of establishing, comprehensive changes to processes and procedures that are, in part, intended to change the culture at BPLC from the top down. As also represented by the Applicant, these changes are focused on enhancements in: (1) Supervision, controls, and governance; (2) risk management compliance assessment; (3) transaction monitoring and communications surveillance; (4) compliance testing; and (5) internal audit.[53]

The Department has developed this exemption to ensure that the highest levels of management are aware of ongoing matters concerning BPLC, the Barclays Affiliated QPAMs, and compliance with this exemption. Requiring the provision of the Audit Report to the Board of Directors and certification by a senior executive officer in the reporting line of the highest compliance officer provides assurance that the highest levels of management within BPLC stay informed about BPLC's and the Barclays Affiliated QPAMs' compliance with the terms of this exemption. In the Department's view, such officials are in the best position to ensure that any inadequacy identified by the auditor is appropriately addressed and that necessary changes to corporate policy are effectuated where necessary. Requiring certification under penalty of perjury is consistent with the Department's longstanding view that basic requirements of compliance and integrity are fundamental to an entity's ability to qualify as a QPAM. However, in accordance with the Applicant's request, the Department has clarified the condition to refer to the ''highest ranking compliance officer.''

Comment 24—Availability of the Audit Report—Section I(i)(9)

Section I(i)(9) of the proposed five-year exemption provides that, ''*Each Barclays Affiliated QPAM provides its certified Audit Report by regular mail to: The Department's Office of Exemption Determinations (OED), 200 Constitution Avenue NW, Suite 400, Washington, DC 20210, or by private carrier to: 122 C Street NW, Suite 400, Washington, DC 20001–2109, no later than 30 days following its completion. The Audit Report will be part of the public record regarding this five-year exemption, if granted. Furthermore, each Barclays Affiliated QPAM must make its Audit Report unconditionally available for examination by any duly authorized employee or representative of the Department, other relevant regulators, and any fiduciary of an ERISA-covered plan or IRA, the assets of which are managed by such Barclays Affiliated QPAM.*''

The Applicant states that the scope of exemption should be limited to PTE 84–14 in all instances and requests that this condition require that the Audit Report be available to plans managed by a QPAM in reliance on PTE 84–14. The Applicant states that this condition can be read to require that the Audit Report be available to asset management plan clients, regardless of whether the Barclays Affiliated QPAM relies on PTE 84–14 for such clients' accounts. The Applicant suggests that the condition read: ''Each Barclays Affiliated QPAM provides its certified Audit Report by regular mail to: The Department's Office of Exemption Determinations (OED), 200 Constitution Avenue NW, Suite 400, Washington, DC 20210, or by private carrier to: 122 C Street NW, Suite 400, Washington, DC 20001–2109, no later than 30 days following its completion. The Audit Report will be part of the public record regarding this exemption. Furthermore, each Barclays Affiliated QPAM must make its Audit Report unconditionally available for examination by any duly authorized employee or representative of the Department, other relevant regulators, and any fiduciary of an ERISA-covered plan or IRA, the assets of which are managed by such Barclays Affiliated QPAM in reliance on PTE 84–14.''

ERISA-covered plans and IRAs, routinely rely on QPAM status before entering into agreements with financial institutions, even if those institutions do not rely on PTE 84–14 when managing plan and IRA assets. Accordingly, the Department has an interest in ensuring that the conditions of this exemption broadly protect ERISA-covered plans and IRAs that have relied on QPAM status in deciding to enter into an agreement with the Applicant or the Barclays Affiliated QPAMs.

Nevertheless, the Department has revised Section I(i)(9) to clarify that the Barclays Affiliated QPAMs are required to make the documents available to any fiduciary of a Covered Plan. The Audit Report, in any event, will be incorporated into the public record attributable to this exemption, under Exemption Application Number D–11910, and, therefore, independently accessible by interested members of the public. Accordingly, the Department has determined to revise the condition by replacing the phrase ''an ERISA-covered plan or IRA, the assets of which are managed by such Barclays Affiliated QPAM'' with the term ''Covered Plan'' (as defined in Section II(f)). Lastly, the Department agrees that access to the Audit Report need only be upon request and such access or delivery can be made electronically, and it has revised the exemption accordingly.

Comment 25—Engagement Agreements—Section I(i)(10)

Section I(i)(10) of the proposed five-year exemption provides that, ''*Each Barclays Affiliated QPAM and the auditor must submit to OED: (A) Any engagement agreement(s) entered into pursuant to the engagement of the auditor under this five-year exemption, if granted; and (B) any engagement agreement entered into with any other entity retained in connection with such QPAM's compliance with the Training or Policies conditions of this five-year exemption, if granted, no later than six (6) months after the Conviction Date (and one month after the execution of any agreement thereafter).*''

The Applicant requests deletion of the requirement under Section I(i)(10)(B) which provides, ''*[e]ach Barclays Affiliated QPAM and the auditor must submit to OED . . . (B) any engagement agreement entered into with any other entity retained in connection with such QPAM's compliance with the Training or Policies conditions of this five-year exemption, no later than six (6) months after the Conviction Date (and one month after the execution of any agreement thereafter);*''.

The Applicant states that the proposed exemption includes multiple conditions for the qualifications of the trainer (Subsection I(h)(2)(ii)), the contents of the Policies (Subsection

[53] See BCI Exemption Application (May 20, 2015) from pages 7 to 15.

I(h)(1)) and for the auditor's review of the adequacy of the Training and Policies (Subsection I(i)(5)(i)). The Applicant represents that there is no reason for the Department to see and review, and make available to the public, every service provider contract that could cover policies, procedures or training. The Applicant states that no reason is given for the Department's review of engagement letters for all legal and consulting services applicable to the policies, procedures and training. Additionally, the Applicant states that it should be permitted to delete or redact commercial terms from any engagement agreement submitted to the Department. Further, the Applicant requests that the timeframe for provision of the auditor's engagement be modified to no later than six (6) months after the Barclays Affiliated QPAM's engagement with an ERISA-covered plan or IRA for the provision of asset management or other discretionary fiduciary services (and one month after the execution of any agreement thereafter). Therefore, the Applicant suggests that the condition read: ''*Each Barclays Affiliated QPAM and the auditor must submit to OED: Any engagement agreement(s) entered into pursuant to the engagement of the auditor under this exemption no later than six (6) months after the Barclays Affiliated QPAM's engagement with an ERISA-covered plan or IRA for the provision of asset management or other discretionary fiduciary services (and one month after the execution of any agreement thereafter). Commercial terms may be removed or redacted from the auditor engagement.*''

In coordination with the Department's modification of Section I(h)(2)(ii) to remove the requirement that the Training must be conducted by an independent professional, the Department has determined to remove the requirement in Section I(i)(10)(B) to provide to the Department the engagement agreements entered into with entities retained in connection with compliance with the Training or Policies conditions. Furthermore, to remove any confusion or uncertainty regarding the timing of the submission of the auditor's engagement agreement, the Department has modified Section I(i)(10) to require that the auditor's engagement agreement be submitted to the Office of Exemption Determinations no later than two (2) months after the engagement agreement is entered into by the Applicant and the independent auditor.

Comment 26—Auditor's Workpapers—Section I(i)(11)

Section I(i)(11) of the proposed five-year exemption provides that the ''*auditor must provide OED, upon request, all of the workpapers created and utilized in the course of the audit, including, but not limited to: The audit plan; audit testing; identification of any instance of noncompliance by the relevant Barclays Affiliated QPAM; and an explanation of any corrective or remedial action taken by the applicable Barclays Affiliated QPAM.*''

The Applicant states that, as noted above in connection with Section I(i)(5), compliance with this provision is within the control of the auditor rather than the Applicant. The Applicant states that a violation of this provision should therefore not result in loss of the exemption. The Applicant also represents that this condition is unnecessary and duplicative. In addition, the Applicant requests that this condition be appropriately limited to ensure that any confidential or otherwise sensitive information is redacted prior to any disclosure of the workpapers in a public file. The Applicant states that the proposed exemption, as worded, requires that the auditor enjoy broad access to a Barclays Affiliated QPAM's records. The Applicant further states that, while such access should be appropriately cabined, the auditor will still have access to sensitive information, such as client information, marketing data, personal information of the QPAM's employees, and other details.

Therefore, the Applicant requests that access be limited to allow the auditor, and OED,[54] to inspect such information without its being disclosed in the public record. The Applicant suggests that this condition read: ''*The auditor must provide OED, upon request, all of the workpapers created and utilized in the course of the audit, provided that any confidential business or personal information of the Barclays Affiliated QPAMs, BPLC, and their clients (or the officers, directors, employees or agents thereof) reflected in the workpapers, including, without limitation, client communications, shall be redacted, and provided further that nothing herein shall be deemed to limit any authority the Department may otherwise have to inspect such information without making it part of the public file. Any failure of the auditor to meet this condition shall not be deemed a violation of the exemption.*''

The Department acknowledges that certain information contained in the workpapers may be confidential and proprietary, and having that information in a public file may create needless or avoidable disclosure issues. The Department has determined to modify Section I(i)(11) to remove the requirement that the auditor provide the workpapers to OED, and instead require that the auditor provide access to the workpapers for the Department's review and inspection. However, given the importance of the workpapers to the Department's own review and the Applicant's contractual relationship with the auditor, the Department declines to include a statement in Section I(i)(11) that a failure on behalf of the auditor to meet this condition will not violate the exemption.

Comment 27—Replacement of Auditor—Section I(i)(12)

Section I(i)(12) of the proposed five-year exemption provides that, ''*BPLC must notify the Department at least thirty (30) days prior to any substitution of an auditor, except that no such replacement will meet the requirements of this paragraph unless and until BPLC demonstrates to the Department's satisfaction that such new auditor is independent of BPLC, experienced in the matters that are the subject of the exemption, if granted, and capable of making the determinations required of this exemption, if granted.*''

The Applicant requests that this Section I(i)(12) be deleted, stating that the proposed exemption contains conditions requiring the auditor to satisfy multiple conditions and it serves no useful purpose to impose an additional requirement to demonstrate to the Department's satisfaction that the auditor satisfies such standards before substitution, particularly given the timeline required for the audit process. The Applicant requests that if the condition is not deleted, the condition be modified to read: ''*BPLC must notify the Department at least thirty (30) days after terminating the engagement of the auditor, the reason for the termination, and provide the Department with the contract of the substitute auditor, the selection of which must satisfy the requirements of subparagraph (i)(1).*''

The Department notes that this exemption is not unique in requiring the Department be notified of changes to service providers (see, *e.g.,* the requirement of Schedule C of the Form 5500 Annual Return/Report for the Plan Administrator of certain plans to report to the Department a termination of the

[54] OED is the Office of Exemption Determinations within the Employee Benefits Security Administration agency of the United States Department of Labor.

plan's auditor and/or enrolled actuary and to provide an explanation of the reasons for the termination, including a description of any material disputes or matters of disagreement concerning the termination). Furthermore, requiring the Applicant to notify the Department of the substitution of an auditor serves to ensure that the Barclays Affiliated QPAMs are attentive to the audit process and the protections it provides; and that the Department has the information it needs to review compliance. The Department has decided, however, to modify Section I(i)(12) to remove the requirement for the Applicant to demonstrate the independence and qualifications of the auditor, however, and requires instead that the Applicant, no later than two months from the engagement of the replacement auditor, notify the Department of a change in auditor and of the reason(s) for the substitution including any material disputes between the terminated auditor and the Applicant. The Applicant's fiduciary obligations with respect to the selection of the auditor, as well as the significant role a credible selection plays in reducing the need for more extensive oversight by the Department, should be sufficient to safeguard the selection process.

Comments 28–29—Contracts With Plans and IRAs—Section I(j)(1)

Section I(j)(1) of the proposed five-year exemption provides: ''*Effective as of the effective date of this five-year exemption, if granted, with respect to any arrangement, agreement, or contract between a Barclays Affiliated QPAM and an ERISA-covered plan or IRA for which a Barclays Affiliated QPAM provides asset management or other discretionary fiduciary services, each Barclays Affiliated QPAM agrees and warrants: (1) To comply with ERISA and the Code, as applicable with respect to such ERISA- covered plan or IRA, to refrain from engaging in prohibited transactions that are not otherwise exempt (and to promptly correct any inadvertent prohibited transactions); and to comply with the standards of prudence and loyalty set forth in section 404 of ERISA with respect to each such ERISA-covered plan and IRA.*''

The Applicant requests that Subsection I(j) provide that the contract requirements apply only to agreements where a QPAM provides services in reliance on PTE 84–14. The Applicant asserts, as noted above, that the scope of exemptive relief in the proposed exemption should in all instances be limited in this manner. In addition, the Applicant states that the condition should make clear that it supersedes the analogous condition in the Temporary Exemption to avoid imposing duplicative requirements. The Applicant suggests that this condition read: ''This Subsection supersedes the analogous section of PTE 2016–16, as of the date of this exemption's publication in the **Federal Register**. Effective as of the publication date, with respect to any arrangement, agreement, or contract between a Barclays Affiliated QPAM and an ERISA-covered plan or IRA under which a Barclays Affiliated QPAM provides asset management or other discretionary fiduciary services in reliance on PTE 84–14, each Barclays Affiliated QPAM agrees and warrants . . . .''

ERISA-covered plans and IRAs routinely rely on QPAM status as a condition of entering into transactions with financial institutions, even with respect to transactions that do not necessarily require adherence to PTE 84–14. In addition, it may not always be clear whether or not the Barclays Affiliated QPAM intends to rely upon PTE 84–14 for any particular transaction. Accordingly, it is critical to ensure that protective conditions are in place to safeguard the interests of ERISA-covered plans and IRAs that are acting in reliance on the availability of this exemption and QPAM status, particularly those which may not have entered into the transaction in the first place, but for the Department's grant of this exemption.

The Department has a clear interest in protecting such ERISA-covered plans and IRAs that enter into an asset management agreement with a Barclays Affiliated QPAM in reliance on the manager's qualification as a QPAM. Moreover, when an ERISA-covered plan or IRA terminates its relationship with an asset manager, it may incur significant costs and expenses as its investments are unwound and as it searches for and hires a new asset manager.

The Department has revised this condition for consistency with its interest in protecting ERISA-covered plans and IRAs that rely upon QPAM status. The condition now applies only to Covered Plans.

The Department rejects the view that it acts outside its authority by protecting ERISA-covered plans and IRAs that rely on Barclay's Affiliated QPAMs' eligibility for this exemption, and reemphasizes the seriousness of the criminal misconduct that caused the Applicant to need this exemption. The Department may grant an exemption under section 408(a)(3) of ERISA or section 4975(c)(2)(C) of the Code only to the extent the Secretary finds, among other things, that the exemption is protective of the affected plan or IRA. As noted above, BPLC personnel engaged in serious misconduct over an extended period and at the expense of their own clients. This misconduct appears to have stemmed, in part, from deficiencies in control and oversight.

Notwithstanding the misconduct, which resulted in violation of Section I(g) of PTE 84–14, the Department has granted this exemption based, in significant part, upon the inclusion of Section I(j)(1) in the exemption, which protects Covered Plans by, among other things, requiring Barclays Affiliated QPAMs to make an express commitment to their customers to adhere to the requirements of ERISA and the Code, as applicable. As previously indicated, the Department has concluded that a culture of compliance, centered on adherence to basic standards of fair dealing as set forth in this exemption, gives the Department a compelling basis for making the required statutory findings that the exemption is in the interests of plan and IRA investors and protective of their rights. Absent such findings, the exemption would have been denied.

In response to the Applicant's comments, however, the Department has required an express commitment to comply with the fiduciary standards and prohibited transaction rules only to the extent these provisions are ''applicable'' under ERISA and the Code. This section, as modified, should serve its salutary purposes of promoting a culture of compliance and enhancing the ability of plans and IRA customers to sever their relationships with minimal injury in the event of noncompliance. This conclusion is reinforced, as well, by the limited nature of the relief granted by this exemption, which generally does not extend to transactions that involve self-dealing.

In response to the Applicant's comments, the Department also notes that nothing in ERISA or the Code prevents the Department from conditioning relief on express contractual commitments to adhere to the requirements set out herein. The QPAMs always remain free to disclaim reliance on the exemption and to avoid such express contractual commitments. To the extent, however, that they hold themselves out as fiduciary QPAMs, they should be prepared to make an express commitment to their customers to adhere to the requirements of this exemption. This commitment strengthens and reinforces the likelihood of compliance, and helps ensure that, in the event of noncompliance, customers will be insulated from injuries caused by noncompliance. These protections also ensure that customers will be able to extricate themselves from transactions that become prohibited as a result of the QPAMs' misconduct, without fear of sustaining additional losses as a result of the QPAMs' actions. In this connection, however, the Department emphasizes that the only claims available to the QPAMs' customers pursuant to these contractual commitments are those separately provided by ERISA or other state and federal laws that are not preempted by ERISA. As before, private litigants have only those causes of action specifically authorized by laws that exist independent of this exemption.

Comment 30—Indemnity Provision—Section I(j)(2)

Section I(j)(2) requires *each Barclays Affiliated QPAM to agree and warrant* ''*[t]o indemnify and hold harmless the ERISA-covered plan or IRA for any damages resulting from a Barclays Affiliated QPAM's violation of applicable laws, a Barclays Affiliated QPAM's breach of contract, or any claim brought in connection with the failure of such Barclays Affiliated QPAM to qualify for the exemptive relief provided by PTE 84–14 as a result of a violation of Section I (g) of PTE 84–14 other than the Conviction.*''

The Applicant asserts that the provision is unfair because it is not limited to clients who are harmed through a direct, causal link to the loss of the exemptive relief provided by PTE 84–14 and the Applicant requests that the condition be deleted. In addition, the Applicant represents that the condition appears to allow plans and IRAs to seek to recover damages (i) that arise from violations and breaches by third parties, (ii) that arise only tenuously from the manager's conduct, (iii) that may be grossly unreasonable in amount, (iv) for claims without merit and (v) for claims in connection with accounts that do not rely on the relief provided by PTE 84–14. If the Department declines to delete this condition, the Applicant requests, in the alternative, that the Department expressly tie the requirement to damages with a proximate causal connection to relevant conduct of the manager by rewording the condition as follows: ''*To indemnify and hold harmless the ERISA-covered plan or IRA for any reasonable damages involving such arrangement, agreement or contract and resulting directly from a violation of ERISA by such Barclays Affiliated QPAM, or, to the extent the Barclays Affiliated QPAM relies on the exemptive relief provided by PTE 84–14 under the arrangement, agreement or contract, the failure of such Barclays Affiliated QPAM to qualify for the exemptive relief provided by PTE 84–14 as a result of a violation of Section I(g) of PTE 84–14 other than as a result of the Conviction. This condition does not require indemnification of indirect, special, consequential or punitive damages.*''

As explained above, the intended purpose of this exemption is to protect ERISA-covered plans and IRAs that entrust the Barclays Affiliated QPAMs with the management of their retirement assets. To this end, it is the Department's view that the protective purpose of this exemption is furthered by Section I(j)(2). The Department emphasizes that this condition is not punitive, but rather ensures that, when an ERISA-covered plan or IRA enters into an asset management agreement with a Barclays Affiliated QPAM in reliance on the manager's qualification as a QPAM, it may expect adherence to basic fiduciary norms and standards of fair dealing, notwithstanding the prior conviction. The condition also ensures that the plan or IRA will be able to disengage from that relationship in the event that the terms of this exemption are violated without undue injury.

However, the Department has revised the applicability of this condition to more closely reflect these interests. In particular, the condition applies only when the Barclays Affiliated QPAM relies on PTE 84–14 or has expressly represented that it qualifies as a QPAM or relies on the QPAM class exemption in its dealings with the plan or IRA. As indicated above, if the asset manager would prefer not to be subject to these provisions as exemption conditions, it may expressly disclaim reliance on QPAM status or PTE 84–14 in entering into its contract with the plan or IRA (in that case, however, it could not rely on the exemption for relief).

The Department has also made certain further changes to this condition in consideration of the Applicant's comment. These changes include: Renumbering the condition for clarity; replacing ''applicable laws'' with clarifying language that conforms to the one-year exemption; replacing ''any damages'' with ''actual losses resulting directly from'' certain acts or omissions of the Barclays Affiliated QPAMs; and adding language which affirms that the obligations under this condition do not extend to damages caused by acts that are beyond the control of the Barclays Affiliated QPAMS.

Comment 31—Limits on Liability—Section I(j)(2), I(j)(3) and I(j)(7) [55]

Sections I(j)(2), I(j)(3) and I(j)(7) require that *each Barclays Affiliated QPAM agree and warrant:*
. . . (2) To indemnify and hold harmless the ERISA-covered plan or IRA for any damages resulting from a Barclays Affiliated QPAM's violation of applicable laws, a Barclays Affiliated QPAM's breach of contract, or any claim brought in connection with the failure of such Barclays Affiliated QPAM to qualify for the exemptive relief provided by PTE 84–14 as a result of a violation of Section I(g) of PTE 84–14 other than the Conviction; (3) Not to require (or otherwise cause) the ERISA-covered plan or IRA to waive, limit, or qualify the liability of the Barclays Affiliated QPAM for violating ERISA or the Code or engaging in prohibited transactions; [and] . . . (7) Not to include exculpatory provisions disclaiming or otherwise limiting liability of the Barclays Affiliated QPAM for a violation of such agreement's terms, except for liability caused by an error, misrepresentation, or misconduct of a plan fiduciary or other party hired by the plan fiduciary who is independent of BPLC, and its affiliates.''

The Applicant requests that these conditions be deleted because they contain duplicative requirements, which extend beyond the scope of relief. The Applicant states that the indemnification provision should be limited to ensure that it operates in a manner that is fair to the Applicant and its affiliates and that, with that change, the condition provides ample protection to clients. The Applicant states that Section I(j)(3) and Section I(j)(7) do not provide any additional protection.

The Department declines to delete Section I(j)(3) from the final exemption. The Department notes that ERISA already precludes ERISA fiduciaries from disclaiming obligations under ERISA. See ERISA section 410 (prohibiting exculpatory clauses as void as against public policy). To the extent the exemption condition prevents the Barclays Affiliated QPAMs from including contractual provisions that are void as against public policy there is no legitimate basis for objection. Such exculpatory language should not be in the governing documents in the first place and is potentially misleading because it suggests disclaimer of obligations that may not be disclaimed.

[55] The Department has determined that Subsection (4) is duplicative of the exemption's prohibition on exculpatory clauses, described below. Thus, the subsection has been deleted. Section I(j) has been renumbered for clarity.

Outside the context of ERISA section 410, the provision's requirement that the Barclays Affiliated QPAMs retain accountability for their adherence to the basic obligations set forth in this exemption is more than justified by the misconduct that led to the fines and Conviction as discussed above, and by the need to ensure that Plan and IRA customers may readily obtain redress and exit contracts with Barclays Affiliated QPAMs without harm in the event of violations.

The Department has modified Section I(j)(6) (formerly, Subsection (j)(7)) to clarify that the prohibition on exculpatory provisions does not extend to losses that arise from an act or event not caused by the Applicant. Also, nothing in this section alters the prohibition on exculpatory provisions set forth in ERISA section 410.

Comment 32—Termination and Withdrawal Restriction—Section I(j)(5) and I(j)(6)

Under Sections I(j)(5) and I(j)(6) of the proposed five-year exemption, the Barclays Affiliated QPAMs agree: ''*(5) Not to restrict the ability of such ERISA-covered plan or IRA to terminate or withdraw from its arrangement with the Barclays Affiliated QPAM (including any investment in a separately managed account or pooled fund subject to ERISA and managed by such QPAM), with the exception of reasonable restrictions, appropriately disclosed in advance, that are specifically designed to ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other investors as a result of an actual lack of liquidity of the underlying assets, provided that such restrictions are applied consistently and in like manner to all such investors;*

[and] . . . (6) Not to impose any fees, penalties, or charges for such termination or withdrawal with the exception of reasonable fees, appropriately disclosed in advance, that are specifically designed to prevent generally recognized abusive investment practices or specifically designed to ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other investors, provided that such fees are applied consistently and in like manner to all such investors.''

The Applicant represents that these conditions should be deleted because they are unnecessary. The Applicant notes that lockup conditions are commonly used, designed to protect all investors in a pooled fund, and applied evenhandedly to all investors. Further, the Applicant states that the conditions, as worded, could provide ERISA plan clients and IRAs a privileged position, to the detriment of other investors.

The Applicant requests that, should these conditions be retained, they be modified as follows: Under renumbered Sections I(j)(4) and (j)(5), the Barclays Affiliated QPAMs agree: ''(4) Not to restrict the ability of such ERISA-covered plan or IRA to terminate or withdraw from its arrangement with the Barclays Affiliated QPAM with respect to any investment in a separately managed account or pooled fund subject to ERISA and managed by such QPAM, with the exception of reasonable restrictions, appropriately disclosed in advance, that are specifically designed to ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other investors. In connection with any such arrangements involving investments in pooled funds subject to ERISA entered into after the Conviction Date, the adverse consequences must relate to a lack of liquidity of the pooled fund's underlying assets, valuation issues, or regulatory reasons that prevent the fund from immediately redeeming an ERISA-covered plan's or IRA's investment, and such restrictions are applicable to all such investors and effective no longer than reasonably necessary to avoid the adverse consequences; [and] . . . (5) Not to impose any fees, penalties, or charges for such termination or withdrawal with the exception of reasonable fees, appropriately disclosed in advance, that are specifically designed to ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other investors, provided that such fees are applied consistently and in like manner to all such investors.''

The Department has revised renumbered Section I(j)(4) and has revised the condition to allow exceptions for a lack of liquidity of the pooled fund's underlying assets, valuation issues, or regulatory reasons that prevent the fund from immediately redeeming an ERISA-covered plan's or IRA's investment in partial satisfaction of the Applicant's request, but has retained the parenthetical that the restriction is not limited to a separately-managed account that is subject to ERISA or a pooled fund that is subject to ERISA. The Department has decided to retain Section I(i)5 as proposed.

Comment 33—Updated Investment Management Agreement—Section I(j)(7)

Section I(j)(8) of the proposed five-year exemption provides that each Barclays Affiliated QPAM agrees and warrants: ''*[w]ithin four (4) months of the date of the Conviction, each Barclays Affiliated QPAM must provide a notice of its obligations under this Section I(j) to each ERISA-covered plan and IRA for which a Barclays Affiliated QPAM provides asset management or other discretionary fiduciary services. For all other prospective ERISA-covered plan and IRA clients for which a Barclays Affiliated QPAM provides asset management or other discretionary services, the Barclays Affiliated QPAM will agree in writing to its obligations under this Section I(j) in an updated investment management agreement between the Barclays Affiliated QPAM and such clients or other written contractual agreement.*''

The Applicant represents that it and its affiliates do not currently provide asset management or other discretionary fiduciary services to ERISA-covered plans or IRAs. The Applicant states that, for that reason, the four-month notice has no purpose. The Applicant requests that this provision be modified to reflect that Barclays Affiliated QPAMs would in the future be required to provide notice prior to an engagement with an ERISA-covered plan or IRA subject to this exemption, consistent with Subsections (h)(1) and (h)(2). The Applicant notes that the timing of the notice was correct in the analogous provision of the Temporary Exemption. Moreover, the Applicant submits that the condition should be limited to plans for which the QPAM relies on PTE 84–14. Finally, the Applicant submits that a contractual agreement is an improper vehicle as a client may attempt to modify proposed contractual terms.

The Applicant suggests that the condition in renumbered Subsection (j)(7) read as follows: ''Prior to a Barclays Affiliated QPAM's engagement with an ERISA-covered plan or IRA for the provision of asset management or other discretionary fiduciary services, such Barclays Affiliated QPAM must provide a notice of its obligations under this Section I(j) to such ERISA-covered plan or IRA.''

The Department has modified the condition to require that Barclays Affiliated QPAMs provide notice prior to an engagement with an ERISA-covered plan or IRA. Further, as noted above, the Department has an interest in protecting a plan or IRA that enters into an asset management agreement with a Barclays Affiliated QPAM in reliance on the manager's qualification as a QPAM, regardless of whether the QPAM relies on the class exemption when managing the plan's or IRA's assets. The Department has revised the applicability of this condition to more closely reflect this interest, and the condition now applies to Covered Plans.

Comment 34—Notice to Plan Clients—Section I(k)

Section I(k) of the proposed five-year exemption provides that ''*[e]ach BPLC affiliated asset manager provides each Future Covered Client with a* ***Federal Register*** *copy of the proposed five-year exemption, along with a separate summary describing the facts that led to the Conviction (the Summary), which have been submitted to the Department, and a prominently displayed statement that the Conviction resulted in a failure to meet a condition of PTE 84–14. The provision of these documents must occur prior to, or contemporaneously with, the client's receipt of a written asset management agreement from the BPLC affiliated asset manager. For purposes of this paragraph, a ''Future Covered Client'' means a client of the BPLC affiliated asset manager that, beginning after the date, if any, that a final exemption is published in the* ***Federal Register****, has assets managed by such asset manager, and has received a representation from the asset manager that the asset manager is a QPAM, or qualifies for the relief provided by PTE 84–14.*''

The Applicant asserts that the condition is overbroad and should be deleted. The Applicant states, by its terms, it extends to clients for which the QPAM does not rely on PTE 84–14 and clients who are neither covered by ERISA or the prohibited transaction provisions of the Internal Revenue Code. Further, the Applicant states that, to the extent the condition is meant to extend to clients for which the QPAM relies on PTE 84–14, it duplicates the requirements of Subsection I(j)(8)).

The Department declines to delete the condition. The Department notes that ERISA-covered plans and IRAs often rely on QPAM status as a condition of entering into transactions with financial institutions, even with respect to transactions that do not strictly require adherence to PTE 84–14. In addition, it may not always be clear whether the Barclays Affiliated QPAM intends to rely upon PTE 84–14 for any particular transaction. Accordingly, it is critical to ensure that protective conditions are in place to safeguard the interests of plans and IRAs that are acting in reliance on QPAM status or the availability of this exemption, particularly those who may not have entered into the transaction in the first place, but for the Department's grant of this exemption. Further, the Department has an interest in protecting plans and IRAs that enter into an asset management agreement with a Barclays Affiliated QPAM in reliance on the manager's qualification as a QPAM. If a plan or IRA terminates its relationship with an asset manager, it may incur significant costs and expenses as its investments are unwound and as it searches for and hires a new asset manager.

The Applicant also requests deletion of the requirement that a separate summary of facts be provided, as the facts are set out in the **Federal Register** notice. The Applicant suggests that the condition read as follows: ''*Notice to Future Covered Clients. Each Barclays Affiliated QPAM provides each Future Covered Client with a* ***Federal Register*** *copy of the final permanent exemption. The provision of this document must occur prior to, or contemporaneously with, the client's receipt of a written asset management agreement from the Barclays Affiliated QPAM. For purposes of this paragraph, a ''Future Covered Client'' means an ERISA-covered Plan client or IRA client of the Barclays Affiliated QPAM that, beginning after the date, if any, that a final exemption is published in the* ***Federal Register****, for which a Barclays Affiliated QPAM will provide asset management or other discretionary fiduciary services in reliance on PTE 84–14.*''

The Department declines to make the requested changes. The exemption seeks to ensure that all interested parties are aware of and attentive to the complete facts and circumstances surrounding this application for exemption. The required disclosure of the proposal and grant ensures full disclosure of the relevant facts and circumstances, and the Summary highlights the important facts that led to the Conviction. Requiring the disclosure of the Summary, proposal, and grant provides the opportunity for all parties to have knowledge of these facts and circumstance. Notwithstanding this, the Department has modified the condition to clarify that disclosures may be provided electronically. Further, the notice requirement has been narrowed to ERISA-covered plans and IRAs that would benefit from this knowledge (*i.e.,* Covered Plans). Notice does not need to be given to a client with respect to which a Barclays Affiliated QPAM has expressly disclaimed reliance on QPAM status or reliance on PTE 84–14.

Comment 35—QPAM Compliance with PTE 84–14 Conditions Except Section I(g); Section I(l)

Section I(l) of the proposed five-year exemption provides that ''*[t]he Barclays QPAMs must comply with each condition of PTE 84–14, as amended, with the sole exception of the violation of Section I(g) of PTE 84–14 that is attributable to the Conviction.*''

The Applicant represents this condition contains an unintended error as ''Barclays QPAM'' is undefined. The Applicant suggests that the condition read: ''The Barclays Affiliated QPAMs must comply with each condition of PTE 84–14, as amended, with the sole exception of the violation of Section I(g) of PTE 84–14 that is attributable to the Conviction.''

The Department has revised the exemption in the manner requested by the Applicant.

Comment 36—Compliance Officer Appointment and Reporting Line—Section I(m)(1)(ii)

Section I(m)(1)(ii) of the proposed five-year exemption provides, ''*BPLC designates a senior compliance officer (the Compliance Officer) who will be responsible for compliance with the Policies and Training requirements described herein. The Compliance Officer must conduct an annual review (the Annual Review) to determine the adequacy and effectiveness of the implementation of the Policies and Training. With respect to the Compliance Officer, the following conditions must be met: . . .*

(ii) The Compliance Officer must have a direct reporting line to the highest-ranking corporate officer in charge of legal compliance that is independent of BPLC's other business lines.''

The Applicant requests the deletion of conditions regarding appointment of the Compliance Officer and the Annual Review. The Applicant states that BPLC pleaded guilty to a single crime, based on the conduct of two individuals in London who had no responsibility for asset management. The Applicant claims that BPLC and its Affiliated QPAMs have very robust compliance departments and that BPLC's compliance and remediation efforts were singled out for praise by DOJ and resulted in BPLC becoming the first corporate entity to receive sentencing credit for such efforts. The Applicant asserts that the Department's imposition of additional compliance requirements is, under these circumstances, unwarranted and seemingly arbitrary. The Applicant states that the Department has not imposed a requirement like that in Subsection I(m) in granting past exemptions, and claims that there is no basis for imposing the requirement herein. The Applicant represents that Barclays should be trusted to determine how to comply with the exemption and its Policies and Training conditions, which are separately the subject of the audit requirement. In addition, the Applicant states that the reference to the ''highest ranking corporate officer in charge of legal compliance'' is unclear. The Applicant requests that if the condition is not deleted, that the condition read: ''*(m)(1) BPLC designates a compliance officer (the Compliance Officer) who will be responsible for compliance with the Policies and Training requirements described herein: . . .*

(ii) The Compliance Officer must have a direct reporting line to the highest-ranking corporate officer in charge of legal or compliance that is independent of BPLC's other business lines.''

The Department proposed the requirement of an internal compliance officer because of serious concerns regarding the Applicant's compliance regime, as discussed above. The Department's determination to grant this exemption is based in part on the Department's view that an internal compliance officer with responsibility over the policies and procedures mandated by this exemption will provide a new level of oversight necessary to ensure that such Policies and Training are properly implemented. In response to the Applicant's comment that the reference to the ''highest ranking corporate officer in charge of legal compliance'' is unclear, as noted above in Section I(i)(8), the Department has modified ''highest ranking corporate officer in charge of legal compliance'' to ''highest ranking corporate officer in charge of compliance for asset management.''

Comment 37—Distribution of Compliance Officer's Annual Report—Section I(m)(2)(iv)

Section I(m)(2)(iv) of the proposed five-year exemption provides, ''*[w]ith respect to each Annual Review, the following conditions must be met: . . .*

(iv) Each Annual Report must be provided to appropriate corporate officers of BPLC and each Barclays Affiliated QPAM to which such report relates; the head of compliance and the General Counsel (or their functional equivalent) of the relevant Barclays Affiliated QPAM; and must be made unconditionally available to the independent auditor described in Section I(i) above.''

To the extent the Annual Review and Annual Report conditions are not deleted, the Applicant requests deletion of the requirement that the Annual Report be provided to ''appropriate corporate officers.'' The Applicant states that this term is undefined and unclear. The Applicant states that the purpose of this condition is satisfied by providing the Report to the General Counsel (or their functional equivalent) who can determine what further internal distribution is necessary. If the condition is not deleted, the Applicant suggests that the condition read: ''*Each Annual Report must be provided to the head of compliance and the General Counsel (or their functional equivalent) of the relevant Barclays Affiliated QPAM and the General Counsel (or their functional equivalent) of BPLC; and must be made unconditionally available to the independent auditor described in Section I(i) above.*''

While the Department declines to delete the Annual Review and Annual Report conditions, after consideration of the Applicant's comment, the Department has revised the exemption in the manner requested by the Applicant.

Comment 38—Compliance Annual Review and Timing—Section I(m)(2)(v)

Section I(m)(2)(v) of the proposed five-year exemption provides, ''*[w]ith respect to each Annual Review, the following conditions must be met: . . . (v) Each Annual Review, including the Compliance Officer's written Annual Report, must be completed at least three (3) months in advance of the date on which each audit described in Section I(i) is scheduled to be completed.*''

To the extent the Annual Review and Annual Report requirements are not deleted, the Applicant requests that this condition be deleted or, at minimum, that the timing requirement be removed. The Applicant states that the compliance review process outlined in the proposed exemption is an extensive undertaking, and the proposed exemption envisions an iterative process in which the auditor communicates with the relevant QPAM upon discovery of issues. The Applicant states that the Department should not mandate each aspect of the Annual Review, to the extent the Annual Review requirement remains, and, in any case, the Annual Review should not be mandated to conclude well before the audit is completed. If the condition is not deleted, the Applicant suggests that the condition read: ''*(v) The first Annual Review, including the Compliance Officer's written Annual Report, must be completed within twelve (12) months of the Effective Date and each successive Annual Review must be completed within twelve (12) months of the prior Annual Review.*''

The Department declines to delete the Annual Review and Annual Report conditions. The Department notes that the Annual Review and the Annual Report are integral to the auditor's assessment of the Applicant's compliance with the terms of the exemption. An independent assessment by the auditor of the adequacy of the Annual Review and the Annual Report is essential to providing appropriate assurances that the Applicant and the Barclays Affiliated QPAMs have taken their obligations under this exemption very seriously and have complied with those obligations. The Department has modified the time by which the Annual Review, including the Annual Report, is due, to three months following the period to which it relates.

Comment 39—Deferred Prosecution Agreement/Non-Prosecution Agreement—Section I(o)(2)

Section I(o)(2) of the proposed five-year exemption provides, with respect to any Deferred Prosecution Agreement or Non-Prosecution Agreement: ''*During the effective period of this five-year exemption, if granted, BPLC: (2) Immediately provides the Department any information requested by the Department, as permitted by law, regarding the agreement and/or conduct and allegations that led to the agreement. After review of the information, the Department may require BPLC, its affiliates, or related parties, as specified by the Department, to submit a new application for the continued availability of relief as a condition of continuing to rely on this exemption. If the Department denies the relief requested in the new application, or does not grant such relief within twelve (12) months of application, the relief described herein is revoked as of the date of denial or as of the expiration of the twelve (12) month period, whichever date is earlier.*''

The Applicant requests that the Department delete this condition. The Applicant states that the condition does not meet the requirements of either the Administrative Procedure Act (the APA) or the Department's own regulations. The Applicant states that if the Department wishes to withdraw an exemption, it must publish its intent to withdraw for notice and comment in the **Federal Register**. *See* 5 U.S.C. 553 and 29 CFR 2570.50. The Applicant states that the proposed rule provides that the Department, at its option, can require the Applicant to ''reapply'' for an exemption, and if the Department denies it or simply lets a year go by, the current exemption is terminated. However, the Applicant states that the APA and the Department's own regulation require that an exemption may not be terminated unless the Department publishes the termination for notice and comment.

The Applicant also objects that the condition could create risk and uncertainty for multiple loans, leases, swaps, forwards and other investments. In addition, the Applicant states that the timing of NPAs/DPAs is uncertain. If the condition is not deleted, the Applicant requests that the condition read as follows: ''During the effective period of the permanent exemption BPLC: (1) Immediately discloses to the Department any Deferred Prosecution Agreement (a DPA) or a Non-Prosecution Agreement (an NPA) with the U.S. Department of Justice, entered into by Barclays or any of its affiliates in connection with conduct described in Section I(g) of PTE 84–14 or section 411 of ERISA; and (2) Immediately provides the Department any information requested by the Department, as permitted by law, regarding the agreement and/or conduct and allegations that led to the agreement.''

The Department in no way intended that this condition to be read as providing for an automatic revocation of the exemption and has revised this condition accordingly. As revised, the condition simply requires that the Applicant notify the Department if and when it or any of its affiliates enter into a DPA or NPA with the U.S. Department of Justice for conduct described in section I(g) of PTE 84–14 or ERISA section 411 and immediately provide the Department with any information requested by the Department, as permitted by law, regarding the agreement and/or conduct and allegations that led to the agreement. The Department retains the right to propose a withdrawal of the exemption pursuant to its procedures contained at 29 CFR 2570.50, should the circumstances warrant such action.

Comment 40—Right to Copies of Policies and Procedures—Section I(p)

Section I(p) of the proposed five-year exemption provides that, ''*[e]ach Barclays Affiliated QPAM, in its agreements with ERISA-covered plan and IRA clients, or in other written disclosures provided to ERISA-covered plan and IRA clients, within 60 days prior to the initial transaction upon which relief hereunder is relied, and then at least once annually, will clearly and prominently: inform the ERISA-covered plan and IRA client that the client has the right to obtain copies of the QPAM's written Policies adopted in accordance with this exemption, if granted.*''

The Applicant requests that this condition be revised to permit clients to seek and obtain copies of the policies and procedures upon request. The Applicant states that this condition adds to the number of duplicative and overlapping notice requirements to clients, which is burdensome and may lead to confusion and clients ignoring these mailings. The Applicant also states that annual re-notification is excessive and only adds to these risks. Further, the Applicant states that the exemption, which the client will already have received, can make clear that clients can request and receive the policies and procedures upon request, removing any need for additional mailings. The Applicant suggests that the condition read: ''ERISA-covered plan and IRA clients whose accounts are managed in reliance on PTE 84–14 shall be provided a copy of the QPAM's written Policies adopted in accordance with the exemption upon request.''

The Department disagrees, in part, with the Applicant's comment. Affording ERISA-covered plan and IRA clients a means by which to review and understand the Policies is a vital protection that is fundamental to this exemption's purpose. However, the Department has modified the condition so that the QPAMs, at their election, may instead provide Covered Plans a disclosure that accurately describes or summarizes key components of the Policies, rather than provide the Policies in their entirety. The Department has also determined that such disclosure may be continuously maintained on a website, provided that the website link to the summary of the written Policies is clearly and prominently disclosed to those ERISA-covered plan and IRA clients to whom this section applies. The Department also agrees with the Applicant that the timing requirement for notice should be revised and, accordingly, has modified the condition of Section I(p) to require notice regarding the information on the website be provided prior to or contemporaneously with a Barclays Affiliated QPAM's engagement by any Covered Plan. The notice shall be provided in its agreements with, or in other written disclosures provided to any such Covered Plan. If the Policies are thereafter changed, *each Covered Plan client must receive a new notice within six (6) months following the end of the calendar* year during which the Policies were changed.

Comment 41—No-Fault Provision—Section I(q)

Section I(q) the proposed five-year exemption provides that, ''*[a] Barclays Affiliated QPAM or a Barclays Related QPAM will not fail to meet the terms of this exemption, if granted, solely because a different Barclays Affiliated QPAM or a Barclays Related QPAM fails to satisfy a condition for relief described in Sections I(c), (d), (h), (i), (j), (k), (n) and (p).*''

The Applicant requests that this provision include references to the conditions described in Subsections I(e), (f), (g), and (m). The Applicant represents that it is important to advance the principle that a QPAM should not lose exemptive relief simply because a separate QPAM within the same corporate family has failed to satisfy a condition. Adding the Subsections listed above will ensure that the relief is meaningful here. Moreover, the Applicant represents that the failure of the auditor to meet a requirement of the exemption should not disqualify the QPAMs from using the exemption. The Applicant suggests that the condition read: ''*A Barclays Affiliated QPAM or a Barclays Related QPAM will not fail to meet the terms of this exemption solely because a different Barclays Affiliated QPAM or a Barclays Related QPAM fails to satisfy a condition for relief described in Sections I(c), (d), (e), (f), (g), (h), (i), (j), (k), (m), (n) and (p), or because the Auditor failed to meet a requirement of this exemption.*''

The Department declines to extend the relief provided under Section I(q) to Sections I(e), (f), (g), and (m).

Section I(e) provides that any failure of a Barclays Affiliated QPAM or Barclays Related QPAM to comply with Section I(g) of PTE 84–14 arose solely from the Conviction. As set forth in the Applicant's materials, the Conviction is the sole reason a new exemption is necessary for the Barclays Affiliated QPAMs. If there were a new or additional conviction of crime described in Section I(g) of PTE 84–14, the Department would need to assess the misconduct, its scope, and its significance. Without such an assessment, the Department could not be confident of the adequacy of the conditions set forth herein with respect to the Barclays Affiliated QPAMs and Related QPAMs. Indeed, depending on the particular facts, a subsequent conviction could be strong evidence of the inadequacy of this exemption's conditions to protect Covered Plans. Further, as stated above, the Department is not obligated to grant further relief to the extent such a conviction occurs.

Section I(f) provides that no Barclays Affiliated QPAM or Barclays Related QPAM exercised authority over the assets of any ERISA-covered plan or IRA in a manner that it knew or should have known would: Further the criminal conduct that is the subject of the Conviction; or cause the Barclays Affiliated QPAM or Barclays Related QPAM or its affiliates or related parties to directly or indirectly profit from the criminal conduct that is the subject of the Conviction. The Applicant has represented that the conduct that is the subject of the BPLC's conviction ''did not involve any of BLPC's asset management units.'' The Department is not persuaded that it should include relief from Section I(f) in Section I(q).

Section I(g) requires BPLC to refrain from providing investment management services to plans, and Section I(m) requires a Compliance Officer to undertake various compliance and reporting obligations. Consequently, if the relief under I(q) were extended to Sections I(g) and I(m), it would render them virtually meaningless. There would be little or no effective penalty for the failure to comply with the conditions, as the Affiliated and Related QPAMs would remain free to rely on the exemption's terms. The Department also is of the view that the potential for disqualification of all Barclays Affiliated QPAMs under this agreement will serve as additional incentive for these entities to comply in good-faith with the provisions of Sections I(g) and (m).

However, the Department has determined to extend the relief in condition (l), which requires Barclays Affiliated QPAMs to comply with each condition of PTE 84–14, as amended, with the sole exception of the violation of Section I(g) of PTE 84–14 that is attributable to the Conviction. Finally, except as noted above, the Department accepts the Applicant's comment that the failure of the auditor to comply with any of the conditions of the exemption should not be treated as a failure by the Barclays Affiliated QPAMs to comply with the conditions of the exemption, provided that such failure was not due to the actions or inactions of the Applicant or its affiliates, and Section I(q) is amended, accordingly, except as described above.

Comment 42—Definition of Affiliated QPAM—Section II(a)

Section II(a) of the proposed five-year exemption provides: ''*[T]he term 'Barclays Affiliated QPAM' means a 'qualified professional asset manager' (as defined in Section VI(a) of PTE 84–14) that relies on the relief provided by PTE 84–14 and with respect to which BPLC is a current or future 'affiliate' (as defined in Section VI(d)(1) of PTE 84–14). The term 'Barclays Affiliated QPAM' excludes the parent entity, BPLC and BCI's Investment Bank division.*''

The Applicant states that BCI was not the subject of the Conviction, nor was its Investment Bank division the subject of the Conviction. The Applicant also represents that the division should not be excluded from the exemption, because BCI is an Affiliated QPAM in the BPLC Group, and excluding a BCI division from the benefits of PTE 84–14 would not only deter ordinary corporate transactions, such as the purchase of an asset management entity and its merging into BCI, it would prevent the development by BCI of new asset management lines of business. Moreover, the Applicant states that the Justice Department did not charge BCI, and thus did not determine that as a corporate entity, it was culpable of a crime. By excluding BCI's Investment Bank division from the benefits of PTE 84–14, the Applicant represents that the Department is making that judgment in the place of the Justice Department and effectively debarring the entity from providing any fiduciary services at all. According to the Applicant, such a result is arbitrary and punitive. Therefore, the Applicant requests that the provision read as follows: ''The term 'Barclays Affiliated QPAM' means a 'qualified professional asset manager'' (as defined in Section VI(a) of PTE 84–14) that relies on the relief provided by PTE 84–14 and with respect to which BPLC is a current or future 'affiliate' (as defined in Section VI(d)(1) of PTE 84–14). The term 'Barclays Affiliated QPAM' excludes BPLC.''

The Department agrees with this comment and has modified Section II(a) accordingly.

Comment 43—Definition of Conviction—Section II(e)

Section II(e) of the proposed five-year exemption provides: ''*The term 'Conviction' means the judgment of conviction against BPLC in the United States District Court for the District of Connecticut (the Court), Case No. 3:15–cr–00077–SRU–1, for participating in a combination and conspiracy to fix, stabilize, maintain, increase or decrease the price of, and rig bids and offers for, euro/U.S. dollar currency pairs exchanged in the foreign currency exchange spot market by agreeing to eliminate competition in the purchase and sale of such currency pairs in the United States and elsewhere, in violation of the Sherman Antitrust Act, 15 U.S.C. 1.*''

The Applicant states that the language in this definition paraphrases the Plea Agreement and expands the use of the term Conviction far beyond the conduct that is the subject of the Plea Agreement. The Applicant states that exemptions are narrowly construed and it is critical that both the asset managers using the exemption and plan counterparties understand precisely what the conditions mean. The Applicant states that, without that precision, it is difficult to know whether conditions regarding compensation, participation, and future hiring are met. The Applicant represents that this overly-broad language goes far beyond the Part I(g) disqualification and will cause the Applicant and counterparties to conclude that it is unusable. Finally, the Applicant states that the definition of ''Conviction'' in Subsection II(e) was accurate in the Temporary Exemption. Therefore, the Applicant requests that this definition read as follows: ''The term ''Conviction'' means the judgment of conviction against BPLC for violation of the Sherman Antitrust Act, 15 U.S.C. 1, which is scheduled to be entered in the District Court for the District of Connecticut (the District Court), Case Number 3:15–cr–00077–SRU–1.''

After considering this comment, the Department has revised the definition accordingly. The Department notes that Section II of the five-year exemption has been reordered to list the defined terms alphabetically; therefore, the term ''Conviction'' is now listed as Subsection II(d).

Comments 44–46—Paragraph 2 of the Summary of Facts and Representations

The Applicant seeks certain clarifications to the Summary of Facts and Representations that the Department does not view as relevant to its determination whether to grant this exemption. Those requested clarifications may be found as part of the public record for Application No. D–11910, in a letter to the Department, dated January 5, 2017.

Comment—Letter from House Committee on Financial Services

The Department also received a comment letter from certain members of Congress (the Members) regarding this exemption, as well as the other QPAM-related exemptions published in the **Federal Register** today. In the letter, the Members recognized that certain conditions contained in these proposed exemptions are crucial to protecting the investments of our nation's workers and retirees, referring to proposed conditions which require each bank to: (a) Indemnify and hold harmless ERISA-covered plans and IRAs for any damages resulting from the future misconduct of such bank; and (b) disclose to the Department any Deferred Prosecution Agreement or a Non-Prosecution Agreement with the U.S. Department of Justice. The Members also requested that the Department hold hearings in connection with the proposed exemptions.

The Department acknowledges the Members' concerns regarding the need for public discourse regarding proposed exemptions. To this end, the Department's procedures regarding prohibited transaction exemption requests under ERISA (the Exemption Procedures) afford interested persons the opportunity to request a hearing. Specifically, section 2570.46(a) of the Exemption Procedures provides that, ''[a]ny interested person who may be adversely affected by an exemption which the Department proposes to grant from the restrictions of section 406(b) of ERISA, section 4975(c)(1)(E) or (F) of the Code, or section 8477(c)(2) of FERSA may request a hearing before the Department within the period of time specified in the **Federal Register** notice of the proposed exemption.'' The Exemption Procedures provide that ''[t]he Department will grant a request for a hearing made in accordance with paragraph (a) of this section where a hearing is necessary to fully explore material factual issues identified by the person requesting the hearing.'' The Exemption Procedures also provide that ''[t]he Department may decline to hold a hearing where: (1) The request for the hearing does not meet the requirements of paragraph (a) of this section; (2) the only issues identified for exploration at the hearing are matters of law; or (3) the factual issues identified can be fully explored through the submission of evidence in written (including electronic) form.'' [56]

The Department notes that while the Members' letter raises policy issues, it does not appear to raise specific material factual issues. The Department previously explored a wide range of legal and policy issues regarding Section I(g) of the QPAM Exemption during a public hearing held on January 15, 2015 in connection with the Department's proposed exemption involving Credit Suisse AG, and has determined that an additional hearing on these issues is not necessary.

After giving full consideration to the record, the Department has decided to grant the exemption, as described above. The complete application file (Application No. D–11910) is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N–1515, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on November 21, 2016 at 81 FR 83427.

Exemption

Section I: Covered Transactions

Certain entities with specified relationships to Barclays PLC (BPLC) (the Barclays Affiliated QPAMs and the Barclays Related QPAMs, as defined further in Sections II(a) and II(b), respectively) will not be precluded from relying on the exemptive relief provided by Prohibited Transaction Class Exemption 84–14 (PTE 84–14 or the QPAM Exemption), notwithstanding the Conviction, as defined in Section II(d), during the Exemption Period,[57] provided that the following conditions are satisfied:

(a) Other than certain individuals who: Worked for a non-fiduciary business of a BPLC subsidiary; had no responsibility for, and exercised no authority in connection with, the management of plan assets; and are no longer employed by the BPLC subsidiary, the Barclays Affiliated QPAMs and the Barclays Related QPAMs (including their officers, directors, agents other than BPLC, and employees of such QPAMs who had responsibility for, or exercised authority in connection with the management of plan assets) did not know of, did not have reason to know of, or participate in the criminal conduct that is the subject of the Conviction. For the purposes of this paragraph (a), ''participate in'' means the knowing approval of the misconduct underlying the Conviction;

(b) Apart from a non-fiduciary line of business within BCI, the Barclays Affiliated QPAMs and the Barclays Related QPAMs (including their officers, directors, and agents other than BPLC, and employees of such Barclays Affiliated QPAMs) did not receive direct compensation, or knowingly receive indirect compensation, in connection with the criminal conduct that is the subject of the Conviction;

(c) The Barclays Affiliated QPAM will not employ or knowingly engage any of the individuals that participated in the criminal conduct that is the subject of the Conviction. For the purposes of this paragraph (c), ''participated in'' means the knowing approval of the misconduct underlying the Conviction;

(d) At all times during the Exemption Period, no Barclays Affiliated QPAM will use its authority or influence to direct an ''investment fund'' (as defined in Section VI(b) of PTE 84–14), that is subject to ERISA or the Code and managed by such Barclays Affiliated QPAM in reliance on PTE 84–14, or with respect to which a Barclays Affiliated QPAM has expressly represented to an ERISA-covered plan or IRA with assets invested in such ''investment fund'' that it qualifies as a QPAM or relies on the QPAM class exemption, to enter into any transaction with BPLC, or to engage BPLC to provide any service to such investment fund, for a direct or indirect fee borne by such investment fund, regardless of whether such transaction or service may otherwise be within the scope of relief provided by an administrative or statutory exemption;

(e) Any failure of a Barclays Affiliated QPAM or a Barclays Related QPAM to satisfy Section I(g) of PTE 84–14 arose solely from the Conviction;

(f) A Barclays Affiliated QPAM or a Barclays Related QPAM did not exercise authority over the assets of any plan subject to Part 4 of Title I of ERISA (an ERISA-covered plan) or section 4975 of the Code (an IRA) in a manner that it knew or should have known would: Further the criminal conduct that is the subject of the Conviction; or cause the Barclays Affiliated QPAM, the Barclays Related QPAM or their affiliates to directly or indirectly profit from the criminal conduct that is the subject of the Conviction;

(g) Other than with respect to employee benefit plans maintained or sponsored for its own employees or the employees of an affiliate, BPLC will not act as a fiduciary within the meaning of section 3(21)(A)(i) or (iii) of ERISA, or section 4975(e)(3)(A) and (C) of the Code, with respect to ERISA-covered plan and IRA assets; provided, however, that BPLC will not be treated as violating the conditions of this exemption solely because it acted as an investment advice fiduciary within the meaning of section 3(21)(A)(ii) or section 4975(e)(3)(B) of the Code;

[56] 29 CFR part 2570, published at 76 FR 66653, October 27, 2011.

[57] Section I(g) of PTE 84–14 generally provides that ''[n]either the QPAM nor any affiliate thereof . . . nor any owner . . . of a 5 percent or more interest in the QPAM is a person who within the 10 years immediately preceding the transaction has been either convicted or released from imprisonment, whichever is later, as a result of'' certain felonies including violation of the Sherman Antitrust Act, Title 15 United States Code, Section 1.

(h)(1) Prior to a Barclays Affiliated QPAM's engagement by an ERISA-covered plan or IRA for discretionary asset management services, where the QPAM relies upon PTE 84–14 or the QPAM represents that it qualifies as a QPAM, the Barclays Affiliated QPAM must develop, implement, maintain, and follow written policies and procedures (the Policies). The Policies must require and must be reasonably designed to ensure that:

(i) The asset management decisions of the Barclays Affiliated QPAM are conducted independently of the corporate management and business activities of BPLC;

(ii) The Barclays Affiliated QPAM fully complies with ERISA's fiduciary duties, and with ERISA and the Code's prohibited transaction provisions, as applicable with respect to each Covered Plan, and does not knowingly participate in any violation of these duties and provisions with respect to Covered Plans;

(iii) The Barclays Affiliated QPAM does not knowingly participate in any other person's violation of ERISA or the Code with respect to Covered Plans;

(iv) Any filings or statements made by the Barclays Affiliated QPAM to regulators, including, but not limited to, the Department, the Department of the Treasury, the Department of Justice, and the Pension Benefit Guaranty Corporation, on behalf of or in relation to Covered Plans, are materially accurate and complete, to the best of such QPAM's knowledge at that time;

(v) To the best of the Barclays Affiliated QPAM's knowledge at the time, the Barclays Affiliated QPAM does not make material misrepresentations or omit material information in its communications with such regulators with respect to Covered Plans;

(vi) The Barclays Affiliated QPAM complies with the terms of this exemption; and

(vii) Any violation of, or failure to comply with an item in subparagraphs (ii) through (vi), is corrected as soon as reasonably possible upon discovery, or as soon after the QPAM reasonably should have known of the noncompliance (whichever is earlier), and any such violation or compliance failure not so corrected is reported, upon the discovery of such failure to so correct, in writing, to the head of compliance and the General Counsel (or their functional equivalent) of the relevant line of business that engaged in the violation or failure, and the independent auditor responsible for reviewing compliance with the Policies. A Barclays Affiliated QPAM will not be treated as having failed to develop, implement, maintain, or follow the Policies, provided that it corrects any instance of noncompliance as soon as reasonably possible upon discovery, or as soon as reasonably possible after the QPAM reasonably should have known of the noncompliance (whichever is earlier), and provided that it adheres to the reporting requirements set forth in this subparagraph (vii);

(2) Prior to a Barclays Affiliated QPAM's engagement by a Covered Plan, each Barclays Affiliated QPAM must develop a program of training (the Training), to be conducted at least annually, for all relevant Barclays Affiliated QPAM asset/portfolio management, trading, legal, compliance, and internal audit personnel. The First Training under this exemption must be completed by all relevant Barclays personnel within eighteen months of the Barclay's Affiliated QPAM's engagement or representation, as described in this provision. The Training must:

(i) At a minimum, cover the Policies, ERISA and Code compliance (including applicable fiduciary duties and the prohibited transaction provisions), ethical conduct, the consequences for not complying with the conditions of this exemption (including any loss of exemptive relief provided herein), and prompt reporting of wrongdoing; and

(ii) Be conducted by an individual with significant understanding and familiarity with asset management and trading practices who has been prudently selected and who has appropriate technical training and proficiency with ERISA and the Code;

(i)(1) Each Barclays Affiliated QPAM submits to an audit conducted every two years by an independent auditor, who has been prudently selected and who has appropriate technical training and proficiency with ERISA and the Code, to evaluate the adequacy of, and each Barclays Affiliated QPAM's compliance with, the Policies and Training described herein. The audit requirement must be incorporated in the Policies. Each audit must cover a consecutive twelve (12) month period starting with the twelve (12) month period that begins on the date that a Barclays Affiliated QPAM is first engaged on or after January 10, 2018, by any Covered Plan. The second audit must cover a consecutive twelve month period that begins on the date that is twelve months after the date the first audit period ends. The third audit period must cover a consecutive twelve month period that begins on the date that is twelve months after the date the second audit period ends. Each biennial audit must be completed no later than six (6) months after the period to which the audit applies. No audit period is required to extend past July 9, 2023, and each biennial audit must be completed no later than six (6) months after the period to which the audit applies;

(2) Within the scope of the audit and to the extent necessary for the auditor, in its sole opinion, to complete its audit and comply with the conditions for relief described herein, and only to the extent such disclosure is not prevented by state or federal statute, or involves communications subject to attorney client privilege, each Barclays Affiliated QPAM and, if applicable, BPLC, will grant the auditor unconditional access to its business, including, but not limited to: its computer systems; business records; transactional data; workplace locations; training materials; and personnel. Such access is limited to information relevant to the auditor's objectives as specified by the terms of this exemption;

(3) The auditor's engagement must specifically require the auditor to determine whether each Barclays Affiliated QPAM has developed, implemented, maintained, and followed the Policies in accordance with the conditions of this exemption, and has developed and implemented the Training, as required herein;

(4) The auditor's engagement must specifically require the auditor to test each Barclays Affiliated QPAM's operational compliance with the Policies and Training. In this regard, the auditor must test for each QPAM, a sample of such QPAM's transactions involving Covered Plans, sufficient in size and nature to afford the auditor a reasonable basis to determine such QPAM's operational compliance with the Policies and Training;

(5) For each audit, on or before the end of the relevant period described in Section I(i)(1) for completing the audit, the auditor must issue a written report (the Audit Report) to BPLC and the Barclays Affiliated QPAM to which the audit applies that describes the procedures performed by the auditor during the course of its examination. The auditor, at their discretion, may issue a single consolidated Audit Report which covers all the Barclays Affiliated QPAMs. The Audit Report must include the auditor's specific determinations regarding:

(i) The adequacy of each Barclays Affiliated QPAM's Policies and Training; each Barclays Affiliated QPAM's compliance with the Policies and Training; the need, if any, to strengthen such Policies and Training; and any instance of the respective Barclays Affiliated QPAM's noncompliance with the written

Policies and Training described in Section I(h) above. The Barclays Affiliated QPAM must promptly address any noncompliance. The Barclays Affiliated QPAM must promptly address or prepare a written plan of action to address any determination by the auditor regarding the Policies and Training and the auditor's recommendations (if any) with respect to strengthening the Policies and Training of the respective Barclays QPAM. Any action taken or the plan of action to be taken by the respective Barclays Affiliated QPAM must be included in an addendum to the Audit Report (which addendum must be completed prior to the certification described in Section I(i)(7) below). In the event such a plan of action to address the auditor's recommendation regarding the adequacy of the Policies and Training is not completed by the time of submission of the Audit Report, the following period's Audit Report must state whether the plan was satisfactorily completed. Any determination by the auditor that the respective Barclays Affiliated QPAM has implemented, maintained, and followed sufficient Policies and Training must not be based solely or in substantial part on an absence of evidence indicating noncompliance. In this last regard, any finding that a Barclays Affiliated QPAM has complied with the requirements under this subparagraph must be based on evidence that the particular Barclays Affiliated QPAM has actually implemented, maintained, and followed the Policies and Training required by this exemption. Furthermore, the auditor must not solely rely on the Annual Report created by the compliance officer (the Compliance Officer) as described in Section I(m) below as the basis for the auditor's conclusions in lieu of independent determinations and testing performed by the auditor as required by Section I(i)(3) and (4) above; and

(ii) the adequacy of the most recent Annual Review described in Section I(m);

(6) The auditor must notify the respective Barclays Affiliated QPAM of any instance of noncompliance identified by the auditor within five (5) business days after such noncompliance is identified by the auditor, regardless of whether the audit has been completed as of that date.;

(7) With respect to each Audit Report, the General Counsel, or one of the three most senior executive officers of the Barclays Affiliated QPAM to which the Audit Report applies, must certify in writing, under penalty of perjury, that the officer has reviewed the Audit Report and this exemption; that such Barclays Affiliated QPAM has addressed, corrected or remedied, any noncompliance and inadequacy, or has an appropriate written plan to address any inadequacy regarding the Policies and Training identified in the Audit Report. Such certification must also include the signatory's determination that the Policies and Training in effect at the time of signing are adequate to ensure compliance with the conditions of this exemption, and with the applicable provisions of ERISA and the Code;

(8) The Risk Committee of BPLC's Board of Directors is provided a copy of each Audit Report; and a senior executive officer with a direct reporting line to the highest ranking compliance officer of BPLC must review the Audit Report for each Barclays Affiliated QPAM and must certify in writing, under penalty of perjury, that such officer has reviewed each Audit Report;

(9) Each Barclays Affiliated QPAM provides its certified Audit Report, by regular mail to: Office of Exemption Determinations (OED), 200 Constitution Avenue NW, Suite 400, Washington, DC 20210, or by private carrier to: 122 C Street NW, Suite 400, Washington, DC 20001–2109, no later than 30 days following its completion of the Audit Report. The Audit Report will be part of the public record regarding this exemption. Furthermore, each Barclays Affiliated QPAM must make its Audit Report unconditionally available, electronically or otherwise, for examination upon request by any duly authorized employee or representative of the Department, other relevant regulators, and any fiduciary of a Covered Plan;

(10) Each Barclays Affiliated QPAM and the auditor must submit to OED: Any engagement agreement(s) entered into pursuant to the engagement of the auditor under this exemption, no later than two (2) months after the execution of any such engagement agreement;

(11) The auditor must provide the Department, upon request, for inspection and review, access to all the workpapers created and utilized in the course of the audit provided such access and inspection is otherwise permitted by law; and

(12) BPLC must notify the Department of a change in the independent auditor no later than two (2) months after the engagement of a substitute or subsequent auditor and must provide an explanation for the substitution or change including a description of any material disputes between the terminated auditor and BPLC;

(j) As of January 10, 2018 and throughout the Exemption Period, with respect to any arrangement, agreement, or contract between a Barclays Affiliated QPAM and a Covered Plan, the Barclays Affiliated QPAM agrees and warrants:

(1) To comply with ERISA and the Code, as applicable, with respect to such Covered Plan; to refrain from engaging in prohibited transactions that are not otherwise exempt (and to promptly correct any inadvertent prohibited transactions); and to comply with the standards of prudence and loyalty set forth in section 404 of ERISA with respect to each such ERISA-covered plan and IRA to the extent that section is applicable;

(2) To indemnify and hold harmless the Covered Plan for any actual losses resulting directly from a Barclays Affiliated QPAM's violation of ERISA's fiduciary duties, as applicable, and of the prohibited transaction provisions of ERISA and the Code, as applicable; a breach of contract by the QPAM; or any claim arising out of the failure of such Barclays Affiliated QPAM to qualify for the exemptive relief provided by PTE 84–14 as a result of a violation of Section I(g) of PTE 84–14 other than the Conviction. This condition applies only to actual losses caused by the Barclays Affiliated QPAM's violations;

(3) Not to require (or otherwise cause) the Covered Plan to waive, limit, or qualify the liability of the Barclays Affiliated QPAM for violating ERISA or the Code or engaging in prohibited transactions;

(4) Not to restrict the ability of such Covered Plan to terminate or withdraw from its arrangement with the Barclays Affiliated QPAM with respect to any investment in a separately managed account or pooled fund subject to ERISA and managed by such QPAM, with the exception of reasonable restrictions, appropriately disclosed in advance, that are specifically designed to ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other investors. In connection with any such arrangements involving investments in pooled funds subject to ERISA entered into after the effective date of this exemption, the adverse consequences must relate to of a lack of liquidity of the underlying assets, valuation issues, or regulatory reasons that prevent the fund from promptly redeeming an ERISA-covered plan's or IRA's investment, and such restrictions must be applicable to all such investors and effective no longer than reasonably necessary to avoid the adverse consequences;

(5) Not to impose any fees, penalties, or charges for such termination or withdrawal with the exception of reasonable fees, appropriately disclosed in advance, that are specifically designed to prevent generally recognized abusive investment practices or specifically designed to ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other investors, provided that such fees are applied consistently and in like manner to all such investors; and

(6) Not to include exculpatory provisions disclaiming or otherwise limiting liability of the Barclays Affiliated QPAM for a violation of such agreement's terms. To the extent consistent with Section 410 of ERISA, however, this provision does not prohibit disclaimers for liability caused by an error, misrepresentation, or misconduct of a plan fiduciary or other party hired by the plan fiduciary who is independent of BPLC, and its affiliates, or damages from acts outside the control of the Barclays Affiliated QPAM;

(7) Prior to a Barclays Affiliated QPAM's engagement with an ERISA-covered plan or IRA for the provision of asset management or other discretionary fiduciary services, such Barclays Affiliated QPAM must provide a notice of its obligations under this Section I(j) to each Covered Plan;

(k) Any client for which a Barclays Affiliated QPAM relies on PTE 84–14 or has expressly represented that the manager qualifies as a QPAM or relies on the QPAM class exemption must receive the proposed and final exemptions, along with a separate summary describing the facts that led to the Conviction (the Summary), which have been submitted to the Department, and a prominently displayed statement (the Statement) that the Conviction results in a failure to meet a condition in PTE 84–14, prior to, or contemporaneously with, the client's receipt of a written asset management agreement from the Barclays Affiliated QPAM. Disclosures may be delivered electronically;

(l) The Barclays Affiliated QPAMs must comply with each condition of PTE 84–14, as amended, with the sole exception of the violation of Section I(g) of PTE 84–14 that is attributable to the Conviction;

(m)(1) Within six months following the date of a Barclays Affiliated QPAM's engagement by an ERISA-covered plan or IRA for discretionary asset management services, with respect to which the QPAM has represented that it qualifies as a QPAM or will rely on PTE 84–14, BPLC designates a senior compliance officer (the Compliance Officer) who will be responsible for compliance with the Policies and Training requirements described herein. The Compliance Officer must conduct an annual review for each annual period beginning with the date of such engagement and the anniversary of such date (the Annual Review) to determine the adequacy and effectiveness of the implementation of the Policies and Training. With respect to the Compliance Officer, the following conditions must be met:

(i) The Compliance Officer must be a professional who has extensive experience with, and knowledge of, the regulation of financial services and products, including under ERISA and the Code; and

(ii) The Compliance Officer must have a direct reporting line to the highest-ranking corporate officer in charge of compliance for asset management;

(2) With respect to each Annual Review, the following conditions must be met:

(i) The Annual Review includes a review of: Any compliance matter related to the Policies or Training that was identified by, or reported to, the Compliance Officer or others within the compliance and risk control function (or its equivalent) during the previous year; any material change in the relevant business activities of the Barclays Affiliated QPAMs; and any change to ERISA, the Code, or regulations related to fiduciary duties and the prohibited transaction provisions that may be applicable to the activities of the Barclays Affiliated QPAMs;

(ii) The Compliance Officer prepares a written report for each Annual Review (each, an Annual Report) that: (A) Summarizes his or her material activities during the preceding year; (B) sets forth any instance of noncompliance discovered during the preceding year, and any related corrective action; (C) details any change to the Policies or Training to guard against any similar instance of noncompliance occurring again; and (D) makes recommendations, as necessary, for additional training, procedures, monitoring, or additional and/or changed processes or systems, and management's actions on such recommendations;

(iii) In each Annual Report, the Compliance Officer must certify in writing that to his or her knowledge: (A) The report is accurate; (B) the Policies and Training are working in a manner which is reasonably designed to ensure that the Policies and Training requirements described herein are met; (C) any known instance of noncompliance during the preceding year and any related correction taken to date have been identified in the Annual Report; and (D) the Barclays Affiliated QPAMs have complied with the Policies and Training, and/or corrected (or is correcting) any instances of noncompliance in accordance with Section I(h) above;

(iv) Each Annual Report must be provided to the appropriate corporate officers of BPLC and each Barclays Affiliated QPAM to which such report relates; the head of compliance and the General Counsel (or their functional equivalent) of the relevant Barclays Affiliated QPAM and the General Counsel (or their functional equivalent) of BPLC; and must be made unconditionally available to the independent auditor described in Section I(i) above;

(v) Each Annual Review, including the Compliance Officer's written Annual Report, must be completed no more than three (3) months following the end of the period to which it relates;

(n) Each Barclays Affiliated QPAM will maintain records necessary to demonstrate that the conditions of this exemption have been met, for six (6) years following the date of any transaction for which such Barclays Affiliated QPAM relies upon the relief in the exemption;

(o) During the Exemption Period, BPLC: (1) Immediately discloses to the Department any Deferred Prosecution Agreement (a DPA) or a Non-Prosecution Agreement (an NPA) with the U.S. Department of Justice, entered into by BPLC or any of its affiliates in connection with conduct described in Section I(g) of PTE 84–14 or section 411 of ERISA; and (2) immediately provides the Department any information requested by the Department, as permitted by law, regarding the agreement and/or conduct and allegations that led to the agreement;

(p) Prior to or contemporaneously with a Barclays Affiliated QPAM's engagement by any Covered Plan, each Barclays Affiliated QPAM will, in its agreements with, or in other written disclosures provided to any such Covered Plan, clearly and prominently inform such Covered Plan client of the right to obtain a copy of the Policies or a description (''Summary Policies'') which accurately summarizes key components of the QPAM's written Policies developed in connection with this exemption. If the Policies are thereafter changed, each Covered Plan client must receive a new disclosure within six (6) months following the end of the calendar year during which the

Policies were changed.[58] With respect to this requirement, the description may be continuously maintained on a website, provided that such website link to the Policies or the Summary Policies is clearly and prominently disclosed to each Covered Plan; and

(q) A Barclays Affiliated QPAM or a Barclays Related QPAM will not fail to meet the terms of this exemption solely because a different Barclays Affiliated QPAM or Barclays Related QPAM fails to satisfy a condition for relief described in Sections I(c), (d), (h), (i), (j), (k), (l), (n) and (p); or the independent auditor described in Section I(i) fails a provision of the exemption other than the requirement described in Section I(i)(11), provided that such failure did not result from any actions or inactions of BPLC or its affiliates.

Section II: Definitions

(a) The term ''BPLC'' means, Barclays PLC, the parent entity, but does not include any subsidiaries or other affiliates.

(b) The term ''Barclays Affiliated QPAM'' means a ''qualified professional asset manager'' (as defined in Section VI(a) of PTE 84–14) that relies on the relief provided by PTE 84–14 and with respect to which Barclays is a current or future ''affiliate'' (as defined in Section VI(d)(1) of PTE 84–14). The term ''Barclays Affiliated QPAM'' excludes the parent entity, BPLC;

(c) The term ''Barclays Related QPAM'' means any current or future ''qualified professional asset manager'' (as defined in section VI(a) of PTE 84–14) that relies on the relief provided by PTE 84–14, and with respect to which BPLC owns a direct or indirect five percent or more interest, but with respect to which BPLC is not an ''affiliate'' (as defined in Section VI(d)(1) of PTE 84–14).

(d) The term ''Conviction'' means the judgment of conviction against BPLC for violation of the Sherman Antitrust Act, 15 U.S.C. 1, which is scheduled to be entered in the District Court for the District of Connecticut (the District Court), Case Number 3:15–cr–00077–SRU–1;

(e) The term ''Conviction Date'' means the date of the judgment of the trial court. For avoidance of confusion, the Conviction Date is January 10, 2017, as set forth in Case Number 3:15-cr-00077–SRU;

(f) The term ''Covered Plan'' means a plan subject to Part 4 of Title 1 of ERISA (''ERISA-covered plan'') or a plan subject to Section 4975 of the Code (''IRA'') with respect to which a Barclays Affiliated QPAM relies on PTE 84–14, or with respect to which a Barclays Affiliated QPAM (or any BPLC affiliate) has expressly represented that the manager qualifies as a QPAM or relies on the QPAM class exemption (PTE 84–14). A Covered Plan does not include an ERISA-covered Plan or IRA to the extent the Barclays Affiliated QPAM has expressly disclaimed reliance on QPAM status or PTE 84–14 in entering into its contract, arrangement or agreement with the ERISA-covered plan or IRA;

(g) The terms ''ERISA-covered plan'' and ''IRA'' mean, respectively, a plan subject to Part 4 of Title I of ERISA and a plan subject to section 4975 of the Code; and

(h) The term ''Exemption Period'' means January 10, 2018, through January 9, 2023.

Effective Date

This exemption is effective on January 10, 2018. The term of the exemption is from January 10, 2018, through January 9, 2023 (the Exemption Period).

Department's Comment: The Department cautions that the relief in this exemption will terminate immediately if, among other things, an entity within the BPLC corporate structure is convicted of a crime described in Section I(g) of PTE 84–14 (other than the Conviction) during the Exemption Period. Although the Applicant could apply for a new exemption in that circumstance, the Department would not be obligated to grant the exemption. The terms of this exemption have been specifically designed to permit plans to terminate their relationships in an orderly and cost effective fashion in the event of an additional conviction or a determination that it is otherwise prudent for a plan to terminate its relationship with an entity covered by the exemption.

Further Information

For more information on this exemption, contact Ms. Anna Vaughan of the Department, telephone (202) 693–8565. (This is not a toll-free number.)

UBS Assets Management (Americas) Inc.; UBS Realty Investors LLC; UBS Hedge Fund Solutions LLC; UBS O'Connor LLC; and Certain Future Affiliates in UBS's Asset Management and Wealth Management Americas Divisions (collectively, the Applicants or the UBS QPAMs) Located in Chicago, Illinois; Hartford, Connecticut; New York, New York; and Chicago, Illinois, Respectively

[Prohibited Transaction Exemption 2017–07; Exemption Application No. D–11907]

Discussion

On November 21, 2016, the Department of Labor (the Department) published a notice of proposed exemption in the **Federal Register** at 81 FR 83385, for certain entities with specified relationships to UBS AG (hereinafter, the UBS QPAMs) to continue to rely on the relief provided by PTE 84–14 for a period of five years,[59] notwithstanding the ''2013 Conviction'' of UBS Securities Japan Co., Ltd. and the ''2017 Conviction'' of UBS, AG (UBS) (collectively, the Convictions), as described herein.

The Department is granting this exemption to ensure that Covered Plans[60] with assets managed by a UBS QPAM may continue to benefit from the relief provided by PTE 84–14. The effective date is January 10, 2018, and the exemption is effective from January 10, 2018 through January 9, 2021 (the Exemption Period).

No relief from a violation of any other law is provided by this exemption, including any criminal conviction described in the proposed exemption. Furthermore, the Department cautions that the relief in this exemption will terminate immediately if, among other things, an entity within the UBS corporate structure is convicted of a crime described in Section I(g) of PTE 84–14 (other than the Convictions) during the Exemption Period. The terms

[58] In the event Applicant meets this disclosure requirement through Summary Policies, changes to the Policies shall not result in the requirement for a new disclosure unless, as a result of changes to the Policies, the Summary Policies are no longer accurate.

[59] 49 FR 9494 (March 13, 1984), as corrected at 50 FR 41430 (October 10, 1985), as amended at 70 FR 49305 (August 23, 2005) and as amended at 75 FR 38837 (July 6, 2010), hereinafter referred to as PTE 84–14 or the QPAM exemption.

[60] ''Covered Plan'' is a plan subject to Part 4 of Title 1 of ERISA (''ERISA-covered plan'') or a plan subject to section 4975 of the Code (''IRA'') with respect to which a UBS QPAM relies on PTE 84–14, or with respect to which a UBS QPAM (or any UBS affiliate) has expressly represented that the manager qualifies as a QPAM or relies on the QPAM class exemption (PTE 84–14). A Covered Plan does not include an ERISA-covered plan or IRA to the extent the UBS QPAM has expressly disclaimed reliance on the QPAM status or PTE 84–14 in entering into its contract, arrangement, or agreement with the ERISA-covered plan or IRA. See further discussion in this Preamble under the heading Comment III A & B—Scope of Section I(j) & Covenants Regarding Compliance with ERISA—Section I(j)(1).

of this exemption have been specifically designed to promote conduct that adheres to basic fiduciary standards under ERISA and the Code. The exemption also aims to ensure that Covered Plans can terminate relationships in an orderly and cost effective fashion in the event a Covered Plan fiduciary determines it is prudent to sever the relationship with a UBS QPAM.

Written Comments

The Department invited all interested persons to submit written comments and/or requests for a public hearing with respect to the notice of proposed exemption, published in the **Federal Register** at 81 FR 83385 on November 21, 2016. All comments and requests for hearing were due by January 5, 2016.[61] The Department received written comments from UBS and members of the U.S. Congress. After considering these submissions, the Department has determined to grant the exemption, with revisions, as described below.

Comment I—The Term of the Exemption

The Applicant requests that the Department extend the term of the exemption from five years to nine years. UBS states that an exemption for less than nine years results in a reapplication requirement without additional meaningful protections. UBS states that if at any time the UBS QPAMs do not comply with all of the conditions under a nine year exemption, the relief provided will be lost. Hence, according to UBS, a nine year exemption is protective of affected ERISA-covered plans and IRAs. UBS also states that a five-year exemption period is not in the interest of the UBS QPAMs' clients or participants and beneficiaries. UBS states that a five-year exemption period creates uncertainty for fiduciaries with the result that such fiduciaries may spend time and money to prepare for a change in investment managers in the event that UBS does not receive another exemption. UBS claims the record does not support a conclusion that a nine year exemption period is inconsistent with ERISA Section 408(a) and neither has the Department conveyed a basis for findings that warrant an exemption for less than nine years. UBS points to precedent established by previous individual QPAM exemptions in which the Department placed ''particular importance'' on the ''degree to which the investment and compliance operations of the QPAM can be sufficiently isolated from the influence of 'bad actors'.'' (80 FR 20262, April 15, 2015). UBS states that ''UBS QPAMs were not involved in the FX Misconduct or the misconduct that is subject of the Convictions.'' UBS requests that, if the five-year exemption period is retained, the Department clarify the timing for an application to extend the relief, and for the Department to act on that application taking into account the notice-and-comment period. UBS also requests that the Department modify the exemption to allow for the continued reliance on the relief provided by a final exemption while any application to extend that relief beyond the initial 5-year period is pending.

In developing this exemption, the Department considered the Non-Prosecution Agreement between UBS and the U.S. Department of Justice (DOJ) dated December 18, 2012 (LIBOR NPA) and the Plea Agreement. When UBS entered into the LIBOR NPA, it agreed, among other things, not to commit any crime in violation of U.S. laws for a period of two years from the date of the LIBOR NPA in exchange for the DOJ agreeing not to prosecute UBS for any crimes related to the submission benchmark interest rates between 2001 and 2010. UBS also agreed to pay a monetary penalty of $500,000,000 and to take steps to further strengthen its internal controls, as required by certain other U.S. and non-U.S. regulatory agencies that had addressed the misconduct described in the LIBOR NPA.

While UBS entered into the LIBOR NPA avoiding prosecution, UBS Securities Japan, a wholly owned subsidiary of UBS, pled guilty and was convicted (2013 Conviction) of one count of wire fraud in violation of Title 18, U.S. Code, sections 1343 and 2[62] arising out of UBS Security Japan's fraudulent submission of Yen LIBOR rates between 2006 and 2009, and its participation in a scheme to defraud counterparties to interest rate derivatives trades executed on its behalf by secretly manipulating certain benchmark interest rates to which the profitability of those trades was tied. As a result of the 2013 Conviction, QPAMs with certain corporate relationships to UBS and UBS Securities Japan were no longer able to rely on PTE 84–14. Following the publication of a notice of proposed exemption in the **Federal Register** and after a period of notice and comment, the Department published a final exemption on September 13, 2013 (PTE 2013–09).[63] PTE 2013–09 among other conditions, required UBS to comply with each condition of PTE 84–14, as amended.[64]

Both the LIBOR NPA and the Plea Agreement contain a Statement of Facts (SOF) that describes the circumstances of UBS's scheme to defraud counterparties to interest rate derivatives transactions by secretly manipulating benchmark interest rates to which the profitability of those transactions was tied. The SOF describes the wide-ranging and systematic efforts, practiced nearly on a daily basis, by several UBS employees (a) to manipulate the YEN LIBOR in order to benefit UBS's trading positions; (b) to use cash brokers to influence other Contributor Panel banks' Yen LIBOR submissions; and (c) to collude directly with employees at other Contributor Panel banks to influence those banks' Yen LIBOR submissions.

DOJ determined UBS subsequently breached the LIBOR NPA when certain employees engaged in fraudulent and deceptive trading and sales practices in certain foreign exchange (FX) market transactions via telephone, email and/or electronic chat, to the detriment of UBS customers.[65] These employees also colluded with other actors in certain FX markets in order to manipulate those markets.

The Department considered the Factual Basis for Breach attached to the Plea Agreement which details that conduct (the FX Misconduct as defined in Section II(e)). That conduct included the following actions: Sales staff misrepresented to customers that markups were not added, when in fact they were; UBS personnel used a price level to ''track'' certain limit orders that was different from customer specified prices; UBS traders and salespeople used hand signals to fraudulently conceal markups from certain customers on ''open-line'' phone calls; and a UBS FX trader conspired with other financial

[61] UBS requested and the Department granted an extension until January 23, 2017 to provide the Notice to Interested Persons. The comment period was therefore extended until February 27, 2017. The Department received additional comments from Applicant, however, after the close of the comment period.

[62] Section 1343 generally imposes criminal liability for fraud, including fines and/or imprisonment, when a person uses wire, radio, or television communication in interstate or foreign commerce. Section 2 generally imposes criminal liability on a person as a principal if that person aids, counsels, commands, induces, or willfully causes another person to engage in criminal activity.

[63] 78 FR 56740 (September 13, 2013).

[64] Section I(h) of PTE 2013–09, at 78 FR 56741 (September 18, 2013).

[65] The circumstances of UBS's violation of the terms of the LIBOR NPA are described in detail in Exhibit 1 to the Plea Agreement, entitled ''The Factual Basis for Breach of the Non-Prosecution Agreement'' (the Factual Basis for Breach).

services firms acting as dealers in the FX spot market by agreeing to restrain competition in the purchase and sale of the Euro/U.S. dollar currency pair. The Factual Basis for Breach takes into account UBS's three recent prior criminal resolutions: The 2012 LIBOR NPA; a February 2009 DOJ Tax Division deferred prosecution agreement for conspiracy to defraud the U.S. of tax revenue through secret Swiss bank accounts for U.S. taxpayers (in connection therewith, UBS agreed to pay a penalty of $780 million); a May 2011 DOJ non-prosecution agreement with the DOJ Antitrust Division to resolve allegations of bid-rigging in the municipal bond derivatives market (in connection therewith, UBS agreed to pay a penalty of $160 million). DOJ also noted that UBS's compliance programs and remedial efforts following the LIBOR NPA failed to detect the collusive and deceptive conduct in the FX markets until a published article in the news media called attention to the matter. As a result of its breach of the LIBOR NPA and the resulting 2017 Conviction, UBS lost exemptive relief under both PTE 84–14 and its individual exemption, PTE 2013–09.

In developing this exemption, the Department also considered statements from a number of regulators about the FX Misconduct. The Financial Conduct Authority's (FCA) Final Notice dated November 11, 2014 states: ''During the Relevant Period, UBS did not exercise adequate and effective control over its G10 spot FX trading business. . . . The front office failed adequately to discharge these responsibilities with regard to obvious risks associated with confidentiality, conflicts of interest and trading conduct.'' That notice also states: ''These failings occurred in circumstances where certain of those responsible for managing front office matters were aware of and/or at times involved in behaviors described above.'' The Unites States Commodity and Futures Trading Commission's (CFTC) Order dated November 11, 2014 states: ''During the Relevant Period, UBS failed to adequately address the risks associated with its FX traders participating in the fixing of certain FX benchmark rates. UBS also lacked adequate internal controls in order to prevent its FX traders from engaging in improper communications with certain FX traders at other banks. UBS lacked sufficient policies, procedures and training specifically governing participation in trading around the FX benchmark rates. . . .''

The Department also considered the size of relevant fines imposed: The Department of Justice imposed $500 million and $203 million fines; the Board of Governors of the Federal Reserve Board imposed a $324 million fine; and the CFTC and the FCA imposed fines of $290 million and £223,814,000, respectively.

In light of the severity of the misconduct, the repeated criminal violations, and the breach of a previous exemption, which was itself necessitated by criminal conduct, the Department has concluded that it is appropriate to grant a more limited term of relief than the five-year period it originally proposed. As a result, the Department has concluded that a three-year term is appropriate for this exemption. A three-year term and the exemption's protective conditions reflect the Department's intent to protect Covered Plans that entrust substantial assets with a UBS QPAM, following serious misconduct, supervisory failures, repeated criminal convictions, and a violation of a previous exemption granted under similar circumstances (PTE 2013–09). The Department intends that the three-year term will give the Department the opportunity to review the adherence by the UBS QPAMs to the conditions set out herein. The shortened three-year period reflects the fundamental importance of the Applicants' prompt efforts to adopt supervisory mechanisms, policies, and procedures that safeguard plans and IRAs, and guard against the risk of further misconduct. The Applicants may apply for an additional extension at such time as they believe appropriate. Before granting an extension, however, the Department expects to consider carefully the efficacy of this exemption and any public comments on additional extensions, particularly including comments on how well the exemption has or has not worked to safeguard the interests of Covered Plans.

Comment II—Non-Prosecution and Deferred-Prosecution Agreements—Section I(q)

Section I(q) of the proposed exemption provides that ''*[d]uring the effective period of this five-year exemption UBS: (1) Immediately discloses to the Department any Deferred Prosecution Agreement (a DPA) or Non-Prosecution Agreement (an NPA) that UBS or any of its affiliates enters into with the U.S. Department of Justice, to the extent such DPA or NPA involves conduct described in Section I(g) of PTE 84–14 or section 411 of ERISA; and (2) immediately provides the Department any information requested by the Department, as permitted by law, regarding the agreement and/or the conduct and allegations that led to the agreement. After review of the information, the Department may require UBS, its affiliates, or related parties, as specified by the Department, to submit a new application for the continued availability of relief as a condition of continuing to rely on this exemption. If the Department denies the relief requested in the new application, or does not grant such relief within twelve months of application, the relief described herein is revoked as of the date of denial or as of the expiration of the twelve month period, whichever date is earlier.*''

UBS requests that section I(q) be deleted or revised to omit the paragraph regarding possible revocation of the exemption due to a new NPA or DPA. UBS states that this condition is unprecedented, highly problematic, and inappropriate for several reasons. The first reason is that the condition treats an NPA or a DPA as equivalent to a criminal conviction under PTE 84–14, Section I(g) in contradiction of guidance in Advisory Opinion Number 2013–05A, which confirms that the ''sole judicial action'' that triggers the disqualification under Section I(g) is a ''criminal conviction.'' UBS notes that Section I(g) of this exemption provides that the Department may require UBS to submit a new application for relief following an NPA or a DPA and the condition provides for the automatic revocation of the exemption if the Department fails to grant the new application within twelve months of its submission. According to UBS, this creates the situation where exemptive relief could be lost irrespective of the merits of the new application solely as a result of the Department's failure to timely act. UBS states this outcome would be arbitrary and could cause the UBS QPAMs' plan clients to make substantial expenditures to immediately replace the UBS QPAMs if the Department fails to timely act on a new application. UBS asserts that this result is not reconcilable with the statement in the Proposed Exemption that the Department designed certain conditions that would ''permit plans to terminate their relationships in an orderly and cost effective fashion.''

Additionally, according to UBS, such a revocation of a previously-granted exemption would be in direct violation of the Department's exemption regulations at 29 CFR 2570.50(b). Those regulations provide that before revoking or modifying an exemption the Department must: (1) Publish a notice of proposed action in the **Federal Register**; (2) provide interested persons with an opportunity to comment on the proposed revocation or modification; (3) notify the applicant of the proposed action and the reasons therefore before publishing such notice; and (4) provide the applicant the opportunity to comment on the proposed revocation or modification subsequent to the publication of the notice. UBS argues that these procedural protections would not be available to the UBS QPAMs as a result of a revocation due to the Department's failure to act on the ''new'' application.

Finally, UBS states that the Department failed to identify any substantive standard that would apply to the evaluation of such a new application. UBS suggests that the revocation of the exemption therefore could be based on a UBS QPAM affiliate's NPA or DPA that does not relate to conduct involving the UBS QPAMs or their personnel or does not raise concerns regarding the QPAMs' independence from such affiliate. UBS is concerned this condition authorizes revocation of the exemption regardless of whether the underlying conduct or circumstances surrounding such an NPA or DPA calls into question the Department's original findings made under Section 408 of ERISA. Finally, UBS states that this condition is unnecessary because the Department already has the authority to modify or revoke the exemption if its original findings were called into question due to a UBS QPAM affiliate's DPA or NPA.

UBS requests that if the condition is not omitted from the exemption, that word ''immediately'' be deleted and replaced with the insertion of the phrase ''as soon as reasonably practicable, the entry into'' before the term ''any Deferred Prosecution Agreement (a DPA).'' UBS also requests that the parenthetical ''(as defined in Section VI(d) of PTE 84–14)'' be added after the word ''affiliate.'' Additionally, UBS requests that the term ''non-privileged'' be placed before the word ''information'' and the phrase as soon ''as reasonably practicable'' be inserted before ''as permitted by law.'' Lastly, UBS requests that the phrase ''and allegations that led to'' be deleted and replaced by inserting the word ''underlying'' before the phrase ''the agreement'' at the end of the Section.

The Department in no way intended to provide for an automatic revocation of this exemption and, in light of UBS's comments, has revised the condition accordingly. As revised, the condition simply requires UBS to notify the Department if and when it or any of its affiliates enter into a DPA or a NPA with the U.S. Department of Justice for conduct described in section I(g) of PTE 84–14 or ERISA section 411 and immediately provide the Department with any information requested by the Department, as permitted by law, regarding the agreement and/or conduct and allegations that led to the agreement. The Department retains the right to propose a withdrawal of this exemption pursuant to its procedures contained at 29 CFR 2570.50, should the circumstances warrant such action. Additionally, as requested by the applicant, the Department has added the parenthetical ''(as defined in Section VI(d) of PTE 84–14)'' to clarify the term ''affiliate.''

Comment III A & B—Scope of Section I(j) & Covenants Regarding Compliance with ERISA—Section I(j)(1)

Section I(j) of the proposed exemption provides that: ''*Effective as of the effective date of this five-year exemption, with respect to any arrangement, agreement, or contract between a UBS QPAM and an ERISA-covered plan or IRA for which such UBS QPAM provides asset management or other discretionary fiduciary services, each UBS QPAM agrees and warrants:*

(1) [t]o comply with ERISA and the Code, as applicable with respect to such ERISA-covered plan or IRA; to refrain from engaging in prohibited transactions that are not otherwise exempt (and to promptly correct any inadvertent prohibited transactions); and to comply with the standards of prudence and loyalty set forth in section 404 of ERISA, as applicable;

(2) Not to require (or otherwise cause) the ERISA-covered plan or IRA to waive, limit, or qualify the liability of the UBS QPAM for violating ERISA or the Code or engaging in prohibited transactions;

(3) Not to require the ERISA-covered plan or IRA (or sponsor of such ERISA-covered plan or beneficial owner of such IRA) to indemnify the UBS QPAM for violating ERISA or engaging in prohibited transactions, except for violations or prohibited transactions caused by an error, misrepresentation, or misconduct of a plan fiduciary or other party hired by the plan fiduciary who is independent of UBS;

(4) Not to restrict the ability of such ERISA-covered plan or IRA to terminate or withdraw from its arrangement with the UBS QPAM (including any investment in a separately managed account or pooled fund subject to ERISA and managed by such QPAM), with the exception of reasonable restrictions, appropriately disclosed in advance, that are specifically designed to ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other investors as a result of an actual lack of liquidity of the underlying assets, provided that such restrictions are applied consistently and in like manner to all such investors;

(5) Not to impose any fees, penalties, or charges for such termination or withdrawal with the exception of reasonable fees, appropriately disclosed in advance, that are specifically designed to prevent generally recognized abusive investment practices or specifically designed to ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other investors, provided that such fees are applied consistently and in like manner to all such investors;

(6) Not to include exculpatory provisions disclaiming or otherwise limiting liability of the UBS QPAM for a violation of such agreement's terms, except for liability caused by an error, misrepresentation, or misconduct of a plan fiduciary or other party hired by the plan fiduciary who is independent of UBS and its affiliates; and

(7) To indemnify and hold harmless the ERISA-covered plan and IRA for any damages resulting from a violation of applicable laws, a UBS QPAM's breach of contract, or any claim arising out of the failure of such UBS QPAM to qualify for the exemptive relief provided by PTE 84–14 as a result of a violation of Section I(g) of PTE 84–14 other than the Convictions;

(8) Within four (4) months of the effective date of this proposed five-year exemption, each UBS QPAM must provide a notice of its obligations under this Section I(j) to each ERISA-covered plan and IRA for which the UBS QPAM provides asset management or other discretionary fiduciary services. For all other prospective ERISA-covered plan and IRA clients for which a UBS QPAM provides asset management or other discretionary fiduciary services, the UBS QPAM will agree in writing to its obligations under this Section I(j) in an updated investment management agreement or advisory agreement between the UBS QPAM and such clients or other written contractual agreement.''

According to UBS, extending Section I(j) and other conditions to circumstances in which the QPAMs do not rely on PTE 84–14 would exceed the proper scope of Section 408 of ERISA and the Department's exemption regulations, which are properly limited to protecting plans or IRAs involved in transactions that require use of PTE 84–14. Accordingly, UBS requests that

Section I(j) be revised to include the phrases ''pursuant to'' and ''in reliance on PTE 84–14.''

UBS also states that it interprets the clause ''to comply with the standards of prudence and loyalty set forth in section 404 of ERISA, as applicable'' to have the same meaning as the same condition in PTE 2016–17,[66] which was previously granted to the UBS QPAMs. UBS interprets the language of Section I(j)(1) as ''requiring the UBS QPAMs to agree to comply with Section 404 of ERISA only to the extent that Section 404 is otherwise ''applicable'' to the ERISA-covered plan or IRA, such that most IRAs would not be subject to this provision because they are not subject to Title I of ERISA.'' UBS also states that if the Department contemplates that this clause would require the UBS QPAMs to contractually agree to comply with the duties set forth in Section 404 of ERISA with respect to all IRAs, such a requirement would be inappropriate. UBS represents that ''including such a requirement in a final exemption would introduce significant uncertainty as to what standards should apply to IRAs not subject to Title I of ERISA.'' UBS argues that ''requiring the UBS QPAMs to contractually agree to treat IRAs as possessing rights that do not apply to them under ERISA would also be inconsistent with the requirements for exemptions under ERISA Section 408.'' According to UBS, section 408 of ERISA requires that the Department make a determination that an exemption is protective of the ''existing'' rights of participants and beneficiaries. Additionally, UBS claims that the last clause of Section I(j)(1) of PTE 2016–17 which states ''with respect to each such ERISA-covered plan and IRA'' is redundant of the first clause of Section I(j)(1) of PTE 2016–17 and has, accordingly, requested deletion of the clause.

ERISA-covered plans and IRAs routinely rely on QPAM status as a condition of entering into transactions with financial institutions, even with respect to transactions which do not strictly require adherence to PTE 84–14. According to the Applicant's own application, ''[e]ven where the QPAM exemption is not strictly required (*e.g.,* for most purchases of publicly-traded stocks), many ERISA plan fiduciaries take great comfort in their managers qualifying for QPAM status and will not use managers that do not so qualify.'' Furthermore, in the report dated August 26, 2015 prepared by John Minahan, Ph.D. and provided to the Department by UBS in support of UBS QPAMs' application for exemption, Dr. Minahan states that ''[b]ecause of the importance of the QPAM designation, if the UBS QPAMs are denied an exemption and can longer act as QPAMs, plan fiduciaries are likely to conclude that they have no choice but to change managers. This is also true for plan clients with investment strategies that do not depend on the QPAM exemption. Fiduciaries of either category of plans are likely to view a denial of an exemption as reflective of the Department's view that the UBS QPAMS should not be trusted to act as an investment manager for benefit plan assets, regardless of whether other prohibited transaction exemptions may be available.''

The Department notes that it may not always be clear whether or not a UBS QPAM intends to rely upon PTE 84–14 for any particular transaction. Accordingly, it is critical to ensure that protective conditions are in place to safeguard the interests of ERISA-covered plans and IRAs that are acting in reliance on the availability of this exemption, particularly those who may not have entered into the transaction in the first place, but for the Department's grant of this exemption.

The Department has a clear interest in protecting ERISA-covered plans and IRAs that enter into an asset management agreement with a UBS QPAM in reliance of the manager's qualification as a QPAM. Moreover, when an ERISA-covered plan or IRA terminates its relationship with an asset manager, it may incur significant costs and expenses as its investments are unwound and as it works to place investments with a new asset manager.

After considering UBS's comments, the Department has revised this condition. The condition now applies to ERISA-covered plans and IRAs only when the UBS asset manager relies on PTE 84–14 or has expressly represented that it qualifies as a QPAM or relies on the QPAM class exemption in its dealings with the ERISA-covered plan or IRA (hereinafter, a Covered Plan). To the extent a UBS QPAM would prefer not to be subject to these conditions, however, it may expressly disclaim reliance on QPAM status or PTE 84–14 in entering into its contract with an ERISA-covered plan or IRA. In that case, the plan or IRA is not a Covered Plan.[67]

The Department rejects the view that it acts outside the scope of its authority by protecting ERISA-covered plans and IRAs that rely on UBS QPAMs' eligibility for this exemption, and reemphasizes the seriousness of the criminal misconduct that caused the UBS QPAMs to need this exemption as well as the FX Misconduct. The Department may grant an exemption under Section 408(a) of ERISA or Code section 4975(c)(2)(C) only to the extent the Secretary finds, among other things, that the exemption is protective of the affected plan(s) or IRA(s). As noted by regulators, personnel at UBS engaged in serious misconduct over an extended period of time at the expense of their own clients. This misconduct appears to have stemmed, in part, from deficiencies in control and oversight.

Notwithstanding the misconduct, which resulted in violation of Section I(g) of PTE 84–14, the Department has determined that this exemption is protective of Covered Plans and in the interest of participants, beneficiaries, and beneficial owners of such Covered Plans. The Department made this determination based, in significant part, upon the protections of Section I(j) that require UBS QPAMs to make an express commitment to Covered Plans to adhere to the requirements of ERISA and the Code, as applicable. As previously indicated, the Department has concluded that a culture of compliance, centered on adherence to basic standards of fair dealing as set forth in this exemption, gives the Department a compelling basis for making the required statutory findings that the exemption is in the interest of, and protects the rights of participants, beneficiaries, and beneficial owners of Covered Plans. Absent such a compelling basis, the exemption would have been denied.

In response to UBS's comments, however, the Department required an express commitment to comply with the fiduciary standards and prohibited transaction rules only to the extent these provisions are ''applicable'' under ERISA and the Code. The revised terms, together with this exemption's limited relief (*e.g.,* this exemption generally does not extend to transactions that involve self-dealing) should serve to promote a culture of compliance and protect Covered Plans and their participants, beneficiaries, and beneficial owners.

In response to UBS's comments, the Department also notes that nothing in ERISA or the Code prevents the

[66] 81 FR 94049 (December 22, 2016). PTE 2016–17 is a temporary exemption in respect of Exemption Application No. D–11863 for UBS QPAMs to rely on the exemptive relief provided by PTE 84–14, notwithstanding the Convictions, for up to twelve months from January 5, 2017.

[67] Of course, the UBS QPAM could not claim exemptive relief under PTE 84–14 or this exemption with respect to any ERISA-covered plan or IRA for which it so expressly disclaims reliance on QPAM status or PTE 84–14.

Department from conditioning relief on express contractual commitments to adhere to the requirements set out herein. The QPAMs remain free to disclaim reliance on the exemption and to avoid such express contractual commitments. To the extent, however, that they hold themselves out as fiduciary QPAMs, they should be prepared to make an express commitment to their customers to adhere to the requirements of this exemption. This commitment strengthens and reinforces the likelihood of compliance, and helps ensure that, in the event of noncompliance, Covered Plans are insulated from injuries caused by noncompliance. These protections also ensure that Covered Plans are able to extricate themselves from transactions that become prohibited as a result of the QPAMs' misconduct, without fear of sustaining additional losses as a result of the QPAMs' actions. In this connection, however, the Department emphasizes that the only claims available to the QPAMs' Covered Plan customers pursuant to these contractual commitments are those separately provided by ERISA or other state and federal laws that are not preempted by ERISA.

Comment III C—Indemnification Requirements—Section I(j)(6) and Revision to Sections I(j)(5) and (3)

Section I(j)(7) of the proposed exemption provides that: ''*Effective as of the effective date of this five-year exemption, with respect to any arrangement, agreement, or contract between a UBS QPAM and an ERISA-covered plan or IRA for which such UBS QPAM provides asset management or other discretionary fiduciary services, each UBS QPAM agrees and warrants: . . . (7)[t]o indemnify and hold harmless the ERISA-covered plan and IRA for any damages resulting from a violation of applicable laws, a UBS QPAM's breach of contract, or any claim arising out of the failure of such UBS QPAM to qualify for the exemptive relief provided by PTE 84–14 as a result of a violation of Section I(g) of PTE 84–14 other than the Convictions.*''

UBS states that Section I(j)(7) of the proposed exemption is overbroad because it could be interpreted to require the UBS QPAMs to indemnify plans for types of damages, such as punitive or consequential damages, that are impermissible under ERISA and/or that are not attributable to any act or omission of UBS or the QPAMs. Thus, UBS requests clarification that any such damages must be reasonable; related to the arrangement, agreement or contract; exclude indirect, special, consequential, or punitive damages; and result directly from the failure of the UBS QPAM. Additionally, UBS has requested that the phrase ''applicable laws'' in Section I(j)(7) of the proposed exemption be replaced with ''ERISA's fiduciary duties and of ERISA and Code's prohibited transaction provisions.''

As explained above, the purpose of this exemption is to protect Covered Plans. Section I(j)(6) (this Section has been renumbered so that Section I(j)(7) of the proposed exemption is now Section I(j)(6) in this exemption) is essential to achieving that purpose. Section I(j)(6) ensures that a Covered Plan may expect a UBS QPAM to adhere to basic fiduciary norms and standards of fair dealing, notwithstanding the Conviction. The condition also ensures that Covered Plans have the ability to disengage from a relationship with a UBS QPAM without undue injury if UBS violates the terms of this exemption. Accordingly, the Department has revised the applicability of this condition to more closely reflect this interest. In particular, the condition applies only to Covered Plans. As indicated above, if the asset manager would prefer not to be subject to these provisions as exemption conditions, it may expressly disclaim reliance on QPAM status or PTE 84–14 in entering into its contract with the Plan or IRA (in that case, however, it could not rely on the exemption for relief).

The Department made further changes upon consideration of UBS's comments, however. These changes include: Renumbering the condition for clarity; replacing ''applicable laws'' with clarifying language that conforms to the one-year exemption, PTE 2016–17; and replacing ''any damages'' with ''actual losses resulting directly from'' certain acts or omissions of the UBS QPAMs. Because Section I(j)(6) extends only to actual losses resulting directly from the actions of the UBS QPAMs, it does not encompass losses solely caused by other parties, events, or acts of God.

Section I(j)(6) of the proposed exemption provides ''*Effective as of the effective date of this five-year exemption, with respect to any arrangement, agreement, or contract between a UBS QPAM and an ERISA-covered plan or IRA for which such UBS QPAM provides asset management or other discretionary fiduciary services, each UBS QPAM agrees and warrants: . . . Not to include exculpatory provisions disclaiming or otherwise limiting liability of the UBS QPAM for a violation of such agreement's terms, except for liability caused by an error, misrepresentation, or misconduct of a plan fiduciary or other party hired by the plan fiduciary who is independent of UBS, and its affiliates.*''

In coordination with the modifications to Section I(j)(6) (formerly Section I(j)(7)) discussed above, the Department modified Section I(j)(5) (formerly I(j)(6) in the proposed exemption) to clarify that the prohibition on exculpatory provisions does not extend to losses that arise from an act or event not caused by UBS and that nothing in this section alters the prohibition on exculpatory provisions set forth in ERISA Section 410.

Section I(j)(3) of the proposed exemption provides that ''*Effective as of the effective date of this five-year exemption, with respect to any arrangement, agreement, or contract between a UBS QPAM and an ERISA-covered plan or IRA for which such UBS QPAM provides asset management or other discretionary fiduciary services, each UBS QPAM agrees and warrants: . . . (3) [n]ot to require the ERISA-covered plan or IRA (or sponsor of such ERISA-covered plan or beneficial owner of such IRA) to indemnify the UBS QPAM for violating ERISA or engaging in prohibited transactions, except for violations or prohibited transactions caused by an error, misrepresentation, or misconduct of a plan fiduciary or other party hired by the plan fiduciary who is independent of UBS.*''

The Department determined that Section I(j)(3), as proposed, is duplicative of the exemption's prohibition on exculpatory clauses in Section I(j)(5) (previously Section I(j)(6) in the proposed exemption) and, accordingly, has deleted the condition. Therefore, as previously stated, Section I(j) has been renumbered accordingly.

Comment IV—Definition of FX Misconduct—Section II(e)

Section I(e) of the proposed exemption provides: ''*The term ''FX Misconduct'' means the conduct engaged in by UBS personnel described in Exhibit 1 of the Plea Agreement (Factual Basis for Breach) entered into between UBS AG and the Department of Justice Criminal Division, on May 20, 2015 in connection with Case Number 3:15–cr–00076–RNC filed in the US District Court for the District of Connecticut.*'' UBS represents that the proposed exemption's definition of FX Misconduct should be limited to the collusive conduct described in Paragraph 15 of Exhibit 1 to the May 20, 2015 Plea Agreement. The Applicant argues that ''UBS was not charged with the other conduct described in Exhibit 1—referred to as the 'unilateral' or 'sales' conduct and was not required to admit this conduct was criminal in nature.'' UBS claims that an individual QPAM exemption applicant has never been required to make representations regarding this type of conduct. UBS further argues that in excluding the ''unilateral'' conduct from the temporary exemptions granted to each of the other banks which were charged with FX-related crimes, unlike UBS, the Department determined that including such conduct would improperly expand the definition ''beyond that which is described as criminal in the Plea Agreement.'' Therefore, UBS argues that references to the ''unilateral'' conduct should be deleted from the UBS final exemption and from the definition of FX Misconduct.

The Department declines to make the requested change to the definition of FX Misconduct. As stated in the Factual Basis for Breach (Exhibit 1 to the May 20, 2015 Plea Agreement), DOJ determined that UBS violated the 2012 Non-Prosecution Agreement (the LIBOR NPA) relating to UBS's fraudulent submission of LIBOR rates and declared a breach of the LIBOR NPA due to a finding that certain UBS employees engaged in fraudulent and deceptive currency trading and sales practices, as well as collusive conduct in certain FX markets. Limiting the definition of the FX Misconduct to include only the collusive behavior specifically described in paragraph 15 of Exhibit 1 of the Plea Agreement would not appropriately reflect the misconduct of UBS employees in regard to the FX markets that DOJ considered in determining there was a breach of the LIBOR NPA which led to the Plea Agreement and the 2017 Conviction. Just as important, the Department believes the FX Misconduct, along with the criminal conduct that is the subject of the Convictions, is relevant to a determination of the protections necessary to assure that the interests of Covered Plans (and their participants, beneficiaries, and beneficial owners) are protected. This exemption is designed to protect Covered Plans and is based on the entirety of the record that describes in detail the FX misconduct, not just part.

Comment V—Deadlines for Completion of the Annual Audits and Annual Reviews—Section I(i)(1) and I(m)(v)

Section I(i)(1) of the proposed exemption provides in part that ''*[e]ach annual audit must cover a consecutive twelve month period starting with the twelve month period that begins on the date of the Conviction Date (the Initial Audit Period)*'' and that ''*[e]ach annual audit must be completed no later than six (6) months after the period to which the audit applies.*'' Section I(m)(v) of the Proposed Exemption provides that ''*[e]ach annual review, including the Compliance Officer's written Annual Report, must be completed at least three (3) months in advance of the date on which each audit described in Section I(i) is scheduled to be completed.*''

UBS represents that while it supports the notion of providing sufficient time in between the completion of the Annual Review and the Annual Audit to allow for the auditor to review the report on the Annual Review, the timing for the Audit and Annual Review would require UBS to conduct the Annual Reviews on a different time schedule than the UBS QPAMs currently follow for the completion of a similar internal review required by the Investment Advisors Act. UBS states that review for the Investment Advisors Act is generally completed on or around the beginning of June of each year. UBS contends that conducting both annual reviews on the same schedule would improve the effectiveness of the Annual Review and achieve substantial efficiencies. Therefore, UBS requests that Section I(i)(1) be revised to provide that (a) the Initial Audit Period cover the fourteen-month period from January 10, 2017 through March 9, 2018, with the audit to be completed six months later (*i.e.,* by September 9, 2018), and (b) the first Annual Review is to be completed three months before the completion of that audit (*i.e.,* by June 9, 2018). UBS states that, thereafter, the annual audits should cover consecutive twelve-month periods (*e.g.,* March 10, 2018 through March 9, 2019), with the same deadlines for completion of the audits and Annual Reviews (*i.e.,* by September 9th and June 9th, respectively, of each year).

The Department agrees that it would be beneficial and efficient for the time frame for the Annual Review to coordinate with the time frame for the compliance review conducted by the UBS QPAMs for other regulators. Therefore, the Department has modified Section I(i)(1) to provide that the Initial Audit Period is the consecutive fourteen-month period beginning on January 10, 2017. Each subsequent audit must cover consecutive twelve-month periods beginning at the end of the Initial Audit Period. Section I(i)(1) has also been modified, as requested, to confirm that for the time period from September 18, 2016 until the January 10, 2017 conviction date, the audit requirements in Section (g) of PTE 2013–09 remained in effect. Accordingly, the audit of such final time period under PTE 2013–09 had to have been completed and submitted within six (6) months of January 10, 2017 (that is, by July 9, 2017). This final audit required under PTE 2013–09 has been completed and the corresponding Audit Report has been submitted to the Department.

Comment VI—Deadline for Implementation of the Required Policies and Training—Sections: I(h)(1) and (2)

Section I(h)(1) of the proposed exemption provides that: ''*[E]ach UBS QPAM must immediately develop, implement, maintain, and follow written policies and procedures (the Policies) requiring and reasonably designed to ensure that: . . .*'' *Section I(h)(2) provides:* ''*[E]ach UBS QPAM must immediately develop and implement a program of training (the Training), conducted at least annually, for all relevant UBS QPAM asset/portfolio management, trading, legal, compliance, and internal audit personnel. The Training must:*''

UBS represents that PTE 2016–17 requires the UBS QPAMs to develop and implement the required policies, procedures, and training program within 6 months of the date of conviction while the proposed exemption requires the UBS QPAMs to ''immediately'' comply with these conditions which are substantially similar to those in the PTE 2016–17. UBS requests that Sections I(h)(1) and (2) in a final exemption be revised to require compliance by the dates set forth in Sections I(h)(1) and (2) of PTE 2016–17 in order to avoid any conflict between the conditions in PTE 2016–17 and the final exemption in the event a final exemption is granted before the occurrence of the 6-month deadline provided for in the PTE 2016–17.

The Department emphasizes that the UBS QPAMs must comply with the Policies and Training requirements within both PTE 2016–17 and this exemption. The Department has determined not to revise Section I(h)(1) and I(h)(2) as requested by UBS. However, the Department has made minor revisions to reflect the fact that UBS QPAMs may already have Policies and Training under the previous exemption, in which case, they are required to ''maintain'' such Policies or Training.

Comment VII A—Notices to Plan Clients and Notices to Interested Persons—Section I(k)(1)

Section I(k)(1) of the proposed exemption provides that: ''*Notice to ERISA-covered plan and IRA clients. Within fifteen (15) days of the publication of this proposed five-year exemption in the* ***Federal Register***, *each UBS QPAM will provide a notice of the proposed five-year exemption, along with a separate summary describing the facts that led to the Convictions (the Summary), which have been submitted to the Department, and a prominently displayed statement (the Statement) that each Conviction separately results in a failure to meet a condition in PTE 84–14, to each sponsor of an ERISA-covered plan and each beneficial owner of an IRA for which a UBS QPAM provides asset management or other discretionary fiduciary services, or the sponsor of an investment fund in any case where a UBS QPAM acts only as a sub-advisor to the investment fund in which such ERISA-covered plan and IRA invests. In the event that this proposed five-year exemption is granted, the **Federal Register** copy of the notice of final five-year exemption must be delivered to such clients within sixty (60) days of its publication in the **Federal Register**, and may be delivered electronically (including by an email that has a link to the five-year exemption). Any prospective clients for which a UBS QPAM provides asset management or other discretionary fiduciary services must receive the proposed and final five-year exemptions with the Summary and the Statement prior to, or contemporaneously with, the client's receipt of a written asset management agreement from the UBS QPAM.*''

UBS requests that Section I(k)(1) be revised to require the notice only be provided to each sponsor of an ERISA-covered plan and each beneficial owner of an IRA for which the UBS QPAMS provides asset management or discretionary fiduciary services in reliance on PTE 84–14. UBS also requests that Section I(k)(1) of the Exemption be revised to reflect the later date by which a certain number of plans and IRAs were provided with notice of the Proposed Exemption, as agreed to by the Department. Lastly, UBS requests that the Department confirm that the declaration required by 29 CFR 2570.43(c) will reflect that later date.

The Department has narrowed the notice requirement to include only ERISA-covered plans and IRAs that would benefit from this knowledge (*i.e.* Covered Plans). The Department confirms that the UBS QPAMs had 63 days after the proposed exemption was published in the **Federal Register** to notify interested persons and the declaration required by 29 CFR 2570.43(c) should reflect the January 23, 2017 date.

Comment VII B—Notices to ''Non-Plan Clients''—Section I(k)(2)

Section I(k)(2) of the proposed exemption provides that: ''*Each UBS QPAM will provide a **Federal Register** copy of the proposed five-year exemption, a **Federal Register** copy of the final five-year exemption; the Summary; and the Statement to each: (A) Current Non-Plan Client within four (4) months of the effective date, if any, of a final five-year exemption; and (B) Future Non-Plan Client prior to, or contemporaneously with, the client's receipt of a written asset management agreement, or other written contractual agreement, from the UBS QPAM. For purposes of this subparagraph (2), a Current Non-Plan Client means a client of a UBS QPAM that: Is neither an ERISA-covered plan nor an IRA; has assets managed by the UBS QPAM as of the effective date, if any, of a final five-year exemption; and has received a written representation (qualified or otherwise) from the UBS QPAM that such UBS QPAM qualifies as a QPAM or qualifies for the relief provided by PTE 84–14. . . .*''

UBS requests that the Department omit this requirement. UBS represents that the scope of exemptive relief, as contemplated by Section 408 of ERISA and the Department's regulations, is limited to plans and IRAs that are affected by the exemption. Therefore, it argues, a condition requiring notice be provided to UBS QPAM clients that are not ERISA-covered plans or IRAs and do not utilize PTE 84–14 would be outside the scope of Section 408 of ERISA.

Given the breadth of the notice requirement otherwise mandated by the exemption, and its decision to restrict the requirement to those arrangements for which QPAM status plays an integral role (*i.e.,* the QPAM represents or relies upon its QPAM status), the Department has decided to delete this provision.

Comment VIII—Distribution of Audit Reports to Board Committees—Section I(i)(8)

Section I(i)(8) of the proposed exemption provides that: ''*The Risk Committee, the Audit Committee, and the Corporate Culture and Responsibility Committee of UBS's Board of Directors are provided a copy of each Audit Report; and a senior executive officer of UBS's Compliance and Operational Risk Control function must review the Audit Report for each UBS QPAM and must certify in writing, under penalty of perjury, that such officer has reviewed each Audit Report;*''

UBS requests that the Department revise this condition to allow UBS's Board of Directors to select which committee (or committees) is provided a copy of each Audit Report. UBS agrees that the results of the annual audit should be communicated to the highest level of UBS's governance structure, but which committee receives the Audit Report is a matter of internal governance best determined by the UBS Board of Directors. UBS claims that this condition could become unworkable if the Board's committee structure and/or the responsibilities of the Board's committees were to change. Alternatively, UBS requests that Section I(i)(8) be modified to limit the requirement to provide a copy of the Audit Report to the Risk Committee of UBS's Board of Directors.

In light of the importance of ensuring proper review of the Audit Report, the Department declines to alter this provision to permit UBS's Board of Directors to decide, in its discretion, which committee receives the Audit Report. However, after review of the record, the Department has revised Section I(i)(8) to reflect that only the Risk Committee of the UBS Board Directors must be provided a copy of the Audit Report.

Section I(i)(4)—Auditor Testing Operational Compliance

Section I(i)(4) of the proposed exemption requires the auditor to ''*test each UBS QPAM's operational compliance with the Policies and Training. In this regard, the auditor must test a sample of each QPAM's transactions involving ERISA-covered plans and IRAs sufficient in size and nature to afford the auditor a reasonable basis to determine the operational compliance with the Policies and Training.*'' UBS has requested that this Section be modified to include the phrase ''in reliance on PTE 84–14'' following the phrase ''involving ERISA-covered plans and IRAs.''

The Department revised this condition for consistency with other conditions of this exemption that are tailored to the Department's interest in protecting Covered Plans.

Additional Audit Requirement Revisions—Sections I(i)(2), I(i)(5), I(i)(7), I(i)(9), I(i)(11), I(i)(12)

In addition to the revisions to the audit requirement for Section I(i)(1), I(i)(4), and i(i)(8) described above, the Department, on its own motion, determined to make revisions to the following Sections to enhance the workability of the audit and the exemption:

Section I(i)(2) of the proposed exemption provides that ''*[t]o the extent necessary for the auditor, in its sole opinion, to complete its audit and comply with the conditions for relief described herein, and as permitted by law, each UBS QPAM and, if applicable, UBS, will grant the auditor unconditional access to its business, including, but not limited to: Its computer systems; business records; transactional data; workplace locations; training materials; and personnel.*'' In the Department's view, to ensure a thorough and robust audit, the independent auditor must be granted access to information it deems necessary to make sound conclusions. However, access to such information must be within the scope of the audit engagement and limited to information relevant to the auditor's objectives as specified by the terms of this exemption and denied only to the extent any disclosure is not permitted by state or federal statute or involves communications subject to attorney client privilege. The Department has modified Section I(i)(2)accordingly.

Section I(i)(5) of the proposed exemption provides that ''*[f]or each audit, on or before the end of the relevant period described in Section I(i)(1) for completing the audit, the auditor must issue a written report (the Audit Report) to UBS and the UBS QPAM to which the audit applies that describes the procedures performed by the auditor during the course of its examination. The Audit Report must include the auditor's specific determinations regarding:*

(i) The adequacy of the UBS QPAM's Policies and Training; the UBS QPAM's compliance with the Policies and Training; the need, if any, to strengthen such Policies and Training; and any instance of the respective UBS QPAM's noncompliance with the written Policies and Training described in Section I(h) above. Any determination by the auditor regarding the adequacy of the Policies and Training and the auditor's recommendations (if any) with respect to strengthening the Policies and Training of the respective UBS QPAM must be promptly addressed by such UBS QPAM, and any action taken by such UBS QPAM to address such recommendations must be included in an addendum to the Audit Report (which addendum is completed prior to the certification described in Section I(i)(7) below). Any determination by the auditor that the respective UBS QPAM has implemented, maintained, and followed sufficient Policies and Training must not be based solely or in substantial part on an absence of evidence indicating noncompliance. In this last regard, any finding that the UBS QPAM has complied with the requirements under this subsection must be based on evidence that demonstrates the UBS QPAM has actually implemented, maintained, and followed the Policies and Training required by this five-year exemption. Furthermore, the auditor must not rely on the Annual Report created by the Compliance Officer as described in Section I(m) below in lieu of independent determinations and testing performed by the auditor as required by Section I(i)(3) and (4) above; and

(ii) The adequacy of the Annual Review described in Section I(m) and the resources provided to the Compliance officer in connection with such Annual Review;

The Department modified Section I(i)(5) to clarify that the auditor may issue one consolidated Audit Report covering all the UBS QPAMS for the period of time being audited.

The Department acknowledges that the UBS QPAMs' efforts to address the auditor's recommendations regarding any inadequacy in the Policies and Training identified by the auditor may take longer to implement than the time limits mandated by the proposed exemption. Accordingly, the Department is modifying Section I(i)(5)(i) to reflect the possibility that the UBS QPAMs' efforts to address the auditor's recommendations regarding any inadequacy in the Policies and Training may not be completed by the submission date of the Audit Report and may involve a written plan to address such items. However, any noncompliance identified by the auditor must be promptly addressed. The revised Section also requires that if such a plan of action to address the auditor's recommendation as to the adequacy of the Policies and Training is not completed by the submission of the Audit Report, the following period's Audit Report, must state whether the plan was satisfactorily completed. Additionally, the Department has modified the final sentence in Section I(i)(5)(i) to more clearly express the Department's intent that the auditor must not rely solely on the work of the Compliance Officer and the Annual Report in formulating its conclusions or findings. The Auditor must perform its own independent testing to formulate its conclusions. This exemption does not prohibit the auditor from considering the Compliance Officer's Annual Report in carrying out its audit function, including its formulation of an audit plan. This exemption, however, does prohibit the auditor from reaching conclusions that are exclusively based upon the contents of the Compliance Officer's Annual Report.

While an independent assessment by the auditor of the adequacy of the Annual Review is essential to providing the Department with the assurance that the Applicant and the UBS QPAMs have given these matters the utmost priority and have taken the necessary actions to comply with the exemption, the Department has determined that the auditor should not be responsible for opining on the adequacy of the resources allocated to the Compliance Officer and on its own motion, has modified Section I(i)(5)(ii) accordingly.

Section I(i)(7) of the proposed exemption provides that ''*[w]ith respect to each Audit Report, the General Counsel, or one of the three most senior executive officers of the UBS QPAM to which the Audit Report applies, must certify in writing, under penalty of perjury, that the officer has reviewed the Audit Report and this five-year exemption; addressed, corrected, or remedied any inadequacy identified in the Audit Report; and determined that the Policies and Training in effect at the time of signing are adequate to ensure compliance with the conditions of this proposed five-year exemption and with the applicable provisions of ERISA and the Code.*'' UBS requested that the Department add the phrase ''to the best of such officer's knowledge at the time'' to this condition. The Department has revised Section I(i)(7) as requested by clarifying that the certification be made to the best of such officer's knowledge at the time.

Furthermore, in coordination with the changes to Section I(i)(5)(i) discussed above, the Department revised Section I(i)(7) to acknowledge that the Applicant's efforts to address the auditor's recommendations regarding inadequacies in the Policies and Training identified by the auditor, may take longer to implement than the timeframe to submit the certified Audit Report. With respect to this issue, the Department did not intend to limit corrective actions to those that could only be completed prior to the submission of the Audit Report. Therefore, the Department has modified Section I(i)(7) to reflect that the senior officer may certify that a written plan to address the inadequacies regarding the Policies and Training identified in the Audit Report is in place.

Section I(i)(9) of the proposed exemption provides that ''*[e]ach UBS QPAM must provide its certified Audit Report, by regular mail to: the Department's Office of Exemption Determinations (OED), 200 Constitution*

Avenue NW, Suite 400, Washington DC 20210, or by private carrier to: 122 C Street NW, Suite 400, Washington, DC 20001–2109, no later than 45 days following its completion. The Audit Report will be part of the public record regarding this five-year exemption. Furthermore, each UBS QPAM must make its Audit Report unconditionally available for examination by any duly authorized employee or representative of the Department, other relevant regulators, and any fiduciary of an ERISA-covered plan or IRA, the assets of which are managed by such UBS QPAM.'' While the Department has an interest in ensuring that the conditions of this exemption broadly protect ERISA-covered plans and IRAs that have relied on QPAM status in deciding to enter into an agreement with the UBS QPAMs, the Department has revised Section I(i)(9) to clarify that the UBS QPAMs are required to make the documents available to any fiduciary of a Covered Plan. Additionally, the Department decided to require that the Audit Report be provided to the Department within 30 days following its completion. The Audit Report, in any event, will be incorporated into the public record attributable to this exemption, under Exemption Application Number D–11907, and, therefore, independently accessible by members of the public. Accordingly, the Department has decided to revise the condition by replacing the phrase ''an ERISA-covered plan or IRA, the assets of which are managed by such UBS QPAM'' with the term ''Covered Plan'' (as defined in Section II(b)). Lastly, the Department agrees that access to the Audit Report need only be upon request and such access can be electronic, and has revised the exemption accordingly.

Section I(i)(10) of the proposed exemption provides that ''*[e]ach UBS QPAM and the auditor must submit to OED: (A) any engagement agreement entered into pursuant to the engagement of the auditor under this five-year exemption; and (B) any engagement agreement entered into with any other entity retained in connection with such QPAM's compliance with the Training or Policies conditions of this proposed five-year exemption, no later than six (6) months after the effective date of this five-year exemption (and one month after the execution of any agreement thereafter).*'' To remove any confusion and uncertainty regarding the timing of the submission of the auditor's and other entity's engagement agreements, the Department has modified Section I(i)(10) to require that the auditor's engagement agreement and the engagement agreements with other entities retained in connection with such UBS QPAM's compliance with the Training or Policies be submitted to the OED no later than two (2) months after the engagement agreement is entered into by the Applicant and the independent auditor or other entity.

Section I(i)(11) of the proposed exemption requires that, ''*[t]he auditor must provide OED, upon request, all of the workpapers created and utilized in the course of the audit, including, but not limited to: The audit plan; audit testing; identification of any instance of noncompliance by the relevant UBS QPAM; and an explanation of any corrective or remedial action taken by the applicable UBS QPAM.*'' The Department acknowledges that certain information contained in the audit workpapers may be confidential and proprietary, and having that information in the public file may create needless or avoidable disclosure issues. Therefore, the Department has determined to modify Section I(i)(11) to remove the requirement that the auditor provide the workpapers to OED, and instead require that the auditor provide access to the workpapers for the Department's review and inspection.

Section I(i)(12) of the proposed five-year exemption requires that ''*UBS must notify the Department at least 30 days prior to any substitution of an auditor, except that no such replacement will meet the requirements of this paragraph unless and until UBS demonstrates to the Department's satisfaction that such new auditor is independent of UBS, experienced in the matters that are the subject of the five-year exemption and capable of making the determinations required of this five-year exemption.*''

The Department decided to remove the requirement for UBS to demonstrate the independence and qualifications of the auditor to the Department. The exemption requires instead that UBS, no later than two (2) months from the engagement of the replacement auditor, notify the Department of a change in auditor and of the reason(s) for the substitution including any material disputes between the terminated auditor and UBS. UBS's fiduciary obligations with respect to the selection of the auditor, as well as the significant role a credible selection plays in reducing the need for more extensive oversight by the Department, should be sufficient to safeguard the selection process.

No-Fault Provision—Failure of Auditor—Section I(s)

Section I(s) of the proposed exemption provides that ''*[a] UBS QPAM will not fail to meet the terms of this five-year exemption, solely because a different UBS QPAM fails to satisfy a condition for relief under this five-year exemption described in Sections I(c), (d), (h), (i), (j), (k), (l), (p), and (r).*'' The Department modified this condition so the failure of the auditor to comply with any of the conditions of the exemption, with the exception of Section I(i)(11) regarding access to the auditor's workpapers, will not be treated as a failure by the UBS QPAMs to comply with the conditions of the exemption provided that such failure was not due to the actions or inactions of UBS or its affiliates.

Comment IX—Additional Requested Revisions

In granting PTE 2016–17, the Department made several modifications to the proposed temporary exemption both at the request of UBS and on the Department's own initiative. UBS requested that the Department make the revisions that were made in PTE 2016–17 to the corresponding conditions in this exemption and additional revisions to certain of these Sections. The Department has addressed these requests as follows:

Knowing or Tacit Approval—Section I(a) and I(c)

Section I(a) of the proposed exemption provides, ''*[t]he UBS QPAMs (including their officers, directors, agents other than UBS, and employees of such UBS QPAMs) did not know of, have reason to know of, or participate in: (1) the FX Misconduct; or (2) the criminal conduct that is the subject of the Convictions (for the purposes of this Section I(a),* ''*participate in*'' *includes the knowing or tacit approval of the FX Misconduct or the misconduct that is the subject of the Convictions).*''

Section I(c) of the proposed exemption provides, ''*[t]he UBS QPAMs will not employ or knowingly engage any of the individuals that participated in: (1) the FX Misconduct or (2) the criminal conduct that is the subject of the Convictions (for the purposes of this Section I(c),* ''*participated in*'' *includes the knowing or tacit approval of the FX Misconduct or the misconduct that is the subject of the Convictions).*''

UBS requests that the words ''or tacit'' in the phrase ''knowing or tacit approval'' be deleted in Sections I(a) and I(c) and be replaced with ''knowing approval'' in a final exemption, to avoid any ambiguity or confusion as to the definition of ''participate in.''

After consideration of UBS's comments, the Department revised the condition in the manner requested by the Applicant.

Receipt of Compensation—Section I(b)

Section I(b) of the proposed exemption provides, ''*[t]he UBS QPAMs (including their officers, directors, agents other than UBS, and employees of such UBS QPAMs) did not receive direct compensation, or knowingly receive indirect compensation, in connection with: (1) the FX Misconduct; or (2) the criminal conduct that is the subject of the Convictions.*''

UBS requests that the Department replace ''receive direct compensation, or knowingly receive indirect compensation'' with ''knowingly receive compensation.'' UBS claims this change is consistent with the underlying purpose of the condition and avoids any ambiguity or confusion regarding the meaning of ''direct'' and ''indirect compensation.''

The Department does not agree that the terms ''direct and ''indirect'' create ambiguity or confusion and has not made the requested revision. It is the Department's intent to preclude relief herein if any asset management personnel of the UBS QPAMs received direct compensation, or knowingly received indirect compensation, in connection with the FX Misconduct or the criminal conduct that is the subject of the Convictions and therefore has not revised Section I(b).

UBS QPAM Will Not Use Its Authority or Influence—Section I(d)

Section I(d) of the proposed exemption provides that ''*[a] UBS QPAM will not use its authority or influence to direct an* ''*investment fund*'' *(as defined in Section VI(b) of PTE 84–14), that is subject to ERISA or the Code and managed by such UBS QPAM to enter into any transaction with UBS or UBS Securities Japan or engage UBS or UBS Securities Japan to provide any service to such investment fund, for a direct or indirect fee borne by such investment fund, regardless of whether such transaction or service may otherwise be within the scope of relief provided by an administrative or statutory exemption.*'' UBS has requested that the phrase ''in reliance on PTE 84–14'' be added to this condition following the phrase ''managed by such UBS QPAM.''

After considering the Applicant's comment, the Department has revised the exemption to clarify that Section I(d) applies to ''investment funds'' managed by the UBS QPAM with respect to Covered Plans.

Provision of Asset Management Services—Section I(g)

Section I(g) provides that ''*UBS and UBS Securities Japan will not provide discretionary asset management services to ERISA-covered plans or IRAs, nor will otherwise act as a fiduciary with respect to ERISA-covered plan or IRA assets.*'' UBS requested that the Department modify Section I(g) in conformity with PTE 2016–17 to clarify that UBS and UBS Securities Japan will not violate this condition in the event that they inadvertently become investment advice fiduciaries and that UBS can act as a fiduciary for plans that it sponsors for its own employees or employees of an affiliate. The Department has modified Section I(g) accordingly.

Termination and Withdrawal Restrictions—Section I(j)(3)

Under Section I(j)(4) of the proposed exemption, the UBS QPAMs agree: ''*[n]ot to restrict the ability of such ERISA-covered plan or IRA to terminate or withdraw from its arrangement with the UBS QPAM (including any investment in a separately managed account or pooled fund subject to ERISA and managed by such QPAM), with the exception of reasonable restrictions, appropriately disclosed in advance, that are specifically designed to ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other investors as a result of an actual lack of liquidity of the underlying assets, provided that such restrictions are applied consistently and in like manner to all such investors.*''

UBS requested that the Department revise Section I(j)(3) (formerly Section I(j)(4) in the proposed exemption) to be consistent with the language used for this condition in PTE 2016–17. Consistent with PTE 2016–17, the Department has revised Section I(j)(4) clarifying the circumstances under which reasonable restrictions are necessary to protect the remaining investors in a pooled fund and to also clarify that in any such event the restrictions must be reasonable and last no longer than reasonably necessary to remedy the adverse consequences.

Notice of Obligations—Section I(j)(7)

Section I(j)(8) of the proposed exemption provides that ''*[w]ithin four (4) months of the effective date of this proposed five-year exemption, each UBS QPAM must provide a notice of its obligations under this Section I(j) to each ERISA-covered plan and IRA for which the UBS QPAM provides asset management or other discretionary fiduciary services. For all other prospective ERISA-covered plan and IRA clients for which a UBS QPAM provides asset management or other discretionary fiduciary services, the UBS QPAM will agree in writing to its obligations under this Section I(j) in an updated investment management agreement or advisory agreement between the UBS QPAM and such clients or other written contractual agreement.*'' In addition to requesting that Section I(j)(8) of the proposed exemption be revised to reflect the changes made in PTE 2016–17, UBS requests that that the requirement in Section I(j)(8) be limited to ERISA-covered plans and IRAs for which the UBS QPAM provides asset management or other discretionary fiduciary services in reliance on PTE 84–14 and that the phrase ''all other prospective'' be replaced with the word ''new.''

As previously noted, this Section has been renumbered so that Section I(j)(8) of the proposed exemption is now Section I(j)(7) in this exemption.

As noted above, the Department has an interest in protecting an ERISA-covered plan or IRA that enters into an asset management agreement with a UBS QPAM in reliance on the manager's qualification as a QPAM, regardless of whether the QPAM relies on the class exemption when managing the assets of the ERISA-covered plan or IRA. The Department has revised the applicability of this condition to more closely reflect this interest, and the condition now applies to Covered Plans. The Department has also modified the condition so that a UBS QPAM will not violate the condition solely because a Covered Plan refuses to sign an updated investment management agreement. Furthermore, the condition has been modified to coordinate with PTE 2016–17, so that a notice that satisfies Section I(j)(8) of that exemption will satisfy renumbered Section I(j)(7) of this exemption, unless the notice contains any language that limits, or is inconsistent with, the scope of this exemption. The Department declines to replace the phrase ''all other prospective'' with the word ''new.'' The Department's intention for the sentence beginning ''[f]or all other prospective'' in Section I(j)(8) of the proposed exemption was to ensure that prospective clients for which a UBS QPAM does not yet provide asset management of other fiduciary services are informed of the UBS QPAM's obligations under Section I(j). Consistent with the request by UBS, the condition has been modified so that the notice must be provided July 9, 2018.

Policies and Procedures Relating to Compliance With ERISA and the Code—Sections I(h)(I)(1)(ii)–(v)

Section I(h)(1)(ii)–(v) of the proposed exemption provide, ''*(h)(1) [e]ach UBS QPAM must immediately develop, implement, maintain, and follow written policies and procedures (the Policies) requiring and reasonably designed to ensure that: . . .*

(ii) The UBS QPAM fully complies with ERISA's fiduciary duties, and with ERISA and the Code's prohibited transaction provisions, and does not knowingly participate in any violation of these duties and provisions with respect to ERISA-covered plans and IRAs;

(iii) The UBS QPAM does not knowingly participate in any other person's violation of ERISA or the Code with respect to ERISA-covered plans and IRAs;

(iv) Any filings or statements made by the UBS QPAM to regulators, including but not limited to, the Department of Labor, the Department of the Treasury, the Department of Justice, and the Pension Benefit Guaranty Corporation, on behalf of ERISA-covered plans or IRAs are materially accurate and complete, to the best of such QPAM's knowledge at that time;

(v)[t]he UBS QPAM does not make material misrepresentations or omit material information in its communications with such regulators with respect to ERISA-covered plans or IRAs, or make material misrepresentations or omit material information in its communications with ERISA-covered plan and IRA clients.''

UBS requests that Section I(h)(1)(v) be revised to add language similar to that found in Section I(h)(1)(iv), indicating that the UBS QPAMs must implement policies designed to avoid any such misrepresentations ''to the best of such QPAM's knowledge at the time.''

The Department has modified the Policies' requirement of adherence to the fiduciary and prohibited transaction provisions of ERISA and the Code so that the Policies expressly focus on the provisions only to the extent ''applicable'' under ERISA and the Code. In general, however, the Department has otherwise retained the stringency and breadth of the Policies requirement, which is more than justified by the repeated compliance and oversight failures exhibited by UBS throughout the period of time during which the criminal misconduct persisted.

The specific elements of the Policies requirement as set forth in this exemption are essential to its protective purposes. In approving this exemption, the Department significantly relies upon conditions designed to ensure that those relying upon its term for prohibited transaction relief will adopt a culture of compliance centered on the basic principles and obligations set forth in the Policies requirement. These standards are core protections of this exemption.

The Department has made some additional changes, however, which should not detract from the Policies' protective purpose. Thus, as requested by UBS, subsection (v) has been revised to contain the ''to the best of QPAM's knowledge at the time'' concept found in subsection (iv). Additionally, the applicability of subsections (iv) and (v) has been narrowed to Covered Plans. To the extent a UBS QPAM would prefer not to be subject to this provision, however, it may expressly disclaim reliance on QPAM status or PTE 84–14 in entering into its contract with the Covered Plan. This revision is consistent with the Department's intent to protect ERISA-covered plans and IRAs that have hired a UBS QPAM in reliance on PTE 84–14 or based on the manager's express representation that it relies on or qualifies under PTE 84–14.

Correction of Violations and Failures To Comply—Section I(h)(vii)

Section I(h)(1)(vii) of the proposed exemption provides that ''*[a]ny violation of, or failure to comply with, an item in subparagraphs (ii) through (vi), is corrected promptly upon discovery, and any such violation or compliance failure not promptly corrected is reported, upon discovery of such failure to promptly correct, in writing, to appropriate corporate officers, the head of compliance and the General Counsel (or their functional equivalent) of the relevant UBS QPAM, the independent auditor responsible for reviewing compliance with the Policies, and an appropriate fiduciary of any affected ERISA-covered plan or IRA that is independent of UBS; however, with respect to any ERISA-covered plan or IRA sponsored by an* ''*affiliate*'' *(as defined in Section VI(d) of PTE 84–14) of UBS or beneficially owned by an employee of UBS or its affiliates, such fiduciary does not need to be independent of UBS. A UBS QPAM will not be treated as having failed to develop, implement, maintain, or follow the Policies, provided that it corrects any instance of noncompliance promptly when discovered, or when it reasonably should have known of the noncompliance (whichever is earlier), and provided that it adheres to the reporting requirements set forth in this subparagraph (vii).*''

UBS requests that this section be revised to clarify that any compliance failures that are discovered must be promptly corrected ''to the extent possible'' and to limit the second clause of the last sentence to any ''material'' ''instance of non-compliance'' that the UBS QPAM ''reasonably should have known about.''

The Department has based the conditions of this exemption on both the particular facts of the UBS cases and its experience over time with previous exemptions. For the reasons set out herein, the Department has concluded that the specific conditions of this exemption are appropriate and give the Department a reasonable basis for concluding that the exemptions are appropriately protective of affected plans and IRAs. As noted above, a central aim of the exemption is to ensure that those relying upon the exemption for relief from the prohibited transaction rules will consistently act to promote a culture of fiduciary compliance, notwithstanding the conduct that violated Section I(g) of PTE 84–14.

While the Department declines to narrow and qualify this subparagraph (vii) with the specific language revision requested by UBS, after consideration, the Department will not condition the exemption on a requirement for notification of violations to an appropriate fiduciary of any affected ERISA-covered plan or IRA that is independent of UBS. Additionally, the Department has revised the term ''corrected promptly'' for consistency with the Department's intent that violations or compliance failures be corrected ''as soon as reasonably possible upon discovery or as soon after the QPAM reasonably should have known of the noncompliance (whichever is earlier).'' However, the Department intends to preclude relief to the extent violations or failures are not corrected as required by the exemption.

Compliance Officer Certification—Section I(m)(2)(iii)

Section I(m)(2)(iii) of the proposes exemption provides: ''*In each Annual Report, the Compliance Officer must certify in writing that to his or her knowledge: (A) The report is accurate; (B) the Policies and Training are working in a manner which is reasonably designed to ensure that the Policies and Training requirements described herein are met; (C) any known instance of noncompliance during the preceding year and any related correction taken to date have been* *identified in the Annual Report; (D) the UBS QPAMs have complied with the Policies and Training in all respects, and/or corrected any instances of noncompliance in accordance with Section I(h) above; and (E) UBS has provided the Compliance Officer with adequate resources, including, but not limited to, adequate staffing.*'' UBS seeks to have Section I(m)(2)(iii) revised to clarify that the certifications must be made to the best of the Compliance Officer's knowledge at the time based on the Annual Review. UBS also requests that Section I(m)(2)(iii)(D) be revised to require the Compliance Officer certify that the UBS QPAM has corrected ''to the extent possible'' any ''known'' instances of noncompliance.

The Department has accepted UBS's request in part and has revised this condition accordingly. Accordingly, Section I(m)(iii) has been modified to require the Compliance Officer to certify in writing ''to the best of his or her knowledge at the time'' and Section I(m)(2)(iii)(D) has be modified to add the word ''known'' before the word ''instances.'' However, the Department has declined to narrow Section I(m)(iii)(D) by adding the phrase ''to the extent'' possible. The Department notes this subparagraph requires that the noncompliance is corrected in accordance with Section I(h) and Section I(h) has been revised to allow for such correction to occur ''as soon as reasonably possible upon discovery or as soon after the QPAM reasonably should have known of the noncompliance (whichever is earlier).''

Notice of Right To Obtain Copy of Policies—Section I(r)

Section I(r) of the proposed exemption provides that, ''*[e]ach UBS QPAM, in its agreements with ERISA-covered plan and IRA clients, or in other written disclosures provided to ERISA-covered plan and IRA clients, within 60 days prior to the initial transaction upon which relief hereunder is relied, and then at least once annually, will clearly and prominently: inform the ERISA-covered plan or IRA client that the client has the right to obtain copies of the QPAM's written Policies adopted in accordance with this five-year exemption.*''

UBS argues that the requirement to provide the disclosure in Section I(r) sixty (60) days prior to a transaction entered into in reliance on this exemption is not in the interest of UBS's current or future ERISA-covered plan and IRA clients. UBS therefore requests that Section I(r) be revised to remove the requirement that the notification be made 60 days prior to the initial transaction that is conducted in reliance on the exemption. UBS represents that the 60 advance notice would effectively place a ''freeze'' on the management of new clients accounts and therefore could deprive ERISA-covered Plans and IRA clients the opportunity to enter into beneficial transactions during the 60-day period, such as time-sensitive transactions to transition new clients' existing investments to new investments or transactions designed to reduce clients' risk exposure. UBS also claims that complying with a 60-day advance notice requirement would be impossible with regard to existing UBS QPAM clients who may have committed to or entered into transactions in reliance on this exemption. For example, UBS represents that some clients may have entered into transactions which are scheduled to occur simultaneously with the granting of this exemption, rendering it impossible for a QPAM to give sixty (60) days prior notice. Additionally, UBS requests that the phrase ''to which such UBS QPAM intends to provide services in reliance upon this exemption'' be added to this condition.

Affording Covered Plans a means by which to review and understand the Policies implemented in connection with this exemption is a vital protection that is fundamental to this exemption's purpose. However, the Department has modified the condition so that the UBS QPAMs, at their election, may instead provide Covered Plans a disclosure that accurately describes or summarizes key components of the Policies, rather than provide the Policies in their entirety. The Department has also determined that such disclosure may be continuously maintained on a website, provided that the website link to the summary of the written Policies is clearly and prominently disclosed to those Covered Plan clients to whom this section applies. The Department also agrees with the Applicant that the timing requirement for disclosure should be revised and, accordingly, has modified the condition of Section I(p) to require notice regarding the information on the website within 60 days of the effective date of this exemption, and thereafter to the extent certain material changes are made to the Policies.

Definition of ''Convictions'' and ''Conviction Date''—Section II(a) and II(d)

Section II(a) of the proposed exemption provides that ''*The term 'Convictions' means the 2013 Conviction and the 2016 Conviction. The term* ''*2013 Conviction*'' *means the judgment of conviction against UBS Securities Japan Co. Ltd. in Case Number 3:12–cr–00268–RNC in the U.S. District Court for the District of Connecticut for one count of wire fraud in violation of Title 18, United Sates Code, sections 1343 and 2 in connection with submission of YEN London Interbank Offered Rates and other benchmark interest rates. The term '2016 Conviction' means the anticipated judgment of conviction against UBS AG in Case Number 3:15–cr–00076–RNC in the U.S. District Court for the District of Connecticut for one count of wire fraud in violation of Title 18, United States Code, Sections 1343 and 2 in connection with UBS's submission of Yen London Interbank Offered Rates and other benchmark interest rates between 2001 and 2010. For all purposes under this proposed five-year exemption, 'conduct' of any person or entity that is the 'subject of [a] Conviction' encompasses any conduct of UBS and/or their personnel, that is described in the Plea Agreement, (including Exhibits 1 and 3 attached thereto), and other official regulatory or judicial factual findings that are a part of this record.*'' UBS has requested the definition of ''convictions'' in Section II(a) be revised to reflect the corresponding changes made in PTE 2016–17 and to reflect that the ''2016 Conviction'' occurred in 2017 and should therefore be referred to as the ''2017 Conviction.'' UBS also requested that the definition of ''Conviction Date'' in Section II(d) be revised to ''January 5, 2017.''

The Department concurs with UBS and has revised the definition of the term ''Convictions'' in Section II(a) to be consistent with the definition provided in Section II(a) of PTE 2016–17 and has revised Sections II(a) and II(d) to replace the phrase ''2016 Conviction'' with ''2017 Conviction.'' Additionally, the Department has deleted the references to ''Conviction Date'' within the exemption. The Department notes that PTE 84–14 references the ''the date of the judgment of the trial court.'' Because that date is January 10, 2017, the compliance dates in this exemption are determined with reference to January 10, 2017.

Definition of ''UBS QPAM''—Section II(b)

Section II(b) of the proposed exemption provides in part that ''[t]he term 'UBS QPAM' excludes the parent entity, UBS AG and UBS Securities Japan.'' UBS has requested that the term ''the parent entity'' be deleted from this Section. The Department has made the requested revision and removed the term ''the parent entity'' from Section II(B).

Comment—Letter from House Committee on Financial Services

The Department also received a comment letter from certain members of Congress (the Members) regarding this exemption, as well as regarding other QPAM-related proposed one year exemptions. In the letter, the Members stated that certain conditions contained in these proposed exemptions are crucial to protecting the investments of our nation's workers and retirees, referring to proposed conditions which require each bank to: (a) Indemnify and hold harmless ERISA-covered plans and IRAs for any damages resulting from the future misconduct of such bank; and (b) disclose to the Department any Deferred Prosecution Agreement or a Non-Prosecution Agreement with the U.S. Department of Justice. The Members also requested that the Department hold hearings in connection with the proposed exemptions.

The Department acknowledges the Members' concerns regarding the need for public discourse regarding proposed exemptions. To this end, the Department's procedures regarding prohibited transaction exemption requests under ERISA (the Exemption Procedures) afford interested persons the opportunity to request a hearing. Specifically, section 2570.46(a) of the Exemption Procedures provides that, ''[a]ny interested person who may be adversely affected by an exemption which the Department proposes to grant from the restrictions of section 406(b) of ERISA, section 4975(c)(1)(E) or (F) of the Code, or section 8477(c)(2) of FERSA may request a hearing before the Department within the period of time specified in the **Federal Register** notice of the proposed exemption.'' The Exemption Procedures provide that ''[t]he Department will grant a request for a hearing made in accordance with paragraph (a) of this section where a hearing is necessary to fully explore material factual issues identified by the person requesting the hearing.'' The Exemption Procedures also provide that ''[t]he Department may decline to hold a hearing where: (1) The request for the hearing does not meet the requirements of paragraph (a) of this section; (2) the only issues identified for exploration at the hearing are matters of law; or (3) the factual issues identified can be fully explored through the submission of evidence in written (including electronic) form.'' [68]

[68] 29 CFR part 2570, published at 76 FR 66653 (October 27, 2011).

While the Members' letter raises important policy issues, it does not appear to raise specific material factual issues. The Department previously explored a wide range of legal and policy issues regarding Section I(g) of the QPAM Exemption during a public hearing held on January 15, 2015 in connection with the Department's proposed exemption involving Credit Suisse AG, and has determined that an additional hearing on these issues is not necessary.

After giving full consideration to the record, the Department has decided to grant the exemption, as described above. The complete application file (Application No. D–11907) is available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, Room N–1515, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on November 21, 2016 at 81 FR 83385.

Exemption

Section I: Covered Transactions

Certain entities with specified relationships to UBS, AG (hereinafter, the UBS QPAMs as defined in Section II(h)) will not be precluded from relying on the exemptive relief provided by Prohibited Transaction Class Exemption 84–14 (PTE 84–14 or the QPAM Exemption),[69] notwithstanding the 2013 Conviction against UBS Securities Japan Co., Ltd. and the 2017 Conviction against UBS, AG (collectively the Convictions, as defined in Section II(a)),[70] during the Exemption Period, provided that the following conditions are satisfied:

(a) The UBS QPAMs (including their officers, directors, agents other than UBS, and employees of such UBS QPAMs) did not know of, did not have reason to know of, or participate in: (1) The FX Misconduct; or (2) the criminal conduct that is the subject of the Convictions (for the purposes of this Section I(a), ''participate in'' includes the knowing approval of the FX Misconduct or the misconduct that is the subject of the Convictions);

(b) The UBS QPAMs (including their officers, directors, agents other than UBS, and employees of such UBS QPAMs) did not receive direct compensation, or knowingly receive indirect compensation, in connection with: (1) The FX Misconduct; or (2) the criminal conduct that is the subject of the Convictions;

(c) The UBS QPAMs will not employ or knowingly engage any of the individuals that participated in: (1) The FX Misconduct or (2) the criminal conduct that is the subject of the Convictions (for the purposes of this Section I(c), ''participated in'' includes the knowing approval of the FX Misconduct or the misconduct that is the subject of the Convictions);

(d) At all times during the Exemption Period, no UBS QPAM will use its authority or influence to direct an ''investment fund'' (as defined in Section VI(b) of PTE 84–14) that is subject to ERISA or the Code and managed by such UBS QPAM with respect to one of more Covered Plans, to enter into any transaction with UBS or UBS Securities Japan or engage UBS or UBS Securities Japan to provide any service to such investment fund, for a direct or indirect fee borne by such investment fund, regardless of whether such transaction or service may otherwise be within the scope of relief provided by an administrative or statutory exemption;

(e) Any failure of the UBS QPAMs to satisfy Section I(g) of PTE 84–14 arose solely from the Convictions;

(f) A UBS QPAM did not exercise authority over the assets of any plan subject to Part 4 of Title I of ERISA (an ERISA-covered plan) or section 4975 of the Code (an IRA) in a manner that it knew or should have known would: Further the FX Misconduct or the criminal conduct that is the subject of the Convictions; or cause the UBS QPAM, its affiliates or related parties to directly or indirectly profit from the FX Misconduct or the criminal conduct that is the subject of the Convictions;

(g) Other than with respect to employee benefit plans maintained or sponsored for its own employees or the employees of an affiliate, UBS and UBS Securities Japan will not act as a fiduciary within the meaning of section 3(21)(A)(i) or (iii) of ERISA, or section 4975(e)(3)(A) and (C) of the Code, with respect to ERISA-covered plan and IRA assets; provided, however, that UBS and UBS Securities Japan will not be treated as violating the conditions of this exemption solely because it acted as an

[69] 49 FR 9494 (March 13, 1984), as corrected at 50 FR 41430 (October 10, 1985), as amended at 70 FR 49305 (August 23, 2005), and as amended at 75 FR 38837 (July 6, 2010).

[70] Section I(g) of PTE 84–14 generally provides that ''[n]either the QPAM nor any affiliate thereof . . . nor any owner . . . of a 5 percent or more interest in the QPAM is a person who within the 10 years immediately preceding the transaction has been either convicted or released from imprisonment, whichever is later, as a result of'' certain criminal activity therein described.

investment advice fiduciary within the meaning of section 3(21)(A)(ii) or section 4975(e)(3)(B) of the Code;

(h)(1) Each UBS QPAM must continue to maintain or immediately implement and follow written policies and procedures (the Policies). The Policies must require, and must be reasonably designed to ensure that:

(i) The asset management decisions of the UBS QPAM are conducted independently of UBS's corporate management and business activities, including the corporate management and business activities of the Investment Bank division and UBS Securities Japan;

(ii) The UBS QPAM fully complies with ERISA's fiduciary duties, and with ERISA and the Code's prohibited transaction provisions, in such case as applicable, and does not knowingly participate in any violation of these duties and provisions with respect to Covered Plans;

(iii) The UBS QPAM does not knowingly participate in any other person's violation of ERISA or the Code with respect to Covered Plans;

(iv) Any filings or statements made by the UBS QPAM to regulators, including, but not limited to, the Department of Labor, the Department of the Treasury, the Department of Justice, and the Pension Benefit Guaranty Corporation, on behalf of or in relation to Covered Plans, are materially accurate and complete, to the best of such QPAM's knowledge at that time;

(v) To the best of the UBS QPAM's knowledge at that time, the UBS QPAM does not make material misrepresentations or omit material information in its communications with such regulators with respect to Covered Plans;

(vi) The UBS QPAM complies with the terms of this exemption; and

(vii) Any violation of, or failure to comply with an item in subparagraphs (ii) through (vi), is corrected as soon as reasonably possible upon discovery, or as soon after the QPAM reasonably should have known of the noncompliance (whichever is earlier), and any such violation or compliance failure not so corrected is reported, upon the discovery of such failure to so correct, in writing, to appropriate corporate officers, the head of compliance and the General Counsel (or their functional equivalent) of the relevant UBS QPAM, and the independent auditor responsible for reviewing compliance with the Policies. A UBS QPAM will not be treated as having failed to develop, implement, maintain, or follow the Policies, provided that it corrects any instance of noncompliance as soon as reasonably possible upon discovery, or as soon as reasonably possible after the QPAM reasonably should have known of the noncompliance (whichever is earlier), and provided that it adheres to the reporting requirements set forth in this subparagraph (vii);

(2) Each UBS QPAM must develop and implement a program of training (the Training), conducted at least annually, for all relevant UBS QPAM asset/portfolio management, trading, legal, compliance, and internal audit personnel. The Training must:

(i) At a minimum, cover the Policies, ERISA and Code compliance (including applicable fiduciary duties and the prohibited transaction provisions), ethical conduct, the consequences for not complying with the conditions of this exemption (including any loss of exemptive relief provided herein), and prompt reporting of wrongdoing; and

(ii) Be conducted by an independent professional who has been prudently selected and who has appropriate technical training and proficiency with ERISA and the Code;

(i)(1) Each UBS QPAM submits to an audit conducted annually by an independent auditor, who has been prudently selected and who has appropriate technical training and proficiency with ERISA and the Code, to evaluate the adequacy of, and each UBS QPAM's compliance with, the Policies and Training described herein. The audit requirement must be incorporated in the Policies. The first annual audit must cover a fourteen-month period that begins on January 10, 2017 (the Initial Audit Period) and all subsequent audits must cover consecutive twelve month periods commencing upon the end of the Initial Audit Period.[71] The Initial Audit Period shall cover the period of time during which PTE 2016–17 [72] is effective and a portion of the time during which this exemption is effective and the audit terms contained in this Section I(i) will supersede the terms of Section I(i) of PTE 2016–17 except as otherwise provided in this exemption. In determining compliance with the conditions for relief in PTE 2016–17 and this exemption, including the Policies and Training requirements, for purposes of conducting the audit, the auditor will rely on the conditions for exemptive relief as then applicable to the respective periods under audit. Additionally, the Department confirms that, for the final audit under PTE 2013–9 covering the time period from September 18, 2016 until the January 10, 2017 conviction date, the audit requirements in Section(g) of PTE 2013–09 remained in effect. Accordingly, the audit of such final time period under PTE 2013–09 had to have been completed and submitted within six (6) months of January 10, 2017, and it has, in fact, been submitted to the Department;

(2) Within the scope of the audit and to the extent necessary for the auditor, in its sole opinion, to complete its audit and comply with the conditions for relief described herein, and only to the extent such disclosure is not prevented by state or federal statute, or involves communications subject to attorney client privilege, each UBS QPAM and, if applicable, UBS, will grant the auditor unconditional access to its business, including, but not limited to: Its computer systems; business records; transactional data; workplace locations; training materials; and personnel. Such access is limited to information relevant to the auditor's objectives as specified by the terms of this exemption;

(3) The auditor's engagement must specifically require the auditor to determine whether each UBS QPAM has developed, implemented, maintained, and followed the Policies in accordance with the conditions of this exemption, and has developed and implemented the Training, as required herein;

(4) The auditor's engagement must specifically require the auditor to test each UBS QPAM's operational compliance with the Policies and Training. In this regard, the auditor must test, for each UBS QPAM, a sample of such QPAM's transactions involving Covered Plans, sufficient in size and nature to afford the auditor a reasonable basis to determine such QPAM's operational compliance with the Policies and Training;

(5) For each audit, on or before the end of the relevant period described in Section I(i)(1) for completing the audit, the auditor must issue a written report (the Audit Report) to UBS and the UBS QPAM to which the audit applies that describes the procedures performed by the auditor during the course of its

[71] The final audit under this exemption would not have to be completed until after the Exemption Period expires. If the Department ultimately decides to grant relief for an additional period, it could decide to alter the terms of the exemption, including the audit conditions (and the timing of the audit requirements). Nevertheless, the Applicant should anticipate that the Department will insist on strict compliance with the audit terms and schedule set forth above. As it considers any new exemption application, the Department may also contact the auditor for any information relevant to its determination.

[72] 81 FR 94049 (December 22, 2016). PTE 2016–17 is a temporary exemption in respect of Exemption Application No. D–11863 that permits UBS QPAMs to rely on the exemptive relief provided by PTE 84–14, notwithstanding the Convictions, for up to twelve months from Conviction Date.

examination. The auditor, at its discretion, may issue a single consolidated Audit Report that covers all the UBS QPAMs. The Audit Report must include the auditor's specific determinations regarding:

(i) The adequacy of each UBS QPAM's Policies and Training; each UBS QPAM's compliance with the Policies and Training; the need, if any, to strengthen such Policies and Training; and any instance of the respective UBS QPAM's noncompliance with the written Policies and Training described in Section I(h) above. The UBS QPAM must promptly address any noncompliance. The UBS QPAM must promptly address or prepare a written plan of action to address any determination of inadequacy by the auditor regarding the adequacy of the Policies and Training and the auditor's recommendations (if any) with respect to strengthening the Policies and Training of the respective UBS QPAM. Any action taken or the plan of action to be taken by the respective UBS QPAM must be included in an addendum to the Audit Report (such addendum must be completed prior to the certification described in Section I(i)(7) below). In the event such a plan of action to address the auditor's recommendation regarding the adequacy of the Policies and Training is not completed by the time of submission of the Audit Report, the following period's Audit Report must state whether the plan was satisfactorily completed. Any determination by the auditor that the respective UBS QPAM has implemented, maintained, and followed sufficient Policies and Training must not be based solely or in substantial part on an absence of evidence indicating noncompliance. In this last regard, any finding that a UBS QPAM has complied with the requirements under this subparagraph must be based on evidence that the particular UBS QPAM has actually implemented, maintained, and followed the Policies and Training required by this exemption. Furthermore, the auditor must not solely rely on the Annual Report created by the compliance officer (the Compliance Officer), as described in Section I(m) below, as the basis for the auditor's conclusions in lieu of independent determinations and testing performed by the auditor as required by Section I(i)(3) and (4) above; and

(ii) The adequacy of the Annual Review described in Section I(m);

(6) The auditor must notify the respective UBS QPAM of any instance of noncompliance identified by the auditor within five (5) business days after such noncompliance is identified by the auditor, regardless of whether the audit has been completed as of that date;

(7) With respect to each Audit Report, the General Counsel, or one of the three most senior executive officers of the UBS QPAM to which the Audit Report applies, must certify in writing, under penalty of perjury, that the officer has reviewed the Audit Report and this exemption; that, such UBS QPAM has addressed, corrected, remedied any noncompliance and inadequacy or has an appropriate written plan to address any inadequacy regarding the Policies and Training identified in the Audit Report. Such certification must also include the signatory's determination, that the Policies and Training in effect at the time of signing are adequate to ensure compliance with the conditions of this exemption and with the applicable provisions of ERISA and the Code;

(8) The Risk Committee of UBS's Board of Directors is provided a copy of each Audit Report; and a senior executive officer of UBS's Compliance and Operational Risk Control function must review the Audit Report for each UBS QPAM and must certify in writing, under penalty of perjury, that such officer has reviewed each Audit Report;

(9) Each UBS QPAM provides its certified Audit Report, by regular mail to: Office of Exemption Determinations (OED), 200 Constitution Avenue NW, Suite 400, Washington, DC 20210; or by private carrier to: 122 C Street NW, Suite 400, Washington, DC 20001–2109. This delivery must take place no later than 30 days following completion of the Audit Report. The Audit Report will be made part of the public record regarding this exemption. Furthermore, each UBS QPAM must make its Audit Report unconditionally available, electronically or otherwise, for examination upon request by any duly authorized employee or representative of the Department, other relevant regulators, and any fiduciary of a Covered Plan;

(10) Each UBS QPAM and the auditor must submit to OED any engagement agreement(s) entered into pursuant to the engagement of the auditor under this exemption. Further, each UBS QPAM must submit to OED any engagement entered into with any other person or entity retained in connection with such QPAM's compliance with the Training or Policies conditions of this exemption no later than two (2) months after the execution of any such engagement agreement;

(11) The auditor must provide the Department, upon request, for inspection and review, access to all the workpapers created and utilized in the course of the audit, provided such access and inspection is otherwise permitted by law; and

(12) UBS must notify the Department of a change in the independent auditor no later than two (2) months after the engagement of a substitute or subsequent auditor and must provide an explanation for the substitution or change including a description of any material disputes between the terminated auditor and UBS;

(j) As of January 10, 2018 and throughout the Exemption Period, with respect to any arrangement, agreement, or contract between a UBS QPAM and a Covered Plan, the UBS QPAM agrees and warrants:

(1) To comply with ERISA and the Code, as applicable with respect to such Covered Plan; to refrain from engaging in prohibited transactions that are not otherwise exempt (and to promptly correct any inadvertent prohibited transactions); and to comply with the standards of prudence and loyalty set forth in section 404 of ERISA with respect to each such ERISA-covered plan and IRA to the extent that section 404 is applicable;

(2) Not to require (or otherwise cause) the Covered Plan to waive, limit, or qualify the liability of the UBS QPAM for violating ERISA or the Code or engaging in prohibited transactions;

(3) Not to restrict the ability of such Covered Plan to terminate or withdraw from its arrangement with the UBS QPAM with respect to any investment in a separately managed account or pooled fund subject to ERISA and managed by such QPAM, with the exception of reasonable restrictions, appropriately disclosed in advance, that are specifically designed to ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other investors. In connection with any such arrangements involving investments in pooled funds subject to ERISA entered into after the effective date of this exemption, the adverse consequences must relate to of a lack of liquidity of the underlying assets, valuation issues, or regulatory reasons that prevent the fund from promptly redeeming an ERISA-covered plan's or IRA's investment, and such restrictions must be applicable to all such investors and effective no longer than reasonably necessary to avoid the adverse consequences;

(4) Not to impose any fees, penalties, or charges for such termination or withdrawal with the exception of

reasonable fees, appropriately disclosed in advance, that are specifically designed to prevent generally recognized abusive investment practices or specifically designed to ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other investors, provided that such fees are applied consistently and in like manner to all such investors;

(5) Not to include exculpatory provisions disclaiming or otherwise limiting liability of the UBS QPAM for a violation of such agreement's terms. To the extent consistent with Section 410 of ERISA, however, this provision does not prohibit disclaimers for liability caused by an error, misrepresentation, or misconduct of a plan fiduciary or other party hired by the plan fiduciary who is independent of UBS, and its affiliates, or damages arising from acts outside the control of the UBS QPAM; and

(6) To indemnify and hold harmless the Covered Plan for any actual losses resulting directly from a UBS QPAM's violation of ERISA's fiduciary duties, as applicable, and of the prohibited transaction provisions of ERISA and the Code, as applicable; a breach of contract by the QPAM, or any claim arising out of the failure of such UBS QPAM to qualify for the exemptive relief provided by PTE 84–14 as a result of a violation of Section I(g) of PTE 84–14 other than the Conviction. This condition applies only to actual losses caused by the UBS QPAM's violations;

(7) By July 9, 2018, each UBS QPAM must provide a notice of its obligations under this Section I(j) to each Covered Plan. For all other prospective Covered Plans, the UBS QPAM will agree to its obligations under this Section I(j) in an updated investment management agreement between the UBS QPAM and such clients or other written contractual agreement. This condition will be deemed met for each Covered Plan that received a notice pursuant to PTE 2016–17 that meets the terms of this condition. Notwithstanding the above, a UBS QPAM will not violate the condition solely because a Plan or IRA refuses to sign an updated investment management agreement.

(k) By March 10, 2018, each UBS QPAM will provide a notice of the exemption, along with a separate summary describing the facts that led to the Convictions (the Summary), which have been submitted to the Department, and a prominently displayed statement (the Statement) that each Conviction separately results in a failure to meet a condition in PTE 84–14, to each sponsor and beneficial owner of a Covered Plan, or the sponsor of an investment fund in any case where a UBS QPAM acts as a sub-advisor to the investment fund in which such ERISA-covered plan and IRA invests. Any prospective client for which a UBS QPAM relies on PTE 84–14 or has expressly represented that the manager qualifies as a QPAM or relies on the QPAM class exemption must receive the proposed and final exemptions with the Summary and the Statement prior to, or contemporaneously with, the client's receipt of a written asset management agreement from the UBS QPAM. Disclosures may be delivered electronically;

(l) The UBS QPAMs must comply with each condition of PTE 84–14, as amended, with the sole exceptions of the violations of Section I(g) of PTE 84–14 that are attributable to the Convictions;

(m)(1) By July 9, 2018, UBS designates a senior compliance officer (the Compliance Officer) who will be responsible for compliance with the Policies and Training requirements described herein. The Compliance Officer must conduct an annual review for each period corresponding to the audit periods set forth in Section I(i)(1) (including the Initial Audit Period) (the Annual Review) [73] to determine the adequacy and effectiveness of the implementation of the Policies and Training. With respect to the Compliance Officer, the following conditions must be met:

(i) The Compliance Officer must be a legal professional who has extensive experience with, and knowledge of, the regulation of financial services and products, including under ERISA and the Code; and

(ii) The Compliance Officer has a dual-reporting line within UBS's Compliance and Operational Risk Control (C&ORC) function: (A) A divisional reporting line to the Head of Compliance and Operational Risk Control, Asset Management, and (B) a regional reporting line to the Head of Americas Compliance and Operational Risk Control. The C&ORC function will be organizationally independent of UBS's business divisions—including Asset Management and the Investment Bank—and is led by the Global Head of C&ORC, who will report directly to UBS's Chief Risk Officer;

(2) With respect to each Annual Review, the following conditions must be met:

(i) The Annual Review includes a review of: Any compliance matter related to the Policies or Training that was identified by, or reported to, the Compliance Officer or others within the C&ORC function during the previous year; any material change in the relevant business activities of the UBS QPAMs; and any change to ERISA, the Code, or regulations related to fiduciary duties and the prohibited transaction provisions that may be applicable to the activities of the UBS QPAMs;

(ii) The Compliance Officer prepares a written report for each Annual Review (each, an Annual Report) that (A) summarizes his or her material activities during the preceding year; (B) sets forth any instance of noncompliance discovered during the preceding year, and any related corrective action; (C) details any change to the Policies or Training to guard against any similar instance of noncompliance occurring again; and (D) makes recommendations, as necessary, for additional training, procedures, monitoring, or additional and/or changed processes or systems, and management's actions on such recommendations;

(iii) In each Annual Report, the Compliance Officer must certify in writing that to the best of his or her knowledge at the time: (A) The report is accurate; (B) the Policies and Training are working in a manner which is reasonably designed to ensure that the Policies and Training requirements described herein are met; (C) any known instance of noncompliance during the preceding year and any related correction taken to date have been identified in the Annual Report; and (D) the UBS QPAMs have complied with the Policies and Training, and/or corrected (or are correcting) any known instances of noncompliance in accordance with Section I(h) above;

(iv) Each Annual Report must be provided to appropriate corporate officers of UBS and each UBS QPAM to which such report relates; the head of Compliance and the General Counsel (or their functional equivalent) of the relevant UBS QPAM; and must be made unconditionally available to the independent auditor described in Section I(i) above;

(v) Each Annual Review, including the Compliance Officer's written Annual Report, must be completed within at least three (3) months following the end of the period to which it relates;

(n) UBS imposes its internal procedures, controls, and protocols on UBS Securities Japan to: (1) Reduce the likelihood of any recurrence of conduct that that is the subject of the 2013

[73] Note that such Annual Review must be completed with respect to the annual periods ending January 9, 2019; January 9, 2020; and January 9, 2021.

Conviction, and (2) comply in all material respects with the Business Improvement Order, dated December 16, 2011, issued by the Japanese Financial Services Authority;

(o) UBS complies in all material respects with the audit and monitoring procedures imposed on UBS by the U.S. Commodity Futures Trading Commission Order, dated December 19, 2012;

(p) Each UBS QPAM will maintain records necessary to demonstrate that the conditions of this exemption have been met, for six (6) years following the date of any transaction for which such UBS QPAM relies upon the relief in the exemption;

(q) During the Exemption Period, UBS: (1) Immediately discloses to the Department any Deferred Prosecution Agreement (a DPA) or Non-Prosecution Agreement (an NPA) with the U.S. Department of Justice, entered into by UBS or any of its affiliates (as defined in Section VI(d) of PTE 84–14) in connection with conduct described in Section I(g) of PTE 84–14 or section 411 of ERISA; and (2) immediately provides the Department any information requested by the Department, as permitted by law, regarding the agreement and/or conduct and allegations that led to the agreement;

(r) By July 09, 2018, each UBS QPAM, in its agreements with, or in other written disclosures provided to Covered Plans, will clearly and prominently inform Covered Plan clients of their right to obtain a copy of the Policies or a description (Summary Policies) which accurately summarizes key components of the UBS QPAM's written Policies developed in connection with this exemption. If the Policies are thereafter changed, each Covered Plan client must receive a new disclosure within six (6) months following the end of the calendar year during which the Policies were changed.[74] With respect to this requirement, the description may be continuously maintained on a website, provided that such website link to the Policies or Summary Policies is clearly and prominently disclosed to each Covered Plan; and

(s) A UBS QPAM will not fail to meet the terms of this exemption, solely because a different UBS QPAM fails to satisfy a condition for relief described in Sections I(c), (d), (h), (i), (j), (k), (l), (p), and (r); or if the independent auditor described in Section I(i) fails a provision of the exemption other than the requirement described in Section I(i)(11), provided that such failure did not result from any actions or inactions of UBS or its affiliates.

[74] In the event Applicant meets this disclosure requirement through Summary Policies, changes to the Policies shall not result in the requirement for a new disclosure unless, as a result of changes to the Policies, the Summary Policies are no longer accurate.

Section II: Definitions

(a) The term ''Convictions'' means the 2013 Conviction and the 2017 Conviction. The term ''2013 Conviction'' means the judgment of conviction against UBS Securities Japan Co. Ltd. in case number 3:12–cr–00268–RNC in the U.S. District Court for the District of Connecticut for one count of wire fraud in violation of Title 18, United States Code, sections 1343 and 2 in connection with submission of YEN London Interbank Offered Rates and other benchmark interest rates. The term ''2017 Conviction'' means the judgment of conviction against UBS, AG in case number 3:15–cr–00076–RNC in the U.S. District Court for the District of Connecticut for one count of wire fraud in violation of Title 18, United States Code, Sections 1343 and 2 in connection with UBS's submission of Yen London Interbank Offered Rates and other benchmark interest rates between 2001 and 2010. For all purposes under this exemption, ''conduct'' of any person or entity that is the ''subject of the Convictions'' encompasses any conduct of UBS and/or their personnel, that is described in (i) Exhibit 3 to the Plea Agreement entered into between UBS, AG and the Department of Justice Criminal Division, on May 20, 2015, in connection with case number 3:15–cr–00076–RNC, and (ii) Exhibits 3 and 4 to the Plea Agreement entered into between UBS Securities Japan and the Department of Justice Criminal Division, on December 19, 2012, in connection with case number 3:12–cr–00268–RNC;

(b) The term ''Covered Plan'' means an ERISA-covered plan or an IRA with respect to which a UBS QPAM relies on PTE 84–14, or with respect to which a UBS QPAM (or any UBS affiliate) has expressly represented that the manager qualifies as a QPAM or relies on the QPAM class exemption, but not with respect to any arrangement, agreement, or contract between a UBS QPAM and an ERISA-covered plan or IRA with respect to which the UBS QPAM has expressly disclaimed reliance on the QPAM status or PTE 84–14 in entering into its contract with the ERISA covered plan or IRA.

(c) The terms ''ERISA-covered plan'' and ''IRA'' mean, respectively, a plan subject to Part 4 of Title I of ERISA and a plan subject to section 4975 of the Code.

(d) The term ''Exemption Period'' means January 10, 2018, through January 9, 2021;

(e) The term ''FX Misconduct'' means the conduct engaged in by UBS personnel described in Exhibit 1 of the Plea Agreement (Factual Basis for Breach) entered into between UBS, AG and the Department of Justice Criminal Division, on May 20, 2015 in connection with Case Number 3:15–cr–00076–RNC filed in the US District Court for the District of Connecticut.

(f) The term ''Plea Agreement'' means the Plea Agreement (including Exhibits 1 and 3 attached thereto) entered into between UBS, AG and the Department of Justice Criminal Division, on May 20, 2015 in connection with Case Number 3:15-cr-00076–RNC filed in the US District Court for the District of Connecticut.

(g) The term ''UBS'' means UBS, AG.

(h) The term ''UBS QPAM'' means UBS Asset Management (Americas) Inc., UBS Realty Investors LLC, UBS Hedge Fund Solutions LLC, UBS O'Connor LLC, and any future entity within the Asset Management or the Wealth Management Americas divisions of UBS, AG that qualifies as a ''qualified professional asset manager'' (as defined in Section VI(a)[75] of PTE 84–14) and that relies on the relief provided by PTE 84–14 or represents to ERISA-covered plans and IRAs that it qualifies as a QPAM and with respect to which UBS, AG is an ''affiliate'' (as defined in Part VI(d) of PTE 84–14). The term ''UBS QPAM'' excludes UBS, AG and UBS Securities Japan.

(i) The term ''UBS Securities Japan'' means UBS Securities Japan Co. Ltd, a wholly-owned subsidiary of UBS incorporated under the laws of Japan.

Effective Date

This exemption is effective January 10, 2018, and the term of the exemption is from January 10, 2018, through January 9, 2021 (the Exemption Period).

Department's Comment: The Department cautions that the relief in this exemption will terminate immediately if, among other things, an entity within the UBS corporate structure is convicted of a crime described in Section I(g) of PTE 84–14 (other than the Convictions) during the Exemption Period. Although UBS could apply for a new exemption in that

[75] In general terms, a QPAM is an independent fiduciary that is a bank, savings and loan association, insurance company, or investment adviser that meets certain equity or net worth requirements and other licensure requirements and that has acknowledged in a written management agreement that it is a fiduciary with respect to each plan that has retained the QPAM.

circumstance, the Department would not be obligated to grant the exemption. The terms of this exemption have been specifically designed to permit plans to terminate their relationships in an orderly and cost effective fashion in the event of an additional conviction or a determination that it is otherwise prudent for a plan to terminate its relationship with an entity covered by the exemption.

Further Information

For more information on this exemption, contact Brian Mica, telephone (202) 693–8402, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor (this is not a toll-free number).

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) These exemptions are supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(3) The availability of these exemptions is subject to the express condition that the material facts and representations contained in the application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 21st day of December, 2017.

Lyssa E. Hall,

Director of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

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