

**DEPARTMENT OF LABOR****Employee Benefits Security Administration****29 CFR Part 2550**

[Application No. D-12022]

Z-RIN 1210 ZA07

**Proposed Amendment to Prohibited Transaction Class Exemption 84-14 (the QPAM Exemption)**

**AGENCY:** Employee Benefits Security Administration, U.S. Department of Labor.

**ACTION:** Notice of proposed amendment to class exemption.

**SUMMARY:** This document gives notice of a proposed amendment to prohibited transaction class exemption 84-14 (the QPAM Exemption). The QPAM Exemption provides relief from certain prohibited transaction restrictions of Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA) and Title II of ERISA, as codified in the Internal Revenue Code of 1986, as amended (the Code).

**DATES:** Written comments and requests for a public hearing on the proposed amendment to the class exemption must be submitted to the Department within September 26, 2022. The Department proposes that the amendment, if granted, will be effective 60 days after the date of publication of the final amendment in the **Federal Register**.

**ADDRESSES:** All written comments and requests for a hearing concerning the proposed amendment to the class exemption should be sent to the Office of Exemption Determinations through the Federal eRulemaking Portal and identified by Application No. D-12022: *Federal eRulemaking Portal:* <http://www.regulations.gov> at Docket ID number: EBSA-2022-0008. Follow the instructions for submitting comments.

See **SUPPLEMENTARY INFORMATION** below for additional information regarding comments.

**FOR FURTHER INFORMATION CONTACT:** Erin Scott Hesse, telephone (202) 693-8546, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor (this is not a toll-free number).

**SUPPLEMENTARY INFORMATION:****Comment Instructions**

All comments and requests for a hearing must be received by the end of the comment period. Requests for a hearing must state the issues to be addressed and include a general description of the evidence to be

presented at the hearing. In light of the current circumstances surrounding the COVID-19 pandemic, persons are encouraged to submit all comments electronically and not to submit paper copies. The comments and hearing requests may be available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N-1513, 200 Constitution Avenue NW, Washington, DC 20210; however, the Public Disclosure Room may be closed for all or a portion of the comment period due to circumstances surrounding the COVID-19 pandemic. Comments and hearing requests will also be available online at <http://www.regulations.gov>, at Docket ID number: EBSA-2022-0008 and <http://www.dol.gov/ebsa>, at no charge.

**Warning:** All comments received will be included in the public record without change and will be made available online at <http://www.regulations.gov>, including any personal information provided, unless the comment includes information claimed to be confidential or other information whose disclosure is restricted by statute. If you submit a comment, EBSA recommends that you include your name and other contact information, but DO NOT submit information that you consider to be confidential, or otherwise protected (such as Social Security number or unlisted phone number), or confidential business information that you do not want publicly disclosed. However, if EBSA cannot read your comment due to technical difficulties and cannot contact you for clarification, EBSA might not be able to consider your comment. Additionally, the <http://www.regulations.gov> website is an “anonymous access” system, which means EBSA will not know your identity or contact information unless you provide it.

**Background**

Title I of the Employee Retirement Income Security Act of 1974, as amended (ERISA), broadly prohibits transactions between plans and “parties in interest”—in general, people or entities closely connected to the plans. Title II of ERISA, codified in the Internal Revenue Code, as amended (the Code), includes parallel prohibitions applicable to tax-qualified plans<sup>1</sup> and “disqualified persons.” Absent an exemption, ERISA section 406(a)(1)(A) through (D) and Code section

<sup>1</sup> These include employee benefit plans as well as individual retirement accounts and individual retirement annuities (together, IRAs).

4975(c)(1)(A) through (D) prohibit, among other things, sales, leases, loans, and the provision of services between these parties. Congress enacted these prohibitions to protect plans, their participants and beneficiaries (including beneficiaries of IRAs), and IRA owners<sup>2</sup> from the potential for abuse that arises when plans and IRAs engage in transactions with closely connected parties. Title I of ERISA and the Code include statutory exemptions from the prohibited transaction provisions, and the Department has authority to grant additional administrative prohibited transaction exemptions on an individual or class basis under ERISA section 408(a) and Code section 4975(c)(2).<sup>3</sup> Before granting an administrative exemption, these provisions require the Secretary of Labor to find that the exemption is: (i) administratively feasible, (ii) in the interests of the plans and their participants and beneficiaries and IRA owners, and (iii) protective of the rights of plan participants and beneficiaries and IRA owners.

The QPAM Exemption permits an investment fund<sup>4</sup> holding assets of plans and IRAs that is managed by a “qualified professional asset manager” (QPAM) to engage in transactions with “parties in interest” or “disqualified persons” to a plan or an IRA, subject to protective conditions. The proposed amendment would modify Section I(g) of the exemption, a provision under which a QPAM may become ineligible to rely on the QPAM Exemption for a period of 10 years if the QPAM, various affiliates, or five percent or more owners of the QPAM are convicted of certain crimes. The proposed amendment would: (1) require a one-time notice to the Department that a QPAM is relying upon the exemption, (2) require up-front terms in a written management agreement that apply in the event of ineligibility, (3) update the list of crimes in current Section I(g) to explicitly include foreign crimes that are substantially equivalent to the listed

<sup>2</sup> For purposes of this proposed exemption, the term “IRA owner” refers to the individual for whom an IRA (as defined in the proposed exemption) is established.

<sup>3</sup> Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. (2018), transferred the authority of the Secretary of the Treasury to issue exemptions of the type proposed to the Secretary of Labor. Therefore, this notice of proposed amendment to the QPAM Exemption is issued solely by the Department.

<sup>4</sup> For purposes of the QPAM Exemption, an investment fund includes single customer and pooled separate accounts maintained by an insurance company, individual trusts, and common, collective, or group trusts maintained by a bank, and any other account or fund subject to the discretionary authority of the QPAM. See Section VI(b) of the QPAM Exemption.

crimes, (4) expand the circumstances that may lead to ineligibility, and (5) provide a one-year winding-down period to help plans and IRAs avoid or minimize possible negative impacts of terminating or switching QPAMs or adjusting asset management arrangements when a QPAM becomes ineligible. The proposed amendment would also: (1) provide clarifying updates to Section I(c) regarding a QPAM's authority over investment decisions, (2) adjust the asset management and equity thresholds in the QPAM definition in Section VI(a), and (3) add a new recordkeeping provision in Section VI(t). The amendment would affect participants and beneficiaries of plans, owners of IRAs, the sponsoring employers of such plans or IRAs (if applicable), QPAMs, and counterparties engaging in transactions covered under the QPAM Exemption.

### The QPAM Exemption<sup>5</sup>

In 1984, the Department granted the QPAM Exemption to permit an investment fund managed by a QPAM to engage in a broad range of transactions with parties in interest with respect to a plan, subject to protective conditions. All references in the QPAM Exemption to "plan" also include a plan described in Code section 4975(e)(1), such as an IRA.<sup>6</sup> The reference to "parties in interest" includes "disqualified persons" under the Code.<sup>7</sup> Throughout this preamble, all references to "Plan" include IRAs, and all references to "parties in interest" include "disqualified persons."<sup>8</sup>

The Department developed and granted the QPAM Exemption based on the premise that its broad exemptive relief from the prohibitions of ERISA section 406(a)(1)(A) through (D) and Code section 4975(c)(1)(A) through (D) could be afforded for transactions in which a Plan engages with a party in interest only if the commitments and investments of Plan assets and the negotiations leading thereto are the sole responsibility of an independent investment manager.

<sup>5</sup> Class Exemption for Plan Asset Transactions Determined by Independent Qualified Professional Asset Managers, 49 FR 9494 (Mar. 13, 1984) as corrected at 50 FR 41430 (Oct. 10, 1985), as amended at 66 FR 54541 (Oct. 29, 2001), 70 FR 49305 (Aug. 23, 2005), and 75 FR 38837 (July 6, 2010).

<sup>6</sup> See Section VI(n) of the QPAM Exemption.

<sup>7</sup> See Section VI(f) of the QPAM Exemption.

<sup>8</sup> Although the Department is using the same definition of "plan" in the proposed amendment, the Department is proposing a ministerial change which will capitalize this term. References throughout this preamble will therefore use the term "Plan."

Part I of the QPAM Exemption (the General Exemption) provides broad prohibited transaction relief for a QPAM-managed investment fund to engage in transactions with parties in interest, but it does not include relief for the QPAM to engage in any transactions involving its own self-dealing and conflicts of interest, which are prohibited under ERISA section 406(b)(1) through (3) and 4975(c)(1)(E) and (F). This important limitation on the relief in the QPAM Exemption serves as a key protection for Plans that are affected by the exemption. The QPAM Exemption also includes conditions designed to ensure that the QPAM does not engage in transactions with parties in interest that have the power to influence the QPAM's decision-making processes. Additionally, QPAMs remain subject to the fiduciary duties of prudence and undivided loyalty, set forth in ERISA section 404, with respect to their client Plans.

In proposing the QPAM Exemption, the Department expressly indicated that any entity acting as a QPAM, and those who are in a position to influence the QPAM's policies, are expected to maintain a high standard of integrity.<sup>9</sup> Accordingly, the exemption includes Section I(g), which provides that a QPAM is ineligible to rely on the exemption for a period of 10 years if the QPAM, various affiliates, or five percent or more owners of the QPAM are convicted of certain crimes. Ineligibility begins as of the date of the judgment of the trial court, regardless of whether the judgment remains under appeal.

### *The Qualified Professional Asset Manager*

As noted above, the QPAM Exemption provides relief for various party in interest transactions involving Plan assets that are transferred to a QPAM for discretionary management, subject to the protective conditions in the exemption. A QPAM is defined as a bank, savings and loan association, insurance company, or a registered investment adviser that meets specified standards regarding financial size and acknowledges in a written management agreement that it is a fiduciary with respect to each Plan that retains it as a QPAM. The Department noted in the 1982 proposed exemption that these categories of asset managers are subject to regulation by federal or state agencies and expressed the view that large

<sup>9</sup> Proposed Class Exemption for Plan Asset Transactions Determined by Independent Qualified Professional Asset Managers, 47 FR 56945, 56947 (Dec. 21, 1982) (Proposed QPAM Exemption).

financial services institutions would be able to withstand improper influence from parties in interest (*i.e.*, maintain independence).<sup>10</sup> The Department believed, and continues to believe that, as a general matter, transactions entered into on behalf of Plans with parties in interest are most likely to conform to ERISA's general fiduciary standards when the decision to enter into the transaction is made by an independent fiduciary.

The QPAM's independence and discretionary control over asset management decisions protect Plans from the danger that parties in interest will exercise improper influence over decision-making with regard to Plan assets. The QPAM acts as a fundamental protection against the possibility that parties in interest could otherwise favor their own competing financial interests at the expense of Plans, their participants and beneficiaries, and IRA owners. Because the Department relies upon the QPAM as a key protection against such improper conduct and the threat posed by conflicts of interest, it is critically important that the QPAM, and those who are in a position to influence its policies, maintain a high standard of integrity. Under the exemption, QPAMs must have the authority to make decisions on a discretionary basis without direct oversight for each transaction by other Plan fiduciaries. Given the scope of their discretion, it is imperative that the QPAM, its affiliates, and owners avoid engaging in criminal conduct and other serious misconduct that would jeopardize Plan assets or call into question the Department's reliance on their oversight as a key safeguard for Plan participants and beneficiaries and IRA owners.

### *Covered Transactions*

The QPAM Exemption consists of four separate parts. The General Exemption set forth in Part I provides broad exemptive relief for a fund managed by a QPAM to engage in a wide variety of transactions described in ERISA section 406(a)(1)(A) through (D) and the corresponding prohibitions of Code section 4975(c)(1)(A) through (D) with virtually all parties in interest other than those parties who are most likely to have the power to influence the QPAM.<sup>11</sup> The General Exemption covers

<sup>10</sup> Proposed QPAM Exemption, 47 FR at 56947.

<sup>11</sup> The QPAM Exemption does not extend to transactions described in PTE 2006-16 (relating to securities lending arrangements), PTE 83-1 (relating to acquisitions of interests in mortgage pools), and PTE 82-7 (relating to certain mortgage financing arrangements). See Section I(b).

many different types of transactions. For example, the exemption provides relief for a QPAM to use fund assets to purchase an asset from a party in interest to a Plan that is invested in the fund. The General Exemption also facilitates much more complex transactions, such as when a QPAM designs a fund to replicate the return of certain commodities indices by investing in futures, structured notes, total return swaps, and other derivatives where a party in interest to a Plan that invested in the fund is involved in the transaction.<sup>12</sup>

As a result of the prohibited transaction relief in the exemption, the QPAM can streamline its compliance with the prohibited transaction provisions of Title I of ERISA and the Code. The QPAM will generally not need to keep and routinely check a list of parties in interest before engaging in a transaction to avoid inadvertently entering into a prohibited transaction with potentially hundreds, if not thousands, of parties in interest. The QPAM also will not have to seek an individual exemption or, alternatively, forgo investment opportunities that would be in the interest of Plans invested in the investment fund merely because a party in interest is involved.

In addition to the General Exemption, the QPAM Exemption also contains additional “Specific Exemptions” in Parts II, III, and IV. Part II of the exemption provides limited prohibited transaction relief for certain transactions involving those employers and certain of their affiliates that could not qualify for the General Exemption in Part I. Paragraph (a) of Part II provides conditional relief for employers and their affiliates to furnish limited amounts of goods and services to an investment fund managed by the QPAM, while paragraph (b) of Part II permits such employers and their affiliates to lease office or commercial space from an investment fund managed by the QPAM.

Part III provides relief for an investment fund managed by the QPAM to lease office or commercial space to the QPAM, an affiliate of the QPAM, or a person who could not qualify under Part I because the person holds powers to appoint or terminate a QPAM as a manager of the Plan’s assets as described in subparagraph (a)(1) of Part I of the exemption.

Part IV provides relief for a place of public accommodation owned by the investment fund to furnish services and

facilities to all parties in interest if the services and facilities are furnished on a comparable basis to the general public. These specific exemptions provide relief from the specified portions of ERISA section 406(a) and 406(b) and the parallel provisions of Code section 4975(c)(1).

The QPAM Exemption was amended in 2010 to add a new Part V, which permits a QPAM to rely upon the prohibited transaction relief in Parts I, III, or IV to manage an investment fund containing the assets of a Plan sponsored by the QPAM or an affiliate.<sup>13</sup> In recognition of the fact that a QPAM does not have the requisite independence from itself or an affiliate for these transactions, paragraphs (b) and (c) of Part V requires the QPAM to adopt written policies and procedures designed to ensure compliance with the exemption conditions and submit to an annual independent exemption audit. The audit must address compliance with the required policies and procedures and the applicable objective requirements of the relevant parts of the exemption.

#### *Conditions*

The conditions of Part I work to ensure that the QPAM is an independent decision maker that will not be influenced by parties in interest closely linked to the Plans that are invested in the QPAM-managed fund. Section I(a) reflects this intention by generally excluding transactions with parties in interest that would be able to appoint or terminate the QPAM or negotiate the terms of the management agreement with the QPAM.<sup>14</sup>

Section I(c) provides that transactions entered into pursuant to the exemption must be negotiated by or under the authority and general direction of the QPAM, and that either the QPAM or (so long as the QPAM retains full fiduciary responsibility with respect to the transaction) a property manager acting in accordance with written guidelines and established and administered by the QPAM, makes the decision on behalf of the investment fund to enter into the transaction. Further, Section I(c)

<sup>13</sup> Amendment to Prohibited Transaction Exemption (PTE) 84-14 for Plan Asset Transactions Determined by Independent Qualified Professional Asset Managers, 75 FR 38837 (July 6, 2010). The “Definitions and General Rules” were redesignated as Part VI.

<sup>14</sup> Section I(a) was amended in 2005 to permit transactions involving parties in interest and disqualified persons with respect to a Plan if the assets of the Plan managed by the QPAM in the fund, when combined with the assets of other Plans established by the same employer or an affiliate and managed in the same fund, represent less than 10 percent of the assets of the investment fund. 70 FR 49305 (Aug. 23, 2005).

provides that the transaction must not be part of an agreement, arrangement, or understanding designed to benefit a party in interest. This language is intended to preclude, for example, transactions that are negotiated by an employer but later presented to the QPAM for approval.<sup>15</sup> Section I(d) provides that transactions with the QPAM or a person “related” to the QPAM (within the meaning of Section VI(h) of the exemption) are excluded from the prohibited transaction relief offered by the exemption. Section I(e) provides that transactions with a party in interest with respect to a Plan whose assets make up more than 20% of the total client assets managed by the QPAM are excluded from the prohibited transaction relief offered by the exemption.<sup>16</sup> Section I(f) requires the terms of each transaction to be at least as favorable to the fund as the terms generally available in an arm’s length transaction between unrelated parties.

Section I(g) provides for ineligibility under the QPAM Exemption if the QPAM, various affiliates, or five percent or more owners of the QPAM are convicted of certain crimes.<sup>17</sup> Specifically, Section I(g) currently states:

Neither the QPAM nor any affiliate thereof (as defined in section VI(d)), nor any owner, direct or indirect, 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: Any felony involving abuse or misuse of such person’s employee benefit plan position or employment, or position or employment with a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary; income tax evasion; any felony involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element; or any other crime described in section 411 of ERISA. For purposes of this section (g), a person shall be deemed to have been “convicted” from the date of the judgment of the trial court, regardless of whether that judgment remains under appeal.<sup>18</sup>

<sup>15</sup> Proposed QPAM Exemption, 47 FR at 56947.

<sup>16</sup> For purposes of Section I(e), the Plan’s assets are combined with the assets of other Plans maintained by the same employer or an affiliate or the same employee organization that are managed by the QPAM.

<sup>17</sup> See 75 FR 38837 (July 6, 2010) for the text of the QPAM Exemption that is in effect unless and until this proposed amendment is finalized.

<sup>18</sup> ERISA section 411 includes: robbery, bribery, extortion, embezzlement, fraud, grand larceny,

<sup>12</sup> See, e.g., Notice of Proposed Exemption involving Credit Suisse AG, 79 FR 52365, 52367 (Sept. 3, 2014).

The exemption defines “affiliate” to include parties in control relationships with the QPAM; parties for which the QPAM is a five percent or more partner or owner; directors, relatives, or partners of the QPAM; and officers and employees who are highly compensated or who have authority with respect to Plan assets.<sup>19</sup>

Additional conditions are applicable to the specific exemptions set forth in Parts II through V of the exemption.

### **Purpose and Approach for the Proposed Amendment**

Substantial changes have occurred in the financial services industry since the Department granted the QPAM Exemption in 1984. These changes include industry consolidation caused by a variety of factors and an increasingly global reach for financial services institutions, both in their affiliations and in their investment strategies, including those for Plan assets. In the years since 1984, the Department has repeatedly considered applications for individual exemptions after convictions for crimes causing ineligibility under Section I(g). The Department has gained extensive experience dealing with corporate convictions giving rise to QPAM ineligibility (both domestically and in foreign jurisdictions) pursuant to Section I(g), and the Department determined that an ineligibility condition tied to criminal convictions continues to provide necessary protection to Plans, their participants and beneficiaries, and IRA owners.

In practice, Section I(g) has effectively required QPAMs that become ineligible but wish to continue to rely on the QPAM Exemption to seek an individual exemption from the Department. Since 2013, the Department has received an increasing number of individual exemption requests involving Section I(g) ineligibility as a result of criminal convictions occurring within the corporate family of large financial

burglary, arson, a felony violation of Federal or State law involving substances defined in section 802(6) of title 21, murder, rape, kidnapping, perjury, assault with intent to kill, any crime described in section 80a–9(a)(1) of title 15, a violation of any provision of this chapter, a violation of section 186 of this title, a violation of chapter 63 of title 18, a violation of section 874, 1027, 1503, 1505, 1506, 1510, 1951, or 1954 of title 18, a violation of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 401), any felony involving abuse or misuse of such person’s position or employment in a labor organization or employee benefit plan to seek or obtain an illegal gain at the expense of the members of the labor organization or the beneficiaries of the employee benefit plan, or conspiracy to commit any such crimes or attempt to commit any such crimes, or a crime in which any of the foregoing crimes is an element.

<sup>19</sup> See Section VI(d).

institutions. Among other things, applicants must fully and accurately disclose the conduct that led to their ineligibility, including whether the QPAM was involved; the specific reasons they should be permitted to continue acting as a QPAM notwithstanding the criminal conduct; the efforts they have undertaken to promote a culture of compliance; and the steps they are prepared to take in the future to ensure Plans, their participants and beneficiaries, and IRA owners are protected. In order to make its finding under ERISA section 408(a) and Code section 4975(c)(2) when the Department has granted individual exemptions that permit continued reliance on the QPAM Exemption after a conviction, it has insisted on the imposition of additional protections, such as a comprehensive independent compliance audit, and taken action to ensure that Plans are permitted to withdraw from the asset management arrangement without penalty and will be indemnified or held harmless in the event of future misconduct.

Exemption applicants have repeatedly and consistently represented to the Department that Plan investors would be harmed if a QPAM abruptly lost exemptive relief as of the conviction date, as dictated by Section I(g). Although ineligibility as a result of Section I(g) does not bar a QPAM from acting as a discretionary asset manager for Plan assets after a conviction, applicants have informed the Department that the loss of exemptive relief has the potential to disrupt Plan investments and investment strategies, including with respect to counterparties to certain transactions who are also relying upon the prohibited transaction relief in the QPAM Exemption.<sup>20</sup> Plans may also experience transition costs if a Plan fiduciary needs to find an alternative asset manager. To avoid immediate disruption and cost to Plan asset management arrangements due to an expected conviction, the Department has granted several one-year temporary individual exemptions to QPAMs facing ineligibility to provide the Department with sufficient time to engage in a more intensive review regarding whether a longer-term individual exemption is warranted.<sup>21</sup> Moreover, since 2013, both the one-year and longer-term exemptions have routinely given Plans

<sup>20</sup> See, e.g., Notice of Proposed Exemption involving JP Morgan Chase & Co., 81 FR 83372, 83363 (Nov. 21, 2016).

<sup>21</sup> In such cases, the Department requires prominent notice be provided to client Plans along with additional protective conditions to ensure Plan assets are protected while longer-term prohibited transaction relief is considered.

the right to exit the relationship with an ineligible QPAM without the imposition of any fees, penalties, or charges.

As discussed in greater detail below, these developments have prompted the Department to propose this amendment to the QPAM Exemption, which would: (1) require a one-time notice to the Department that a QPAM is relying upon the exemption, (2) require up-front terms in a written management agreement that apply in the event of ineligibility, (3) update the list of crimes in current Section I(g) to explicitly include foreign crimes that are substantially equivalent to the listed crimes,<sup>22</sup> (4) expand the circumstances that may lead to ineligibility, (5) provide a one-year winding-down period to help Plans avoid or minimize possible negative impacts of changing QPAMs or adjusting their asset management arrangements when a QPAM becomes ineligible, and (6) instruct entities applying for individual exemption relief based on ineligibility under Section I(g) to review the Department’s most recent individual exemptions involving Section I(g) ineligibility with an expectation that similar conditions will be required if an exemption is proposed and granted.

The amendment also would: (1) make a clarifying revision to Section I(c) that specifies that the terms of the transaction, commitments, investment of fund assets, and any corresponding negotiations are the sole responsibility of the QPAM; (2) increase the asset management and equity thresholds in the QPAM definition in Section VI(a) commensurate with changes in the Consumer Price Index since 1984; and (3) add a standard recordkeeping provision in new Section VI(t).

The Department is proposing this amendment on its own motion, pursuant to ERISA section 408(a) and Code section 4975(c)(2) and in accordance with the procedures set forth in 29 CFR part 2570 (76 FR 66637 (October 27, 2011)).

### **Proposed Amendment to Section I(g)—Reporting to the Department, Written Management Agreement, and Ineligibility**

#### *Subsection I(g)(1)—Reporting to the Department*

To ensure that the Department is aware of entities that rely on the QPAM Exemption for prohibited transaction relief, the Department is proposing to require each QPAM to report such

<sup>22</sup> This is consistent with the Department’s longstanding view and intended to remove all doubt about foreign convictions, as discussed in more detail below.

reliance by email to the Department. Each QPAM that relies upon the exemption must report the legal name of each business entity relying upon the exemption (and any name the QPAM may be operating under) in the email to the Department.<sup>23</sup> The QPAM must only provide this notification to the Department once unless there is a change to the legal name or operating name(s) of the QPAM relying upon the exemption. The Department intends to keep a current list of entities relying upon the QPAM Exemption on its publicly available website. The Department requests comment on whether it should require additional identifying information, such as the CRD number of a registered investment adviser and whether banks, savings and loan associations, and insurance companies have similar identifying information that they should be required to provide.

#### *Subsection I(g)(2)—Written Management Agreement*

The fundamental premise of Section I(g) is to require QPAMs to act with integrity. Therefore, the proposed amendment would require QPAMs to include certain standards of integrity required under the exemption in a written management agreement with its client Plans (the Written Management Agreement). Specifically, the proposed amendment would require QPAMs to include a provision in their Written Management Agreement providing that in the event the QPAM, its Affiliates, and five percent or more owners engage in conduct resulting in a Criminal Conviction or receipt of a written Ineligibility Notice (described in more detail below), the QPAM would not restrict its client Plan's ability to terminate or withdraw from its arrangement with the QPAM.<sup>24</sup> This amendment would prevent QPAMs from imposing any fees, penalties, or charges on client Plans in connection with terminating or withdrawing from a QPAM-managed investment fund.<sup>25</sup>

<sup>23</sup> For instance, assume a corporate family is comprised of legal entities named: Corporate Parent A, Investment Manager B, Broker-Dealer C, Retail Bank D, and Institutional Bank E (doing business as InstiBank). Investment Manager B and Institutional Bank E are the only entities acting as QPAMs. Investment Manager B would notify the Department that it is acting as a QPAM and its legal name is Investment Manager B. Institutional Bank E would notify the Department that it is acting as a QPAM and its legal name is Institutional Bank E, but it is doing business as InstiBank.

<sup>24</sup> The terms "Criminal Conviction" and "Ineligibility Notice" are discussed in more detail below.

<sup>25</sup> This would not apply to reasonable fees, appropriately disclosed in advance, that are specifically designed to prevent generally

The QPAM would also be required to include a provision in its Written Management Agreement that would require it to indemnify, hold harmless, and promptly restore actual losses to each client Plan for any damages directly resulting from a violation of applicable laws, a breach of contract, or any claim arising out of the failure of such QPAM to remain eligible for relief under the QPAM Exemption as a result of conduct that leads to a Criminal Conviction or Ineligibility Notice. Actual losses include losses and related costs arising from unwinding transactions with third parties and from transitioning Plan assets to an alternative asset manager as well as costs associated with any exposure to excise taxes under Code section 4975 as a result of a QPAM's inability to rely upon the relief in the QPAM Exemption. The QPAM also must agree not to employ or knowingly engage any individual that participated in the conduct that is the subject of a Criminal Conviction or Ineligibility Notice. These terms must apply for a period of at least 10 years from the Ineligibility Date.<sup>26</sup>

#### *Subsection I(g)(3) and Sections VI(r) and VI(s)—Types of Misconduct and Entities That Cause Ineligibility*

##### Criminal Convictions

Although the Department has a longstanding practice of considering individual exemption applications from QPAMs in connection with *foreign* convictions, the proposed definition of Criminal Conviction would remove any doubt that Section I(g) of the QPAM Exemptions applies to foreign convictions that are substantially equivalent to the listed U.S. federal or state crimes.<sup>27</sup> Moreover, the Department reiterates that the date of conviction (whether foreign or domestic) triggers ineligibility under the current QPAM Exemption and the

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 would be excepted. If such fees, penalties, or charges occur, they must be applied consistently and in a like manner to all such investors.

<sup>26</sup> The term "Ineligibility Date" is discussed in more detail below.

<sup>27</sup> See, e.g., Prohibited Transaction Exemption (PTE) 2020-01, 85 FR 8020 (Feb. 12, 2020); PTE 2019-01, 84 FR 6163 (Feb. 26, 2019); PTE 2016-11, 81 FR 75150 (Oct. 28, 2016); PTE 2016-10, 81 FR 75147 (Oct. 28, 2016); PTE 2012-08, 77 FR 19344 (March 30, 2012); PTE 2004-13, 69 FR 54812 (Sept. 10, 2004); and PTE 96-62 ("EXPRO") Final Authorization Numbers 2003-10E, 2001-02E, and 2000-30E, available at <https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/exemptions/expro-exemptions-under-pte-96-62>.

proposed amendment, rather than the time any particular instance of misconduct occurred.<sup>28</sup> The timing of ineligibility is provided in proposed Section I(h).

As amended, proposed subsection I(g)(3)(A), covers the same U.S. federal and state crimes as the current QPAM Exemption, and the proposed definition of Criminal Conviction in Section VI(r) expressly covers foreign convictions. The Department's modifications also are intended to make clear that all crimes listed in the definition and applicable under Section I(g) are covered by the provision, regardless of whether they also are expressly referenced in ERISA section 411. Although the definition of Criminal Conviction broadly includes the convictions listed in ERISA section 411, the modified text makes clear that the listed convictions are not limited by any other part or aspect of ERISA section 411.

Proposed subsection VI(r)(2) makes clear that relevant convictions include specified foreign convictions. Specifically, Section I(g)'s ineligibility provision, as amended, would apply to convictions "by a foreign court of competent jurisdiction for any crime . . . however denominated by the laws of the relevant foreign government, that is substantially equivalent to" one of the U.S. federal or state crimes identified in subsection VI(r)(1).

The Department includes the specific reference to foreign convictions in the proposed amendment to eliminate any ambiguity regarding whether the identified crimes in current Section I(g) extend to foreign convictions.<sup>29</sup> Given that financial services institutions increasingly have a global reach, both in their affiliations and in their investment strategies, transactions involving Plan assets are increasingly likely to involve entities that reside and operate in foreign jurisdictions. An ineligibility provision that is limited to U.S. federal and state convictions would ignore these realities and provide insufficient protection for Plans investing through a QPAM's international affiliates. Moreover, the Department continues to

<sup>28</sup> In this regard, the Department notes that any foreign conviction within the last ten years falls within the scope of Section I(g). This applies even to misconduct that occurred during the period between the letter from the Department's Office of the Solicitor to the Securities Industry and Financial Markets Association (SIFMA) dated November 2, 2020, and the letter from the Department's Office of the Solicitor to SIFMA, dated March 23, 2021 (both regarding the treatment of foreign convictions under Section I(g) of the QPAM Exemption).

<sup>29</sup> Questions regarding the applicability of foreign convictions have been raised in advisory opinion requests and in connection with individual exemption requests.

believe that criminal convictions for the types of crimes identified in the QPAM Exemption are relevant to a QPAM's ability to manage Plan assets with integrity, care, and undivided loyalty, regardless of whether the crime occurs in a domestic or foreign jurisdiction. Foreign crimes of the sort described in the proposed amendment call into question a firm's culture of compliance just as much as domestic crimes. Fraud, embezzlement, tax evasion, and the other listed crimes are signs of potential serious compliance and integrity failures, whether prosecuted domestically or in foreign jurisdictions.

In addition, if foreign convictions were not included in Section I(g), the exemption would potentially impose more lenient conditions on foreign-based conglomerates than U.S.-based entities, which was not the Department's intent. In order to make the statutory findings for issuing exemptions dictated by ERISA section 408(a) and Code section 4975(c)(2), the Department must find that an exemption is in the interest of and protective of the rights of Plans, their participants and beneficiaries, and IRA owners. The Department believes that it could not make these statutorily mandated findings if foreign convictions were not included within the scope of Section I(g). The Department requests comments on this section, including whether there are certain types or aspects of criminal behavior that deserve additional focus.

#### Prohibited Misconduct—Generally

The Department is also proposing to add a new category of misconduct that may lead to ineligibility under Section I(g), which is described in proposed subsection I(g)(3)(B) as "participating in Prohibited Misconduct." Proposed Section VI(s) defines Prohibited Misconduct as (1) any conduct that forms the basis for a non-prosecution or deferred prosecution agreement that, if successfully prosecuted, would have constituted a crime described in Section VI(r); (2) any conduct that forms the basis for an agreement, however denominated by the laws of the relevant foreign government, that is substantially equivalent to a non-prosecution agreement or deferred prosecution agreement described in subsection VI(s)(1); (3) engaging in a systematic pattern or practice of violating the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; (4) intentionally violating the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; or (5) providing materially misleading

information to the Department in connection with the conditions of the exemption.

For purposes of proposed Section VI(s), the term "participating in" refers not only to actively participating in the Prohibited Misconduct but also to knowingly approving of the conduct or having knowledge of such conduct without taking appropriate and proactive steps to prevent such conduct from occurring, including reporting the conduct to appropriate compliance personnel. When a QPAM's ineligibility is linked to Prohibited Misconduct under any portion of Section VI(s), the Department will provide affected entities with a written warning and an opportunity to be heard.<sup>30</sup> These due process protections are discussed in more detail below.

Overall, in the Department's view, QPAMs and those in a position to influence or control a QPAM's policies that repeatedly engage in criminal conduct or other egregious misconduct in connection with compliance with the conditions of the exemption do not display the requisite standards of integrity to rely on the relief provided in the exemption.

#### Prohibited Misconduct—Deferred Prosecution and Non-Prosecution Agreements

The Department's intention in proposing to add subsections VI(s)(1) and (2) is to ensure that QPAMs are not able to avoid the conditions related to integrity and ineligibility under Section I(g) simply by entering into non-prosecution and deferred prosecution agreements with prosecutors to sidestep the consequences that otherwise would result from a Criminal Conviction. Plans may suffer significant harm if they are exposed to serious misconduct committed by unscrupulous firms or individuals that ultimately results in a deferred or non-prosecution agreement rather than a Criminal Conviction and its consequent ineligibility under Section I(g).

#### Prohibited Misconduct—Violations of the Exemption and Misleading Statements to the Department

The Department is proposing in subsections VI(s)(3) through (5) to condition eligibility for the exemption on the following additional components: (i) engaging in a systematic pattern or practice of violating the conditions of this exemption, (ii) intentionally violating the conditions of

this exemption, or (iii) providing materially misleading information to the Department in connection with the exemption. These categories of misconduct weigh against the QPAM operating with integrity, which is necessary for the QPAM to continue relying on the broad prohibited transaction relief in the class exemption.

Engaging in such activities potentially exposes Plans, their participants and beneficiaries, and IRA owners to risk of harm and raises serious questions about the Department's reliance on the QPAM as a key protective component of the exemption. The Department believes that these components of the eligibility provision will encourage QPAMs to maintain an appropriate focus on compliance with legal requirements related to the exemption and the protection of Plans, their participants and beneficiaries, and IRA owners. In connection with a robust compliance infrastructure, a minor number of isolated violations of the conditions of the exemption would not constitute a systemic pattern or practice.

The Department determined that including these components in the Prohibited Misconduct definition strikes the appropriate balance of protecting Plans (and ultimately, participants, beneficiaries, and IRA owners) while not imposing a condition that is overly broad. The Department has determined that limiting eligibility in this manner serves as an important safeguard in connection with the broad discretion that a QPAM must have to utilize the relief in the exemption for itself and its client Plans.

With respect to these provisions, the Department intends to rely on its enforcement authority and program to detect a QPAM's participation in the types of misconduct included in subsections VI(s)(3) through (5). These components are constructed so that ineligibility occurs only in limited circumstances, and even in these circumstances, only after: (1) an investigation by the appropriate field office, and (2) the QPAM thereafter receives a written warning that the Department is considering issuing a written Ineligibility Notice. This written Ineligibility Notice process gives the QPAM the opportunity to be heard before the Department issues the notice, which would make the QPAM ineligible to use the exemption from the date the Department issues the notice, except that the mandatory one-year winding down period would be applicable, as discussed below.

<sup>30</sup> The Department notes that QPAMs, their Affiliates, and 5% or more owners that are criminally convicted receive due process through the formal judicial process.

### Prohibited Misconduct—Request for Comments

The Department requests comment on the extent to which Section VI(s) is appropriately tailored to target the types of conduct that implicates integrity issues that should affect a QPAM's eligibility to use the exemption in circumstances where it or its five percent or more owners or Affiliates participate in non-criminal activity that has the potential to harm Plans and whether additional or alternative elements may be warranted. The Department also requests comments regarding whether it should treat any additional activities as Prohibited Misconduct. To the extent commenters believe additional activities should be added to the proposed list, the Department request comments explaining how such actions implicate the QPAM's integrity. The Department also requests comments as to whether any of the listed activities should not be included in the list of Prohibited Misconduct. To the extent commenters believe action(s) should be removed from the proposed list, the Department requests an explanation of why such action(s) do not implicate the QPAM's integrity and are not appropriately included. The Department also requests comments on whether the due process provisions that apply to the Prohibited Misconduct ineligibility events also should apply to the Criminal Conviction events—in whole or in part. The Department is particularly interested in receiving comments regarding whether and how the process should apply to foreign Criminal Convictions. For instance, should the process provide an opportunity for a QPAM to request the Department's determination regarding whether a foreign conviction is substantially equivalent to a domestic conviction? Should the Department consider particular factors such as the elements of the crime and the nature of the tribunal or investigating entity in making such a determination?

### Entities Whose Criminal Convictions or Prohibited Misconduct May Cause Ineligibility of the QPAM

Section I(g) ineligibility currently applies upon convictions of QPAMs, their Affiliates, and five percent or more owners of the QPAM. The Department is not proposing any changes to this aspect of Section I(g). Therefore, the exemption retains this scope, including the "control" definition that pertains to part of the definition for establishing when an entity is considered an "Affiliate" of the QPAM, which specifically is defined as "[a]ny person

directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with" the QPAM.<sup>31</sup> This means that a QPAM's ineligibility is generally tied to convictions of entities that own five percent or more of the QPAM or are in control-based relationships with a QPAM. The Department notes that meaningful control can exist even with small ownership interests, such as when the entity with the ownership interest is in a position to influence the QPAM to act or refrain from acting in a certain manner, including being involved as a knowing or unknowing participant or benefactor in the conduct that forms the basis for a Criminal Conviction or Ineligibility Notice.

QPAMs should be careful when entering into joint ventures or other passive investment ventures where another entity's ownership interest could jeopardize the QPAM's ability to rely upon the QPAM Exemption. Such QPAMs should also be cognizant that another entity with an ownership interest in the QPAM could be using the QPAM, knowingly or not, to further its own criminal conduct or Prohibited Misconduct. Ultimately, any such conduct that results in a Criminal Conviction or Ineligibility Notice will cause the QPAM to become ineligible for the relief offered under the QPAM Exemption, implicate the terms of the Written Management Agreement (discussed above), and the conditions of the mandatory one-year winding-down period (discussed below) and may impact the QPAM's ability to obtain supplemental individual exemption relief.

### Scope of "Substantially Equivalent" Foreign Crimes and Foreign Prohibited Misconduct and Requesting Review by the Department

If a foreign Criminal Conviction or foreign Prohibited Misconduct occurs, impacted QPAMs should interpret the scope of this provision broadly and consistent with the Department's statutorily mandated focus on the protection of plans in ERISA section 408(a) and Code section 4975(c)(2). In situations where a crime or foreign conduct raises particularly unique issues related to the substantial equivalence of the foreign Criminal Conviction or Prohibited Misconduct,

<sup>31</sup> The definition of affiliate also includes directors, relatives, or partners of those in control-based relationships as well as employees or officers that are highly compensated or have direct or indirect authority, responsibility, or control regarding custody, management, or disposition of plan assets. See Section VI(d) for a complete definition.

the QPAM may seek the Department's view regarding whether the foreign crime, conviction, or misconduct is substantially equivalent to a U.S. federal or state crime or Prohibited Misconduct.

The QPAM will have an opportunity to present its position and have an opportunity to be heard. However, any QPAM submitting a request for review should do so promptly, and whenever possible in the case of a foreign conviction, before a judgment is entered so that the QPAM has sufficient time to complete the notice obligations under the proposed mandatory one-year winding-down period, discussed below.

The Department is interested in receiving comments regarding: (1) whether this process should be formalized in any way, such as by integrating this review with the process proposed in connection with an Ineligibility Notice (discussed below); and (2) whether the Department should consider particular factors, such as the elements of the crime and the nature of the tribunal or investigating entity in making its determination.

### Proposed Section I(h)—Timing of Ineligibility

The proposed amendment would not change the ten-year ineligibility period under current Section I(g). Thus, under proposed subsection I(g)(3), a QPAM would remain ineligible to rely upon the QPAM Exemption for a period of ten years from the date of ineligibility (the Ineligibility Date). For Prohibited Misconduct, the ineligibility period begins as of the date of an Ineligibility Notice, whereas, for a Criminal Conviction, it begins on the date the trial court enters its judgment.<sup>32</sup> The proposed amendment makes it clear that for a foreign conviction, ineligibility would begin on "the date of the judgment of any court in a foreign jurisdiction that is the equivalent of a U.S. federal or state trial court. . . ." This refers to a trial court of original or primary jurisdiction, such as a court of first instance.<sup>33</sup> The period of ineligibility would begin on the conviction date, regardless of whether the judgment is appealed. Only upon a subsequent final judgment reversing the conviction would a person no longer be considered "convicted" under proposed subsection I(g)(3)(A).

With respect to Prohibited Misconduct, the QPAM would become

<sup>32</sup> For convictions that also result in imprisonment of a person, the end of the ten-year period is counted from the date of release from imprisonment.

<sup>33</sup> This is generally considered to be the lowest level court in a particular jurisdiction that has the power to render a judgment of conviction.

ineligible to rely upon the QPAM Exemption for a period of ten years from the date the Department issues the Ineligibility Notice. The Department seeks comments on the timing of ineligibility.

The Department believes that the approach originally contained in the QPAM Exemption and retained in the proposal for Criminal Convictions provides a consistent, administrable, and protective standard for determining the timing of ineligibility, including for convictions in foreign jurisdictions. A trial court's determination of wrongdoing is a more than adequate reason to trigger the conditions for the Written Management Agreement and initiate the winding-down period in the absence of an individual exemption permitting continued reliance on the QPAM Exemption after the Department's full consideration of the misconduct and steps taken by the firm to redress compliance concerns. This is true regardless of whether the parties have chosen to appeal the judgment. In the absence of an individual exemption, the loss of the ability to rely on the QPAM Exemption simply requires the firm to conduct its business in a manner that complies with the statutory prohibitions in Title I of ERISA and the Code. Permitting a firm to continue to rely on the QPAM Exemption—possibly for years—even after it has been found guilty by a trier of fact of serious criminal misconduct is inconsistent with the Department's responsibility to ensure that the exemption is in the interest of and sufficiently protects Plans, their participants and beneficiaries, and IRA owners, as required for the Department to make its findings under ERISA section 408(a) and Code section 4975(c)(2). At a minimum, in such circumstances, ineligible firms should be required to seek an individual exemption—based on a public record and full consideration of the implications of their criminal misconduct. This will ensure that the substantial relief from the statutory prohibitions that has been afforded to Plans through the QPAM Exemption is appropriately designed for the protection of Plans, their participants and beneficiaries, and IRA owners under a corresponding individual exemption.

#### **Proposed Section I(i)—Warning and Opportunity To Be Heard in Connection With Prohibited Misconduct—Written Ineligibility Notice**

Before issuing a written Ineligibility Notice in connection with Prohibited Misconduct, the Department will issue a written warning to the QPAM

identifying the conduct implicating subsection I(g)(3)(B) and providing 20 days for the QPAM to respond. As noted above, the Department intends to rely on its enforcement authority and program to detect conduct that would lead to a written warning. If the QPAM does not respond to the written warning within 20 days, the Department will issue the written Ineligibility Notice. However, if the QPAM responds within the 20-day timeframe, the Department will provide the QPAM with the opportunity to be heard, in person (including by phone or videoconference on an internet-based platform), or in writing, or a combination, before the Department decides whether to issue the written Ineligibility Notice. The opportunity to be heard will be limited to one conference, which the Department will schedule within 30 days of the QPAM's response to the written warning, unless the Department determines in its sole discretion to allow additional conferences. The written Ineligibility Notice will articulate the basis for the Department's determination that the conduct described in subsection I(g)(3)(B) has occurred.

The Department requests comment on this process, specifically including the length of time to respond to a written warning and whether additional procedural protections should be incorporated.

#### **Proposed Section I(j)—Mandatory One-Year Winding-Down Period**

As part of this proposed amendment, the Department has included a mandatory one-year winding-down period that begins on the Ineligibility Date. The winding-down period is designed to accommodate a Plan's ability to wind down its relationship with the QPAM. Satisfaction of the conditions of the winding-down period would affect the availability of relief for all transactions covered by this exemption and directly implicates the requirements for the Written Management Agreement. This includes relief for past transactions and any transaction continued during the one-year winding-down period. Additionally, prohibited transaction relief during the winding-down period would be subject to compliance with all of the exemption's conditions other than Section I(g).

Once the winding-down period begins, relief under the QPAM Exemption would only be available for existing clients of the QPAM—*i.e.*, client Plans of the QPAM that had a pre-existing Written Management Agreement (as required under Section

VI(a)) on the Ineligibility Date for transactions entered into before the Ineligibility Date. Thus, after the Ineligibility Date, the QPAM would be prohibited from engaging in new transactions in reliance on the QPAM Exemption for existing client Plans. Additionally, if the QPAM obtains new clients during the winding-down period, the exemption would not apply to transactions entered into on their behalf, unless such relief is granted in a separate individual exemption.

The Department designed the proposed winding-down period to mitigate the cost and disruption to Plans, their participants and beneficiaries, and IRA owners that can occur when a QPAM becomes ineligible for relief based on proposed subsection I(g)(3). The one-year winding-down period would provide a QPAM's client Plans with time to decide whether to hire an alternative discretionary asset manager that is eligible to operate as a QPAM or continue their relationship with the ineligible QPAM, which could only provide discretionary asset management services to them by engaging in transactions in a non-prohibited manner, relying on alternative exemptions, or pursuing alternative investment strategies. The Department believes that a one-year winding-down period would be necessary to ensure that Plans have sufficient time to engage in a search for an alternative QPAM or discretionary asset manager if they decide it is in the Plan's best interest to do so. The Department understands that searching for and hiring a new QPAM or discretionary asset manager can be complex and expensive and require care and time, including development of a request for proposal and an appropriate transition plan to transfer millions of dollars of investments from one manager to another without causing harm and losses, including lost opportunity costs, to the Plan.

The winding-down conditions would require the QPAM to provide notice of its ineligibility under subsection I(g)(3) to its existing client Plans and the Department (via [QPAM@dol.gov](mailto:QPAM@dol.gov)) within 30 days after the Ineligibility Date. This notice must include an objective description of the facts and circumstances upon which the Criminal Conviction or Ineligibility Notice is based and be written with sufficient detail, consistent with the QPAM's duties of prudence and undivided loyalty, to fully inform a Plan fiduciary of the nature and severity of the criminal conduct or Prohibited Misconduct so that such Plan fiduciary is able to satisfy, as applicable, its own

fiduciary duties of prudence and loyalty under Title I of ERISA in the context of hiring, monitoring, evaluating, and retaining the QPAM.

Within 30 days after the Ineligibility Date, the QPAM must also notify its client Plans that, as required by subsection I(g)(2)(A) and (B), the QPAM will not restrict the client's ability to terminate or withdraw from its arrangement with the QPAM. Thus, the QPAM may not impose any fees, penalties, or charges on client Plans in connection with the process of terminating or withdrawing from a QPAM-managed investment fund except for 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. If such fees, penalties, or charges occur, they must be applied consistently and in a like manner to all such investors.

The notice would also indicate that as required by proposed subsection I(g)(2)(C), the QPAM will indemnify, hold harmless, and promptly restores losses to each client Plan for any damages resulting from a violation of applicable laws, a breach of contract, or any claim arising out of the QPAM's ineligibility under subsection I(g)(3). For purposes of this provision, actual losses specifically include losses and costs arising from unwinding transactions with third parties and from transitioning Plan assets to an alternative discretionary asset manager.

Additionally, to ensure Plans are protected from bad actors, the QPAM must not employ or knowingly engage any individual that participated in conduct that is the subject of a Criminal Conviction or Ineligibility Notice. For Criminal Convictions, this applies regardless of whether the individual is separately convicted in connection with the criminal conduct. The QPAM must adhere to this requirement no later than the Ineligibility Date.

Because the Ineligibility Date commences the 30-day notice period, any financial services institution that has remote relationships with another institution should communicate with that institution to ensure that it is able to satisfy the notice and indemnity conditions of the winding-down period if the financial services institution is acting as a QPAM and will also become ineligible.

Finally, after the one-year period expires, the QPAM could not rely on the

relief provided in the QPAM Exemption unless the Department grants the QPAM an individual exemption to continue relying upon the QPAM Exemption. The winding-down period would not be suspended while an individual exemption application is pending with the Department. The Department requests comments on the winding-down period, including whether one year is the appropriate length of time and whether there are additional protections for Plan participants and beneficiaries and IRA owners that the Department should consider.

#### **Proposed Section I(k)—Requesting an Individual Exemption**

The proposed amendment would add new Section I(k) to the exemption, which provides that a QPAM that is ineligible or anticipates becoming ineligible may, consistent with the exemption procedures set forth in 29 CFR part 2570, subpart B, apply for supplemental individual exemption relief. Section I(k) instructs an applicant, as part of such a request, to review the Department's most recently granted individual exemptions involving section I(g) ineligibility with the expectation that similar conditions will be required if an exemption is proposed and granted. If an applicant requests the Department to exclude any term or condition from its exemption that is included in a recently issued similar individual exemption, the applicant must accompany such request with a detailed explanation of the reason such change is necessary and in the interest of and protective of the Plan, its participants and beneficiaries, and IRA owners. The Department will review such requests consist with the requirements of ERISA section 408(a) and Code section 4975(c)(2).

Such applicants also should provide detailed information in their applications quantifying the specific cost or harms in dollar amounts, if any, Plans would suffer if a QPAM could not rely on the exemption after the winding-down period, including the specific dollar amounts of investment losses resulting from foregone investment opportunities and any evidence supporting the proposition that investment opportunities would only be available to Plans on less advantageous terms.

An applicant should not construe the Department's acceptance of an individual exemption application as a guarantee that the Department will grant an individual exemption. Therefore, a QPAM that submits an individual exemption application must ensure that it manages Plan assets prudently and

loyally during the winding-down period with the expectation that the Department may not grant further exemptive relief.

The Department notes that, in order for it to make the necessary statutory findings under ERISA section 408(a) and Code section 4975(c)(2), applicants also should anticipate that the Department may condition individual exemptive relief on a certification by a senior executive officer of the QPAM (or comparable person) that: (1) all of the conditions of the winding-down period were met, and (2) an independent audit reviewing the QPAM's compliance with the conditions of the one-year winding-down period has been completed.

Applicants may also request more limited relief than is otherwise available under the QPAM Exemption. For instance, a QPAM may only need prohibited transaction relief for a particular limited category of transactions, such as an on-going lease that was entered into on behalf of an investment fund which is expected to continue past the one-year winding-down period. In such circumstances, due to the limited nature of the transaction(s) for which relief is sought, applicants should discuss the terms and conditions of prior individual exemptions involving Section I(g) in connection with a request for more limited prohibited transaction relief. The applicant also should include a detailed explanation in its application regarding how Plans will be otherwise protected and why the transaction cannot be unwound prior to the end of the winding-down period without harm or losses to such Plans.

Finally, the Department notes that an applicant anticipating that it will need relief beyond the end of the winding-down period should apply to the Department for an individual exemption as soon as practicable. As a fiduciary, the QPAM has obligations with respect to Plans beyond those required by the QPAM Exemption and should approach the Department at the earliest point at which it appears a conviction will occur, such as when a plea agreement has been entered into—even if the conviction date has not yet occurred—to ensure that appropriate steps can be taken by or on behalf of its client Plans who ultimately would be impacted by the QPAM's loss of exemptive relief. QPAMs affected by a conviction also should not wait until late in the winding-down period to apply for an individual exemption.

### Proposed Amendment to Section I(c)— Involvement in Investment Decisions by Parties in Interest

The Department is proposing to modify the language in Section I(c) consistent with its original intent when granting the QPAM Exemption. In the 1984 grant notice, the Department stated that an essential premise of the exemption is that broad prohibited transaction relief can be afforded:

[O]nly if the commitments and investments of plan assets and the negotiations leading thereto, are the sole responsibility of an independent investment manager. It appears to the Department that, if exemptive relief were to be provided where the QPAM has less than ultimate discretion over acquisitions for an investment fund that it manages, the potential for decision making with regard to plan assets that would inure to the benefit of a party in interest would be increased.<sup>34</sup>

The proposed amendatory language in Section I(c) is intended to make clear that a QPAM must not permit other parties in interest to make decisions regarding Plan investments under the QPAM's control. Therefore, the Department is proposing to include in the opening of Section I(c) a statement providing that the terms of the transaction, "commitments, investment of fund assets, and any corresponding negotiations on behalf of the Investment Fund are the sole responsibility of the QPAM . . . ." The Department also proposes to add additional amendatory language at the end of Section I(c) stating that the prohibited transaction relief in the exemption applies "only in connection with an Investment Fund that is established primarily for investment purposes" and that "[n]o relief is provided under this exemption for any transaction that has been planned, negotiated, or initiated by a Party in Interest, in whole or in part, and presented to a QPAM for approval because the QPAM would not have sole responsibility with respect to the transaction as required by this section I(c)." This language aligns with the following language from the original 1982 proposal for the QPAM Exemption:

Party in interest transactions that are negotiated by, *e.g.*, an employer which sponsors a plan, and are then presented to a QPAM for approval would not qualify for the class exemption as proposed. However, the exemption, as proposed, would be available even though the transfer of assets by a plan to a QPAM is subject to general investment guidelines, so long as there is no arrangement, direct or indirect, for the QPAM to negotiate, or engage in, any specific

transaction or to benefit any specific person.<sup>35</sup>

The Department has determined that adding this additional clarifying language in Section I(c) would eliminate any possible ambiguity regarding the extent to which a party in interest may be involved in a transaction with an investment fund managed by a QPAM. A party in interest should not be involved in any aspect of a transaction, aside from certain ministerial duties and oversight associated with plan transactions, such as providing general investment guidelines to the QPAM. The role of the QPAM under the terms of the exemption is not to act as a mere independent approver of transactions. Rather, the QPAM must have and exercise discretion over the commitments and investments of Plan assets and the related negotiations with respect to a fund that is established primarily for investment purposes in order for the relief provided under the exemption to apply.<sup>36</sup>

### Proposed Amendment to Section VI(a)—Asset Management and Equity Thresholds

The QPAM Exemption was originally granted, in part, on the premise that large financial services institutions would be able to withstand improper influence from parties in interest. The asset management and equity thresholds were included to set minimum size thresholds that would help ensure a QPAM would be able to withstand that influence. In 2005, the Department finalized an amendment to the QPAM Exemption that included updating the asset management and shareholders' and partners' equity thresholds for registered investment advisers in the QPAM definition in subsection VI(a)(4) of the exemption. In connection with that amendment, the Department indicated that the original thresholds "may no longer provide significant protections for plans in the current financial marketplace" and adjusted the figures based on changes in the Consumer Price Index.<sup>37</sup> The Department has determined that the same rationale necessitates further updates to the registered investment adviser thresholds and those of other

types of QPAMs, such as banks and insurance companies, which have not been updated since 1984. The Department determined to adjust all the thresholds in Section VI(a) based on the original published figures in the 1984 grant notice. This will ensure that changes to the thresholds for all types of financial institutions reflect the same baseline change to the Consumer Price Index (*i.e.*, 1984 vs. 2021).<sup>38</sup> By publication through notice in the **Federal Register**, the Department will also make subsequent annual adjustments for inflation to the Equity Capital, Net Worth, and asset management thresholds in subsection VI(a)(1) through (4), rounded to the nearest \$10,000, no later than January 31st of each year.

Therefore, in all places in subsection VI(a)(1) through (3) that currently indicate a \$1,000,000 threshold, the Department is proposing to adjust those figures to \$2,720,000. In subsection VI(a)(4), the Department is proposing to adjust the current assets under management threshold of \$85,000,000 to \$135,870,000, and the shareholders' and partners' equity and the broker-dealer net worth thresholds of \$1,000,000 to \$2,040,000.

As a minor ministerial change, the Department is also proposing to replace "Federal Savings and Loan Insurance Corporation" with "Federal Deposit Insurance Corporation" in subsection VI(a)(2) because the Federal Savings and Loan Insurance Corporation was abolished by Congress in 1989, and its responsibilities were transferred to the Federal Deposit Insurance Corporation.<sup>39</sup>

### Proposed Amendment Adding Section VI(t)—Recordkeeping

The proposed amendment also includes a new recordkeeping requirement in Section VI(t), which would require QPAMs to maintain records for six years demonstrating compliance with this exemption. The Department is proposing this amendment to ensure that evidence of compliance is available for review and to make the QPAM Exemption consistent with other exemptions that generally impose a recordkeeping requirement on parties relying on an exemption to ensure they will be able to demonstrate, and that the Department

<sup>35</sup> 47 FR at 56947.

<sup>36</sup> For example, the QPAM Exemption is unavailable if a plan sponsor hires a QPAM to engage a plan in transactions that do not include an investment component, such as hiring a party in interest service provider for a welfare plan. It is also unavailable when a plan sponsor desires to enter into a party in interest transaction with its plan but leaves the ultimate determination and review to a QPAM.

<sup>37</sup> Proposed Amendment to PTE 84–14, 68 FR 52419, 52423 (Sept. 3, 2003).

<sup>38</sup> For purposes of these changes, the Department used March 1984 and December 2021 as the relevant dates in the U.S. Bureau of Labor Statistics CPI Inflation Calculator available at: [https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm).

<sup>39</sup> See Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Public Law 101–73 (1989).

<sup>34</sup> 49 FR at 9497.

will be able to verify, compliance with the exemption conditions.

Section VI(t) would require that the records be kept in a manner that is reasonably accessible for examination. The records must be made available, to the extent permitted by law, to any authorized employee of the Department or the Internal Revenue Service or another federal or state regulator; any fiduciary of a plan invested in an investment fund managed by the QPAM; any contributing employer and any employee organization whose members are covered by a Plan invested in an investment fund managed by the QPAM; and any participant or beneficiary of a Plan or IRA owner invested in an investment fund managed by the QPAM.

QPAMs also would be required to make such records reasonably available for examination at their customary location during normal business hours. Participants and beneficiaries of a Plan, IRA owners, plan fiduciaries, and contributing employers/employee organizations would be able to request only information applicable to their own transactions, and not a QPAM's privileged trade secrets or privileged commercial or financial information, or confidential information regarding other individuals. If the QPAM refuses to disclose information to a party other than the Department on the basis that the information is exempt from disclosure, the Department would require the QPAM to provide a written notice, within 30 days, advising the requestor of the reasons for the refusal and that the Department may request such information. The requestor would then be able to contact the Department if it believes it would be useful for the Department to request the information.

Any failure to maintain the records necessary to determine whether the conditions of the exemption have been met would result in the loss of the relief provided under the exemption only for the transaction or transactions for which such records are missing or have not been maintained. Such failure would not affect the relief for other transactions if the QPAM maintains required records for such transactions.

#### Other Ministerial Changes

The Department is also proposing a few ministerial changes to the QPAM Exemption that would not substantively alter the conditions or relief provided under the exemption. Specifically, the Department proposes to: (1) change the headings of each portion of the exemption from "Part" to "Section", (2) remove many internal cross-references to definitional provisions and instead

capitalize the terms used in those definitional provisions throughout the exemption,<sup>40</sup> and (3) add internal references to "above" and "below" throughout to direct readers where to find certain cross-referenced provisions.

The Department has corrected two minor typographical errors by changing: (1) "assure" to "ensure" in Section V and the related audit provision in Section VI(q), and (2) "INHAM" to "QPAM" in Section VI(p). All references to "ERISA" and the "Code" have been updated so that they come before the sections referenced, and references to the term "employee benefit plan" have been removed so that the exemption uses only the term "Plan." Finally, the definitional term "Control" in Section VI(e) has been amended to specifically refer to variations of the word "control" used throughout the exemption. Therefore, Section VI(e) now defines the terms "Controlling," "Controlled by," "under Common Control," and "Controls" in the same manner as the prior single term "control."

#### Regulatory Impact Analysis

##### Executive Orders 12866, 13563, and Administrative Laws

The Department has examined the effects of this proposed amendment as required by Executive Order 12866,<sup>41</sup> Executive Order 13563,<sup>42</sup> the Paperwork Reduction Act of 1995,<sup>43</sup> the Regulatory Flexibility Act,<sup>44</sup> section 202 of the Unfunded Mandates Reform Act of 1995,<sup>45</sup> Executive Order 13132,<sup>46</sup> and the Congressional Review Act.<sup>47</sup>

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, select regulatory approaches that maximize net benefits (including potential economic, environmental, and public health and safety effects; distributive impacts; and equity). Executive Order 13563 emphasizes the importance of quantifying costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

Under Executive Order 12866, "significant" regulatory actions are

subject to review by the Office of Management and Budget (OMB).<sup>48</sup> Section 3(f) of the Executive Order defines a "significant regulatory action" as an action that is likely to result in a rule that may (1) have an annual effect on the economy of \$100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities (also referred to as "economically significant"); (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

OMB, informed by the Department's analysis, has determined that this proposed amendment is economically significant within the meaning of section 3(f)(1) of the Executive Order because it may have an annual effect of \$100 million or more on the economy, as discussed in the Transfers section, below.

The Department has quantified the impact of the proposed amendment based on the best available data and provides an assessment of its benefits, costs, and transfers below. Based on this assessment, the Department concludes that the proposed amendment's benefits would justify its costs. Pursuant to the Congressional Review Act, OMB anticipates designating a revised QPAM amendment, if finalized as proposed, as a "major rule," as defined by 5 U.S.C. 804(2).

#### Need for Regulation

Substantial changes have occurred in the financial services industry since the Department granted the QPAM Exemption in 1984. These changes include industry consolidation caused by a variety of factors and an increasingly global reach for financial services institutions, both in their affiliations and in their investment strategies, including those for Plan assets.

An amendment to the QPAM Exemption is needed to address ambiguity as to whether foreign convictions are included in the scope of the ineligibility provision under Section I(g). QPAMs today often have corporate

<sup>40</sup> However, for the sake of clarity, cross-references have been retained for the term "Affiliate" because it is defined in different ways under Section VI(c) and (d) of the exemption.

<sup>41</sup> Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993).

<sup>42</sup> Improving Regulation and Regulatory Review, 76 FR 3821 (Jan. 18, 2011).

<sup>43</sup> 44 U.S.C. 3506(c)(2)(A) (1995).

<sup>44</sup> 5 U.S.C. 601 *et seq.* (1980).

<sup>45</sup> 2 U.S.C. 1501 *et seq.* (1995).

<sup>46</sup> Federalism, 64 FR 153 (Aug. 4, 1999).

<sup>47</sup> 5 U.S.C. 804(2) (1996).

<sup>48</sup> Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993).

or relationship ties to a broad range of entities, some of which are located internationally. Additionally, some global financial service institutions are headquartered or have parent entities that reside in foreign jurisdictions. These entities may have significant control and influence over the operation and management of all entities within a large financial institution's organizational structure, including those operating as QPAMs for some Plans. Additionally, the international ties of QPAMs come not just from their affiliations and parent entities, but also their investment strategies, including those involving Plan assets.

The Department is also concerned about corporate families and entities that engage in significant misconduct of a similar type and quality as the conduct that might lead to a Criminal Conviction, but which ultimately does not result in a conviction. The amendment is needed to ensure that QPAMs are not able to avoid the conditions related to integrity and ineligibility under Section I(g) simply by entering into non-prosecution and deferred prosecution agreements with prosecutors to side-step the consequences that otherwise would result from a Criminal Conviction. Plans may suffer significant harm if they are exposed to serious misconduct committed by unscrupulous firms or individuals that ultimately results in a deferred or non-prosecution agreement rather than Criminal Conviction and consequent ineligibility under Section I(g). Likewise, intentionally or systematically violating the conditions of the exemption exposes Plans to significant potential harm at the hands of those with influence or control over their assets. In the Department's view, QPAMs and those in a position to influence or control a QPAM's policies that repeatedly engage in these types of serious misconduct do not display the requisite standards of integrity necessary to provide the protection intended for Plans under the exemption.

Through its administration of the individual exemption program, the Department also determined that certain aspects of the QPAM Exemption would benefit from a focus on mitigating potential costs and disruption to Plans when a QPAM becomes ineligible for the exemptive relief because of a conviction under Section I(g). Two major ways in which the amendment would reduce the harmful impact on Plans is by requiring penalty-free withdrawal and indemnification terms to be included in the QPAM's Written Management Agreement with its client Plans and including a one-year winding-

down period to avoid unnecessary disruptions to Plans upon a Criminal Conviction or receipt of an Ineligibility Notice due to other Prohibited Misconduct. The winding-down period will help bridge the gap between the QPAM Exemption and the Department's administration of its individual exemption program in connection with Section I(g) ineligibility.

The amendment is also needed to update asset management and equity thresholds to current values in the definition of "QPAM" in Section VI(a). Some of the thresholds that establish the requisite independence upon which the QPAM Exemption is based have not been updated since 1984, and the thresholds for registered investment advisers have not been updated since 2005. The amendment will standardize all the thresholds to current values using the Bureau of Labor Statistics Consumer Price Index.

Finally, the QPAM Exemption currently lacks a recordkeeping requirement which the Department generally includes in its administrative exemptions. The amendment would add a recordkeeping requirement to ensure QPAMs will be able to demonstrate, and the Department will be able to verify, compliance with the exemption conditions.

Together, the Department believes these updates are necessary to ensure the QPAM Exemption remains in the interest of and protective of the rights of Plans and their participants and beneficiaries and IRA owners as required by ERISA section 408(a) and Code section 4975(c)(2).

#### **Affected Entities**

##### *Qualified Professional Asset Managers (QPAMs)*

The following entities generally qualify for the relief set out in the *current* text of the QPAM Exemption:

(1) *Banks*—as defined in section 202(a)(2) of the Investment Advisers Act of 1940, with equity capital in excess of \$1,000,000.

(2) *Savings and loan associations*—the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, with equity capital or net worth in excess of \$1,000,000;

(3) *Insurance companies*—subject to supervision under state law, with net worth in excess of \$1,000,000; and

(4) *Investment advisers*—registered under the Investment Advisers Act of 1940 with total client assets under management in excess of \$85,000,000 and either (1) shareholders' or partners' equity in excess of \$1,000,000 or (2) payment of liabilities guaranteed by an

affiliate, another entity that could qualify as a QPAM, or a broker-dealer with net worth of more than \$1,000,000.

Additionally, the entity must acknowledge that it is a fiduciary for each Plan it manages in a written management agreement.

QPAMs that meet the current thresholds, but who otherwise will not meet the new threshold requirements, will also be affected by the amendment, as they would no longer be able to rely on the QPAM Exemption.

The Department estimated there are 616 potential QPAMs by approximating the total number of providers who in 2019 provided services of "Investment Management" and "Named Fiduciary" simultaneously to at least one plan, as reported in Schedule C of the 2019 Form 5500, and whose NAICS codes start with the 2-digit 52, which corresponds to Finance and Insurance Institutions.<sup>49</sup>

##### *Loss of Ability To Rely on the QPAM Exemption*

According to past QPAM Section I(g) individual exemption applicants, the broad exemptive relief in the QPAM Exemption provides client Plans access to one of the Department's most advantageous trading exemptions while ensuring that they are insulated from the influence of bad actors. According to these past applicants, if an entity is no longer able to represent that it is a QPAM, client Plans are far less likely to retain the QPAM as their manager, even in situations where the client technically does not need the relief provided by the exemption. Although a QPAM that fails to satisfy Section I(g) may continue to operate as an asset manager for Plans, the Department understands that some entities use their QPAM status as an indicator of their size and/or sophistication to potential client Plans. Therefore, loss of the ability to rely upon the QPAM Exemption may create perceived or actual costs in the form of lost opportunities for the QPAM.

Additionally, the Department understands that many QPAMs perceive the QPAM Exemption to be one of the simplest exemptions to comply with. Therefore, even if QPAMs believe alternative exemptions are available, they may seek QPAM status as an

<sup>49</sup> Using 2019 Form 5500 data, the Department counted in total 1390 service providers who provided services of "Investment Management" and "Named Fiduciary," of which only 765 reported their business code. Out of these 765 providers, 339 reported their business code starting with the 2-digit NAICS code 52, yielding a ratio of 0.44 of potential QPAMs to other providers. Therefore, the Department estimates that there were 0.44 \* 1390 = 616 potential QPAMs in 2019.

additional protection from the risk, even if limited, of exposure to excise taxes under Code sections 4975(a) and (b) for engaging in non-exempt prohibited transactions as a result of failing the conditions of those exemptions.

Some of the costs and transfers associated with the loss of reliance on the QPAM Exemption are not added costs or transfers imposed by this proposed amendment, but rather costs attributable to the criminal behavior of a QPAM or its affiliate. Additionally, the Department has ultimately granted many applicants individual exemption relief, which has minimized the costs associated with loss of the QPAM Exemption. The Department has quantified or qualitatively discussed costs and transfers that would result from the proposed amendment, below. Many of the benefits that flow through to Plans, their participants and beneficiaries, and IRA owners stem from proposed amendment provisions which impose minimal or no costs but generally benefit them by providing more certainty, protection, and transitional support, such as the provision clarifying that foreign convictions are included in the crimes enumerated in Section I(g), clarification that QPAMs must not permit other parties in interest to make decisions regarding Plan investments under the QPAM's control, and the addition of a mandatory one-year winding-down period.

#### *Plans With Assets in an Investment Fund Managed by a QPAM*

The proposed amendment will affect Plans whose assets are held by an Investment Fund that is managed by a QPAM. The Department does not collect data on Plans that use QPAMs to manage their assets. Nevertheless, the Department estimates that a single QPAM services, on average, 32 client Plans.<sup>50</sup> Therefore, the Department estimates that in total there are 19,712 client Plans (616 QPAMs times 32 client Plans per QPAM). The Department requests comment on the number of Plans that may need to find an alternative asset manager or investment fund(s) as a result of the proposed increased thresholds.

<sup>50</sup> Although the Department estimates there are 616 QPAMs, it can only observe and count the number of client Plans corresponding to 339 QPAMs. The Department counted 10,719 Plans served by these 339 observable QPAMs, yielding an average of 32 client Plans per QPAM in 2019. The Department acknowledges that these entities do not necessarily act as QPAMs to their client Plans, and, therefore, considers this average as an upper limit for the number of client Plans served by a QPAM.

#### **Benefits**

As noted above, many of the benefits from this proposal to Plans, their participants, beneficiaries, and IRA owners would stem from new and amended conditions that would not significantly increase costs, but would provide more clarity, certainty, protection, and transitional support. In particular, the Department expects that the proposed amendment would provide the specific benefits described below.

#### *Written Management Agreement—Subsection I(g)(2)*

The proposed terms for the Written Management Agreement will benefit Plans by providing them with additional certainty that the Plan and its assets will be insulated from losses if a Criminal Conviction or Prohibited Misconduct that results in an Ineligibility Notice occurs. The proposed Written Management Agreement conditions also would benefit client Plans by ensuring they can terminate the arrangement or withdraw from a QPAM-managed Investment Fund without penalty, further ensuring that Plans are not exposed to unnecessary costs when relief under the exemption is lost through no fault of their own. The Department also believes requiring a QPAM to agree to these terms before misconduct occurs establishes a more prominent indication that the QPAM will operate with integrity throughout its dealings with client Plans, which provides additional certainty and assurances to such clients that a Plan's assets will be properly and prudently managed and protected. Similarly, the Department expects these proposed conditions will increase the overall value and attractiveness to Plans of retaining an asset manager that meets the requirements of the QPAM Exemption.

#### *Ineligibility Due to Foreign Criminal Convictions—Subsection I(g)(3)(A) and Subsection VI(r)(2)*

The QPAM Exemption was issued, in part, based on the principle that any entity acting as a QPAM—and those who are in a position to influence a QPAM's policies—should maintain a high standard of integrity.<sup>51</sup> This principle is called into question when a QPAM, or an entity that may be in a position to influence its policies, is convicted of certain crimes. The Department sought to address this issue by making entities ineligible for the prohibited transaction relief in the QPAM Exemption as of the date of the

<sup>51</sup> Proposed QPAM Exemption, 47 FR at 56947.

trial court judgment for any of the crimes listed in Section I(g).

Since the initial grant of the QPAM Exemption, the Department has granted nine individual exemption requests from QPAM applicants in connection with a foreign conviction; the first being in 2000.<sup>52</sup> The specific reference to foreign-equivalent crimes modernizes the QPAM Exemption to align with the realities of modern investment practices engaged in by many Plans. In this regard, removing all doubt that foreign-equivalent crimes are a basis for ineligibility provides necessary protections for Plans, as required by ERISA section 408(a) and Code section 4975(c)(2). This ultimately provides a benefit to Plans that rely upon QPAMs with strong ties to entities operating in foreign jurisdictions by not depriving them of the protection provided by the proposed amendment to Section I(g).

#### *Ineligibility Due to Participating in Prohibited Misconduct—Subsection I(g)(3)(B) and Section VI(s)*

As noted above, the QPAM Exemption is in large part premised on any entity acting as a QPAM, and those who are in a position to influence the QPAM's policies, maintaining a high standard of integrity. To reinforce this standard, the Department proposes to expand the circumstances that lead to ineligibility to avoid unfair and unequal treatment of entities and corporate families that have a record of engaging in malfeasance that ultimately may not result in a Criminal Conviction. Therefore, this extension of the ineligibility provision of current Section I(g) provides a benefit to Plans that rely upon QPAMs that are a part of corporate families with significant compliance failures by not depriving them of the protections provided under the proposed amendment to Section I(g).

#### *Mandatory One-Year Winding-Down Period—Section I(j)*

The winding-down period benefits Plans because it is designed to accommodate a Plan's ability to wind-down its relationship with the QPAM, if necessary. The winding-down period ensures that responsible Plan fiduciaries have the time and ability to choose an

<sup>52</sup> See Prohibited Transaction Exemption (PTE) 2020-01, 85 FR 8020 (Feb. 12, 2020); PTE 2019-01, 84 FR 6163 (Feb. 26, 2019); PTE 2016-11, 81 FR 75150 (Oct. 28, 2016); PTE 2016-10, 81 FR 75147 (Oct. 28, 2016); PTE 2012-08, 77 FR 19344 (March 30, 2012); PTE 2004-13, 69 FR 54812 (Sept. 10, 2004); and PTE 96-62 ("EXPRO") Final Authorization Numbers 2003-10E, 2001-02E, and 2000-30E, available at <https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/exemptions/expro-exemptions-under-pte-96-62>.

alternative discretionary asset manager or investment strategy without undue cost to the Plan. Under the current text of Section I(g), the immediate ineligibility of a QPAM upon a judgment of conviction may expose Plans to potential costs and losses without the necessary time to make alternative investment arrangements.

Immediate loss of relief under the QPAM Exemption could place Plans in the difficult position of either: (1) searching for a new asset manager for the services previously provided by the ineligible QPAM; or (2) being forced to liquidate assets at inopportune times, incur transaction costs to sell and repurchase assets, and lose returns while the assets are in transition. Searching for a new asset manager could require a particularly resource- and time-intensive process for Plan fiduciaries.

The proposed amendment benefits Plans by providing Plan fiduciaries with time and flexibility to determine the best path forward. This includes the benefit of ensuring Plans can mitigate any potential for disruption and losses by implicating the terms required in the Written Management Agreement under proposed subsection I(g)(2). If Plan fiduciaries decide to retain an ineligible QPAM as a discretionary asset manager, the one-year winding-down period will give the Plan fiduciaries time to determine and prepare for any changes that may be necessary for Plan investments.

Finally, the winding-down period benefits QPAMs by providing additional time for them to request an individual exemption from the Department. This will allow QPAMs, consistent with their applicable fiduciary obligations, to communicate with and assist their client Plans in determining an appropriate path forward for the management of Plan assets.

#### *Requesting an Individual Exemption—Section I(k)*

In addition to providing more certainty to QPAMs and Plans, the proposed amendment would also require QPAMs that seek individual exemption relief to review the Department's most recently granted individual exemptions with the expectation that similar conditions will be required if an exemption is proposed and granted. If an applicant requests the Department to exclude any term or condition from its exemption that is included in a recently issued similar individual exemption, the applicant must accompany such request with a detailed explanation of the reason such change is necessary, in the interest of,

and protective of the Plan, its participants and beneficiaries, and IRA owners. Applicants also should provide detailed information in their applications quantifying the specific cost in dollar amounts, if any, of the harms Plans would suffer if a QPAM could not rely on the exemption after the winding-down period.

The Department generally requests such information from an applicant if it is not included in its application. Therefore, the Department believes that the benefit of this provision will be reduced costs due to a more streamlined exemption application process because clearer standards for how an applicant should formulate its application would be established. The Department requests comment on this assumption.

#### *Involvement in Investment Decisions by Parties in Interest—Section I(c)*

The proposed modification to the language in Section I(c) will benefit Plans, their participants and beneficiaries, and IRA owners by ensuring that the Plan is not engaging in harmful prohibited transactions that are orchestrated by parties in interest. The Department understands that some Plan fiduciaries, in conjunction with hiring a QPAM, may be engaging in abuses of the exemption. The amendatory language should help ensure that Plans, their participants and beneficiaries, and IRA owners are not exposed to conflicts of interest that the QPAM Exemption was not designed to address and for which the Department should not provide prohibited transaction relief.

#### *Asset Management and Equity Thresholds—Section VI(a)*

The Department expects that the benefit associated with the proposed updates to the asset management and equity thresholds is the preservation of the underlying intent of the size conditions, which is to ensure the use of an asset manager that is sufficiently large to be able to withstand improper influence from parties in interest (*i.e.*, maintain independence).

#### **Costs**

All QPAMs must acknowledge that they are fiduciaries within the meaning of Title I of ERISA and/or the Code with respect to each Plan that has retained the QPAM. In analyzing compliance costs associated with the amendment, the Department considers the regulatory baseline that QPAMs already are required to comply with—primarily ERISA's fiduciary duty requirements (to the extent applicable), the other existing conditions in the QPAM Exemption, and the individual exemption process as

well as related individual exemptions granted in connection with Section I(g) ineligibility. The Department does not expect the amendment to increase, more than marginally, existing costs associated with QPAM ineligibility and individual exemption requests related to Criminal Convictions. The Department is uncertain, however, regarding the number of QPAMs that would become ineligible under the proposed expansion of the ineligibility provision related to participating in Prohibited Misconduct. The Department is also uncertain about the extent to which the proposed changes in asset management and equity thresholds would give rise to new costs because some QPAMs that meet the current thresholds no longer would be able to rely on the exemption if they do not meet the proposed increased thresholds.

The following analysis considers the impact on all QPAMs, except that the analysis of the cost of the winding-down provision is only considered for ineligible QPAMs. Although the Department has provided a cost analysis below, the heightened standards proposed in this amendment may result in entities being more careful about ensuring that their compliance programs are sufficiently robust to prevent Prohibited Misconduct or Convictions from occurring. In this respect, the proposed exemption would provide clear guardrails that would make the costs associated with QPAMs becoming ineligible clearly avoidable.

#### *Reporting Reliance on the QPAM Exemption—Subsection I(g)(1)*

The Department believes that the one-time requirement to report reliance on the QPAM Exemption via email to [QPAM@dol.gov](mailto:QPAM@dol.gov) will result in a minor additional clerical cost. The information required under subsection I(g)(1) is limited to the legal name of the entity relying upon the exemption and any name the QPAM may be operating under.

This notification would occur only once for most QPAMs. Therefore, the Department expects it will take 15 minutes, on average, for each QPAM to prepare and send this electronic notification. This cost is estimated to be \$8,505.<sup>53</sup> The Department seeks comment on this estimate.

<sup>53</sup> The cost is based upon the expenditure of 0.25 hours for each QPAM: (616 QPAMs \* 0.25 hours = 154 hours in total). To calculate the cost, an hourly labor rate of \$55.23 is used for a clerical worker. Therefore, the total cost amounts to: (616 QPAMs \* 0.25 hours \* \$55.23) = \$8,505 (rounded). The Department estimates of labor costs by occupation reflect estimates of total compensation

*Written Management Agreement—Subsection I(g)(2)*

The Department believes that the cost associated with adding the required terms under subsection I(g)(2) to a QPAM’s Written Management Agreement only would impose costs related to updating existing management agreements. QPAMs will need to send the update to each of their client Plans, but the QPAM likely would be able to prepare a single standard form with identical language and then send it to each client Plan. For each QPAM, the Department estimates it will take one hour of in-house legal professional time to update and supplement their existent standard management agreements, and two minutes of clerical time to prepare and mail a one-page addition to the agreement to each client Plan. Including mailing costs, the total estimated cost of this requirement amounts to \$135,540.<sup>54</sup>

*Ineligibility Due to Foreign Convictions—Subsection I(g)(3)(A) and Subsection VI(r)(2)*

The Department and QPAMs have treated foreign convictions as causing

ineligibility under Section I(g) since at least 2000.<sup>55</sup> Therefore, the Department believes that the clarifying reference that includes foreign convictions within the scope of Section I(g) will not change the costs of the exemption as compared to the current costs.

*Mandatory One-Year Winding-Down Period—Section I(j)*

To estimate the number of future ineligible QPAMs, the Department first referred to individual exemptions the Department granted to QPAMs facing ineligibility under current Section I(g) in connection with 14 separate convictions or possible convictions since 2013.<sup>56</sup> The Department believes the individual exemptions granted since 2013 provide the best basis for estimating the number of future ineligible QPAMs. The Department lacks data regarding the actual number of QPAMs covered by each individual exemption before 2013; therefore, the exemptions issued since 2013 best reflect the current legal and prosecutorial environment that ultimately leads to convictions covered

by current Section I(g). Each individual exemption may affect multiple QPAMs, so the Department considers the number of affected entities to be the number of QPAMs covered by each individual exemption. The Department then estimated the number of QPAMs that might be captured by the proposed expansion of the ineligibility provision that applies to participating in Prohibited Misconduct.

As shown in the table below, the Department estimates that eight QPAMs each year would be subject to the one-year winding-down period after a Criminal Conviction.<sup>57</sup> The number of QPAMs affected in any given year is a function of the number of convictions covered by Section I(g) and the number of entities within a corporate family operating as QPAMs. Therefore, in some years, the number of affected QPAMs impacted by ineligibility due to a Criminal Conviction could be higher than eight, and in other years it could be lower. These calculations are broken down in the table below.

TABLE 1—SUMMARY OF PAST CONVICTIONS THAT WOULD IMPLICATE THE PROPOSED WINDING-DOWN PERIOD  
[By year] \*

	Number of convictions	Number of affected QPAMs
2013 .....	1	4
2014 .....	1	3
2015 .....	1	20
2016 .....	6	25
2017 .....		
2018 .....		
2019 .....		
2020 .....		
2021 .....	1	13
<b>Total .....</b>	<b>10</b>	<b>65</b>

and overhead costs. Estimates for total compensation are based on mean hourly wages by occupation from the 2020 Occupational Employment Statistics and estimates of wages and salaries as a percentage of total compensation by occupation from the 2020 National Compensation Survey’s Employee Cost for Employee Compensation. Estimates for overhead costs for services are imputed from the 2017 Service Annual Survey. To estimate overhead cost on an occupational basis, the Office of Research and Analysis allocates total industry overhead cost to unique occupations using a matrix of detailed occupational employment for each NAICS industry. All values are presented in 2020 dollars.

<sup>54</sup> This cost is based upon the expenditure of one hour of a legal professional for each of the 616 estimated QPAMs using an hourly labor rate of \$140.96. This labor cost is estimated as (616 QPAMs \* 1 hour \* \$140.96) = \$86,831 for legal professional time (rounded). As specified in the PRA section, the Department estimates each QPAM serves 32 client Plans on average. The Department also expects each QPAM will have to append one page to their existing management agreements and that it will take each QPAM two minutes of clerical time to prepare and mail this one-page addition to

each client Plan. This labor cost is then estimated as (616 QPAMs \* 32 client Plans \* (2/60) hours \* \$55.23) = \$36,290 for clerical time (rounded). The Department estimates that the costs of printing and mailing one page are \$0.05 and \$0.58, respectively. Therefore, adding one page to all management agreements amounts the total printing and mailing cost to (616 QPAMs \* 32 client Plans) \* 1 page \* (\$0.05 + \$0.58) = \$12,419 (rounded). The estimated total cost of the provision is therefore \$86,831 + \$36,290 + \$12,419 = \$135,540.

<sup>55</sup> See, e.g., Prohibited Transaction Exemption (PTE) 2020–01, 85 FR 8020 (Feb. 12, 2020); PTE 2019–01, 84 FR 6163 (Feb. 26, 2019); PTE 2016–11, 81 FR 75150 (Oct. 28, 2016); PTE 2016–10, 81 FR 75147 (Oct. 28, 2016); PTE 2012–08, 77 FR 19344 (March 30, 2012); PTE 2004–13, 69 FR 54812 (Sept. 10, 2004); and PTE 96–62 (“EXPRO”) Final Authorization Numbers 2003–10E, 2001–02E, and 2000–30E, available at <https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/exemptions/expro-exemptions-under-pte-96-62>.

<sup>56</sup> Ineligible QPAMs that request individual exemptions generally request relief for the entire ten-year ineligibility period. However, to engage in thorough fact-finding process and to verify

compliance with certain audit provisions in the individual exemptions, the Department has granted exemptions that include less than ten years of relief in many situations. Ineligible QPAMs then typically apply for an extension of relief even though no additional conviction has occurred. Additionally, in situations where an ineligible QPAM is impacted by a subsequent conviction before the expiration of the ten-year ineligibility period for the initial conviction, the winding-down period would also not be implicated, so there is no additional cost burden associated with subsequent convictions. The Department notes that there were a total of three subsequent convictions after an initial conviction for some entities in 2017, 2018, and 2019.

<sup>57</sup> The Department did not include in this estimate any of the possible QPAMs that have remote relationships with a convicted entity, identified in the individual exemptions as “Related QPAMs.” The Department has never received comments, questions, requests for guidance, or separate individual exemption applications from any entities that would fall into that definition, and therefore, assumes such entities are not operating as QPAMs. The Department welcomes input on this assumption.

TABLE 1—SUMMARY OF PAST CONVICTIONS THAT WOULD IMPLICATE THE PROPOSED WINDING-DOWN PERIOD—  
Continued  
[By year]\*

	Number of convictions	Number of affected QPAMs
Average .....	1.1	7.2
Estimated Yearly Average** (rounded) .....	2	8

\* The average number of affected QPAMs includes zeros for years without convictions that would implicate the winding-down period. There were three convictions during the period from 2017 through 2020 that would not implicate the winding-down period and associated costs.

\*\* The corresponding calculated averages include decimals; therefore, to err on the side of caution and inclusion the estimated yearly average is rounded to the upper integer.

The Department's proposed expansion of the ineligibility provision to include Prohibited Misconduct that leads to an Ineligibility Notice likely will increase the number of QPAMs that become ineligible due to Section I(g). Although the Department does not have precise data to determine the exact number of QPAMs that would become ineligible due to this proposed expansion, the Department has assumed the additional number of ineligible QPAMs to be equal to the eight QPAMs that experience ineligibility due to a conviction under current Section I(g), resulting in a total of 16 ineligible QPAMs. The Department requests comments on this assumption and data or other information that would allow the Department to more precisely estimate the number of QPAMs that would lose eligibility due to this proposed expansion.

Because the conditions of the winding-down provision borrow from the conditions included in the Department's existing individual Section I(g) exemptions, the Department does not believe there will be any added cost with respect to the proposed winding-down period for QPAMs that become ineligible due to a Criminal Conviction relative to the current baseline of obtaining an individual exemption covering this same time period. However, an additional eight QPAMs, on average, may become ineligible each year for participating in Prohibited Misconduct, implicating the winding-down period and the conditions related to proposed provisions that are required to be included in the Written Management Agreement. As a result, QPAMs would have to possibly bear the costs associated with indemnifying their client Plans for losses that would occur if they move to a new asset manager. The Department lacks sufficient data at this time to estimate these costs associated with the winding-down period and requests comments regarding these costs. The Department welcomes

comments that would provide data to assist in calculating an estimate.

*Notice to Plans—Subsection I(j)(1)*

Within 30 days after the conviction date, the QPAM must provide notice to the Department at [QPAM@dol.gov](mailto:QPAM@dol.gov) and each of its client Plans stating (i) its failure to satisfy subsection I(g)(3); and (ii) that it agrees, as required by subsection I(g)(2), not to restrict the ability of a client Plan to terminate or withdraw from its arrangement with the QPAM. QPAMs that violate Section I(g) under the current QPAM Exemption are required to provide this type of notice when they obtain an individual exemption, so no incremental burden is attributed to this requirement for QPAMs that become ineligible due to a Criminal Conviction. However due to the expanded proposed scope of ineligibility, QPAMs that become ineligible after receiving an Ineligibility Notice due to participating in Prohibited Misconduct will incur the cost of sending notices to their client Plans for the first time. With an average of 32 client Plans per QPAM, the Department estimates that, in total, four hours of in-house legal professional time will be required to prepare all notices as well as seven hours of clerical time for distribution. Including mailing costs, the Department estimates that the total incremental cost related to ineligibility after receiving an Ineligibility Notice is \$1,090.<sup>58</sup>

<sup>58</sup> The burden is estimated assuming 8 QPAMs will need to send the notice: 8 QPAMs \* 0.5 hours of professional legal time = 4 hours to prepare all notices. The Department also assumes that 80 percent of all notices will be delivered by regular mail, requiring approximately two minutes of clerical time to prepare the notices for mailing, that is, (8 QPAMs \* 32 Plans \* 0.80 sent by paper) \* (2/60) hours of clerical time = 7 hours (rounded). The Department also estimates that the cost burden for preparing and mailing the notices will be approximately equal to \$139, that is, 205 \* ((2 \* \$0.05) + \$0.58) = \$139 (rounded). Therefore, the total cost associated with this requirement is (4 \* legal professional labor rate of \$140.96) + (7 \* clerical labor rate of \$55.23) + \$139 = \$1,090 (rounded). Any discrepancies in the calculations are a result of rounding.

The Department believes the cost of sending this notice to the Department will be negligible because the QPAM will have already prepared and sent the notice to client Plans and the notice to the Department is required to be sent electronically.

*Warning and Opportunity To Be Heard in Connection With Prohibited Misconduct—Section I(i)*

As described above, the Department estimates eight QPAMs could experience ineligibility due to participating in Prohibited Misconduct. Before QPAMs become ineligible, they would be provided with a written warning and an opportunity to be heard under Section I(i). As a result, QPAMs would have to possibly bear the costs associated with this process. The Department estimates that this process would occur twice each year, with each process covering four QPAMs that are part of the same corporate family. The Department estimates that preparing a response to the ineligibility notice and for a conference with the Department would require 10 in-house legal professional hours (two preparations \* 10 hours) resulting in 20 total hours at an equivalent cost of approximately \$2,819.<sup>59</sup> The Department estimates that preparing a response and preparing for the conference will also require 16 total outside legal professional hours (2 preparations times 8 hours) at a cost of \$7,904.<sup>60</sup> Thus, the total labor cost of preparing a response and preparing for a conference amounts to \$10,723. The Department requests comment on this cost estimate.

<sup>59</sup> This cost is based upon an hourly labor rate of \$140.96 for an in-house legal professional. 2020 National Compensation Survey's Employee Cost for Employee Compensation.

<sup>60</sup> The outside legal professional labor rate is a composite weighted average of the Laffey Matrix for Wage Rates (<http://www.laffeymatrix.com/see.html>, Year: 6/01/21–5/31/22): (\$381 \* 0.4) + (\$468 \* 0.35) + (\$676 \* 0.15) + (\$764 \* 0.1) = \$494.

*Requesting an Individual Exemption—Section I(k)*

Proposed new Section I(k) provides that a QPAM that is ineligible or anticipates that it will become ineligible due to an actual or possible Criminal Conviction may apply for an individual exemption from the Department to continue to rely on the relief provided in the QPAM Exemption for a longer period than the one-year winding-down period. In such an event, the exemption provides that an applicant should review the Department's most recently granted individual exemptions involving Section I(g) ineligibility. If an applicant requests the Department to exclude any term or condition from its exemption that is included in a recently granted individual exemption, the applicant must include a detailed statement with its exemption application explaining the reason(s) why the proposed variation is necessary and in the interest and protective of affected Plans, their participants and beneficiaries, and IRA owners. Such applicants also should provide detailed information in their applications quantifying the specific cost in dollar amounts, if any, of any harm its client Plans would suffer if a QPAM could not rely on the exemption after the winding-down period, including the specific dollar amounts of investment losses resulting from foregone investment opportunities and any evidence supporting the proposition that investment opportunities would only be available to Plans on less advantageous terms.

Due to the proposed expanded scope of ineligibility to include participating in Prohibited Misconduct, the Department estimates that two additional applicants each year would apply for an individual exemption, each covering four ineligible QPAMs. Each of these two new applicants will spend 12 hours of in-house legal professional and 13 hours of in-house clerical time preparing the required documentation for the application that will be used by an outside legal professional. The Department estimates that total labor costs (wages plus benefits plus overhead) for an in-house legal professional would average \$140.96 per hour and \$55.23 per hour for clerical staff.<sup>61</sup> Therefore, the Department estimates that preparing this documentation would require 24 in-house legal professional hours (2 applications \* 12 hours) and 26 clerical hours (2 applications \* 13 hours)

<sup>61</sup> See *supra*, notes 53 and 59. 2020 National Compensation Survey's Employee Cost for Employee Compensation.

resulting in 50 total hours at an equivalent cost of approximately \$4,819.<sup>62</sup> Further, the Department estimates that, on average, 25 hours of outside legal professional time will be spent preparing the documentation for the application, with a total labor cost for outside legal professionals estimated to average \$494.00 per hour.<sup>63</sup> The Department estimates that preparing the applications will also require 50 total outside legal professional hours (2 applications \* 25 hours) at a cost of \$24,700. Thus, the total labor cost of application preparation amounts to \$29,519.

For applications that reach the stage of publication of a proposed exemption in the **Federal Register**, a notice must be prepared and distributed to interested parties. If both applications are published annually, approximately 256 notices will be distributed (this corresponds to 32 client Plans per each of the eight QPAMs affected by two applications). Similarly, if the proposed exemptions are ultimately granted, each of these eight QPAMs will be required to send an objective description of the facts and circumstances upon which the misconduct is based to each client Plan. The Department estimates that the distribution for notices and objective descriptions will require 10 minutes for each one of the 256 interested parties, totaling approximately 42 hours at a cost of approximately \$2,357.<sup>64</sup> In addition, material and mailing costs for all of these notices totals approximately \$443.<sup>65</sup> Therefore, the Department estimates that the total costs associated with notice distribution would be \$2,800.

**Additional Requirement for QPAMs Requesting an Individual Exemption**

If an applicant requests the Department to exclude any term or condition from its exemption that is included in a recently granted individual exemption, the applicant

<sup>62</sup> The 24 in-house legal professional hours are estimated to cost \$3,383 (rounded), and the 26 in-house clerical hours are estimated to cost \$1,436 (rounded). This totals to \$4,819 (rounded). Any discrepancies in the calculations are a result of rounding.

<sup>63</sup> See *supra*, note 60.

<sup>64</sup> The total cost is calculated as: ((10/60) hours \* 256 interested parties \* \$55.23 hourly clerical rate) = \$2,357 (rounded).

<sup>65</sup> The Department estimates that 80% of these notices, that is, 205 notices, will be delivered by regular mail. The Department further assumes that notices and the descriptions of facts and circumstances will be delivered separately, comprising 15 and 5 pages, respectively. Therefore, with a printing cost of \$0.05 per page and a mailing cost of \$0.58 per notice, the Department estimates the total mailing cost as 205 \* ((15 \* \$0.05) + \$0.58) + 205 \* ((5 \* \$0.05) + \$0.58) = \$443 (rounded).

must include a detailed statement with its exemption application explaining the reason(s) why the proposed variation is necessary and in the interest and protective of affected Plans, their participants and beneficiaries, and IRA owners. In these applications, detailed information would be required quantifying the specific cost to Plans, in dollar amounts, of the harm its client Plans would suffer if a QPAM could not rely on the exemption after the winding-down period. This should include dollar amounts of investment losses resulting from foregone investment opportunities and any evidence supporting the proposition that investment opportunities would only be available to Plans on less advantageous terms.

The Department assumes the eight QPAMs that are estimated to become ineligible due to the receipt of a written Ineligibility Notice would incur incremental costs due to the cost quantification requirement described above and also the requirement to review the Department's most recently granted individual exemptions involving Section I(g) ineligibility. To satisfy the requirement to review the Department's most recently granted individual exemptions, the Department estimates that it would require three hours of outside legal professional time to review past individual exemptions and draft this addition to the individual exemption application. Therefore, for the two applications covering the eight ineligible QPAMs receiving a written Ineligibility Notice, the cost associated with the additional requirement totals \$4,288.<sup>66</sup>

The eight QPAMs that would become ineligible due to a Criminal Conviction will only incur an incremental cost to ensure they include in their exemption applications the specific dollar amounts

<sup>66</sup> The burden is estimated assuming 8 QPAMs experience ineligibility that will need to include this information in their individual exemption application. Because the average number of QPAMs covered by a single exemption is four, the cost estimation is made assuming 2 applications. At an hourly rate of \$165.45 for financial professional time, the cost associated with the cost quantification requirement is estimated as: (2 applications \* 4 hours \* \$165.45 financial professional rate) = \$1,324 (rounded). For the cost associated with the review of past exemptions, a composite wage rate is used for the outside legal professional by employing a weighted average of the legal fees reported in the Laffey Matrix for Wage Rates (<http://www.laffeymatrix.com/see.html>, Year: 6/01/21–5/31/22): (\$381 \* 0.4) + (\$468 \* 0.35) + (\$676 \* 0.15) + (\$764 \* 0.1) = \$494. The total cost associated with reviewing past exemptions is then (2 applications \* 3 hours \* \$494 outside legal professional rate) = \$2,964 (rounded). Therefore, the total cost associated with the additional requirement for QPAMs ineligible due to receiving a written Ineligibility Notice is (\$1,324 + \$2,964) = \$4,288 (rounded).

of investment losses resulting from foregone investment opportunities and any evidence supporting the proposition that investment opportunities would only be available to client Plans on less advantageous terms. For this requirement, the Department assumes it would require four hours of a financial professional time to prepare such a report. Therefore, for the two applications covering the eight ineligible QPAMs due to a Criminal Conviction, the cost associated with the additional requirement totals \$1,324.<sup>67</sup>

#### *Involvement in Investment Decisions by Parties in Interest—Section I(c)*

The Department anticipates that the modifications to Section I(c) will not change the costs of the exemption as compared to cost of the current QPAM Exemption because the types of transactions that were intended to be excluded by current Section I(c) are the same types of transactions intended to be excluded by modified Section I(c).

#### *Asset Management and Equity Thresholds—Section VI(a)*

As a result of the proposed adjustments to the asset management and equity thresholds to the QPAM definition in Section VI(a), the Department acknowledges some QPAMs may not meet the new threshold requirements, and, consequently, would no longer be able to rely on the QPAM

Exemption. The Department expects QPAMs and Plans that utilize these QPAMs to incur costs due to this transition but lacks strong data to estimate the impact.<sup>68</sup> The Department has requested similar data in connection with individual applications for exemptions following convictions covered by Section I(g), but the data provided by applicants has been limited, as have been the costs identified by the applicants. The Department seeks comments and data on the number of QPAMs who will potentially become unable to rely upon the exemption (along with the number of Plans and value of Plan assets) that will be impacted by the increase in asset management and equity thresholds.

#### *Recordkeeping—Section VI(t)*

The amendment would also add a new recordkeeping provision that would apply to all QPAMs. Due to the fiduciary status of QPAMs and the existing regulatory environment, the Department assumes that QPAMs already maintain such records as part of their regular business practices. In addition, the recordkeeping requirements correspond to the six-year period in ERISA sections 107 and 413. Therefore, the Department expects that the recordkeeping requirement would impose a negligible burden. The Department welcomes comments

regarding the burden associated with the recordkeeping requirement.

If a QPAM refuses to disclose information to any of the parties listed in Section VI(t), on the basis that information is exempt from disclosure, the QPAM must provide a written notice advising the requestor of the reason for the refusal and that the Department may request such information. The Department does not have data on how often such a refusal is likely to occur; however, the Department believes such instances would be rare. As a result, the Department believes this requirement would impose negligible cost and requests comments about whether this may happen more frequently and the possible costs.

#### *Rule Familiarization Costs*

The Department estimates that it will take 60 minutes, on average, for each QPAM to become familiar with the proposed amendment. The familiarization cost is estimated to be \$304,304.<sup>69</sup> The Department seeks comment on this estimate.

#### *Summary of Costs*

The total estimated annual costs associated with the proposal will be \$487,370 in the first year and \$183,066 in subsequent years. Table 2 summarizes the costs for each requirement.

TABLE 2—COST SUMMARY

Requirement	Aggregate cost change (in dollars)
Reporting Reliance on the QPAM Exemption .....	\$8,505
Written Management Agreement .....	135,540
Notice to Plans .....	1,090
Written Warning and Opportunity to be Heard .....	10,723
Requesting an Individual Exemption Costs:	
Preparation Labor Cost .....	29,519
Notices Distribution .....	2,800
Additional Requirement-Criminal Conviction QPAMs .....	1,324
Additional Requirement-Prohibited Misconduct QPAMs .....	4,288
Rule Familiarization Costs .....	304,304
First Year Total Estimated Annual Cost .....	498,093
Subsequent Years Total Estimated Annual Cost <sup>1</sup> .....	193,789

**Note:** Only quantifiable costs are displayed.  
<sup>1</sup> Excludes Rule Familiarization Costs.

<sup>67</sup> The burden is estimated assuming 8 QPAMs experience ineligibility that will need to include this information in their individual exemption application. Because the average number of QPAMs covered by a single exemption is four, the cost estimation is made assuming 2 applications. At an hourly rate of \$165.45 for financial professional time, this cost is estimated as: (2 applications \* 4 hours \* \$165.45 financial professional rate) = \$1,324 (rounded).

<sup>68</sup> Some QPAMs have suggested in the past that there could be costs associated with unwinding transactions that relied on the QPAM Exemption

and reinvesting assets in other ways. The loss of QPAM status could also require an asset manager to keep lists of parties in interest to its client Plans to ensure the asset manager does not engage in prohibited transactions. However, even without the QPAM Exemption, a wide variety of investments are available that do not involve non-exempt prohibited transactions.

<sup>69</sup> The cost is based upon the expenditure of 1.0 hours for each of the 616 estimated QPAMs to become familiar with the proposed amendments: (616 QPAMs \* 1 hour = 616 hours in total). To calculate the cost a composite wage rate is used by

employing a weighted average of the legal fees reported in the Laffey Matrix for Wage Rates (<http://www.laffeymatrix.com/see.html>, Year: 6/01/21-5/31/22): (\$381 \* 0.4) + (\$468 \* 0.35) + (\$676 \* 0.15) + (\$764 \* 0.1) = \$494. This amounts to: (616 QPAMs \* 1 hour \* \$494) = \$304,304. Note that QPAMs likely rely on outside specialized legal counsel to help keep them in compliance with the QPAM Exemption. The specialized outside legal counsel likely will review the amendment and present updates to their clients, which means that the costs will be spread out over multiple clients.

## Transfers

If an asset manager becomes ineligible for relief under the QPAM Exemption (e.g., because of its participation in Prohibited Misconduct), its client Plans may choose to transfer assets and revenue away from the ineligible asset manager to its competitors. From the Plan's perspective, the reduction in assets entrusted to the original asset manager (and associated revenue reduction) are offset by the increase in assets managed by another asset manager or managers (and associated revenue increase). Even if the impact of the switch is minimal or neutral from the point of view of the Plan, it is nevertheless appropriately characterized as a transfer from a societal perspective.<sup>70</sup>

Although the Department does not have sufficient data to quantify the likely size of such revenue transfers, they could have an annual effect that exceeds \$100 million due to the significant pool of Plan assets that QPAMs manage. To the extent the proposed amendment results in the movement of assets from asset managers that become ineligible to rely on the exemption because of their Prohibited Misconduct to asset managers that have not engaged in such misconduct, the associated revenue transfers promote the Department's objectives in proposing this amendment to the QPAM Exemption and enhance the security of Plan investments.

The Department seeks comments on transfers that could result from the proposed expansion of the QPAM Exemption's ineligibility provision. The Department is particularly interested in receiving comments addressing whether a QPAM's client Plans would be likely to move all or some their assets to an alternative asset manager after a QPAM becomes ineligible due to the proposed expansion of the ineligibility provision. The Department also specifically requests comments on the likely size of the transaction costs associated with searching for and hiring new asset managers.

## Regulatory Alternatives

In order to make the statutory findings for issuing exemptions dictated by ERISA section 408(a) and Code section 4975(c)(2), the Department must find

<sup>70</sup> Although a QPAM's client Plans could be expected to move some or all of its assets to another asset manager if the QPAM is convicted of an enumerated crime, this discussion does not address these transfers. The Department has long viewed both domestic and foreign convictions as causing ineligibility under the existing exemption. Consequently, the regulatory baseline already includes the impact of such convictions.

that an exemption is in the interest of and protective of the rights of Plans, their participants and beneficiaries, and IRA owners. Therefore, the Department provides several qualitative alternatives to the proposed amendment, as discussed below, that were considered in connection with the statutorily mandated exemption requirements.

Do not amend the QPAM Exemption—Continue status quo of addressing ineligibility under current Section I(g) and only through administration of the individual exemption program.

The Department considered not expanding the scope of Section I(g) and maintaining its practice of addressing ineligibility under Section I(g) only through the individual exemption process. However, immediate ineligibility under Section I(g) has become a source of uncertainty and potential disruption to Plans. As the financial services industry has become increasingly consolidated, the number of entities becoming ineligible for relief under the QPAM Exemption has grown, prompting more entities to face ineligibility. Through the individual exemption process, client Plans would continue to be exposed to the potential for immediate disruption and transition costs that might otherwise be avoided through this proposed amendment.

The Department decided against this alternative in favor of this proposed amendment, relying on its experience processing individual exemption applications to create a smoother transition between the QPAM Exemption and the individual exemption program so that a QPAM's client Plans have certainty regarding their rights after an ineligibility event occurs.

*Amend the QPAM Exemption to expressly exclude foreign convictions.*

The Department considered expressly limiting the scope of convictions to only those in a U.S. federal or state trial courts. However, given the increasingly global reach of asset managers and investment strategies, the Department determined such a limitation would leave Plans less protected and be inconsistent with the ERISA section 408(a) and Code section 4975(c)(2) required findings. An affiliated entity's criminal or other misconduct in a foreign jurisdiction is an important indicator of the integrity of the entire corporate organization and casts doubt on a QPAM's ability to act in a manner that will properly protect Plans and their participants and beneficiaries from the related damages, losses, and other harm that often result from such criminal or other misconduct.

*Amend the QPAM Exemption to remove asset management and equity thresholds.*

As an alternative to updating the asset management and equity thresholds, the Department revisited whether such thresholds could be removed entirely from the exemption. The Department determined that this approach would be inconsistent with one of the core concepts upon which the QPAM Exemption was based. In the absence of an appropriate alternative ensuring that a QPAM will remain an independent decision-maker, free from influence of other Plan fiduciaries, the Department is unable to justify the removal of the thresholds.

## Paperwork Reduction Act

As part of its continuing effort to reduce paperwork and respondent burden, the Department conducts a preclearance consultation program to allow the general public and federal agencies to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA).<sup>71</sup> This helps to ensure that the public understands the Department's collection instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

Currently, the Department is soliciting comments concerning the proposed information collection request (ICR) included in the proposed QPAM Exemption amendment. To obtain a copy of the ICR, contact the PRA addressee shown below or go to <https://www.reginfo.gov/public/>.

The Department has submitted a copy of the proposed amendment to the Office of Management and Budget (OMB), in accordance with 44 U.S.C. 3507(d), for review of its information collections. The Department and OMB are particularly interested in comments that:

- Evaluate whether the collection of information is necessary for the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

<sup>71</sup> 44 U.S.C. 3506(c)(2)(A) (1995).

- Enhance the quality, utility, and clarity of the information to be collected; and
- Help minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology (e.g., permitting electronically delivered responses).

Commenters may send their views on the Department's PRA analysis in the same way they send comments in response to the NPRM as a whole (e.g., through the [www.regulations.gov](http://www.regulations.gov) website), including as part of a comment responding to the broader NPRM. In addition to having an opportunity to file comments with the Department, comments about the paperwork implications of the proposed regulation may also be addressed to the OMB. Comments should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503 and marked "Attention: Desk Officer for the Employee Benefits Security Administration." OMB requests that comments be received by September 26, 2022, which is 60 days from publication of the proposed amendment to ensure their consideration.

*PRA Addressee:* Address requests for copies of the ICR to James Butikofer, Office of Research and Analysis, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue NW, Room N-5718, Washington, DC 20210 or by email at: [ebssa.opr@dol.gov](mailto:ebssa.opr@dol.gov). ICRs also are available at <https://www.reginfo.gov> (<https://www.reginfo.gov/public/do/PRAMain>).

Prohibited Transaction Exemption 84-14, 49 FR 9494 (March 13, 1984), as corrected at 50 FR 41430 (October 10, 1985) and amended at 70 FR 49305 (August 23, 2005) and at 75 FR 38837 (July 6, 2010) (the QPAM Exemption) permits various parties related to Plans to engage in transactions involving Plan assets if, among other conditions, the assets are managed by a QPAM.

The following analysis considers the existing paperwork burden associated with the existing QPAM Exemption. The Department estimates that there were 616 QPAMs in 2019.<sup>72</sup>

<sup>72</sup> Using Form 5500 data for 2019, the Department counted in total 1390 service providers who provided services of "Investment Management" and "Named Fiduciary," of which only 765 reported their business code. Out of these 765 providers, 339 reported their business code starting with the 2-digit NAICS code 52, yielding a ratio of 0.44 of

#### *Paperwork Burden Associated With the QPAM Exemption Information Collection Requirements*

Using 2019 Form 5500 data, the Department estimated there are 616 potential QPAMs by approximating the total number of providers who in 2019 provided services of "Investment Management" and "Named Fiduciary" simultaneously to at least one plan, as reported on Schedule C of the 2019 Form 5500, and whose NAICS codes start with the 2-digit 52, which corresponds to Finance and Insurance Institutions.<sup>73</sup> Furthermore, using the same data, the Department estimates that a single QPAM services, on average, 32 client Plans.<sup>74</sup> Therefore, the Department estimates that in total there are 19,712 client Plans (616 QPAMs times 32 client Plans per QPAM).

#### *QPAM-Sponsored Plans—Policies and Procedures—Section V(b)*

The existing information collection requirements of the QPAM Exemption require in-house QPAMs to develop written policies and procedures designed to ensure compliance with the conditions of the exemption. Existing in-house QPAMs will have already prepared their policies and procedures in accordance with the QPAM Exemption, however some in-house QPAMs may also update their policies and procedures in a given year. The Department estimates that the burden associated with preparing policies and procedures will affect ten percent of all in-house QPAMs, including all new in-house QPAMs and some existing in-house QPAMs.

The latest Form 5500 estimates from the year 2019 indicate that there are approximately 118 in-house QPAMs.<sup>75</sup> Therefore, the Department estimates

potential QPAMs to other providers. Therefore, the Department estimates that there were  $0.44 * 1390 = 616$  potential QPAMs in 2019.

<sup>73</sup> The Department counted in total 1390 service providers who provided services of "Investment Management" and "Named Fiduciary," of which only 765 reported their business code. Out of these 765 providers, 339 reported their business code starting with the 2-digit NAICS code 52, yielding a ratio of 0.44 of potential QPAMs to other providers. Therefore, the Department estimates that there were potentially  $0.44 * 1390 = 616$  QPAMs in 2019.

<sup>74</sup> Although the Department estimates there are 616 QPAMs, it can only observe and count the number of client Plans corresponding to 339 QPAMs. The Department counted 10,719 Plans served by these 339 observable QPAMs, yielding an average of 32 client Plans per QPAM in 2019. The Department acknowledges that these entities do not necessarily act as QPAMs to their served client Plans, and therefore considers this average as an upper limit for the number of client Plans served by a QPAM.

<sup>75</sup> The Department estimated the number of in-house QPAMs in 2019 using the estimated fraction of QPAMs who also sponsored a Plan in 2019.

that about 12 QPAMs will need to update their policies and procedures each year.<sup>76</sup> The Department estimates that the costs associated with new QPAMs meeting the policies and procedures requirements of the QPAM Exemption is \$1,663.<sup>77</sup>

#### *QPAM-Sponsored Plans—Independent Audit—Section V(c)*

Additionally, the exemption requires in-house QPAMs to engage an independent auditor to conduct an annual exemption audit and issue an audit report to the Plan. The Department estimates that each of the 118 in-house QPAMs will use in-house legal professionals, financial managers, and clerical time to provide documents and respond to questions from the auditor. The Department assumes QPAMs use either a law firm or a consulting firm to conduct the exemption audits, and the Department assumes that the average cost of an exemption audit is \$25,000.<sup>78</sup> This results in a total estimated cost of \$2,950,000.<sup>79</sup> Additionally, each exemption audit is assumed to require about five hours of a legal professional's time, 13 hours of a financial manager's time, and six hours of clerical time for each of the 118 QPAMs to provide needed materials for the audit. This amounts to an approximate cost of \$3,187 per in-house QPAM, therefore resulting in a total equivalent cost of \$376,070.<sup>80</sup> The Department requests comment on the cost and time estimates to conduct the audits.

<sup>76</sup>  $0.1 * 118 \text{ QPAMs} = 12 \text{ QPAMs (rounded)}$ . Any discrepancies may occur from rounding figures in this summary but not in the actual calculations.

<sup>77</sup> The burden is estimated as follows:  $(0.1 * 118 * 1 \text{ hour}) = 12 \text{ hours (rounded)}$ . A labor rate of \$140.96 is used for legal counsel and applied in the following calculation:  $(0.1 * 118 * 1 \text{ hour} * \$140.96) = \$1,663 \text{ (rounded)}$ .

<sup>78</sup> The Department has received information from industry representatives that the cost of a similar annual audit required by PTE 96-23 (the INHAM Exemption) may range from approximately \$10,000 to \$25,000, depending on asset size and how many years the INHAM has used the auditing firm. Because of the type of audit required for an in-house QPAM, the Department has assumed that the average cost of an exemption audit required by the QPAM Exemption would be \$25,000.

<sup>79</sup> Assuming that the average cost of an exemption audit would be \$25,000,  $118 \text{ QPAMs} * \$25,000 = \$2,950,000$ .

<sup>80</sup> The burden is estimated as follows:  $(118 * 5 \text{ hours}) + (118 * 13 \text{ hours}) + (118 * 6 \text{ hours}) = 2,832 \text{ hours}$ . A labor rate of \$140.96 is used for legal counsel, a labor rate of \$165.45 is used for a financial professional, and a labor rate of \$55.23 is used for a clerical worker. These labor rates are applied in the following calculation:  $(118 * 5 \text{ hours} * \$140.96) + (118 * 13 \text{ hours} * \$165.45) + (118 * 6 \text{ hours} * \$55.23) = \$376,070 \text{ (rounded)}$ . All labor rates reflect EBSA estimates.

### Property Manager Written Guidelines—Section I(c)

The exemption also contains a requirement for written guidelines when, in certain instances, a property manager acts on behalf of a QPAM. In this case, the QPAM is required to establish and administer the guidelines. Because agreements between an institution and a property manager are customary, the Department estimates that this requirement will impose no additional burden on QPAMs.

### Reporting Reliance on the QPAM Exemption—Subsection I(g)(1)

QPAMs will have to report their reliance on the QPAM Exemption via email to *QPAM@dol.gov*. This notification would occur only once for most QPAMs. The information required under subsection I(g)(1) is limited to the legal name of the entity relying upon the exemption and any name the QPAM may be operating under. The Department expects it will take 15 minutes, on average, for each QPAM to both prepare and send this electronic notification. This burden is estimated to amount to 154 hours with an equivalent cost of \$8,505.<sup>81</sup> The Department seeks comment on this estimate.

### Notice to Plans—Subsection I(j)(1)

Within 30 days after the conviction date or receipt of an Ineligibility Notice due to participating in Prohibit Misconduct, the QPAM must provide notice to the Department at *QPAM@dol.gov* and each of its client Plans stating (i) its failure to satisfy subsection I(g)(3); and (ii) that it agrees, as required by subsection I(g)(2), not to restrict the ability of a client Plan to terminate or withdraw from its arrangement with the QPAM. With 16 ineligible QPAMs and an average of 32 client Plans per QPAM, the Department estimates that in total eight in-house legal professional hours will be required to prepare all notices as well as 13.7 hours of clerical time for distribution. In addition, mailing costs for all 16 QPAMs amount to \$279.<sup>82</sup>

<sup>81</sup> The cost is based upon the expenditure of 0.25 hours for each QPAM: (616 QPAMs \* 0.25 hours) = 154 hours in total. To calculate the equivalent cost, an hourly labor rate of \$55.23 is used for a clerical worker. Therefore, the total equivalent cost amounts to: (616 QPAMs \* 0.25 hours \* \$55.23) = \$8,505 (rounded).

<sup>82</sup> The burden is estimated assuming 16 QPAMs will need to send the notice: 16 QPAMs \* 0.5 hours of professional legal time = 8 hours to prepare all notices. The Department also assumes that 80 percent of all notices will be delivered by regular mail, requiring approximately two minutes of clerical time to prepare the notices for mailing, that is, (16 QPAMs \* 32 Plans \* 0.80 sent by paper) \* (2/60) hours of clerical time = 13.7 hours (rounded). The Department also estimates that the cost burden for preparing and mailing the notices will be

The Department believes the cost of sending this notice to the Department will be negligible since the QPAM will already prepare and send the notice to their client Plans and the notice is required to be sent electronically.

### Recordkeeping—Section VI(t)

The amendment would also add a new recordkeeping provision that would apply to all 616 QPAMs. Due to the fiduciary status of QPAMs and the existing regulatory environment in which they exist, the Department assumes that QPAMs already maintain many of the required records as part of their regular business practices. In addition, the recordkeeping requirements correspond to the six-year period in ERISA sections 107 and 413. The Department expects that the recordkeeping requirement would impose, on average, a burden of five minutes per QPAM. Therefore, the Department estimates that the overall hour burden of this recordkeeping requirement for all 616 QPAMs will be 51 hours with an equivalent cost of \$2,835.<sup>83</sup> The Department welcomes comments regarding the burden associated with the recordkeeping requirement.

If a QPAM refuses to disclose information to any of the parties listed in proposed Section VI(t) on the basis that such information is exempt from disclosure, the QPAM must provide a written notice advising the requestor of the reason for the refusal and that the Department may request such information. The Department does not have data on how often such a refusal is likely to occur; however, the Department believes such instances would be rare and impose negligible cost. The Department requests comments about whether this may happen more frequently and the possible costs.

### Requesting an Individual Exemption—Section I(k)

The receipt of an Ineligibility Notice due to Prohibited Misconduct could lead a QPAM to request an individual exemption. The burden for filing an application requesting an individual

approximately equal to \$279, that is,  $410 * ((2 * \$0.05) + \$0.58) = \$279$  (rounded). Therefore, the total cost associated with this requirement is  $(8 * \text{legal professional labor rate of } \$140.96) + (13.7 * \text{clerical labor rate } \$55.23) + \$279 = \$2,180$  (rounded). Any discrepancies in the calculations are a result of rounding.

<sup>83</sup> The burden is estimated for the 616 QPAMs as follows:  $(616 * (5/60) \text{ hours}) = 51 \text{ hours}$  (rounded). A labor rate of \$55.23 is used for clerical workers. These labor rates are applied in the following calculation:  $(616 * (5/60) \text{ hours} * \$55.23) = \$2,835$  (rounded). All labor rates reflect EBSA estimates.

exemption is included in the ICR for the Exemption Procedure Regulation, which has been approved under OMB Control Number 1210-0060. Instead of amending that ICR, the estimated burden for applications from QPAMs receiving an Ineligibility Notice due to Prohibited Misconduct is included here.<sup>84</sup> The Department estimates that applications for this type of individual exemption would be submitted by, on average, four entities, and require 12 hours of in-house legal professional time and 13 hours of in-house clerical time to prepare the documentation for the application that will be used by the outside counsel. The Department estimates that total labor costs (wages plus benefits plus overhead) for an in-house legal professional would average \$140.96 per hour and \$55.23 per hour for clerical staff.<sup>85</sup> Therefore, the Department estimates that preparing the documentation for the application would require 24 in-house legal professional hours (2 applications \* 12 hours) and 26 clerical hours (2 applications \* 13 hours) resulting in 50 total hours at an equivalent cost of approximately \$4,819.<sup>86</sup>

The Department expects that an exemption application related to QPAM ineligibility generally is prepared by or under the direction of attorneys with specialized knowledge of ERISA. The Department assumes that these same attorneys will also prepare and distribute the notice of the application to interested parties.

Applications for Section I(g) average approximately 25 pages. Due to the somewhat focused nature of developing an application related to Section I(g) ineligibility, the Department estimates that, on average, 25 hours of outside

<sup>84</sup> In three years when control number 1210-0060 is extended, the increase in requests for individual exemptions will be captured in the historical data used for the renewal and the burden going forward will be captured there.

<sup>85</sup> The Department estimates of labor costs by occupation reflect estimates of total compensation and overhead costs. Estimates for total compensation are based on mean hourly wages by occupation from the 2020 Occupational Employment Statistics and estimates of wages and salaries as a percentage of total compensation by occupation from the 2020 National Compensation Survey's Employee Cost for Employee Compensation. Estimates for overhead costs for services are imputed from the 2017 Service Annual Survey. To estimate overhead cost on an occupational basis, the Office of Research and Analysis allocates total industry overhead cost to unique occupations using a matrix of detailed occupational employment for each NAICS industry. All values are presented in 2020 dollars.

<sup>86</sup> The 24 in-house legal professional hours are estimated to cost \$3,383 (rounded), and the 26 in-house clerical hours are estimated to cost \$1,436 (rounded). This totals to \$4,819 (rounded). Any discrepancies in the calculations are a result of rounding.

legal professional time will be spent preparing the documentation for the application. The Department requests comment on the accuracy of this assumption. Total labor costs (wages plus benefits plus overhead) for outside legal professionals are estimated to average \$494.00 per hour.<sup>87</sup> Therefore, the Department estimates that preparing the applications will require 50 outside legal professional hours (2 applications \* 25 hours) with an equivalent cost of \$24,700. This estimate includes potential meetings with Department personnel as well as preparation of supplementary documents that are requested by the Department following some of these meetings.

For applications that reach the proposed exemption stage, the QPAM must prepare and distribute a notice to interested parties. If both applications result in a published proposed exemption each year, approximately 256 notices to interested parties will be distributed to the QPAMs' client Plans, and, if the proposed exemption is granted, an objective description also must be distributed to interested parties that describes the facts and circumstances upon which the misconduct is based.<sup>88</sup>

The distribution of the notices to interested persons is estimated to require about five minutes of in-house clerical time per notice. Therefore, distribution of notices will require approximately 21 hours at an equivalent cost of approximately \$1,178 ((5 minutes/60 minutes) \* 256 notices \* \$55.23 hourly clerical rate). The Department estimates that 256 notices to interested persons will be sent, and that 205 of the notices (80 percent) will be distributed via first class mail with a material cost of \$0.05 per page and distribution costs of \$0.58 per notice. The Department estimates that each notice will contain approximately 15 pages. The foregoing generates an estimated cost of approximately \$273.<sup>89</sup> The Department further estimates that approximately 51 (20 percent of the total number of notices) will be distributed electronically.

If the proposed exemption is ultimately granted, the requirement for each QPAM to send an objective description of the facts and circumstances upon which the misconduct is based is estimated to

require about five minutes of in-house clerical time per notice. Therefore, distribution of notices will require approximately 21 hours at an equivalent cost of approximately \$1,178 ((five minutes/60 minutes) \* 256 notices \* \$55.23 hourly clerical rate). This will result in an additional distribution cost for 256 notices of which 205 (80 percent) will be distributed via first class mail with a material cost of \$0.05 per page and distribution costs of \$0.58 per notice. The Department estimates that each notice will contain approximately five pages. This generates an estimated cost of approximately \$170.<sup>90</sup>

#### Additional Requirement for QPAMs Requesting an Individual Exemption

The Department proposed new Section I(k) which indicates that a QPAM that is ineligible or anticipates that it will become ineligible due to an actual or possible Criminal Conviction may apply for an individual exemption from the Department to continue to rely on the relief provided in this exemption for a longer period than the one-year winding-down period. In such an event, an applicant should review the Department's most recently granted individual exemptions involving Section I(g) ineligibility. If an applicant requests the Department to exclude any term or condition from its exemption that is included in a recently granted individual exemption, the applicant must include a detailed statement with its exemption application explaining the reason(s) why the proposed variation is necessary and in the interest and protective of affected Plans, their participants and beneficiaries, and IRA owners. Such applicants also should provide detailed information in their applications quantifying the specific cost or harms in dollar amounts, if any, Plans would suffer if a QPAM could not rely on the exemption after the winding-down period, including the specific dollar amounts of investment losses resulting from foregone investment opportunities and any evidence supporting the proposition that investment opportunities would only be available to Plans on less advantageous terms.

All 16 QPAMs would need to include this information if they submit an exemption application. The Department estimates that it will require three hours of outside legal professional time to review past individual exemptions and draft this addition to the individual exemption application and four hours of a financial professional time. The

estimated total hour burden of this requirement is thus estimated to total 12 hours of outside legal professional time and 16 hours of financial professional time, altogether resulting in an equivalent cost of \$8,575.<sup>91</sup> The Department seeks comments on these estimates and assumptions.

Based on the foregoing, the PRA burden associated with the information collection requirements contained in the QPAM Exemption are summarized below:

*Agency:* DOL–EBSA.

*Type of Review:* Revision.

*Title of Collection:* Plan Asset

Transactions Determined by Independent Qualified Professional Asset Managers under Prohibited Transaction Exemption 1984–14.

*OMB Control Number:* 1210–0128.

*Affected Public:* Business or other for-profits.

*Estimated Number of Respondents:* 616.

*Estimated Number of Annual Responses:* 2,404.<sup>92</sup>

*Frequency of Response:* Annual or as needed.

*Estimated Total Annual Burden Hours:* 3,241.<sup>93</sup>

<sup>91</sup> The burden is estimated assuming 16 QPAMs experience ineligibility that will need to include this in their individual exemption application. The average number of QPAMs covered by a single exemption is four. This amounts to: (4 applications \* 3 hours) = 12 hours of outside legal professional time, and (4 applications \* 4 hours) = 16 hours of a financial professional time. For an outside legal professional, a composite wage rate is used by employing a weighted average of the legal fees reported in the Laffey Matrix for Wage Rates (<http://www.laffeymatrix.com/see.html>, Year: 6/01/21–5/31/22): (\$381 \* 0.4) + (\$468 \* 0.35) + (\$676 \* 0.15) + (\$764 \* 0.1) = \$494. This amounts to: (4 applications \* 3 hours \* \$494 outside legal professional rate) = \$5,928. Additionally, at an hourly rate of \$165.45 for financial professional time, this cost is estimated as: (4 applications \* 4 hours \* \$165.45 financial professional rate) = \$2,647 (rounded). Therefore, the total estimated equivalent cost of this requirement amounts to: (\$5,928 + \$2,647) = \$8,575 (rounded).

<sup>92</sup> The Department estimates that in each year, 12 QPAMs will need to update their policies and procedures, 118 QPAMs will need to conduct an audit and issue an audit report, 16 ineligible QPAMs will need to send the notice to 32 plans each within 30 days after the Ineligibility Date, all 616 QPAMs will have report their reliance on the QPAM exemption, all 616 QPAMs will need to maintain the records, two applicants will request an individual exemption, 8 QPAMs will distribute notices to their 32 interested parties each for applications that reach the stage of publication, 8 QPAMs will distribute objective description of the facts to their 32 interested parties if the correspondent proposed exemption is ultimately granted, 16 QPAMs will need to add the review of recently granted exemptions, along with the potential costs to Plans quantification. This results in a three-year average of 2,404 = (12 + 118 + (16 \* 32) + 616 + 616 + 2 + (8 \* 32) + (8 \* 32) + 16) responses each year.

<sup>93</sup> To satisfy the conditions of the existing QPAM Exemption, the Department estimates that in each

<sup>87</sup> The outside legal professional labor rate is a composite weighted average of the Laffey Matrix for Wage Rates (<http://www.laffeymatrix.com/see.html>, Year: 6/01/21–5/31/22): (\$381 \* 0.4) + (\$468 \* 0.35) + (\$676 \* 0.15) + (\$764 \* 0.1) = \$494.

<sup>88</sup> 32 client Plans \* 8 QPAMs.

<sup>89</sup> Through regular mail this cost is estimated as 205 \* ((15 \* \$0.05) + \$0.58) = \$273 (rounded).

<sup>90</sup> Through regular mail this cost is estimated as 205 \* ((5 \* \$0.05) + \$0.58) = \$170 (rounded).

*Estimated Total Annual Burden Cost:* \$2,950,722.<sup>94</sup>

### Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)<sup>95</sup> imposes certain requirements with respect to federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act and are likely to have a significant economic impact on a substantial number of small entities.<sup>96</sup> Unless an agency determines that a proposal is not likely to have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires the agency to present an initial regulatory flexibility analysis (IRFA) of the proposed amendment.

The Department estimates that there are 616 potential QPAMs by approximating the total number of service providers who in 2019 provided “Investment Management” and “Named Fiduciary” services simultaneously to at least one plan as reported on Schedule C of the 2019 Form 5500, and whose NAICS codes start with the 2-digit 52, which corresponds to Finance and Insurance Institutions.<sup>97</sup> There are about 234,440 small firms that report a NAICS

subsequent year, there will be an hour burden of 3,241. This burden is calculated as follows: (12 hours for a fraction of QPAMs to update their policies and procedures internally) + (2,832 hours for QPAMs to provide needed materials for the audit) + (154 hours for ineligible QPAMs to prepare the notice to Plans) + (13.7 hours for ineligible QPAMs to send by regular mail the notice to Plans) + (50 hours for reporting the reliance on the QPAM Exemption) + (51 hours for recordkeeping) + (50 hours for applicant QPAMs to prepare the documentation for the application) + (50 hours for applicant QPAMs to prepare the documentation for the application with an outside legal professional) + (42 hours for the distribution of notices and objective descriptions for applications that reach the stage of publication) + (28 hours for QPAMs to include the addition for the individual exemption application) = 3,241 hours (rounded).

<sup>94</sup> To satisfy the conditions of the QPAM Exemption, the Department estimates that in each year, there will be a cost of \$2,950,722. This accounts for the cost of \$2,950,000 associated with hiring a firm to conduct the audit, \$279 for the ineligible QPAMs to send paper notices, \$273 for the distribution of notices for applications that reach the stage of publication via regular mail, and \$170 for the distribution of objective description of the facts and circumstances via regular mail if the correspondent proposed exemptions are granted. Any discrepancies in the calculations are a result of rounding.

<sup>95</sup> 5 U.S.C. 601 *et seq.* (1980).

<sup>96</sup> 5 U.S.C. 551 *et seq.* (1946).

<sup>97</sup> Using 2019 Form 5500 data, the Department counted in total 1390 service providers who provided services of “Investment Management” and “Named Fiduciary,” of which only 765 reported their business code. Out of these 765 providers, 339 reported their business code starting with the 2-digit NAICS code 52, yielding a ratio of 0.44 of potential QPAMs to other providers. Therefore, the Department estimates that there were  $0.44 * 1390 = 616$  potential QPAMs in 2019.

code of 52.<sup>98</sup> The Department does not know how many QPAMs fit the SBA’s small entity definition for the finance and insurance sector. However, if the Department assumes that all 616 potential QPAMs are small entities, they will comprise only 0.3 percent of small firms in this industry (616 possible QPAMs out of 234,440 small firms with NAICS code 52), which is not a substantial number of small entities.<sup>99</sup>

Based on the foregoing, pursuant to section 605(b) of RFA, the Acting Assistant Secretary of the Employee Benefits Security Administration hereby certifies that the proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities. The Department invites comments on this certification.

### Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 requires each federal agency to prepare a written statement assessing the effects of any federal mandate in a proposed or final agency rule that may result in an expenditure of \$100 million or more (adjusted annually for inflation with the base year 1995) in any one year by state, local, and tribal governments, in the aggregate, or by the private sector.<sup>100</sup> For purposes of the Unfunded Mandates Reform Act, as well as Executive Order 12875, this proposal does not include any federal mandate that the Department expects would result in such expenditures by state, local, or tribal governments, or the private sector.<sup>101</sup>

### Federalism Statement

Executive Order 13132 outlines fundamental principles of federalism, and requires adherence by federal agencies to specific criteria in the process of their formulation and implementation of policies that have “substantial direct effects” on the states, the relationship between the national government and states, or on the distribution of power and responsibilities among the various

<sup>98</sup> Source: Small Business Administration calculations of the number of firms reporting a NAICS code of 52 from the 2017 Statistics of U.S. Businesses.

<sup>99</sup> The Department also notes that the asset and equity thresholds were included in the QPAM Exemption as an important protection to ensure a QPAM is large enough to withstand the influence of other Plan fiduciaries and parties in interest. The exemption, by design, was not intended for smaller entities. Without updates to the size thresholds, this protective aspect of the exemption will continually erode due to inflation.

<sup>100</sup> 2 U.S.C. 1501 *et seq.* (1995).

<sup>101</sup> Enhancing the Intergovernmental Partnership, 58 FR 58093 (Oct. 28, 1993).

levels of government.<sup>102</sup> Federal agencies promulgating regulations that have federalism implications must consult with state and local officials and describe the extent of their consultation and the nature of the concerns of state and local officials in the preamble to the final rule.

In the Department’s view, this proposed amendment would not have federalism implications because it would not have direct effects on the states, on the relationship between the national government and the states, nor on the distribution of power and responsibilities among various levels of government. The Department welcomes input from affected states regarding this assessment.

### 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 ERISA section 408(a) and Code section 4975(c)(2) does not relieve a fiduciary, or other party in interest or disqualified person with respect to a Plan, from certain other provisions of ERISA and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of ERISA section 404 which require, among other things, that a fiduciary act prudently and discharge their duties respecting the Plan solely in the interests of the participants and beneficiaries of the Plan. Additionally, the fact that a transaction is the subject of an exemption does not affect the requirement of Code section 401(a) that the Plan must operate for the exclusive benefit of the employees of the employer maintaining the Plan and their beneficiaries;

(2) Before the amendment to the exemption may be granted under ERISA section 408(a) and Code section 4975(c)(2), the Department must find that it is administratively feasible, in the interests of Plans, their participants and beneficiaries, and IRA owners, and protective of the rights of participants and beneficiaries of the Plan and IRA owners;

(3) If granted, the amended exemption is applicable to a particular transaction only if the transaction satisfies the conditions specified in the exemption; and

(4) The proposed amendment, if granted, is supplemental to, and not in derogation of, any other provisions of ERISA and the Code, including statutory or administrative exemptions and

<sup>102</sup> Federalism, *supra* note 46.

transitional 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.

### Proposed Amendment

#### Section I—General Exemption

The restrictions of ERISA section 406(a)(1)(A) through (D) and the taxes imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(A) through (D), shall not apply to a transaction between a Party in Interest with respect to a Plan and an Investment Fund (as defined in Section VI(b)) in which the Plan has an interest, and which is managed by a Qualified Professional Asset Manager (QPAM) (as defined in Section VI(a)), if the following conditions are satisfied:

(a) At the Time of the Transaction (as defined in Section VI(i)), the Party in Interest, or its Affiliate (as defined in Section VI(c)), does not have the authority to—

(1) Appoint or terminate the QPAM as a manager of the Plan assets involved in the transaction, or

(2) Negotiate on behalf of the Plan the terms of the management agreement with the QPAM (including renewals or modifications thereof) with respect to the Plan assets involved in the transaction;

Notwithstanding the foregoing, in the case of an Investment Fund in which two or more unrelated Plans have an interest, a transaction with a Party in Interest with respect to a Plan will be deemed to satisfy the requirements of this Section I(a) if the assets of the Plan managed by the QPAM in the Investment Fund, when combined with the assets of other Plans established or maintained by the same employer (or Affiliate thereof described in Section VI(c)(1) below) or by the same employee organization, and managed in the same Investment Fund, represent less than ten (10) percent of the assets of the Investment Fund;

(b) The transaction is not described in—

(1) Prohibited Transaction Exemption 2006–16 (71 FR 63786; October 31, 2006) (relating to securities lending arrangements) (as amended or superseded),

(2) Prohibited Transaction Exemption 83–1 (48 FR 895; January 7, 1983) (relating to acquisitions by plans of interests in mortgage pools) (as amended or superseded), or

(3) Prohibited Transaction Exemption 82–87 (47 FR 21331; May 18, 1982) (relating to certain mortgage financing

arrangements) (as amended or superseded);

(c) The terms of the transaction, commitments, and investment of fund assets, and any associated negotiations on behalf of the Investment Fund are the sole responsibility of the QPAM. Either the QPAM, or (so long as the QPAM retains full fiduciary responsibility with respect to the transaction) a property manager acting in accordance with written guidelines established and administered by the QPAM, makes the decision on behalf of the Investment Fund to enter into the transaction, provided that the transaction is not part of an agreement, arrangement, or understanding designed to benefit a Party in Interest. The prohibited transaction relief provided under this exemption applies only in connection with an Investment Fund that is established primarily for investment purposes. No relief is provided under this exemption for any transaction that has been planned, negotiated, or initiated by a Party in Interest, in whole or in part, and presented to a QPAM for approval because the QPAM would not have sole responsibility with respect to the transaction as required by this Section I(c);

(d) The Party in Interest dealing with the Investment Fund is neither the QPAM nor a person Related to the QPAM;

(e) The transaction is not entered into with a Party in Interest with respect to any Plan whose assets managed by the QPAM, when combined with the assets of other Plans established or maintained by the same employer (or Affiliate thereof described in subsection VI(c)(1) below) or by the same employee organization, and managed by the QPAM, represent more than twenty (20) percent of the total client assets managed by the QPAM at the time of the transaction; and

(f) At the Time of the Transaction, and at the time of any subsequent renewal or modification thereof that requires the consent of the QPAM, the terms of the transaction are at least as favorable to the Investment Fund as the terms generally available in arm's length transactions between unrelated parties;

(g) *Integrity.*

(1) *Reporting reliance on the exemption to the Department.* Any QPAM that relies upon this exemption must notify the Department via email at [QPAM@dol.gov](mailto:QPAM@dol.gov). Each QPAM that relies upon the exemption must report the legal name of each business entity relying upon the exemption in the email to the Department and any name the QPAM may be operating under. This notification needs to be reported only

once unless there is a change to the legal name or operating name(s) of the QPAM relying upon the exemption or the QPAM no longer is relying on the exemptive relief provided in the exemption.

(2) *Written Management Agreement.* In its Written Management Agreement with clients (as required under Section VI(a)), the QPAM must include a statement that, in the event of a Criminal Conviction (described in subsection I(g)(3)(A)) or a Written Ineligibility Notice (described in subsection I(g)(3)(B)) and for at least a period of 10 years, the QPAM:

(A) agrees not to restrict the ability of a client Plan to terminate or withdraw from its arrangement with the QPAM;

(B) will not impose any fees, penalties, or charges on client Plans in connection with the process of terminating or withdrawing from an Investment Fund managed by the QPAM except for reasonable fees, appropriately disclosed in advance, that are specifically designed to: (i) prevent generally recognized abusive investment practices or (ii) 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 a like manner to all such investors;

(C) agrees to indemnify, hold harmless, and promptly restore actual losses to the client Plans for any damages that directly result to them from a violation of applicable laws, a breach of contract, or any claim arising out of the conduct that is the subject of a Criminal Conviction or Written Ineligibility Notice of the QPAM or an Affiliate (as defined in Section VI(d)) or an owner, direct or indirect, of a five (5) percent or more interest in the QPAM. Actual losses specifically include losses and costs arising from unwinding transactions with third parties and from transitioning Plan assets to an alternative asset manager as well as costs associated with any exposure to excise taxes under Code section 4975 as a result of a QPAM's inability to rely upon the relief in the QPAM Exemption; and

(D) will not employ or knowingly engage any individual that participated in the conduct that is the subject of a Criminal Conviction or Written Ineligibility Notice regardless of whether the individual is separately convicted in connection with the criminal conduct.

(3) *Ineligibility due to a Criminal Conviction or Written Ineligibility Notice.* Subject to the Ineligibility Date

provision set forth in Section I(h), a QPAM is ineligible to rely on this exemption for 10 years following:

(A) A Criminal Conviction, as defined in Section VI(r), of the QPAM or any Affiliate thereof (as defined in Section VI(d))—or any owner, direct or indirect, of a five (5) percent or more interest in the QPAM; or

(B) Receipt by the QPAM or any Affiliate thereof (as defined in Section VI(d))—or any owner, direct or indirect, of a five (5) percent or more interest in the QPAM of a Written Ineligibility Notice issued by the Department for participating in Prohibited Misconduct. For purposes of this exemption, “participating in” refers not only to active participation in the Prohibited Misconduct, but also to knowing approval of the conduct, or knowledge of such conduct without taking active steps to prohibit such conduct, including reporting the conduct to the appropriate compliance personnel.

(h) *Ineligibility Date.* A QPAM shall become ineligible:

(1) as of the “Conviction Date,” which is the date of the judgment of the trial court (or the date of the judgment of any court in a foreign jurisdiction that is the equivalent of a U.S. federal or state trial court), regardless of whether that judgment is appealed; or

(2) the date of the written “Ineligibility Notice” described in Section I(i), below. A person will become eligible to rely on this exemption again only upon a subsequent judgment reversing such person’s conviction or the expiration of the 10-year ineligibility period.

(i) *Written Ineligibility Notice—Warning and Opportunity to be Heard.* Before issuing a Written Ineligibility Notice, the Department will issue a written warning to the QPAM identifying specific conduct implicating subsection I(g)(3)(B). The Department will provide the QPAM with the opportunity to be heard, in person (including by phone or videoconference), or in writing, or a combination, before the Department makes a decision about whether to issue the Written Ineligibility Notice. The QPAM will have 20 days from the date of the warning letter to respond with a request for a conference. If a response is not received by the Department within 20 days after the date of the warning letter, the Department will issue a written Ineligibility Notice. The opportunity to be heard will be limited to one conference, which will be scheduled within 30 days of the QPAM’s response to the written warning, unless the Department determines in its sole discretion to

allow additional conferences. The written Ineligibility Notice will articulate the basis for the Department’s determination that the conduct described in subsection I(g)(3)(B) has occurred.

(j) *One-Year Winding-Down Period Due to Ineligibility.* Any QPAM that becomes ineligible under subsection I(g)(3) must engage in a winding-down period during which relief is available under this exemption only for the QPAM’s client Plans that had a pre-existing Written Management Agreement required under subsection I(g)(2) above on the Ineligibility Date. Relief during the winding-down period is available for a period of one year after the Ineligibility Date and the QPAM must fully comply with each condition of the exemption during the one-year period. A QPAM must ensure that it manages plan assets prudently and loyally during the winding-down period. During the winding-down period, the QPAM must comply with the following additional conditions:

(1) Within 30 days after the Ineligibility Date the QPAM must provide notice to the Department at [QPAM@dol.gov](mailto:QPAM@dol.gov) and each of its client Plans stating:

(A) its failure to satisfy subsection I(g)(3) and the resulting initiation of this one-year winding-down period;

(B) that in accordance with subsections I(g)(2)(A) and (B), it will not restrict the ability of its client Plans to terminate or withdraw from its arrangement with the QPAM nor impose fees, penalties, or charges on the client Plan in connection with terminating or withdrawing from a QPAM-managed Investment Fund; and agrees to indemnify, hold harmless, and promptly restore losses to the client Plan in accordance with subsection I(g)(2)(C);

(C) an objective description of the facts and circumstances upon which the Criminal Conviction or Written Ineligibility Notice is based, written with sufficient detail to fully inform the client Plan’s fiduciary of the nature and severity of the conduct so that such fiduciary can satisfy its fiduciary duties of prudence and loyalty with respect to hiring, monitoring, evaluating, and retaining the QPAM in a non-QPAM capacity;

(2) No later than the Ineligibility Date under Section I(h), the QPAM must not employ or knowingly engage any individual that participated in the conduct that is the subject of a Criminal Conviction or Written Ineligibility Notice causing ineligibility of the QPAM under subsection I(g)(3);

(3) The QPAM may not engage in new transactions after the Ineligibility Date

in reliance on this exemption for existing client Plans; and

(4) After the one-year winding-down period expires, the entity may not rely on the relief provided in this exemption until the expiration of the 10-year ineligibility period unless it obtains an individual exemption permitting it to continue relying upon this exemption.

(k) *Requests for an Individual Exemption.* A QPAM that is ineligible or anticipates that it will become ineligible due to an actual or possible Criminal Conviction may apply for an individual exemption from the Department to continue to rely on the relief provided in this exemption for a longer period than the one-year winding-down period. An applicant should review the Department’s most recently granted individual exemptions involving Section I(g) ineligibility with the expectation that similar conditions will be required if the Department proposes and grants an exemption. If an applicant requests the Department to exclude any term or condition from its exemption that is included in a recently granted individual exemption, the applicant must include a detailed statement with its exemption application explaining the reason(s) why the proposed variation is necessary and in the interest and protective of affected Plans, their participants and beneficiaries, and individuals for whose benefit a Plan described in Code section 4975(e)(1)(B) or (C) is established (IRA owners). The Department will review such requests consist with the requirements of ERISA section 408(a) and Code section 4975(c)(2). Such applicants also should provide detailed information in their applications quantifying the specific cost or harms in dollars amounts, if any, their client Plans would suffer if the QPAM could not rely on the exemption after the winding-down period, including the specific dollar amounts of investment losses resulting from foregone investment opportunities and any evidence supporting the proposition that investment opportunities would be available to client Plans on less advantageous terms. An applicant should not construe the Department’s acceptance of an individual exemption application as a guarantee that the Department will grant an individual exemption. A QPAM that submits an individual exemption application must ensure that it manages Plan assets prudently and loyally during the winding-down period.

## Section II—Specific Exemption for Employers

The restrictions of ERISA sections 406(a), 406(b)(1), and 407(a) and the

taxes imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(A) through (E), shall not apply to:

(a) The sale, leasing, or servicing of Goods or the furnishing of services, to an Investment Fund managed by a QPAM by a Party in Interest with respect to a Plan having an interest in the fund, if—

(1) The Party in Interest is an employer any of whose employees are covered by the Plan or is a person who is a Party in Interest by virtue of a relationship to such an employer (described in Section VI(c) below),

(2) The transaction is necessary for the administration or management of the Investment Fund,

(3) The transaction takes place in the ordinary course of a business engaged in by the Party in Interest with the general public,

(4) The amount attributable in any taxable year of the Party in Interest to transactions engaged in with an Investment Fund pursuant to this Section II(a) does not exceed one (1) percent of the gross receipts derived from all sources for the prior taxable year of the Party in Interest, and

(5) The requirements of Sections I(c) through (g) above are satisfied with respect to the transaction.

(b) The leasing of office or commercial space by an Investment Fund maintained by a QPAM to a Party in Interest with respect to a Plan having an interest in the Investment Fund, if—

(1) The Party in Interest is an employer any of whose employees are covered by the Plan or is a person who is a Party in Interest by virtue of a relationship to such an employer (described in Section VI(c) below);

(2) No commission or other fee is paid by the Investment Fund to the QPAM or to the employer, or to an Affiliate of the QPAM or employer (as defined in Section VI(c) below), in connection with the transaction;

(3) Any unit of space leased to the Party in Interest by the Investment Fund is suitable (or adaptable without excessive cost) for use by different tenants;

(4) The amount of space covered by the lease does not exceed fifteen (15) percent of the rentable space of the office building, integrated office park, or of the commercial center (if the lease does not pertain to office space);

(5) In the case of a Plan that is not an eligible individual account plan (as defined in ERISA section 407(d)(3)), immediately after the transaction is entered into, the aggregate fair market value of employer real property and employer securities held by the

Investment Funds of the QPAM in which the Plan has an interest does not exceed ten (10) percent of the fair market value of the assets of the Plan held in those Investment Funds. In determining the aggregate fair market value of employer real property and employer securities as described herein, a Plan shall be considered to own the same proportionate undivided interest in each asset of the Investment Fund or funds as its proportionate interest in the total assets of the Investment Fund(s). For purposes of this requirement, the term “employer real property” means real property leased to, and the term “employer securities” means securities issued by an employer any of whose employees are covered by the Plan or a Party in Interest of the Plan by reason of a relationship to the employer described in ERISA section 3(14)(E) or (G); and

(6) The requirements of Sections I(c) through (g) above are satisfied with respect to the transaction.

### Section III—Specific Lease Exemption for QPAMs

The restrictions of ERISA section 406(a)(1)(A) through (D), 406(b)(1) and (2), and the taxes imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(A) through (E), shall not apply to the leasing of office or commercial space by an Investment Fund managed by a QPAM to the QPAM, a person who is a Party in Interest of a Plan by virtue of a relationship to such QPAM described in ERISA section 3(14)(G), (H), or (I), or a person not eligible for the General Exemption of Section I above by reason of Section I(a), if—

(a) The amount of space covered by the lease does not exceed the greater of 7,500 square feet or one (1) percent of the rentable space of the office building, integrated office park, or of the commercial center in which the Investment Fund has the investment;

(b) The unit of space subject to the lease is suitable (or adaptable without excessive cost) for use by different tenants;

(c) At the Time of the Transaction, and at the time of any subsequent renewal or modification thereof that requires the consent of the QPAM, the terms of the transaction are not more favorable to the lessee than the terms generally available in arm’s length transactions between unrelated parties; and

(d) No commission or other fee is paid by the Investment Fund to the QPAM, any person possessing the disqualifying powers described in Section I(a), or any Affiliate of such persons (as defined in

Section VI(c) below), in connection with the transaction.

### Section IV—Transactions Involving Places of Public Accommodation

The restrictions of ERISA section 406(a)(1)(A) through (D) and 406(b)(1) and (2) and the taxes imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(A) through (E), shall not apply to the furnishing of services and facilities (and Goods incidental thereto) by a place of public accommodation owned by an Investment Fund managed by a QPAM to a Party in Interest with respect to a Plan having an interest in the Investment Fund, if the services and facilities (and incidental Goods) are furnished on a comparable basis to the general public.

### Section V—Specific Exemption Involving QPAM-Sponsored Plans

The relief in Sections I, III, or IV above from the applicable restrictions of ERISA section 406(a), section 406(b)(1) and (2), and the taxes imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(A) through (E), shall apply to a transaction involving the assets of a Plan sponsored by the QPAM or an Affiliate (as defined in Section VI(c)) of the QPAM if:

(a) The QPAM has discretionary authority or control with respect to the Plan assets involved in the transaction;

(b) The QPAM adopts Written Policies and Procedures that are designed to ensure compliance with the conditions of the exemption;

(c) An independent auditor, who has appropriate technical training or experience and proficiency with ERISA’s fiduciary responsibility provisions and so represents in writing, conducts an Exemption Audit on an annual basis. Following completion of the Exemption Audit, the auditor shall issue a written report to the Plan presenting its specific findings regarding the level of compliance with: (1) the Written Policies and Procedures adopted by the QPAM in accordance with Section V(b) above, and (2) the objective requirements of this exemption. The written report shall also contain the auditor’s overall opinion regarding whether the QPAM’s program complied with: (1) the Written Policies and Procedures adopted by the QPAM, and (2) the objective requirements of the exemption. The Exemption Audit and the written report must be completed within six months following the end of the year to which the audit relates; and

(d) The transaction meets the applicable requirements set forth in Sections I, III, or IV above.

## Section VI—Definitions and General Rules

For purposes of this exemption:

(a) The term “Qualified Professional Asset Manager” or “QPAM” means an Independent Fiduciary which is—

(1) A bank, as defined in section 202(a)(2) of the Investment Advisers Act of 1940 that has the power to manage, acquire or dispose of assets of a Plan, which bank has, as of the last day of its most recent fiscal year, Equity Capital in excess of \$2,720,000; or

(2) A savings and loan association, the accounts of which are insured by the Federal Deposit Insurance Corporation that has made application for and been granted trust powers to manage, acquire or dispose of assets of a Plan by a State or Federal authority having supervision over savings and loan associations, which savings and loan association has, as of the last day of its most recent fiscal year, Equity Capital or Net Worth in excess of \$2,720,000; or

(3) An insurance company which is qualified under the laws of more than one State to manage, acquire, or dispose of any assets of a Plan, which company has, as of the last day of its most recent fiscal year, Net Worth in excess of \$2,720,000 and which is subject to supervision and examination by a State authority having supervision over insurance companies; or

(4) An investment adviser registered under the Investment Advisers Act of 1940 that has total client assets under its management and control in excess of \$135,870,000 as of the last day of its most recent fiscal year, and either (A) Shareholders’ or Partners’ Equity in excess of \$2,040,000, or (B) payment of all of its liabilities including any liabilities that may arise by reason of a breach or violation of a duty described in ERISA sections 404 and 406 is unconditionally guaranteed by—(i) A person with a relationship to such investment adviser described in subsection VI(c)(1) below if the investment adviser and such Affiliate have Shareholders’ or Partners’ Equity, in the aggregate, in excess of \$2,040,000; or (ii) A person described in (a)(1), (a)(2) or (a)(3) of Section VI above; or (iii) A broker-dealer registered under the Securities Exchange Act of 1934 that has, as of the last day of its most recent fiscal year, Net Worth in excess of \$2,040,000;

Provided that such bank, savings and loan association, insurance company, or investment adviser has acknowledged in a “Written Management Agreement” that it is a fiduciary with respect to each Plan that has retained the QPAM and which complies with subsection I(g)(2).

(5) By publication through notice in the **Federal Register**, the Department will make subsequent annual adjustments for inflation to the Equity Capital, Net Worth, and asset management thresholds in subsection VI(a)(1) through (4), rounded to the nearest \$10,000, no later than January 31 of each year.

(b) An “Investment Fund” includes single customer and pooled separate accounts maintained by an insurance company, individual trusts and common, collective or group trusts maintained by a bank, and any other account or fund to the extent that the disposition of its assets (whether or not in the custody of the QPAM) is subject to the discretionary authority of the QPAM.

(c) For purposes of Section I(a) and Sections II and V above, an “Affiliate” of a person means—

(1) Any person directly or indirectly, through one or more intermediaries, Controlling, Controlled by, or under Common Control with the person;

(2) Any corporation, partnership, trust or unincorporated enterprise of which such person is an officer, director, ten (10) percent or more partner (except with respect to Section II this figure shall be five (5) percent), or highly compensated employee as defined in Code section 4975(e)(2)(H) (but only if the employer of such employee is the Plan sponsor); and

(3) Any director of the person or any employee of the person who is a highly compensated employee, as defined in Code section 4975(e)(2)(H), or who has direct or indirect authority, responsibility or control regarding the custody, management or disposition of Plan assets involved in the transaction. A named fiduciary (within the meaning of ERISA section 402(a)(2)) of a Plan with respect to the Plan assets involved in the transaction and an employer any of whose employees are covered by the Plan will also be considered Affiliates with respect to each other for purposes of Section I(a) above if such employer or an Affiliate of such employer has the authority, alone or shared with others, to appoint or terminate the named fiduciary or otherwise negotiate the terms of the named fiduciary’s employment agreement.

(d) For purposes of Section I(g) above an “Affiliate” of a person means—

(1) Any person directly or indirectly through one or more intermediaries, Controlling, Controlled by, or under Common Control with the person;

(2) Any director of, Relative of, or partner in, any such person;

(3) Any corporation, partnership, trust or unincorporated enterprise of which

such person is an officer, director, or a five (5) percent or more partner or owner; and

(4) Any employee or officer of the person who—

(A) Is a highly compensated employee (as defined in Code section 4975(e)(2)(H)) or officer (earning ten (10) percent or more of the yearly wages of such person); or

(B) Has direct or indirect authority, responsibility, or control regarding the custody, management or disposition of Plan assets.

(e) The terms “Controlling,” “Controlled by,” “under Common Control with,” and “Controls” means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(f) The term “Party in Interest” means a person described in ERISA section 3(14) and includes a “disqualified person,” as defined in Code section 4975(e)(2).

(g) The term “Relative” means a relative as that term is defined in ERISA section 3(15), or a brother, a sister, or a spouse of a brother or sister.

(h) A QPAM is “Related” to a Party in Interest for purposes of Section I(d) above if, as of the last day of its most recent calendar quarter: (i) The QPAM owns a ten (10) percent or more Interest in the Party in Interest; (ii) a person Controlling, or Controlled by, the QPAM owns a twenty (20) percent or more Interest in the Party in Interest; (iii) the Party in Interest owns a ten (10) percent or more Interest in the QPAM; or (iv) a person Controlling, or Controlled by, the Party in Interest owns a twenty (20) percent or more Interest in the QPAM. Notwithstanding the foregoing, a Party in Interest is “Related” to a QPAM if: (i) A person Controlling, or Controlled by, the Party in Interest has an ownership Interest that is less than twenty (20) percent but greater than ten (10) percent in the QPAM and such person exercises Control over the management or policies of the QPAM by reason of its ownership Interest; (ii) a person Controlling, or Controlled by, the QPAM has an ownership Interest that is less than twenty (20) percent but greater than ten (10) percent in the Party in Interest and such person exercises Control over the management or policies of the Party in Interest by reason of its ownership Interest. For purposes of this definition:

(1) The term “Interest” means with respect to ownership of an entity—

(A) The combined voting power of all classes of stock entitled to vote or the total value of the shares of all classes of stock of the entity if the entity is a corporation,

(B) The capital interest or the profits interest of the entity if the entity is a partnership, or

(C) The beneficial interest of the entity if the entity is a trust or unincorporated enterprise; and

(2) A person is considered to own an "Interest" if, other than in a fiduciary capacity, the person has or shares the authority—

(A) To exercise any voting rights or to direct some other person to exercise the voting rights relating to such interest, or

(B) To dispose or to direct the disposition of such interest.

(i) "At the Time of the Transaction" means the date upon which the transaction is entered into. In addition, in the case of a transaction that is continuing, the transaction shall be deemed to occur until it is terminated. If any transaction is entered into on or after December 21, 1982, or a renewal that requires the consent of the QPAM occurs on or after December 21, 1982, and the requirements of this exemption are satisfied at the time the transaction is entered into or renewed, respectively, the requirements will continue to be satisfied thereafter with respect to the transaction. Notwithstanding the foregoing, this exemption shall cease to apply to a transaction exempt by virtue of Section I or Section II above at such time as the percentage requirement contained in Section I(e) is exceeded, unless no portion of such excess results from an increase in the assets transferred for discretionary management to a QPAM. For this purpose, assets transferred do not include the reinvestment of earnings attributable to those Plan assets already under the discretionary management of the QPAM. Nothing in this paragraph shall be construed as exempting a transaction entered into by an Investment Fund which becomes a transaction described in ERISA section 406 or Code section 4975 while the transaction is continuing, unless the conditions of this exemption were met either at the time the transaction was entered into or at the time the transaction would have become prohibited but for this exemption.

(j) The term "Goods" includes all things which are movable or which are fixtures used by an Investment Fund but does not include securities, commodities, commodities futures, money, documents, instruments, accounts, chattel paper, contract rights, and any other property, tangible or intangible, which, under the relevant facts and circumstances, is held primarily for investment.

(k) For purposes of subsection VI(a)(1) and (2) above, the term "Equity Capital"

means stock (common and preferred), surplus, undivided profits, contingency reserves, and other capital reserves.

(l) For purposes of subsection VI(a)(2), (3), and (4) above, the term "Net Worth" means capital, paid-in and contributed surplus, unassigned surplus, contingency reserves, group contingency reserves, and special reserves.

(m) For purposes of subsection VI(a)(4) above, the term "Shareholders' or Partners' Equity" means the equity shown in the most recent balance sheet prepared within the two years immediately preceding a transaction undertaken pursuant to this exemption, in accordance with generally accepted accounting principles.

(n) The term "Plan" refers to an employee benefit plan described in ERISA section 3(3) and/or a plan described in Code section 4975(e)(1).

(o) For purposes of Section VI(a) above, the term "Independent Fiduciary" means a fiduciary managing the assets of a Plan in an Investment Fund that is independent of and unrelated to the employer sponsoring such Plan. For purposes of this exemption, the fiduciary will not be deemed to be independent of and unrelated to the employer sponsoring the Plan if such fiduciary directly or indirectly Controls, is Controlled by, or is under Common Control with the employer sponsoring the Plan. Notwithstanding the foregoing: (1) for the period from December 21, 1982, through November 3, 2010, a QPAM managing the assets of a Plan in an Investment Fund will not fail to satisfy the requirements of this section solely because such fiduciary is the employer sponsoring the Plan or directly or indirectly Controls, is Controlled by, or is under Common Control with the employer sponsoring the Plan; and (2) effective after November 3, 2010 a QPAM acting as a manager for its own Plan or the Plan of an Affiliate (as defined in subsection VI(c)(1) above) will be deemed to satisfy the requirements of this section if the requirements of Section V above are met.

(p) An "Exemption Audit" of a Plan must consist of the following:

(1) A review of the Written Policies and Procedures adopted by the QPAM pursuant to Section V(b) above for consistency with each of the objective requirements of this exemption (as described in Section VI(q) below);

(2) A test of a representative sample of the Plan's transactions during the audit period that is sufficient in size and nature to afford the auditor a reasonable basis:

(A) To make specific findings regarding whether the QPAM is in compliance with (i) the Written Policies and Procedures adopted by the QPAM pursuant to Section VI(q) below and (ii) the objective requirements of this exemption, and

(B) To render an overall opinion regarding the level of compliance of the QPAM's program with subsection VI(p)(2)(A)(i) and (ii) above;

(3) A determination as to whether the QPAM has satisfied the definition of a QPAM under the exemption; and

(4) Issuance of a written report describing the steps performed by the auditor during the course of its review and the auditor's findings.

(q) For purposes of Section VI(p), the Written Policies and Procedures must describe the following objective requirements of this exemption and the steps adopted by the QPAM to ensure compliance with each of these requirements:

(1) The definition of a QPAM in Section VI(a);

(2) The requirement of Sections V(a) and I(c) regarding the discretionary authority or control of the QPAM with respect to the Plan assets involved in the transaction, in negotiating the terms of the transaction and with respect to the decision on behalf of the Investment Fund to enter into the transaction;

(3) For a transaction described in Section I above:

(A) That the transaction is not entered into with any person who is excluded from relief under Section I(a), Section I(d), or Section I(e) above;

(B) That the transaction is not described in any of the class exemptions listed in Section I(b) above;

(4) If the transaction is described in Section III above:

(A) That the amount of space covered by the lease does not exceed the limitations described in Section III(a) above, and

(B) That no commission or other fee is paid by the Investment Fund as described in Section III(d) above.

(r) "Criminal Conviction" means the person or entity:

(1) is convicted in a U.S. federal or state court or released from imprisonment, whichever is later, as a result of any felony involving abuse or misuse of such person's Plan position or employment, or position or employment with a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary; income tax evasion; any felony involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment,

embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element; or a crime identified in ERISA section 411; or

(2) is convicted by a foreign court of competent jurisdiction as a result of a crime, however denominated by the laws of the relevant foreign government, that is substantially equivalent to an offense described in (1), above.

(s) "Prohibited Misconduct" means:

(1) any conduct that forms the basis for a non-prosecution or deferred prosecution agreement that, if successfully prosecuted, would have constituted a crime described in Section VI(r);

(2) any conduct that forms the basis for an agreement, however denominated by the laws of the relevant foreign government, that is substantially equivalent to a non-prosecution agreement or deferred prosecution agreement described in (1);

(3) engaging in a systematic pattern or practice of violating the conditions of this exemption in connection with otherwise non-exempt prohibited transactions;

(4) intentionally violating the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; or

(5) providing materially misleading information to the Department in connection with the conditions of the exemption.

(t) The QPAM maintains the records necessary to enable the persons described in subsection (t)(2) below to determine whether the conditions of

this exemption have been met with respect to a transaction for a period of six years from the date of the transaction in a manner that is reasonably accessible for examination. No prohibited transaction will be considered to have occurred solely on the basis of the unavailability of such records if they are lost or destroyed due to circumstances beyond the control of the QPAM before the end of the six-year period.

(1) No party, other than the QPAM responsible for complying with this Section VI(r), will be subject to the civil penalty that may be assessed under ERISA section 502(i) or the excise tax imposed by Code section 4975(a) and (b), if applicable, if the records are not maintained or available for examination as required by this Section VI(t) below.

(2) Except as provided in subsection (3) or precluded by 12 U.S.C. 484 (regarding limitations on visitatorial powers for national banks), and notwithstanding any provisions of ERISA section 504(a)(2) and (b), the records are reasonably available at their customary location during normal business hours for examination by:

(A) Any authorized employee of the Department or the Internal Revenue Service or another state or federal regulator,

(B) Any fiduciary of a Plan invested in an Investment Fund managed by the QPAM,

(C) Any contributing employer and any employee organization whose members are covered by a Plan invested in an Investment Fund managed by the QPAM, or

(D) Any participant or beneficiary of a Plan invested in an Investment Fund managed by the QPAM.

(3) None of the persons described in subsection (2)(B) through (D) above are authorized to examine records regarding an Investment Fund that they are not invested in, privileged trade secrets or privileged commercial or financial information of the QPAM, or information identifying other individuals.

(4) Should the QPAM refuse to disclose information to a person described in subsection (2)(A) through (D) above on the basis that the information is exempt from disclosure, the QPAM must provide a written notice advising the requestor of the reasons for the refusal and that the Department may request such information by the close of the thirtieth (30th) day following the request.

(5) A QPAM's failure to maintain the records necessary to determine whether the conditions of this exemption have been met will result in the loss of the relief provided under this exemption only for the transaction or transactions for which such records are missing or have not been maintained. Such failure does not affect the relief for other transactions if the QPAM maintains required records for such transactions in compliance with this Section VI(t).

Signed at Washington, DC, this 18th day of July, 2022.

**Ali Khawar,**

*Acting Assistant Secretary, Employee Benefits Security Administration, U.S. Department of Labor.*

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