DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2570

RIN 1210–AC05

Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications

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

ACTION: Final rule.

SUMMARY: The Department of Labor (the Department) is adopting amendments to its existing procedure governing the filing and processing of applications for administrative exemptions from the prohibited transaction provisions of the Employee Retirement Income Security Act of 1974 (ERISA), the Internal Revenue Code of 1986 (the Code), and the Federal Employees' Retirement System Act of 1986 (FERSA) (the Amendments). The Secretary of Labor (the Secretary) is authorized to grant exemptions from the prohibited transaction provisions of ERISA, the Code, and FERSA and to establish an exemption procedure to provide for such relief. The Amendments update and supersede the Department's existing prohibited transaction exemption procedures.

DATES: The amendments in this rule are effective April 8, 2024.

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Customer Service Information: Individuals interested in obtaining information from the Department concerning ERISA and employee benefit plans may call the Employee Benefits Security Administration's Toll-Free Hotline, at 1–866–444–EBSA (3272) or visit the Department's website (*www.dol.gov/ebsa*).

SUPPLEMENTARY INFORMATION:

Background

Part 4 of Title I of ERISA establishes an extensive framework of standards and rules that govern the conduct of ERISA plan fiduciaries; collectively, these rules are designed to safeguard the integrity of employee benefit plans. As part of this structure, ERISA section 406(a) generally prohibits a plan fiduciary from causing the plan to engage in a variety of transactions with certain related parties, unless a statutory or administrative exemption applies to the transaction. These related parties (which include plan fiduciaries, sponsoring employers, unions, service providers, and other persons who may be in a position to exercise improper influence over a plan) are defined as ''parties in interest'' in ERISA section 3(14). ERISA section 406(b) generally prohibits a plan fiduciary from (1) dealing with the assets of a plan in their own interest or for their account, (2) acting in any transaction involving the plan on behalf of a party whose interests are adverse to those of the plan or its participants and beneficiaries, or (3) receiving any consideration for their own personal account from a party dealing with the plan in connection with a transaction involving plan assets, unless an exemption specifically applies to such conduct. To supplement these provisions, ERISA sections 406(a)(1)(E) and 407(a) impose restrictions on the nature and extent of plan investments in assets such as ''employer securities'' (as defined in ERISA section 407(d)(1)) and ''employer real property'' (as defined in ERISA section 407(d)(2)). The transactions prohibited under ERISA sections 406 and 407 are referred to as ''prohibited transactions.''

Most of the transactions prohibited by ERISA section 406 are likewise prohibited by Code section 4975, which imposes an excise tax on those transactions to be paid by each ''disqualified person'' (defined in Code section 4975(e)(2) in virtually the same manner as the term ''party in interest'' is defined in ERISA section 3(14)) who engages in the prohibited transactions.

Prohibited Transaction Exemptions

Both ERISA and the Code contain various statutory exemptions from the prohibited transaction rules. These statutory exemptions were enacted by Congress to prevent the disruption of a number of customary business practices involving employee benefit plans, parties in interest, and fiduciaries. The statutory exemptions afford relief for transactions such as loans to participants and stock ownership plans, the provision of services necessary for the operation of a plan, certain investment advice transactions involving individual account plan participants and beneficiaries, and the investment of plan assets into deposits in certain financial institutions regulated by state or Federal agencies.

In addition to the statutory exemptions, ERISA section 408(a) authorizes the Secretary to grant administrative exemptions from the restrictions of ERISA sections 406 and 407(a) in instances where the Secretary makes a finding on the record that relief is (1) administratively feasible, (2) in the interests of the plan and its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries of such plan. Similarly, Code section 4975(c)(2) authorizes issuance of administrative exemptions from the prohibitions of Code section 4975(c)(1) subject to the same findings. Before an exemption is granted, notice of its pendency must be published in the **Federal Register** and interested persons must be given the opportunity to comment on the proposed exemption. If the exemption transaction involves potential fiduciary self-dealing or conflicts of interest, an opportunity for a public hearing must be provided.

ERISA section 408(a) authorizes the Secretary to grant administrative exemptions on either an individual or a class basis. Class exemptions provide general relief from the restrictions of ERISA, the Code, and FERSA to those parties in interest who engage in the categories of transactions described in the exemption and who also satisfy the conditions stipulated by the exemption. Persons who are in conformity with all the requirements of a class exemption do not ordinarily decide to seek an individual exemption for the same transaction from the Department. Individual exemptions, by contrast, involve case-by-case determinations as to whether the specific facts represented by an applicant concerning an exemption transaction as well as the conditions applicable to such a transaction support a finding by the Department that the requirements for relief from the prohibited transaction provisions of ERISA, the Code, and FERSA have been satisfied in a particular instance. While the vast majority of administrative exemptions issued by the Department are the product of requests for relief from individual applicants or the broader employee benefits community, ERISA section 408(a) also authorizes the Department to initiate administrative exemptions on its own motion.

In considering individual exemption requests from applicants, the Department exercises its authority under ERISA section 408(a) by carefully examining the decision-making process used by a plan's fiduciaries with respect to an exemption transaction, and the safeguards that are established against conflicts of interest. In general, the Department does not make determinations concerning the appropriateness or prudence of the investment proposals submitted by

exemption applicants. However, the Department ordinarily will not favorably consider an exemption request if the Department believes that the proposed transactions are inconsistent with the fiduciary responsibility provisions of ERISA sections 403 and 404. To protect plans and their participants, the Department requires an exemption transaction to be designed to minimize the potential for conflicts of interest and self-dealing. Also, exemptions generally preclude unilateral action by the applicant that could disadvantage the plan.

Prohibited Transaction Exemption Procedure

ERISA section 408(a) and Code section 4975(c)(2) direct the Secretary and the Secretary of the Treasury (the Secretaries), respectively, to establish procedures for granting administrative exemptions. In connection with this directive, ERISA section 3003(b) directs the Secretaries to consult and coordinate with each other with respect to the establishment of rules applicable to the granting of exemptions from the prohibited transaction restrictions of ERISA and the Code. Further, under ERISA section 3004, the Secretaries are authorized to develop rules on a joint basis that are appropriate for the efficient administration of ERISA.

Pursuant to these statutory provisions, the Secretaries jointly issued an exemption procedure on April 28, 1975 (ERISA Procedure 75–1, 40 FR 18471, also issued as Rev. Proc. 75–26, 1975–1 C.B. 722). Under this procedure, a person seeking an exemption under both ERISA section 408(a) and Code section 4975 was obliged to file an exemption application with both the Internal Revenue Service (IRS) and the Department. However, requiring applicants to seek exemptive relief for the same transaction from two separate Federal departments soon proved administratively cumbersome.

To resolve this problem, section 102 of Presidential Reorganization Plan No. 4 of 1978 (3 CFR, 1978 Comp., p. 332), reprinted in 5 U.S.C. app. at 672 (2006), and in 92 Stat. 3790 (1978)), effective on December 31, 1978, transferred to the Secretary the authority of the Secretary of the Treasury to issue exemptions under Code section 4975, with certain enumerated exceptions. As a result, Congress gave the Secretary authority under Code section 4975(c)(2) and ERISA section 408(a) to issue individual and class administrative exemptions from the prohibited transaction restrictions of ERISA and the Code. The Secretary has delegated this authority, along with most of the Secretary's other responsibilities under ERISA, to the Assistant Secretary of Labor for the Employee Benefits Security Administration.[1]

FERSA also contains prohibited transaction rules similar to those found in ERISA and the Code that are applicable to parties in interest with respect to the Federal Thrift Savings Fund established by FERSA. The Secretary is directed under FERSA to prescribe, by regulation, a procedure for granting administrative exemptions from certain of those prohibited transactions.[2] The Secretary also delegated this rulemaking authority under FERSA to the Assistant Secretary of Labor for the Employee Benefits Security Administration.[3]

Over time, the Department has issued additional guidance explaining its policies and practices relating to the consideration of exemption applications. In 1985, the Department published a statement of policy concerning the issuance of retroactive exemptions from the prohibited transaction provisions of ERISA section 406 and Code section 4975 (ERISA Technical Release 85–1, January 22, 1985). This statement noted that, in evaluating future applications for retroactive exemptions, the Department would ordinarily take into account a variety of objective factors in determining whether a plan fiduciary had exhibited good faith conduct in connection with the past prohibited transaction for which relief is sought (such as whether the fiduciary had utilized a contemporaneous independent appraisal or reference to an objective third-party source, *e.g.,* a stock exchange, in establishing the fair market value of the plan assets acquired or disposed of by the plan in connection with the transaction at issue). However, while noting that the satisfaction of such objective criteria might be indicative of a fiduciary's good faith conduct, the release cautioned that the Department would routinely examine the totality of facts and circumstances surrounding a past prohibited transaction before reaching a final determination on whether a retroactive exemption is warranted.

In 1990, the Department published a final regulation (29 CFR 2570.30 through 2570.52 (1991), reprinted in 55 FR 32847 (August 10, 1990)), setting forth a revised exemption procedure that superseded ERISA Procedure 75–1 (the Exemption Procedure Regulation). This regulation, which became effective on September 10, 1990, reflected the jurisdictional changes made by Presidential Reorganization Plan No. 4 and extended the scope of the exemption procedure to applications for relief from the FERSA prohibited transaction rules. In addition, the Exemption Procedure Regulation codified various informal exemption guidelines developed by the Department since the adoption of ERISA Procedure 75–1.

In 1995, the Department issued a publication entitled ''Exemption Procedures under Federal Pension Law'' (the 1995 Exemption Publication). In addition to providing a brief overview of the exemption process, the 1995 Exemption Publication included definitions of technical terms such as ''qualified independent fiduciary,'' ''qualified independent appraiser,'' and ''qualified appraisal report.'' These definitions, derived from conditions contained in previously granted exemptions, provide important guidance about the Department's standards concerning the independence, knowledge, and competence of third-party experts retained by a plan to review and oversee an exemption transaction, as well as the contents of the reports and representations the Department ordinarily requires from such experts.

The Department published an updated Exemption Procedure Regulation in 2011 (29 CFR 2570.30 through 2570.52 (2011)).[4] The updated Exemption Procedure Regulation revised the prohibited transaction exemption procedure to reflect changes in the Department's exemption practices since the previous exemption procedure was issued in 1990. Among other things, the Department consolidated elements of the exemption policies and guidance previously found in ERISA Technical Release 85–1 and the 1995 Exemption Publication within a single, comprehensive final regulation. The updated Exemption Procedure Regulation promoted the prompt and efficient consideration of all exemption applications by (1) clarifying the types of information and documentation generally required for a complete filing, (2) affording expanded opportunities for the electronic submission of information and comments relating to an exemption, and (3) providing plan participants and other interested persons with a more thorough understanding of the exemption under consideration.

[1] *See* Secretary of Labor's Order 6–2009, 74 FR 21524 (May 7, 2009).

[2] 5 U.S.C. 8477(c)(3).

[3] *See* Secretary of Labor's Order 6–2009, 74 FR 21524 (May 7, 2009).

[4] 76 FR 66637 (October 27, 2011).

Most recently, on March 15, 2022, the Department published a proposed amendment to the Exemption Procedure Regulation (the Proposed Rule) that would update its existing procedures governing the filing and processing of applications for administrative exemptions from the prohibited transaction provisions of ERISA, the Code, and FERSA.[5] The Department received 29 comment letters on the Proposed Rule before the public comment period ended on May 29, 2022.

After consideration of the comments, including a written request for a public hearing, the Department held a virtual public hearing on September 15, 2022, which provided an opportunity for all interested parties to testify on material factual information regarding the Proposed Rule.[6] Eight organizations were represented at the hearing. The Department reopened the Proposed Rule's public comment period on the hearing date. Following the hearing, the Department posted the hearing transcript to EBSA's website on October 6, 2022, and announced that the reopened comment period that began on the hearing date would close on October 28, 2022.[7] Eight organizations submitted comments during the reopened comment period.

After careful consideration of the comments and testimony, the Department is finalizing the Proposed Rule (the Final Amendment). The Final Amendment makes a number of changes to the Proposed Rule in response to comments, which are discussed in detail in the section below titled ''Changes to the Exemption Procedure Proposed Rule.''

Changes to the Exemption Procedure Proposed Rule

The Department issued the Proposed Rule to promote a prompt, efficient, open, and transparent exemption application process. Accordingly, the Proposed Rule would make applicants explicitly aware of the information the Department requires and the specific steps it takes during the exemption application process to ensure that a thorough and complete record is created by which any impacted party, including plan participants and beneficiaries, can review and understand the decision-making process the Department engaged in when considering an exemption application. Specifically, in the Proposed Rule, the Department, among other things, proposed to (1) clarify the types of information and documentation required for a complete application, (2) revise the definitions of a ''qualified independent fiduciary'' and ''qualified independent appraiser'' to ensure their independence, (3) clarify the content of specific reports and documents applicants must submit to ensure that the Department receives sufficient information to make the requisite findings under ERISA section 408(a) to issue an exemption, (4) update various timing requirements to ensure clarity in the application review process, (5) clarify items that are included in the administrative record for an application and when the administrative record is available for public inspection, and (6) expand opportunities for applicants to submit information to the Department electronically.

General Comments on the Proposed Rule and the Need for Changes

Before discussing specific changes the Department made to the Proposed Rule in this Final Amendment, the Department notes that many commenters raised general, broad objections to the Proposed Rule.[8] Some commenters expressed concern that the Department had become more restrictive in its approach to exemptions and contended that the Proposed Rule would result in fewer exemptions. As evidence of this assertion, the commenters pointed to a decline in the number of exemptions the Department has issued over the last several years. The Department does not believe, however, that it has become unduly restrictive in its approach to exemptions. Instead, the number and frequency of granted exemptions reflects multiple factors, including market participants' increased ability to structure transactions in ways that avoid violating the prohibited transaction rules, the flexibility provided by many administrative class exemptions previously issued by the Department, the expansion of statutory exemptions, and market developments. The Department also notes that in the 2023 fiscal year, the Department granted 19 individual prohibited transaction exemptions, an increase in the number of exemptions from previous years.

One concern that the Department shares with many of the commenters is that the process was starting to become more drawn-out and longer than necessary. One reason the process is sometimes lengthy is that the Department frequently needs to follow-up with applicants to ensure that it has all of the information necessary to make the required statutory findings. This timeline was frustrating to everyone, and commenters noted it throughout their comments. While the commenters are correct that the Department intended to formalize many of its current exemption practices in this rulemaking process, its goal in doing so is to bring clarity and transparency to the exemption process, especially for plan participants and beneficiaries impacted by the exemption transaction, not to decrease the number of applications it receives or grants. The Department's reasoning is that by providing clearer expectations about what information should be included in exemption applications, some of the friction associated with the exemption process can be reduced because the Department will have less need to request additional information from applicants. This will make the entire process more accessible and efficient, especially for applicants that have less experience with the Department's exemption process. Contrary to the commenters' concerns, the Final Amendment is designed to help applicants navigate through the exemption process and not to dissuade them from applying for exemptions. The Final Amendment makes the exemption application process more efficient by reducing or eliminating delays caused when information is missing from exemption applications, and they are otherwise incomplete. It also tries to ensure that all entities have the same access to the exemption transaction process by making all steps of the process transparent.

In addition, commenters stated that the Proposed Rule is overly prescriptive, burdensome, and costly. The Department reiterates that one of the main reasons it is amending the Exemption Procedure Regulation is to clarify the specific items it expects applicants to include with their exemption applications and provide information regarding the process by which the Department evaluates exemption applications. The Department can achieve this goal only if the requirements of the Final Amendment are sufficiently prescriptive, because by adding more specificity, the Department will make the exemption application process less burdensome and costly and more streamlined and efficient.

The Department emphasizes that ERISA section 408(a) requires it to build an administrative record for the Department to make its required findings that an exemption transaction

[5] 87 FR 14722 (March 15, 2022).

[6] 87 FR 51299 (August 22, 2022).

[7] 87 FR 62751 (October 17, 2022).

[8] These commenters consisted of parties from the financial services industry and their attorney representatives, as well as independent fiduciaries and appraisers.

is (1) administratively feasible, (2) in the interest of the plan and its participants and beneficiaries, and (3) protective of its participants and beneficiaries. Under the current Exemption Procedure Regulation, the Department often engages in a drawn-out process where it makes several requests for additional information from the applicant after the submission of an application in the course of the Department's review. The information required under ERISA section 408(a) is, however, the same whether it is included with the initial submission of an application or obtained through this drawn-out process. Making the Department's expectations clearer through the Final Amendment should streamline and expedite the application process, which should redound to the benefit of both applicants and the Department. These changes will also enhance the administrative feasibility for exemptions.

Several commenters also urged the Department to withdraw the Proposed Rule and repropose it at a later date after receiving additional input from interested stakeholders. The Department disagrees with these commenters. The Department received comments from many different types of parties, representing financial institutions, fiduciaries, appraisers, plans, and participants and beneficiaries, among others during the initial comment period. The Department also notes that it provided interested stakeholders with multiple additional opportunities to provide their input on the Proposed Rule beyond their initial comments by (1) extending the initial public comment period, (2) holding a public hearing where the regulatory community expressed its views directly to the Department through written and oral testimony, and (3) reopening the comment period on the hearing date. Moreover, the Final Amendment improves the Department's exemption process and ultimately reduces applicants' burden; further delay would unnecessarily deprive the public of these benefits.

One commenter raised a concern that the Department may apply the Proposed Rule's provisions regarding independent fiduciaries and appraisers to other areas, such as the employee stock ownership plan valuation rules under ERISA. In response to this comment, the Department notes that the Final Amendment applies only to the Department's rules regarding the filing and processing of exemption applications. If the Department decides to issue future guidance regarding other areas of ERISA that contains similar rules for fiduciaries and appraisers to those contained in the Final Amendment, notice and an opportunity to comment on such guidance would be provided to the public, consistent with the Administrative Procedure Act.

Finally, several commenters objected to the Office of Management and Budget (OMB) and the Department's determination that the rule was not ''significant'' for purposes of Executive Order 12866. These commenters asserted that the Department should have included a regulatory impact analysis (RIA) with the Proposed Rule to assess its impact on plans, participants, and beneficiaries. In response to such comments, the Department has included an assessment of the potential costs and benefits of the Final Amendment, in accordance with section 6(a)(3)(B)(ii) of Executive Order 12866 (as amended by Executive Order 14094).[9]

Specific Rule Provisions

The current Exemption Procedure Regulation consists of 23 individual sections (§§ 2570.30 through 2570.52) that are arranged by topic, and that generally reflect the chronological order of steps the Department takes to process an exemption application. This Final Amendment retains the current section-by-section topical structure and most of the operative language of the current Exemption Procedure Regulation. While the Department made some non-substantive revisions to the current Exemption Procedure Regulation to improve its readability and provide clarity that are not discussed in this preamble, the Department addresses all substantive amendments to the current Exemption Procedure Regulation in the section-by-section discussion below.

Section 2570.30

Section 2570.30 sets forth the scope of the Exemption Procedure Regulation. It addresses the filing and processing of applications for both individual and class exemptions that the Department may propose and grant pursuant to ERISA section 408(a), Code section 4975(c)(2), FERSA, and on its own motion. Paragraph (b) broadly addresses the Department's power to issue exemptions. Similar to the Proposed Rule, the Department revises the regulatory text that is applicable to retroactive exemptions in the Final Amendment, to include a statement that the Department will review any retroactive exemption application to determine whether any plan participants or beneficiaries were harmed by the transaction for which retroactive relief is sought. This language reinforces the Department's existing policy that it, generally, will not support a request for a retroactive exemption involving a transaction that negatively impacted participants and beneficiaries. The Department notes that whether a transaction negatively impacts participants and beneficiaries will be determined based on the facts and circumstances, which will include a possible determination as to whether participants and beneficiaries were made whole for any harm. Further, the Department emphasizes in the Final Amendment that it will apply a high level of scrutiny to any retroactive exemption application using longstanding standards that have been previously set forth by the Department in the Exemption Procedure Regulation. As a result, the Department strongly suggests that a party that anticipates engaging in a transaction that would require retroactive exemptive relief contact the Department before engaging in the transaction.

Paragraph (d) of the Proposed Rule provides, generally, that the issuance of an administrative exemption does not relieve a fiduciary or other party in interest or disqualified person with respect to a plan from the obligation to comply with certain other provisions of ERISA, the Code, or FERSA. For clarity, the Final Amendment adds additional text to the proposed paragraph (d) to clarify the impact of an administrative exemption under the Code. Specifically, the Final Amendment states that the issuance of an exemption does not affect the requirements of Code section 401(a), including that a plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries, or the rules with respect to other Code provisions, including that an administrative exemption with respect to a contribution to a pension plan does not affect the deductibility of the contribution under Code section 404.

Paragraph (e) of the Final Amendment provides that the Department will not accept oral exemption applications or grant exemptions orally. Similar to the Proposed Rule, the Department has revised the regulatory text in the Final Amendment to clarify that the Department will provide feedback in response to oral inquiries, but it will not be bound by that feedback. The Department cannot give parties assurances that an exemption will be issued or whether a specific exemption condition will be required before it has

[9] The Department's RIA that is included in this Final Amendment was informed by comments that the Department received in response to its notice and comment solicitation in the Paperwork Reduction Act section of the Proposed Rule.

gone through the public exemption process, fully considered the record, and made a final determination. The Department also proposed to include language that any oral statements made by the party making the inquiry will become part of the administrative record. Commenters objected to this language on the basis that it would have a chilling effect on the regulated community's communications with the Department. As discussed in more detail below in § 2570.32(d), the creation of an accurate and complete administrative record outweighs commenters' concerns and necessitates the inclusion of oral communications in the administrative record. However, in order to be responsive to commenters' concerns while ensuring an accurate and complete administrative record, the Department has streamlined the Final Amendment to omit language in the proposed paragraph (e) regarding oral communications. Instead, all issues pertaining to the administrative record, many previously highlighted by the Proposed Rule, including the inclusion of pre-submission and oral communications, are addressed in § 2570.32(d).

Finally, the Department proposed to add a new paragraph (g), which would have provided that the Department issues administrative exemptions at its sole discretion based on the statutory criteria set forth in ERISA section 408(a) and Code section 4975(c)(2). Several commenters were concerned that the ''sole discretion'' language used here and in other sections of the Proposed Rule represented an attempt by the Department to leave stakeholders without a realistic opportunity to challenge its actions as arbitrary and capricious under the Administrative Procedure Act. For example, the commenters maintained that the Department could create a competitive imbalance by issuing two exemptions in identical circumstances with different conditions, or by refusing to give an exemption to one applicant that was given to a similarly situated applicant.

The Department disagrees. While the proposed text correctly reflects that the decision to grant or deny an exemption ultimately is within the Department's sole discretion, the regulation could not circumvent the Administrative Procedure Act requirements nor does (or could) it purport to give the Department authority to act arbitrarily. Therefore, the Department has retained the language as proposed in the Final Amendment.

In conjunction with this new paragraph (g), the Department proposed to add language stating that the existence of previously issued administrative exemptions is not determinative of whether the Department will propose future exemptions for applications with the same or similar facts, or whether a proposed exemption will contain the same conditions as a similar previously issued administrative exemption. The addition of this language reinforces the Department's existing policy that it has the sole discretionary authority to issue exemptions and is not bound by facts or conditions of prior exemptions in making determinations with respect to an exemption application. This policy allows the Department to retain sufficient flexibility to grant exemptions that are appropriate in an ever-changing business, legislative, and regulatory policy environment.

Commenters objected to proposed paragraph (g) and argued that the Department should be bound or, at a minimum, influenced by previously issued administrative exemptions. These commenters believe that prior exemptions should establish precedent that stakeholders can reasonably rely on to foster predictability, efficiency, and consistent treatment of different applicants.

It is reasonable for applicants to identify similar exemptions the Department previously has granted in certain situations as a starting point when submitting an exemption application to the Department. Applicants should be aware, however, that revisions and changes may be necessary based on the current facts and circumstances, whether they are driven by business, legislative, regulatory, or policy considerations. The Department endeavors to use the prohibited transaction class exemption process when the exemption transaction is reasonably understood to be a transaction that would benefit, and be protective of the interests of, participants and beneficiaries of numerous plans. When the Department is considering a prohibited transaction individual exemption, however, it is because the Department understands the transaction to be specific and unique to the party before it. Accordingly, parties that are facing similar, but not identical situations, are encouraged to seek their own exemption. Previously issued exemptions are instructive, and a useful starting point, but do not prevent the Department from considering each situation that comes before it in its entirety. As a result, the Department has modified the proposed paragraph (g) in the Final Amendment to provide that previously issued administrative exemptions may inform the Department's determination of whether to propose future exemptions based on the unique facts and circumstances of each application.

Lastly, with respect to proposed paragraph (g), commenters raised concerns regarding the interplay between the Department's stance that applicants cannot rely on exemptions as precedents and the existing expedited review process the Department established in Prohibited Transaction Exemption 96–62 (commonly referred to as EXPRO).[10] EXPRO permits the Department to perform an expedited review of an exemption application that is ''substantially similar'' to two other exemptions the Department has granted in the prior five years, as determined in the Department's sole discretion. The Department disagrees with the commenters' position that the Proposed Rule creates tension with EXPRO. Pursuant to proposed paragraph (g), the Department may use previously issued exemptions to inform its decisions regarding whether to grant individual exemptions. The EXPRO process merely uses prior exemptions to expeditiously inform the Department of whether an exemption would meet the requirements of ERISA section 408(a); it does not bind the Department to prior exemptions as precedent. Instead, before granting an exemption under EXPRO, the Department must determine, in its sole discretion, (1) whether a proposed transaction is ''substantially similar'' and (2) whether there is little, if any, risk of abuse or loss to plan participants and beneficiaries. Even if a transaction is substantially similar, the Department may deny an application under EXPRO if it finds that the particular transaction creates a risk of abuse or loss, or if it determines that the exemption transaction differs from the prior exemptions based on the Department's understanding of changes in present circumstances, whether business, legislative, regulatory, or policy.

Section 2570.31

Section 2570.31 sets forth definitions that are used throughout the Exemption Procedure Regulation. While the Department did not propose to revise most of the definitions (other than to improve readability), the Department proposed substantive revisions to several existing definitions and added new definitions. These changes address issues that the Department has often experienced in its review of exemption applications.

[10] 67 FR 44622 (July 3, 2002).

First, the Department proposed to revise the definition of ''affiliate'' set forth in paragraph (a) to include:

- any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person. For purposes of this paragraph, the term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual; any officer, director, partner, employee, or relative (as defined in ERISA section 3(15)) of any such person; or
- any corporation, partnership, trust, or unincorporated enterprise of which such person is an officer, director, partner, or five percent or more owner.

In addition to rewording the text for clarity, the proposed revised definition would have included all employees and officers, rather than only those who are highly compensated (as defined in Code section 4975(e)(2)(H)) or have direct or indirect authority, responsibility, or control regarding the custody, management, or disposition of plan assets involved in the subject exemption transaction to ensure that all parties that commonly serve as affiliates are captured, without a complicating reference to a Code citation.

Although commenters maintained that the revised definition may have been too broad because it is overly inclusive and might capture parties that are not related to the exemption transaction, the Department is finalizing this definition as proposed. The revision reflects the affiliate definition the Department currently uses in individual and class exemptions and has proved to be both appropriately protective and workable.[11]

The Department proposed to substantially revise the definition of the term ''qualified independent appraiser'' in paragraph (i) of the proposal. Commenters generally objected to the proposed changes because, according to them, such changes could result in a substantial reduction of the number of experienced appraisers available to represent the interests of plans in exemption transactions, and it would especially be harmful for smaller appraisers. They also indicated that the changes could result in further industry consolidation, which could lead to concentration of risks. After considering these comments, the Department has decided not to finalize the revised definition as proposed, and, except for the modifications discussed below, generally, has reverted to the qualified independent appraiser definition in the current Exemption Procedure Regulation.

The Department made a few revisions to the Exemption Procedure Regulation text in the Final Amendment regarding the qualified independent appraiser definition to clarify the underlying meaning of the existing language. The Department requested comments on these definitions, including whether the ''proposed changes are clear [and whether they] appropriately reflect the manner in which entities interact with ERISA-covered plans and plan participants and beneficiaries.'' [12] Based on this request for comment, the Department received input from the public that the proposed definition of qualified independent appraiser would better reflect the manner in which the appraiser interacted with plans if the definition were slightly changed. Specifically, the Final Amendment amends the qualified independent appraiser definition to provide that the Department generally will not conclude that an appraiser's independence is compromised solely based on the revenues it receives from parties in interest (and their affiliates) participating in the exemption transaction, as long as the appraiser neither receives nor is projected to receive more than two percent of its revenues within the current Federal income tax year from the parties in interest (and their affiliates). Although larger percentages merit more stringent scrutiny, an appraiser may be considered independent based upon other facts and circumstances provided that the appraiser neither receives nor is projected to receive more than five percent of its revenues within the current Federal income tax year from parties in interest (and their affiliates) participating in the exemption transaction.

While the amended definition returns to the two and five percent of revenue thresholds provided in the Exemption Procedure Regulation, the Department has modified the language in the Final Amendment to clarify that an appraiser whose revenue threshold is less than two percent is not automatically deemed independent. The Department may consider other facts and circumstances indicating that an appraiser is not independent regardless of its revenue threshold. For example, if an appraiser is likely to be retained by the applicant for additional appraisals due to its provision of an appraisal submitted with the exemption application, the Department may question whether the appraiser is truly independent. Further, the modified language emphasizes that appraisers with revenue thresholds that are between two and five percent could merit heightened scrutiny from the Department. The revised language in the Final Amendment strikes the appropriate balance of addressing commenters' concerns that the proposed changes could have negatively impacted the appraiser marketplace while giving appropriate weight to the participant-protective importance of an appraiser's independence based on all relevant facts and circumstances regardless of the appraiser's revenue percentage.

The Department also proposed to revise the qualified independent appraiser definition in the Proposed Rule to provide that an appraiser must be independent of and unrelated to the qualified independent fiduciary involved with the exemption transaction. Commenters objected to the revision by asserting that many independent fiduciaries retain affiliates to perform appraisals and eliminating this practice would unnecessarily drive up the cost of an exemption application. After considering these comments, the Department has not included the proposed language in the Final Amendment.

The Department also proposed to revise the definition of a ''qualified appraisal report'' in paragraph (h)(2)(i) to require the appraiser to provide an appraisal report ''on behalf of the plan.'' Commenters representing appraisers stated that longstanding ethical standards of the valuation profession require appraisers to perform appraisals independently and without bias in favor of any party. All appraisal reports are based on objective criteria and may not be ''on the behalf'' of any party. After considering this information, the Department did not include the proposed language in the Final Amendment.

The Department made similar amendments to the definition of ''qualified independent fiduciary'' in paragraph (j) of the proposed § 2570.31. As with the qualified independent appraiser definition, commenters expressed concern that the proposed changes to the qualified independent fiduciary definition would substantially reduce the number of experienced independent fiduciaries available to represent the interests of plans and participants and beneficiaries in exemption transactions, especially

[11] *See, e.g.,* PTE 2020–02 (85 FR 82798, December 18, 2020); PTE 2022–02 (87 FR 23245, April 19, 2022); PTE 2022–03 (87 FR 54264, September 2, 2022); and Proposed Exemption for Morgan Stanley & Co. LLC, and Current and Future Affiliates and Subsidiaries, Application No. D–11955 (86 FR 64695, November 18, 2021).

[12] 87 FR 14725 (Mar. 15, 2022).

smaller independent fiduciaries. After considering these concerns, the Department, generally, is not finalizing these provisions of the exemption as proposed and has mostly reverted to the language of the Exemption Procedure Regulation.

The Department proposed to revise the independent fiduciary definition to:

- require the fiduciary to be independent from any other party involved in the development of the exemption request; and
- state that the Department would consider whether a fiduciary has an interest in the exemption transaction or in future transactions of the same nature or type in determining whether a fiduciary is independent.

Beyond the broad objections described above regarding the changes to the definition, commenters stated these particular changes would result in the exclusion of experienced independent fiduciaries, leaving only inexperienced fiduciaries to represent the interests of plans and participants and beneficiaries. Commenters maintained that if a fiduciary develops expertise in a particular area, it would necessarily have an interest in future transactions, because future business drives a fiduciary to invest the resources necessary to develop expertise. While the Department is persuaded not to include the proposed change in the Final Amendment, it has revised the definition to provide that when the Department makes an independence determination based on all of the relevant facts and circumstances, that determination will include an evaluation of the extent to which the plan's counterparty in the exemption transaction participated or influenced the selection of the fiduciary. Using such explanatory language emphasizes the conflict of interest concerns, previously raised in the Proposed Rule, that the Department focuses on as part of its evaluation of fiduciary independence without unduly limiting those parties that may serve as independent fiduciaries.

Second, as with the definition of a qualified independent appraiser, the Department proposed to revise the revenue threshold used to determine independence in the Proposed Rule. Commenters made the same objections to this proposed change by asserting that it could have a detrimental impact on the independent fiduciary marketplace. After considering these comments, the Department, generally, has not included the proposed changes in the Final Amendment and has largely reverted to the original revenue thresholds set forth in the existing Exemption Procedure Regulation. However, as with the definition of a qualified independent appraiser, the Department has revised the language in the Exemption Procedure Regulation in the Final Amendment to clarify the underlying intent of the existing language.

Specifically, the Final Amendment states that the Department generally will not conclude that a fiduciary's independence is compromised solely based on the revenues it receives from parties in interest (and their affiliates) that are participating in the exemption transaction if the fiduciary neither receives nor is projected to receive more than two percent of its revenues within the current Federal income tax year from the parties in interest (and their affiliates). Although larger percentages merit more stringent scrutiny, a fiduciary may be considered independent based upon other facts and circumstances provided that the fiduciary neither receives nor is projected to receive more than five percent of its revenues within the current Federal income tax year from parties in interest (and their affiliates) participating in the exemption transaction.

As with the qualified independent appraiser definition, the amended independent fiduciary definition in the Final Amendment retains the two and five percent of revenue standards thresholds set forth in the existing Exemption Procedure Regulation, but modifies the language to clarify that a fiduciary with revenues less than the two percent revenue threshold is not automatically deemed independent: the Final Amendment provides that the Department may consider other facts and circumstance indicating whether a fiduciary is independent regardless of its revenue threshold. Further, the Department has revised the language in the Final Amendment to emphasize that fiduciaries whose revenue thresholds are between two and five percent merit heightened scrutiny from the Department. The revised language addresses the commenters' concerns that the proposed changes could have negatively impacted the independent fiduciary marketplace while giving proper weight to the participant-protective independence of the fiduciary, initially raised as a concern in the Proposed Rule, based on all relevant facts and circumstances.

Proposed paragraph (k) would have added a new definition of ''pre-submission applicant'' that defines a pre-submission applicant as a party that contacts the Department, either orally or in writing, to inquire whether a party with a particular fact pattern would need to submit an exemption application and, if so, what conditions and relief would be applicable. This definition would not include a party that contacts the Department to inquire broadly without reference to a specific fact pattern. The Department has included this definition in the Final Amendment to clearly distinguish parties that make inquiries with the Department that could potentially lead to an exemption application from those that simply seek non-fact specific guidance from the Department. As discussed below, this distinction impacts how the Department addresses the inquiries and whether an administrative record is created when pre-submission applicants contact the Department regarding an exemption transaction.

The Department also proposed to add a new definition of ''party involved in the exemption transaction'' that included the following:

(1) a party in interest (as defined in paragraph (f));

(2) any party (or its affiliate) that is engaged in the exemption transaction; and

(3) any party (or its affiliate) that provides services with respect to the exemption transaction to either the plan or a party described in (1) or (2).

The Department proposed to use this term to replace ''party in interest'' throughout the Exemption Procedure Regulation. After considering comments and reviewing whether the proposed switch to ''party involved in the exemption transaction'' facilitated the Department's goals of transparency and efficiency, the Department has determined not to include this definition in the Final Amendment and is reverting the reference in the applicable provisions to the term ''party in interest'' that is used in the current Exemption Procedure Regulation. Reverting to the term ''party in interest'' ensures that applicants can understand which parties are being addressed and can efficiently collect the information necessary to complete an application.

Section 2570.32

Section 2570.32 addresses who may apply for an exemption and when the administrative record for an exemption application is created. The Department proposed two revisions to § 2570.32. First, paragraph (a) would have been revised to describe persons who may apply for exemptions. The Department proposed to delete the language in paragraph (a) stating that ''the Department will initiate exemption proceedings upon the application of'' to

clarify that this paragraph addresses only those parties who are permitted to apply for an exemption. The Department has retained this revision in the Final Amendment as proposed because the revised language makes clear that paragraph (a) does not address whether the Department is required to initiate an exemption proceeding. The decision to initiate an exemption proceeding remains within the Department's sole discretion.

The Department also proposed to add a new paragraph (d) to address questions applicants have frequently asked the Department regarding the creation of the administrative record for an exemption application that is available for public inspection. To reflect the addition of this content, the Department proposed adding ''and the administrative record'' to the heading of § 2570.32. The Department has included these proposed revisions in the Final Amendment.

The Department proposed in paragraph (d)(1) of the Proposed Rule to open the administrative record for public inspection beginning on the date a pre-submission applicant provides information regarding an exemption transaction to the Department, and it proposed in paragraph (d)(2) that all pre-submission documents and communications between the Department and pre-submission applicants would immediately become part of the administrative record that is open for public inspection.

Commenters objected to this proposed change because, in their view, it would have a chilling effect on informal and anonymous communications between the Department and the regulated community. These commenters asserted that applicants would be less likely to start the exemption application process or otherwise approach the Department to discuss potential exemption transactions if every communication with the Department is included in the administrative record that is available to the public.

The Department's objective in proposing to add paragraph (d)(1) to the Exemption Procedure Regulation was to ensure a complete and accurate administrative record while still encouraging applicants to communicate freely with the Department. As discussed in more detail below, the Final Amendment still requires pre-submission information to be a part of the administrative record. However, the Department acknowledges commenters' concerns about making information submitted during the pre-submission process immediately available for public disclosure. Therefore, the Department has modified the proposed language in paragraph (d)(1) in the Final Amendment to provide that the administrative record for an exemption application becomes open for public inspection, pursuant to § 2570.51(a), on the date an applicant submits an exemption application to the Office of Exemption Determinations. This revision makes clear that the administrative record for an exemption transaction is not available for public inspection until an applicant formally submits a written exemption application to the Department. However, the Department also notes that paragraph (d)(1) is not meant to encourage extended negotiations between a potential applicant and the Department before it submits an exemption application, or to permit applicants to circumvent an open process by ''informally'' seeking an exemption from the Department, while maintaining that they have not yet formally applied. At its sole discretion, the Department may decline to engage in extended conversations without submission of a formal application that ensures an appropriately open and transparent process.

While the Department acknowledges commenters' concerns regarding the inclusion of pre-submission information in the administrative record, including oral communications, the Department's position is that building an accurate and transparent record takes precedence over those concerns. In making its required statutory findings under ERISA section 408(a), the Department is required to build an administrative record to support its findings under ERISA section 408(a). The administrative record is incomplete without all of the information that informed the Department's determinations with respect to the application, including notes of oral communications with the Department.

The Department emphasizes that the record is not developed solely for the benefit of the applicant; it is also available for review and consideration by all parties that may be affected by the exemption request, including participants and beneficiaries. The inclusion of pre-submission information in the public record ensures not only accuracy but transparency into the Department's exemption determination process. The record should contain all the information necessary to fully review the Department's ultimate decision. Not including all discussions between the applicant and the Department that inform the Department's decision may hinder, for example, a plan participant's ability to provide comments or additional facts that might be beneficial to the Department's review of the application or prevent a court from fully understanding the basis for the Department's exemption determination if an applicant or beneficiary legally challenges the Department's decision. The Department notes, too, that members of the public can continue to communicate anonymously with the Department pursuant to the requirements of § 2570.33(d).

Based on the Department's position that all pre-submission information, whether written or oral, must be included in the administrative record as of the date an applicant submits an exemption application, and building on the Proposed Rule's language, the Department has amended paragraph (d)(2) in the Final Amendment to provide that the administrative record includes, but is not limited to, the following: (1) the initial exemption application and any modifications or supplements thereto; (2) all correspondence with the applicant after the applicant submits the exemption application; and (3) any information submitted to the Department by the applicant in connection with the exemption application, whether such information is provided orally or in writing (as well as any comments and testimony received by the Department in connection with an application).

The Department clarified paragraph (d)(2) of the Final Amendment in turn, by adding a new paragraph (d)(3) which states that, although the administrative record is open and available to the public only after an applicant submits an exemption application, the record includes any material documents or supporting information that an applicant submitted to the Department in connection with the transaction that is the subject of the application, whether orally or in writing, before the applicant formally submits an exemption application to the Department. The administrative record does not include documents or records of communications with the Department that are unrelated to the exemption transaction that is the subject of the application or are associated with an exemption application an applicant submits subsequent to the unrelated communications.

Consistent with the goals outlined in the Proposed Rule, paragraphs (d)(2) and (3) of the Final Amendment clearly establish the documents and communications that the Department will include in the administrative record to add clarity and transparency to the Department's exemption

determination process. The new language expressly states that all information material to the Department's decision will be included, thereby ensuring the creation of an accurate and complete administrative record. The Department emphasizes, however, that pursuant to paragraph (d)(3), pre-submission information that is not material, such as inapplicable background information or information regarding other transactions that are not relevant to the exemption transaction, will not be included in the administrative record. Whether information is material for purposes of paragraph (d)(3) will be determined solely at the Department's discretion. Limiting pre-submission information in this manner should address the most significant concerns of the commenters while fully addressing the Department's obligation to build a transparent, accurate, and complete administrative record for its determinations regarding an exemption application.

In connection with commenters' concerns regarding the proposed inclusion of pre-submission documents and communications in the administrative record, several commenters requested the right to review and comment on or correct the Department's administrative record before the Department provides public access to it. The Department's position is that including such a right would be inconsistent with its goal of creating a record that accurately reflects the information the Department considered when making its determination. Allowing an applicant to edit the administrative record for its own exemption application would defeat the Department's goal of transparency for not only applicants, but all parties impacted by the transaction, as well as the general public. To the extent, however, that a party believes it is appropriate to correct any part of the public record, they are welcome to submit comments and clarifications which the Department also will include in the public record. The Department has determined that the need for an open, transparent, and fully developed process is best served by including all the information it received or reviewed when making an exemption determination in the administrative record at the time an exemption is proposed whether or not the Department relies on such information.

Finally, the Department proposed to update paragraph (d)(4) of the Exemption Procedure Regulation to reflect modern methods of communication. The paragraph provides that if documents are required to be provided in writing by either the applicant or the Department, the documents could be provided either by mail or electronically, unless otherwise required by the Department at its sole discretion. The Department has adopted this provision in the Final Amendment as proposed.

Section 2570.33

In § 2570.33, the Department proposed to address applications the Department will not consider. Specifically, the Department proposed to revise the text of the Exemption Procedure Regulation to clarify when it will not consider an exemption application. First, the Department proposed to revise paragraph (a)(1), under which the Department may exclude exemption applications that fail to include current information. The Department intended that the proposed revision would clarify that the Department would treat an applicant's failure to include current information the same as an applicant's failure to include information. The premise of this revision is that absent current information, the Department cannot develop an accurate understanding of the facts sufficient to enable a review of the underlying application. The Department has adopted this provision in the Final Amendment as proposed.

Second, the Department proposed to revise paragraph (a)(2), which generally excludes from consideration an application involving: (1) a transaction or transactions that are the subject of an investigation for possible violations of part 1 or 4 of subtitle B of Title I of ERISA or FERSA sections 8477 or 8478; or (2) a party in interest who is the subject of such an investigation or who is a defendant in an action by the Department or the IRS to enforce those provisions of ERISA or FERSA. The proposed revision would have expanded the existing exclusion to include any ERISA investigations (not only those pursuant to Title I of ERISA or FERSA sections 8477 and 8478), as well as investigations under any other Federal or state law. The proposal also would have expanded the limitation on applications from parties that are the subject of an investigation or a defendant in an action brought by the Department or the IRS to include any other regulatory agencies enforcing ERISA, the Code, FERSA, or any other Federal or state laws. Commenters argued that the new language was too expansive and would unnecessarily exclude potential applicants.

The Department has determined that the proposed revision to paragraph (a)(2) should not be included in the Final Amendment because parties should not be excluded automatically due to these additional investigations (except for a failure to include required information), thereby reverting closer to the current Exemption Procedure Regulation. The proposed regulation broadly expanded the existing exclusion to include any ERISA investigation (not only sections 8477 and 8478), as well as any other Federal or state law. In response to the comments, the Department decided that a more limited expansion was more appropriate. The best approach is to require applicants to disclose investigations or other court or enforcement actions, which is addressed in § 2570.34. Following this disclosure, the Department can make a fully informed decision regarding whether an exemption application should be accepted based on the facts and circumstances, rather than automatically rejecting an exemption application in this circumstance.

The Department acknowledges that some commenters were concerned that these additional disclosures, and their inclusion in the administrative record, could lead the public to presume malfeasance on the part of applicants. The Department declines to adopt any changes based on this comment, because a complete and accurate record is essential to a transparent exemption process. The Department notes that applicants who are concerned about potential reputational harm may include an explanation or description of mitigating facts along with their disclosure for inclusion in the administrative record. The Department also notes that some of the required disclosures may already be reflected in publicly available disciplinary actions by other regulators or may have been disclosed by the applicant in another context. For example, an applicant that is a publicly-traded company may have already disclosed certain investigations or disciplinary actions as part of its filing of a Form 10–K with the Securities and Exchange Commission.

The Department proposed to delete the language in the current paragraph (c) regarding the administrative record, because that topic is now addressed in revisions to § 2570.32 discussed above. The Department has made this revision in the Final Amendment as proposed.

The Department proposed to revise the part of paragraph (c) addressing the submission of confidential information. The current Exemption Procedure Regulation provides that if an applicant designates any information required by the rule or requested by the Department as confidential, the Department will determine whether the information is

material to the exemption determination. If it determines at its sole discretion that the information is material, the Department will not process the application unless the applicant withdraws the claim of confidentiality. The Department proposed to revise this language to clarify that it would not review an application that includes confidential information, with the exception of confidential designations by a Federal, State, or other governmental entity. This means that if an applicant submits any confidential information as part of an exemption application, the Department would not review the information nor process the exemption application. As a result, the Department would process the application only after the applicant withdraws its claim of confidentiality or revokes its submission of the confidential information. This change would support the Department's goal of increasing transparency while protecting confidential information and has adopted this provision in the Final Amendment as proposed.

One commenter objected to the proposed revisions to paragraph (c) on the grounds that requiring an applicant to remove a claim of confidentiality with respect to material information will discourage applicants from submitting applications. The Department maintains that the need for transparency in the exemption application process overrides the commenter's concerns. The Department's record must be complete and accurate and available for public inspection. If information that should be included in the administrative record is excluded based on a claim of confidentiality, a third party could not review the full administrative record, which would impede the Department's goal of establishing a full and transparent exemption determination process. The Department's obligation to make proper findings is undermined by the submission of confidential documents and information that are insulated from public comment and evaluation.

The revised language in the Final Amendment also states that by submitting an exemption application, an applicant consents to public disclosure of the entire administrative record pursuant to § 2570.51. This revision, consistent with the intent of the Proposed Rule, places applicants on notice that they are consenting to the public disclosure of all information in the administrative record when they submit an exemption application, which will lead to a fully transparent exemption process.

The Department proposed adding a new paragraph (d) that governs communications with pre-submission applicants as newly defined in § 2570.31(k). The proposed language provided that the Department would not communicate with a pre-submission applicant or its representative, whether through written correspondence or a conference, if the pre-submission applicant does not: (1) identify and fully describe the transaction for which exemptive relief is sought; (2) identify the applicant, the applicable plan(s), and the relevant parties to the exemption transaction; and (3) set forth the prohibited transaction provision(s) that the applicant believes are applicable.

Commenters objected to this language, arguing that it would have a chilling effect on informal and anonymous pre-submission discussions between the Department and the regulated community. The Department understands the commenters' concerns, but it also must be able to associate informal guidance it provides with specific applications that are submitted. While the Department welcomes pre-submission requests for guidance, it is imperative that parties approaching the Department for such guidance regarding a specific exemption transaction provide the Department with sufficient information to allow it to properly attribute the guidance to a specific transaction and the relevant prohibited transaction provisions that are applicable to the transaction.

Accordingly, the Final Amendment requires those seeking pre-submission guidance to identify the transaction for which exemptive relief is sought, as well as the applicable prohibited transaction provision(s). However, to address commenters' concerns, the Department has not included the proposed language in the Final Amendment that would have required pre-submission applicants to identify the applicant, the applicable plan(s), and the relevant parties to the exemption transaction before the Department will communicate with a pre-submission applicant. Eliminating specific identifying information should address commenters' concerns regarding anonymity while ensuring that the Department obtains the complete information it needs to provide relevant advice to an anonymous pre-submission applicant.

Section 2570.34

Section 2570.34 addresses information the Department requires applicants to include in an exemption application. While the Department proposed to expand the information the Department requires to be included in an application in some cases, the Department's intention in expanding the required information was to streamline the exemption process by ensuring that most of the information the Department needs to make an exemption determination is available to it when the application is submitted, which will expedite the exemption determination process.[13] The Department specifically requested comments on the changes to the information required to be submitted as part of the application, including comments on whether the Department should consider other types of information.[14]

Specifically, the Department proposed to revise paragraphs (a)(1) and (3) to require addresses, phone numbers, and email addresses for the applicants, representatives, and parties in interest. The Department proposed to require applicants to include this information in the initial exemption application to ensure that the Department can efficiently contact the proper parties.

In addition, the Department proposed to replace the original paragraph (a)(4) with new paragraphs (a)(4), (5), and (7) to facilitate the Department's understanding of the decision-making process the applicant undertook to determine that it was necessary to submit an exemption application. Accordingly, the Department proposed for paragraph (a)(4) to require the applicant to include in its application a description of: (1) the reason(s) for engaging in the exemption transaction; (2) any material benefit that a party in interest involved in the exemption transaction may receive as a result of the subject transaction (including the avoidance of any materially adverse outcome by the party in interest as a result of engaging in the exemption transaction); and (3) the costs and benefits of the exemption transaction to the affected plan(s), participants, and beneficiaries, including quantification of those costs and benefits to the extent possible.

Commenters objected to this language on the grounds that requiring the disclosure is burdensome and unnecessary. However, the Department views this information as an essential component of an exemption application, because it will facilitate the Department's understanding of the underlying rationale for the exemption transaction, including the costs and benefits for both the party in interest and the plan and its participants and

[13] 87 FR 14727 (Mar. 15, 2022).

[14] *Id.*

beneficiaries. For example, when an applicant that is a plan sponsor provides not only a rationale for engaging in the exemption transaction, but also a statement of the benefits to the sponsor, as well as the costs and benefits to the plan, the Department can more accurately determine whether it has sufficient information to make its findings under ERISA section 408(a). The Department needs to understand the scope and severity of the conflicts of interest associated with the transaction, as well as the potential costs and benefits of the transaction, before it can make a properly informed decision about the merits of the application and how best to structure a participant-protective exemption. In addition, the requirement should not be too burdensome, because a fiduciary that is complying with its fiduciary obligations under ERISA section 404 should fully evaluate all the factors set forth in paragraph (a)(4) in the normal course of fulfilling its fiduciary responsibilities before deciding to seek an exemption or engage in the transaction at issue. Further, the Department notes that the required disclosures would likely be requested as part of the Department's normal review of an exemption application.

Based on the foregoing, the Department is including the proposed revisions in the Final Amendment as proposed. The Department notes that it is not requiring a full actuarial or technical economic accounting with respect to a proposed exemption transaction but, instead, is requesting applicants to disclose information they obtain by performing a full review of the transaction, which includes, at a minimum, reviewing the material benefits and cost of the transaction for the plan and its participants and beneficiaries. The Department also notes that this information is already typically requested when the Office of Exemption Determinations reviews exemption applications, such that this information would eventually have to be provided during the Department's review of the application, and the Department's primary objective in requiring this information to be submitted with the initial application is to streamline the exemption determination process.

The Department also proposed to add a new paragraph (a)(5) that would build on paragraph (a)(4) by proposing to require applicants to include with their exemption applications a detailed description of possible alternatives to the exemption transaction that would not involve a prohibited transaction and an explanation as to why the applicant did not pursue those alternatives. Commenters objected to this language by asserting that it would be burdensome, if not impossible, for an applicant to investigate and evaluate all potential approaches to a transaction. Further, commenters argued that ERISA does not require them to evaluate and exhaust all alternatives to an exemption transaction before submitting an exemption application.

The Department recognizes that ERISA does not require an applicant to evaluate every imaginable option with respect to an exemption transaction and that doing so may prove impractical, and it did not intend to suggest otherwise. In response to the comments, but still recognizing the concerns the Department raised in the Proposed Rule, the Department has modified the language in the Final Amendment to provide that an applicant must submit a description of the alternatives to the exemption transaction that it considered or evaluated before submitting the exemption application and explain why those alternatives were not pursued with its exemption application. Thus, the Department simply requires an applicant to explain to the Department the process by which the applicant arrived at its decision to propose an exemption application. If as part of that decision-making process the applicant evaluated alternatives, the applicant must disclose those alternatives to the Department, along with the rationales for not selecting such alternatives, to provide the Department with insight into the applicant's decision-making process. Although the Department is not retaining the proposed amendment to paragraph (a)(5) that would have required an exhaustive review of all alternatives to an exemption transaction, the Department notes that a failure to consider and address reasonable alternatives to engaging in a prohibited transaction may provide grounds for the Department to deny an exemption application. The prohibited transaction rules are the starting point for the Department's evaluation of an exemption application, and those rules are designed to prohibit transactions that involve significant conflicts of interest. Considering the harm conflicts of interest can inflict on plans and participants and beneficiaries, and the challenges the Department faces in determining the full scope and severity of these conflicts and their potential impact on the affected plan and its participants and beneficiaries, it is reasonable for the Department to require the applicant to explain why the most protective and appropriate approach is not avoiding entering into a prohibited transaction that requires an exemption from the Department to comply with ERISA. The Department encourages applicants to evaluate whether the exemption transaction could be structured in a manner that would not result in a prohibited transaction. In many cases, the best way to protect participants' interests is not to engage in a transaction subject to significant conflicts of interest, but rather to avoid the conflicts of interest in the first place and structure the transaction to avoid the need for an exemption from otherwise illegal conduct.

The Department proposed to insert a new paragraph (a)(7) that would replace the prior requirement that an applicant state why the transaction is customary to the industry with a requirement for the applicant to set forth a description of each conflict of interest or potential instance of self-dealing that would be permitted if the exemption is granted. Commenters expressed concern that complying with the proposed revision may be difficult and burdensome. The Department, however, disagrees with these concerns and has included the new paragraph in the Final Amendment as proposed. The Department is making this change because the Exemption Procedure Regulation's prior ''customary to the industry'' language did not require applicants to sufficiently inform the Department of the conflicts of interest and instances of self-dealing involved in an exemption transaction or the costs and benefits to a plan and its participants and beneficiaries. The information required by the new language assists the Department in identifying the conflicts of interest and instances of self-dealing involved in an exemption transaction, and thereby facilitates the Department's analysis regarding whether the exemption transaction is structured to properly protect the interests of the plan and its participants and beneficiaries as required by ERISA section 408(a). As with information about applicants' decision-making processes, the Department notes it would need to request this information at some point during the application process to make its required statutory findings. By requesting this information upfront, as opposed to requesting it later in the application process, the Department is streamlining the exemption determination process and thereby reducing its associated burdens and costs.

Together, the Final Amendment's new paragraphs (a)(4), (5), and (7) will help the Department better understand applicants' proposed exemption transactions and their implications for

plans, participants, and beneficiaries. They also will help ensure that the Department has sufficient information to make its required findings under ERISA section 408(a) regarding whether a requested exemption would be (1) administratively feasible, (2) in the interests of the plan and of its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries when the applicant submits its application to the Department.

The final revisions to paragraph (a) are intended to provide consistency among exemption applications. The revised paragraph (a)(8) simply expands the disclosure requirement to include a statement regarding whether the transaction is the subject of investigation or enforcement actions by any regulatory authority. This change is consistent with the changes to § 2570.33 that are discussed above and ensures that the Department has the information it needs to make an informed decision regarding an exemption application.

The Department proposed to add a new paragraph (a)(10) that would require applicants that use the term ''affiliate'' in their exemption applications to include a statement that either (1) the definition of affiliate set forth in § 2570.31(a) is applicable or (2) explains why a different affiliate definition should be applied. The Department added this language to encourage the use of a single, consistent affiliate definition among all applications, which will prevent issues that could result from different definitions of the term being used in different exemptions. The Department has adopted this requirement in the Final Amendment as proposed.

Paragraph (b) addresses some of the Department's specific concerns with respect to exemption transactions. The most substantial change adds paragraph (b)(2), which requires applicants to include a statement in their applications that (A) the exemption transaction will be in the best interest of the plan and its participants and beneficiaries; (B) all compensation received, directly or indirectly, by a party involved in the exemption transaction will not exceed reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2); and (C) all of the statements to the Department, the plan, or, if applicable, the qualified independent fiduciary or qualified independent appraiser about the exemption transaction and other relevant matters will not be materially misleading at the time the statements are made. If the applicant does not include such a statement in its exemption application, the applicant must explain why these exemption standards should not be applicable to the exemption transaction.

For purposes of paragraph (b), an exemption transaction is in the best interest of a plan if the plan fiduciary causing the plan to enter into the transaction determines, with the care, skill, prudence, and diligence under the circumstances then prevailing, that a prudent person acting in a like capacity and familiar with such matters would, in the conduct of an enterprise of a like character and with like aims, enter into the exemption transaction based on the circumstances and needs of the plan. Such fiduciary shall not place the financial or other interests of itself, a party to the exemption transaction, or any affiliate ahead of the interests of the plan or subordinate the plan's interests to those of any party or affiliate.

In proposed paragraph (b)(2), the Department generally incorporated compliance with ''impartial conduct standards'' as formalized in Prohibited Transaction Exemption 2020–02 as a baseline condition for approved exemptions. Commenters, however, stated that the proposed new paragraph (b)(2) should not be included in the Final Amendment, because the impartial conduct standards are not applicable to all transactions. The Final Amendment, however, does not require the impartial conduct standards to be made applicable to all exemptions as a condition for the Department to grant them. The impartial conduct standards, however, are rooted in well-established fiduciary principles designed to address problems of agency and conflicts of interest, and as such, are often strong and flexible safeguards against abuse in transactions subject to the prohibited transaction rules. Accordingly, while the failure to propose adoption of such standards is not automatically disqualifying, the adoption of such standards as part of a proposed exemption can lend important support to a finding by the Department that the exemption transaction is in the interest of and protective of the plan and its participants and beneficiaries.

Rather than mandating adoption of such standards, paragraph (b)(2) of this regulation provides applicants with an opportunity to explain why the impartial conduct standards should not be applicable to their exemption transactions. The applicant's inclusion of an explanation as to why the standards are not applicable provides the Department with necessary insight into the applicant's process of evaluating the conflicts of interest that may or may not be inherent in the proposed exemption transaction. As discussed above with respect to paragraph (a), understanding and addressing conflicts of interest is a necessary part of the process the Department must undertake when evaluating exemption transactions to make its required statutory findings under ERISA section 408(a).

Commenters also objected to the inclusion of proposed paragraph (b)(2) on the grounds that the language runs counter to certain court decisions and Congressional intent. The Department disagrees with these assertions. As noted, the Final Amendment does not mandate the adoption of impartial conduct standards in every case, independently impose an enforceable obligation to comply with those standards, or purport to pre-decide the circumstances in which such conditions should be imposed. Instead, the Department is only requiring applicants to explain whether the standards would be met by the transaction at issue. This is clearly helpful information for the Department to have in reviewing exemptions for statutorily prohibited transactions, and for fiduciaries to consider before moving forward with transactions. The information allows the Department to address essential questions regarding whether a proposed exemption transaction is in the interests of and protective of the rights of the participants and beneficiaries. For example, knowing whether a transaction is in a plan's best interest can greatly inform the Department's statutorily mandated findings regarding whether the exemption transaction is in the interests of and protective of the rights of the participants and beneficiaries. Further, if the applicant informs the Department that the impartial conduct standards are not applicable, that knowledge will inform the Department's understanding of the transaction and its structure.

Proposed paragraph (b)(4) (previously paragraph (b)(3)) proposed to provide that if an advisory opinion has been requested by any party to the exemption transaction from the Department with respect to any issue relating to the exemption transaction, the exemption application must include (1) a copy of the letter concluding the Department's action on the advisory opinion request; or (2) if the Department has not yet concluded its action on the request, a copy of the request or the date on which it was submitted together with the Department's correspondence control number as indicated in the acknowledgment letter. The Department proposed to revise this provision for readability and to require an applicant

to include with its application any opinion or guidance issued by the Department and any other opinions or guidance issued by Federal, State, or regulatory bodies regarding the exemption transaction. The modification expands the prior text to ensure that all relevant information regarding the exemption transaction, including guidance issued in connection to the transaction by other Federal, State, or regulatory bodies is available to the Department when making its determination whether to grant an exemption. The Department is including this change in the Final Amendment as proposed.

The Department proposed to include a new paragraph (b)(7) that would require applicants that communicate with the Department either orally or in writing before submitting an exemption application to submit a statement setting forth the date(s) and with whom the applicant communicated before submitting the application. The Department added this language to work in tandem with the proposed revisions made to the Final Amendment in response to the requests made by multiple commenters that pre-submission applicants not be required to identify themselves. Since the Final Amendment permits certain anonymous discussions, paragraph (b)(7) now requires applicants that engaged in anonymous discussions to identify themselves to the Department so it can link prior anonymous discussions to the current applicant. Linking pre-submission communications to a current application ensures that the Department understands the entire context of an exemption application. The Department emphasizes, however, that this provision is only triggered when the applicant submits an exemption application.

The Final Amendment also includes substantial revisions to the proposed requirements set forth in proposed paragraphs (c) through (f) regarding statements and documents about qualified independent appraisers and qualified independent fiduciaries that are involved in an exemption transaction. Even though the final version of § 2570.31 generally reverts to the previous definitions of qualified independent appraiser and qualified independent fiduciary, the Department has revised, consistent with the intent of the Proposed Rule, paragraphs (c) through (f) of § 2570.34 to ensure that the appraiser and fiduciary are independent and that their valuations and oversight over the exemption transaction are accurate and reliable.

The proposed revision to paragraph (c) addressed statements and documents included in the application by the qualified independent appraiser. The Department proposed to extend the provisions of paragraph (c) to auditors and accountants. As a result, proposed paragraph (c) applied to all statements submitted by appraisers, auditors, and accountants to ensure that the Department can rely on any and all financial documents submitted by third parties.

More specifically, the Department proposed to revise several provisions that govern the information that must be included in any statements submitted by an appraiser, auditor, or accountant. First, the Department proposed to add a paragraph (c)(1) to require that statements include a signed and dated declaration under penalty of perjury that, to the best of the qualified independent appraiser's, auditor's, or accountant's knowledge and belief, all of the representations made in such statement are true and correct. Commenters objected to the proposed penalty of perjury requirement because, they argued, it would increase appraiser liability and discourage participation in the ERISA market. The Final Amendment does not require a declaration under penalty of perjury. Instead, it requires a certification that, to the best of the qualified independent appraiser's, auditor's, or accountant's knowledge and belief, all of the representations made in such statement are true and correct. The revised language in the Final Amendment balances the Department's need to ensure that an appraiser stands behind the accuracy of an appraisal report while reducing the potential chilling effect of a declaration under penalty of perjury.

Next, the Department proposed to expand paragraph (c)(2) to specifically address the contractual obligations of the appraiser, auditor, or accountant. The proposed provision required a copy of the qualified independent appraiser's, auditor's, or accountant's engagement letter and, if applicable, contract with the plan describing the specific duties the appraiser, auditor, or accountant shall undertake to be included with an application. The proposal would have provided that the appraiser, auditor, or accountant's letter or contract may not: (1) include any provision that provides for the direct or indirect indemnification or reimbursement of the independent appraiser, auditor, or accountant by the plan or another party for any failure to adhere to its contractual obligations or to Federal and state laws applicable to the appraiser's, auditor's, or accountant's work; or (2) waive any rights, claims or remedies of the plan or its participants and beneficiaries under ERISA, the Code, or other Federal and state laws against the independent appraiser, auditor, or accountant with respect to the exemption transaction.

Proposed paragraph (c)(2) would have prevented appraisers, auditors, and accountants from avoiding accountability to the plan and its participants by relying on indemnification or reimbursement provisions, whether direct or indirect, to avoid financial liability for their failure to comply with their contract or state or Federal law. When parties agree to relieve appraisers, auditors, and accountants from accountability through releases, waivers, and indemnification or reimbursement agreements, they undermine the protective conditions of the exemption, compromise the independence of their services, and cast doubt on the reliability of the service providers' work.

Commenters objected to proposed paragraph (c)(2)'s prohibition of contractual indemnification provisions. They argued that the proposed prohibition would dramatically increase the potential liability of large appraisers that often are engaged to appraise hard-to-value assets. According to the commenters, this would lead large appraisers to shift their resources to providing financial advisory services to non-employee benefit plan clients, leaving small appraisers to service the employee benefit plan market.

The Department is not persuaded by the commenters' concerns. The commenters did not provide any evidence that appraisers, accountants, or auditors would leave the marketplace if indemnification provisions were prohibited, and there is a large market of such professionals who will continue to serve plans, even if some of their colleagues choose not to render their services if they retain the liability assigned under state and Federal law for substandard work. In practice, the Department has issued numerous individual exemptions that prohibit such provisions without negative consequence.[15]

Further, the possibility that some market participants might decline to provide professional appraisal, accounting, or auditing services is

[15] *See, e.g.,* PTE 2022–04 granted to the Children's Hospital of Philadelphia Pension Plan for Union-Represented Employees, 87 FR 71358 (Nov. 11, 2022) and PTE 2021–03 granted to the Electrical Insurance Trustees Insurance Fund (the EIT Fund) and the Electrical Joint Apprenticeship and Training Trust, 86 FR 34054 (June 28, 2021).

outweighed by the Department's need to ensure that they render unbiased and professional services that meet state and Federal standards. For example, the function of independent appraisers in prohibited transactions is to provide an unbiased and objective statement of value. That function is undermined when the appraisers are relieved from responsibility and accountability for the proper discharge of their important work. Similarly, accountants and auditors play a fundamental role in ensuring that participants' interests are protected, but that role is compromised when the parties relieve them of liability and accountability for adherence to applicable legal standards.

However, the Department understands that there are certain limited situations where a contractual indemnification provision may be appropriate such as when there are nuisance claims. As a result, the Department has revised proposed paragraph (c)(2) in the Final Amendment to provide that an appraiser, auditor or accountant's letter or contract may include a provision providing for reimbursement of legal expenses with respect to claims for any failure to adhere to the appraiser's, auditor's, or accountant's contractual obligations or to Federal and state laws applicable to the appraiser's, auditor's, or accountant's work, provided that: (A) the plan determines that the reimbursement is prudent following a good faith determination that the appraiser, auditor, or accountant likely did not fail to adhere to its contractual obligations or to Federal and state laws applicable to its work and will be able to repay the plan if it is found liable or enters into a settlement agreement based on an alleged breach; and (B) the letter or contract requires the appraiser, auditor, or accountant to repay all of the reimbursements in a timely fashion if the appraiser, auditor, or accountant enters into a settlement agreement regarding any asserted failure to adhere to its contractual obligations, or to state or Federal laws, or has been found liable for a breach of contract or violation of any Federal or state laws applicable to the appraiser's, auditor's, or accountant's work. The new language allows appraisers, auditors, and accountants and their clients to negotiate agreements regarding claims that are not likely to result in liability for the appraiser, auditor, or accountant.

The Department also revised proposed paragraph (c)(4) in the Final Amendment to state that submitted documents must contain a detailed description of any relationship that the qualified independent appraiser, auditor, or accountant has had or may have with the plan or any party in interest involved in the exemption transaction or its affiliates that may influence its judgment, including a description of any past engagements with the appraiser, auditor, or accountant. The language builds on the Department's insistence, as outlined in the Proposed Rule, that independent parties involved in the exemption transaction must truly be independent.

The Department notes that it proposed to include more expansive disclosure language; the proposal would have extended the disclosure requirement to apply to any parties involved in the exemption transaction and any parties involved in developing the proposed exemption request. Commenters objected to the proposal's language on the grounds that compliance was overly expansive and burdensome. They also disputed whether the language addressed any harm. To address these comments, the Department has revised the language in the Final Amendment to limit its application to parties in interest involved in the exemption transaction and their affiliates, and no longer extends the provision to include parties involved in developing the proposed exemption transaction. However, the Final Amendment retains the core requirement that relationships, past or present, with such parties in interest that may influence the appraiser, auditor, or accountant's judgment must be disclosed in the exemption application. This outcome settles at a middle ground between the Exemption Procedure Regulation and the Proposed Rule and balances the burden of disclosure with the Department's need to address instances in which a party has potentially conflicting relationships because it is dependent on or otherwise regularly involved with parties in interest or their affiliates.

The Department proposed to include language in paragraph (c)(5) that the appraisal report must be prepared solely in the interest of the plan. This language reflected proposed language in § 2570.31(h). As discussed above, commenters stated that all appraisal reports are based on objective criteria and may not be ''on the behalf'' of any party. The Department did not intend to suggest that appraisals should be slanted in favor of any particular party, and accordingly, the Department has revised paragraph (c)(5) of the Final Amendment to provide that a written appraisal report must be prepared by a qualified independent appraiser who determines, to the best of their ability and in accordance with professional appraisal standards, the fair market value of the subject asset(s) without bias towards the plan's counterparty in the transaction or other interested parties. The Department notes that the final provision, which addresses the same concerns raised by the Proposed Rule, includes anti-bias language to emphasize that the appraisal report must not favor one party over another. Specifically, the Department is concerned that appraisals of employer stock often may be influenced by the employer in employee stock ownership plan transactions or that an appraiser may rely on information provided by the applicant without verifying the veracity of the information.

The Department is deleting the statement in current paragraph (c)(4)(iii), now paragraph (c)(5)(iii), that requires an applicant to submit a new appraisal to the Department if an appraisal report is one year or more old. This deletion makes clear to applicants that they must submit a current appraisal report with their application when submitting it to the Department, and that the Department will not move forward with its analysis of an exemption transaction without receipt of a current appraisal report.

The Final Amendment also makes changes in paragraph (c)(8). The revisions are discreet changes that are consistent with the revised definition of a qualified independent appraiser in § 2570.31(i) and describe how the revenue limitations thereunder are calculated.

The Department proposed to add a new paragraph (d) that would have required an applicant to include detailed information regarding the appraiser selection process. The preamble to proposed paragraph (d) explained that the Department's goal in proposing the disclosure was ''to promote a prudent and loyal selection process to hire a qualified independent appraiser.'' [16] In response to this proposal, commenters objected on the grounds that the information submitted as part of the process can be confidential and the fact that a party would be documented as not being selected in the public record could discourage parties from participating in the selection process. Commenters also argued that the Department does not have the statutory authority to insert itself into the fiduciary selection process.

The Department has modified the proposed provision in response to commenters' concerns. Paragraph (d) of the Final Amendment now states that an

[16] 87 FR 14729 (Mar. 15, 2022).

applicant must include the following information with its exemption application: (1) a representation that the independent fiduciary prudently selected the appraiser after diligent review of the appraiser's technical training and proficiency with respect to the type of valuation at issue, the appraiser's independence from the plan's counterparties in the exemption transaction, and the absence of any material conflicts of interest with respect to the exemption transaction; (2) a representation that the appraiser is independent within the meaning of § 2571.31(i); and (3) a representation that the independent appraiser has appropriate technical training and proficiency with respect to the specific details of the exemption transaction. This new requirement achieves the goal the Department identified in its proposal to ensure that applicants follow a prudent and loyal selection process when they hire a qualified independent appraiser. The Department specifically requested comments on these proposed revisions, ''including whether the Department should consider other types of information.'' [17] Commenters pointed to other types of information the Department could request that would allow the Department to fulfill its stated objective and that would allay the commenters' concerns over the proposed requirements. Accordingly, the Final Amendment's requirement fulfills the Department's need to require applicants to follow a prudent and loyal selection process while addressing commenters' concerns.

The Department similarly revises the proposed new paragraph (e). Similar to proposed paragraph (d), proposed paragraph (e) would have required applicants to provide detailed information regarding the process by which an independent fiduciary was selected. Commenters raised similar concerns regarding this language. Therefore, as with paragraph (d), paragraph (e) of the Final Amendment has been revised to require applicants to include the following representations with their exemption applications: (1) a representation that an appropriate fiduciary without material conflicts of interest prudently selected the independent fiduciary after diligently reviewing the independent fiduciary's technical training and proficiency with respect to ERISA, the Code, and the specific details of the exemption transaction, and the sufficiency of the independent fiduciary's fiduciary liability insurance coverage; (2) a representation that the fiduciary retained to act as the independent fiduciary is independent within the meaning of § 2570.31(j); and (3) a representation that the independent fiduciary has appropriate technical training and proficiency with respect to ERISA and the Code and the specific details of the exemption transaction. As with paragraph (d), the new paragraph promotes a prudent and loyal selection process while addressing commenters' concerns.

In the Final Amendment, the Department revises paragraph (f), which specifies the information an applicant must include in the qualified independent fiduciary's statement required to be submitted with its application. As with the changes to the qualified independent appraiser's statement, these changes are designed to bolster independence and reliability.

First, paragraph (f)(1) of the proposal would have required the statement to include a signed and dated declaration under penalty of perjury that, to the best of the qualified independent fiduciary's knowledge and belief, all of the representations made in such statement are true and correct. As with the proposal's paragraph (c)(1), commenters objected to the penalty of perjury requirement because it would increase independent fiduciary liability and discourage them from participating in the employee benefit plan market. In response to those commenters, the Final Amendment does not require a declaration under penalty of perjury, and, instead, requires a certification that, to the best of the qualified independent fiduciary's knowledge and belief, all of the representations made in such statement are true and correct. The revised language appropriately ensures that an independent fiduciary stands behind its statements and actions while avoiding the potential chilling impact of a declaration under penalty of perjury. Next, paragraph (f)(2) aims to prevent fiduciaries from avoiding accountability to the plan and its participants and beneficiaries by relying on indemnification or reimbursement provisions, whether direct or indirect, to avoid financial liability for their failure to comply with their contract or state or Federal law. When parties agree to relieve fiduciaries from accountability through releases, waivers, and indemnification or reimbursement agreements, they undermine the protective conditions of an applicable exemption, compromise the independence of their services, and cast doubt on the reliability of the service providers' work.

As with the proposed paragraph (c)(2), commenters objected to the prohibition of contractual indemnification provisions in proposed paragraph (f)(2). They argued similarly that the prohibition on contractual indemnification provisions would dramatically increase the potential liability of independent fiduciaries that often are engaged to perform work with respect to exemption transactions. According to the commenters, this would lead large independent fiduciaries to shift their resources to providing fiduciary services to non-employee benefit plan clients, leaving small, inexperienced fiduciaries to service the employee benefit plan market.

The Department does not agree with the commenters' concerns. First, the Department notes that ERISA section 410 already places limitations on indemnification provisions for fiduciaries. Second, the commenters did not provide any evidence that fiduciaries would leave the employee benefit plan marketplace if an indemnification provision were prohibited, and many independent fiduciaries will continue to serve plans, even if some of their colleagues choose not to render their services if they retain the liability assigned under state and Federal law for substandard work. As with qualified independent appraisers, the Department has, in recent practice, already required qualified independent fiduciaries to adhere to stricter requirements in recent exemptions without a negative effect on the independent fiduciary market.[18] Furthermore, the possibility that some independent fiduciaries might decline to provide fiduciary services to the employee benefit plan market is outweighed by the Department's need to ensure that they render unbiased and professional services that meet state and Federal standards. Independent fiduciaries play a critical role in ensuring that participants' interests are protected, but that role is compromised when the parties relieve themselves of liability and accountability for adherence to applicable legal standards.

However, the Department does recognize that there are certain limited situations, such as nuisance claims,

[17] 87 FR 14727 (Mar. 15, 2022).

[18] *See, e.g.,* Section II(f) of PTE 2023–12 (88 FR 11699. February 23, 2023); Section II(p) of PTE 2022–02 (87 FR 23245, April 19, 2022); Section III(h) of PTE 2022–03 (87 FR 54264, September 2, 2022); Section I(h) of PTE 2021–03 (86 FR 34054, June 28, 2021); Section III(n) of the Notice of Proposed Exemption Involving J.P. Morgan Securities LLC, J.P. Morgan Investment Management Inc., J.P. Morgan Securities, and Chase Wealth Management (86 FR 57446, October 15, 2021).

where a contractual reimbursement provision may be appropriate. As a result, paragraph (f)(2) of the Final Amendment provides that the independent fiduciary's letter or contract may include a provision providing for reimbursement of legal expenses with respect to claims for any failure to adhere to the fiduciary's contractual obligations or to Federal and state laws applicable to the independent fiduciary's work, provided that (A) the plan determines that the reimbursement is prudent following a good faith determination that the independent fiduciary likely did not fail to adhere to its contractual obligations or to Federal and state laws applicable to the independent fiduciary's work and will be able to repay the plan if the fiduciary is found liable or enters into a settlement for the breach; and (B) the letter or contract requires the independent fiduciary to repay all of the reimbursements, in a timely fashion, in the event the independent fiduciary enters into a settlement agreement regarding any asserted failure to adhere to its contractual obligations, or to state or Federal laws, or has been found liable for a breach of contract or violation of any Federal or state laws applicable to the fiduciary's work. The new language allows independent fiduciaries and their clients to negotiate agreements to address claims that are not likely to result in liability for the fiduciary and is consistent with the underlying concerns previously laid out by the Proposed Rule. The Department requires the fiduciary selecting the independent fiduciary to make a good faith determination to fulfill its fiduciary obligations but does not require an exhaustive legal review. The Department also notes that despite the revised language, no language may be included in the letter or contract that runs afoul of ERISA section 410.

In order to ensure that qualified independent fiduciaries have sufficient resources to compensate plans for any losses for which they are liable, the Department originally proposed language that would require fiduciaries to maintain a sufficient amount of fiduciary liability insurance to indemnify the plan for damages resulting from a breach by the independent fiduciary of either: (1) ERISA, the Code, or any other Federal or state law; or (2) its contract or engagement letter under proposed paragraph (f)(3). The insurance could not contain an exclusion for actions brought by the Secretary or any other Federal, State, or regulatory body, the plan, or plan participants and beneficiaries. Commenters objected to this language on the grounds that obtaining insurance that could meet the requirements of the language would be difficult, if not impossible. They also argued that the cost of such insurance would drive many independent fiduciaries to exit the employee benefit plan marketplace.

The Department acknowledges the commenters' concerns but also wants to ensure that qualified independent fiduciaries have sufficient resources to compensate plans for any losses for which they are liable. Therefore, the Department has revised the proposed language in the Final Amendment to simply require applicants to include in their exemption applications a description of any fiduciary liability insurance policy maintained by the independent fiduciary that includes: (A) the amount of coverage available to indemnify the plan for damages resulting from a breach by the independent fiduciary of either ERISA, the Code, or any other Federal or state law or its contract or engagement letter; and (B) whether the insurance policy contains an exclusion for actions brought by the Secretary or any other Federal, State, or regulatory body, the plan, or plan participants or beneficiaries. Some entities that provide ERISA fiduciary services with respect to exemption transactions may not be either sufficiently liquid or sufficiently capitalized to address liability that might arise in connection with an exemption transaction. A prudent independent fiduciary must have sufficient insurance to address those issues. Therefore, the Department's position is that a prudent fiduciary should make a reasoned determination regarding the appropriate amount of insurance it should maintain to fulfill its fiduciary obligation to a plan and protect the plan's participants and beneficiaries. Revising paragraph (f)(2) in the Final Amendment to require a description of any fiduciary liability insurance policy maintained by the independent fiduciary allows the independent fiduciaries to make their own determinations regarding insurance, while also providing the Department with the information it needs to determine whether a proposed exemption is in the interest of and protective of the rights of participants and beneficiaries. Further, the information would assist the Department in determining whether it should request additional information regarding the independent fiduciary's assets, capital, or insurance in order to determine whether sufficient resources exist to cover a potential loss.

The Department notes that the Final Amendment's independent fiduciary insurance disclosure requirement is uniquely imposed on independent fiduciaries because of their important role as a unique bulwark against conflicts of interest. Under ERISA's statutory framework, fiduciaries have central responsibility—and accountability—for the protection of plan participants' interests. Consequently, the Department is especially concerned that they have the financial wherewithal to make good on violations that injure plan participants. Independent fiduciaries may ultimately bear the responsibility of (1) making final decisions regarding determinations (*e.g.,* approval of an appraisal) and (2) approving the overall exemption transaction. Independent fiduciaries also must make a determination as to whether a third-party service provider, such as an appraiser, has sufficient insurance, assets, and liquidity to address any liability that may arise from a failure to meet the service provider's contractually imposed obligations when determining whether to retain the service provider. Independent fiduciaries are critically important to ensuring that the exemptions are in the interest and protective of the plan and its participants and beneficiaries. Therefore, when they submit an exemption application, applicants should be positioned to carefully consider and disclose the independent fiduciary's ability to remedy any injuries caused by its fiduciary violations and make the plan whole for any losses caused by the independent fiduciary's failure to discharge its role properly.[19]

Due to the qualified independent fiduciary's essential role in many exemptions, the Department makes additional changes to paragraph (f) in the Final Amendment that are consistent with the stated goals of the Proposed Rule to further bolster the qualified independent fiduciary's independence. First, paragraph (f)(6) of the Final Amendment expands the existing acknowledgement provision to require an acknowledgement that the fiduciary understands its duties and

[19] The Department notes that the independent fiduciaries themselves are the parties best informed about their own ability to remedy any potential ERISA liability, and that the exemption process is not an adversarial proceeding in which the Department is in a position to adjudicate all the relevant facts. Accordingly, the Department's acceptance of these disclosures should not be viewed as a determination by the Department that an independent fiduciary has adequately addressed its ability to remedy any potential ERISA liability.

responsibilities under ERISA, is acting as a fiduciary of the plan with respect to the exemption transaction, has no material conflicts of interest with respect to the exemption transaction, and is not acting as an agent or representative of the plan sponsor. The Final Amendment expands the acknowledgment to capture more potential conflicts. Under the Final Amendment, the fiduciary can no longer simply acknowledge that it is an ERISA fiduciary, but it also has to acknowledge that it is acting with respect to the transaction solely in the interest of the plan, not acting on behalf of the plan sponsor, and not subject to conflicts of interest.

The Department also revises paragraph (f)(7) in the Final Amendment to provide that the qualified independent fiduciary must certify in writing that the exemption transaction complies with the impartial conduct standards set forth in paragraphs (b)(2)(i)(A) through (C). The Final Amendment revises paragraph (f)(9) to reflect the changes to the definition of a qualified independent fiduciary.

The Department added a new paragraph (f)(10) to the Final Amendment that requires the qualified independent fiduciary to state that it has no conflicts of interest with respect to the exemption transaction that could affect the exercise of its best judgment as a fiduciary. The requirement puts the fiduciary on the record that it has no conflicts that could impact its judgment and, thereby, promotes compliance with the exemption's terms.

In the proposal, the Department proposed to revise paragraph (f)(11) to require an applicant to address in its exemption application whether the qualified independent fiduciary has been under investigation or examination, or has been engaged in litigation or a continuing controversy. Specifically, the fiduciary would have been required to either (1) include a statement that within the last five years, the independent fiduciary has not been under investigation or examination by, and has not engaged in litigation or a continuing controversy with, the Department, the IRS, the Justice Department, the Pension Benefit Guaranty Corporation, the Federal Retirement Thrift Investment Board, or any other Federal or state entity involving compliance with provisions of ERISA, the Code, FERSA, or other Federal or state law; or (2) include a statement describing the applicable investigation, examination, litigation or controversy. Commenters objected to the breadth of the language, asserting that it would capture a wide universe of events that were not related to the interests of employee benefit plans.

In response to the concerns, the Department revised paragraph (f)(11) in the Final Amendment to limit disclosure to require the independent fiduciary to include a statement that it has not been under investigation or examination by, and has not engaged in litigation investigations or controversies involving: (A) compliance with provisions of ERISA or FERSA; (B) its representation of or position or employment with any employee benefit plan, including investigations or controversies involving ERISA or the Code, or any other Federal or state law; (C) conduct of the business of a broker, dealer, investment adviser, bank, insurance company, or fiduciary; (D) income tax evasion; or (E) or any felony or conspiracy involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities.

In the final amendment, the Department now is requiring applicants only to disclose events that are directly applicable to the provision of fiduciary services to employee benefit plans. Specifically, the Department has limited the disclosure to cover a fiduciary's work experience that is relevant to determining whether the fiduciary can meet the high standard to which it is held under ERISA, whether that experience is in the employee benefits field or another industry in which a fiduciary's ability to uphold its heightened obligations is reflected. These disclosures are essential to informing the Department's determination of whether the proposed independent fiduciary will be able to meet the heightened standards to which a fiduciary is held under ERISA, and the important role they would serve in overseeing transactions that otherwise would be prohibited under ERISA. The Department notes, for clarity, that the term employee benefit plan also refers to governmental and church plans.

Paragraph (f)(12) connects with the Proposed Rule's paragraph (f)(11), which is slightly revised for clarity in the Final Amendment by requiring applicants to include in their exemption applications the qualified independent fiduciary's statement that within the last 13 years, it has not been:

(1) convicted or released from imprisonment, whichever is later, as a result of any felony involving abuse or misuse of such person's position or employment with an employee benefit plan or 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 of which any of the foregoing crimes is an element; or any crime identified in ERISA section 411, regardless of whether the conviction occurred in a U.S. or foreign jurisdiction; or

(2) convicted by a foreign court of competent jurisdiction or released from imprisonment, whichever is later, as a result of any crime that is substantially equivalent to an offense described in paragraph (f)(12)(i)(A)(*1*); or

A statement describing a conviction or release from imprisonment described in paragraph (f)(12)(i)(A).

For purposes of paragraph (f), a person is deemed to have been ''convicted'' from 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 remains under appeal and regardless of whether the foreign jurisdiction considers a trial court judgment final while under appeal.

Commenters raised concerns that the required disclosure of foreign convictions is overly expansive, burdensome, and confusing. The Department disagrees with these concerns and maintains that the burden imposed by this disclosure is minimal and moreover that the burden is outweighed by the Department's need to have information relevant to the qualifications and independence of the fiduciary and to the prudence and loyalty of the applicant's selection of the independent fiduciary. Further, the Department does not believe the requirement is overly expansive or confusing, because it is limited to convictions that are specifically related to a fiduciary's duties that are relevant to the Department's determination.

Lastly, the Final Amendment narrows paragraph (g)(3) regarding other third-party experts. The paragraph now provides that the detailed description of any relationship is limited to parties in interest (or affiliates) involved in the exemption transaction. This revision is consistent with the changes made in the Final Amendment with respect to appraisers and fiduciaries.

Section 2570.35

Section 2570.35 addresses information that must be included in an individual exemption application. The Department proposed multiple changes to § 2570.35 for readability and consistency with changes made in other sections of the Exemption Procedure Regulation and included these changes in the Final Amendment. In addition, the Department included some minor changes in the Final Amendment that require applicants to provide the mail and email addresses of the plan and parties in interest to which the exemption application applies, as well as a reminder that applicants should not submit social security numbers with their applications.

Beyond those changes, the Department proposed to revise paragraph (a)(6) to address foreign convictions more clearly, which was further revised in the Final Amendment solely for clarity. While the Department's position is that the current Exemption Procedure Regulation language includes foreign convictions, the proposal amended the provision to clearly require applicants to disclose whether, within the last 13 years, they or any party involved in the exemption transaction had been convicted by a foreign court of competent jurisdiction or released from imprisonment, whichever is later, as a result of any crime, however denominated by the laws of the relevant foreign government, that is substantially equivalent to an offense described in paragraph (a)(6)(i) and a description of the circumstances of any such conviction. For purposes of this section, a person is deemed to have been ''convicted'' from the date of the trial court's judgment (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 remains under appeal and the foreign jurisdiction considers a trial court judgment final while under appeal.

Commenters objected to the inclusion of foreign convictions in the proposal because they asserted that their inclusion is not relevant to the exemption process and is inconsistent with guidance issued by the Department with respect to Prohibited Transaction Exemption 84–14.

The Department disagrees with the commenters' position, and it has adopted the proposed changes in the Final Amendment. The Department's position is that clarifying the treatment of foreign convictions removes uncertainty from the exemption application process, which ensures that the Department receives all relevant information it needs to make an exemption determination. Applicants' foreign convictions for crimes involving self-interested and conflicted transactions are relevant to the Department's statutory findings because such convictions may indicate risk to the plan and its participants and beneficiaries. This information also informs the Department about how to handle potential conflicts of interest and enhances its ability to design protective conditions by clarifying whether a party is likely to comply with the terms of the exemption. For example, if a party has a history of fiduciary violations in foreign jurisdictions, the Department may look closer or impose different conditions with respect to an exemption that allows a party to engage in a transaction with potential fiduciary conflicts of interest. The Department also notes that the language of the Final Amendment is applicable solely to the exemption application process and is not an interpretation of Prohibited Transaction Exemption 84–14.

The Department also proposed to revise paragraph (a)(7) to be consistent with the Department's approach to fiduciaries that have been the subject of investigation, examination, or litigation as set forth in § 2570.34(f)(11). Commenters objected to the breadth of the language by asserting that it captures a wide universe of events that are not related to employee benefit plans.

After considering these comments, consistent with § 2570.34(f)(11), the Department has limited the language in the proposed amendment to only require applicants to include information in their applications that is essential to the Department's evaluation of an independent fiduciary's ability to meet ERISA's fiduciary standards, which are the highest known to law.[20] As revised, the provision in the Final Amendment is limited to those investigations, examinations, or litigation involving: (i) compliance with provisions of ERISA or FERSA; (ii) representation of or position or employment with any employee benefit plan, including investigations or controversies involving ERISA or the Code, or any other Federal or state law; (iii) conduct of the business of a broker, dealer, investment adviser, bank, insurance company, or fiduciary; (iv) income tax evasion; or (v) or any felony or conspiracy involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities. This change represents a subset of the investigations, examinations, and litigation matters that the Department proposed to include. This revision ensures that the Department has full knowledge of any potential issues or conflicts that may impact an independent fiduciary's duty to meet its ERISA obligations, while not requiring disclosures that are overly inclusive or burdensome.

The Department also proposed to revise paragraph (a)(12), which required the applicant to state the percentage of plan assets affected by the exemption transaction to provide that if the exemption transaction includes the acquisition of an asset by the plan, the fair market value of the asset to be acquired must be included in both the numerator and denominator of the applicable fraction. The new language simply clarifies the Department's understanding of how to calculate the fair market value percentage in an acquisition so that the percentage accurately reflects the impact of the exemption transaction on overall plan assets. This language has been adopted in the Final Amendment without change.

Paragraph (a)(18) requires applicants to provide information on which parties will bear the cost of the exemption application and notifying interested persons. The Proposed Rule would have explained that the disclosure is intended to capture all of the costs and fees associated with the exemption transaction, not just those immediately derived from the submission of the exemption application. This facilitates the Department's understanding of the true cost of a particular exemption transaction. This provision has thus been included in the Final Amendment without change.

In addition, paragraph (a)(18) of the proposal included language that stated that a plan may not bear the costs of the exemption application, commissions, fees, and notification of interested persons unless the Department determines, in its sole discretion, that a compelling circumstance exists that necessitates the payment of these expenses by the plan. Commenters argued that allowing a plan to bear these costs is acceptable because many applications are solely for the benefit of a plan, and that prohibiting the plan from incurring such expenses was arbitrary. After consideration, the Department has determined not to include this language in the Final Amendment.

Finally, the Department proposed to add a new paragraph (a)(20), which

[20] *See, Donovan* v. *Bierwirth,* 680 F.2d 263, 272 (2d Cir. 1982).

would have required the applicant to state in its exemption application whether any prior transactions have occurred between (1) the plan or plan sponsor and (2) a party in interest involved in the exemption transaction. Requiring this information allows the Department to determine where the exemption transaction fits in the relationship between the plan and the parties in interest involved in the exemption transaction, and to evaluate whether the exemption transaction is part of a larger set of transactions or a pattern of practice. Therefore, the Department included that provision in the Final Amendment as proposed.

The Department proposed a minor change to paragraph (b)(4). The current Exemption Procedure Regulation requires the application to contain a net worth statement with respect to any party in interest providing a personal guarantee with respect to the exemption transaction. The Department expanded this language to cover not just parties in interest, but any party providing such a guarantee. This change allows the Department to more accurately determine the value of any guarantee associated with the exemption transaction, and, therefore, has been included in the Final Amendment.

In accordance with its discussion of § 2570.30 regarding retroactive exemption requests, the Department proposed to make specific revisions to the requirements for retroactive exemptions in paragraph (d). For example, the Department proposed to amend current paragraph (d)(1) to state that the Department will consider exemption requests for retroactive relief only when (1) the safeguards necessary for the grant of a prospective exemption were in place at the time the parties entered into the exemption transaction, and (2) the plan and its participants and beneficiaries have not been harmed by the exemption transaction. An applicant for a retroactive exemption must demonstrate that the responsible plan fiduciaries acted in good faith by taking all appropriate steps necessary to protect the plan from abuse, loss, and risk at the time of the exemption transaction. An applicant should further explain and describe whether the exemption transaction could have been performed without engaging in a prohibited exemption transaction, and whether the goals of the exemption transaction could have been achieved through an alternative transaction that served the aims of the plan equally well.

The Department's proposed revisions were intended to emphasize that the applicant must demonstrate that the plan and its participants and beneficiaries were not harmed by the exemption transaction for which an applicant requests retroaction relief. The Department cannot readily make the findings required by ERISA section 408(a) that the transaction is in the interests of the plan and its participants and beneficiaries and protective of their rights if, in fact, the transaction were harmful to plan participants and beneficiaries. The Department's determination of whether a transaction was harmful will be based on the facts and circumstances of the transaction, including whether the participant and beneficiaries were made whole. Further, the applicant must: (1) demonstrate that the plan fiduciaries took all appropriate steps necessary to prevent abuse, loss, and risk when the transaction took place; and (2) fully explain and describe whether the exemption transaction could have been performed without engaging in a prohibited exemption transaction, and whether the goals of the transaction could have been achieved through an alternative transaction that served the plan's objectives equally well.

Including such information in the exemption application demonstrates to the Department that the fiduciaries were acting prudently to protect the plan and its participants and beneficiaries when the transaction took place. Therefore, the Department has finalized these revisions as proposed while making minor edits to the wording.

In order to assist applicants in demonstrating that they acted in good faith when entering into a previously consummated exemption transaction, proposed paragraph (d)(2) provided factors the Department would consider when reviewing a retroactive exemption application. As proposed, paragraph (d)(2)(i) was revised to state that one of the factors the Department would consider is the involvement of an independent fiduciary before an exemption transaction occurs who acts on behalf of the plan and is qualified to negotiate, approve, and monitor the exemption transaction; provided, however, the Department could consider, at its sole discretion, an independent fiduciary's appointment and retrospective review after completion of the exemption transaction due to exigent circumstances. The Department proposed making these revisions to the prior language to clarify that, in certain exigent circumstances, the Department may consider, at its sole discretion, the approval of an independent fiduciary after the fact. The Department recognizes that under certain rare and extreme circumstances, an independent fiduciary's retroactive approval of the transaction may assist the Department in determining whether an applicant acted in good faith.

The Department also proposed to revise paragraph (d)(2)(v) to assist with the good faith determination. The proposed revision required an applicant to submit evidence that the plan fiduciary did not engage in an act or transaction that the fiduciary should have known was prohibited under ERISA section 406 and/or Code section 4975. The proposed revision applied the more appropriate ERISA standard that a fiduciary is responsible not only for what it knows, but what it should have known. Setting forth this standard ensures that the plan fiduciary actively engaged and evaluated the exemption transaction. The Department is adopting this provision in the Final Amendment as proposed.

Finally, the Department proposed to revise the last paragraph on retroactive exemptions. Specifically, proposed paragraph (d)(3) addressed the Department's position that it will not consider retroactive exemption requests if the exemption transaction resulted in a loss for the plan. The proposed revision made clear that the Department's starting presumption is that it will simply not consider such requests. However, the Department also proposed to clarify that the determination as to loss is only applied at the time of the exemption application. Thus, if the facts later show that the exemption transaction resulted in a loss months or years after the completion of the exemption application, that information is not relevant to the exemption determination, which is made based on the facts available at the time. The Department has adopted this revision in the Final Amendment as proposed.

Section 2570.36

Section 2570.36 addresses where to file an exemption application. In the proposal, the Department proposed to modernize the submission process by no longer requiring a paper submission, and instead directing applicants to make their submissions to *e-oed@dol.gov.* The revision retains applicants' right to submit a paper application and provides current information on the correct delivery addresses while noting that the address published in the Exemption Procedure Regulation may change over time. The Department has finalized the revision as proposed, and notes that it will provide the current submission address on its website.

Section 2570.37

Section 2570.37 addresses an applicant's duty to supplement its exemption application. The Department proposed to revise paragraph (a) to state that applicants have a duty to promptly notify the Department of any material changes to facts or representations either during the Department's consideration of the application or following the Department's grant of an exemption. This duty only extends to the information that was provided at the time of the grant of the exemption. In paragraph (b), the Department includes the duty for applicants to disclose to the Department whether a party in interest participating in the exemption transaction is the subject of an investigation or enforcement action relating to an employee benefit plan by including investigative and enforcement actions by any Federal or state governmental entity, not just the Department, the IRS, the Justice Department, the Pension Benefit Guaranty Corporation, and the Federal Retirement Thrift Investment Board. The Department has included this provision in the Final Amendment as proposed, but it notes that solely for this purpose, SEC examinations are not included.

Section 2570.38

Section 2570.38 addresses the issuance of tentative denial letters before the Department issues a final denial letter to an applicant. Tentative denial letters, often referred to as TD letters, inform the applicant that the Department has tentatively decided not to move forward with proposing an exemption, and describe the applicant's rights to request a conference and submit additional information. The Department proposed to revise the text to clarify that it may extend the 20-day period during which an applicant normally would be required to request a hearing or notify the Department of its intent to submit additional information following the issuance of a tentative denial letter at its sole discretion. The Department proposed to make this change to inform applicants that the 20-day period provides a hard deadline for the applicant to reply unless the Department chooses to extend the period at its sole discretion based on the facts and circumstances. The Department has made this change to the Final Amendment as proposed.

Section 2570.39

Section 2570.39 addresses the applicant's ability to submit additional information. Consistent with other proposed revisions to the Exemption Procedure Regulation, the Department proposed a revision to update the manner by which the applicant may communicate with the Department. The Department also proposed to revise paragraph (b) to provide that, while the applicant is required to submit the additional information within 40 days after the date the Department issued a tentative denial letter, the Department may extend the time period at its sole discretion. The Department also proposed to make conforming changes throughout the section. As with § 2570.38, the Department proposed this change to inform the applicant that the time period is a hard deadline, unless the Department chooses to extend the period pursuant to its own discretion based on the facts and circumstances.

Finally, the Department proposed to delete paragraph (d). The paragraph provides that if an applicant could not submit all of the supplementary information within the 40-day time period (unless extended by the Department), it could withdraw the application and reinstate it at a later time. The Department proposed to delete this provision to be consistent with proposed changes to § 2570.44, which covers withdrawn applications. As described below, the Department is amending its approach regarding withdrawals and reapplications in that section.

The Department notes that the requirement in paragraph (b) that the certification accompanying the submission of additional information be made pursuant to a penalty of perjury is revised for consistency with § 2570.34(c) and (f) to require a certification that all information provided to the Department is true and correct. Otherwise, the Department is including all of the proposed revisions to § 2570.39 as proposed.

Section 2570.40

Section 2570.40 addresses conferences between the applicant, or its representative, and the Department. Current paragraph (b) provides that, generally, an applicant is entitled to only one conference under the Exemption Procedure Regulation. The Department proposed to retain this text, but the Department added additional language providing that the Department may request the applicant to participate in additional conferences at its sole discretion. The proposal provided that the Department would make such a request if it determines that additional conferences are appropriate based on the facts and circumstances of the exemption application.

The Department also proposed to revise paragraphs (d) through (h), which govern the timing of conferences and the submission of information. As with changes to §§ 2570.39 and 2570.40(b), the Department proposed to revise these sections to provide that the Department may, at its sole discretion, extend time periods. These changes were proposed to similarly inform the applicant that the time periods outlined in the section provide a hard deadline for the applicant, unless the Department, based on the facts and circumstances, chooses to extend the period pursuant to its own discretion.

The Department also proposed to add a new paragraph (i) providing that the Department, at its sole discretion, may hold a conference with any party, including the qualified independent fiduciary or the qualified independent appraiser, regarding any matter related to an exemption request without the presence of the applicant or other parties to the exemption transaction or their representatives. Under the proposal, any such conferences could occur in addition to the conference with the applicant described in § 2570.40(b). Commenters objected to this new paragraph, arguing that it is unnecessary and presumes malfeasance on the part of the applicant.

The Department disagrees. The Department proposed to add this language to clarify that it is entitled to hold conferences with whomever it deems necessary. The new paragraph acknowledges that, under certain circumstances, the Department may need to meet with a third party to accurately assess the exemption application. The language does not presume or connote an applicant's malfeasance; it only recognizes the fact that certain parties, such as independent fiduciaries or appraisers, may be less restrained when discussing issues solely with the Department. For example, the Department may determine that a discussion with a qualified independent fiduciary without the presence of the applicant or its representative may provide additional insight into the qualified independent fiduciary's work if the applicant is not present to influence the explanation of the fiduciary's work product or limit the topics which are discussed.

After considering the comments, the Department has included the revisions to § 2570.40 in the Final Amendment as proposed.

Section 2570.41

Section 2570.41 addresses final denial letters, which are the final action taken by the Department with respect to an

application if the Department has determined that an exemption will not be granted for an exemption transaction. The Department proposed to add a new paragraph (a), which provides that the Department would issue a final denial letter without issuing a tentative denial letter under § 2570.38, or conducting a hearing on the exemption under either § 2570.46 or § 2570.47, (in other words, a direct denial) if the Department determines in its sole discretion, that: (1) the applicant has failed to submit information requested by the Department in a timely manner; (2) the information provided by the applicant does not meet the requirements of §§ 2570.34 and 2570.35; or (3) a conference has been held between the Department and the applicant before the issuance of a tentative denial letter during which the Department and the applicant addressed the reasons for denial that otherwise would have been set forth in a tentative denial letter pursuant to § 2570.38. While the language of §§ 2570.38, 2570.46, and 2570.47 does not require a tentative denial letter to be sent or a hearing to occur under all circumstances, the current language does not clearly state that the Department may issue a final denial letter without taking those steps. To eliminate uncertainty, the Department proposed to add the new text to make clear that, based on the reasons outlined above, the Department may issue final denial letters without tentative denial letters or hearings.

Commenters objected to the new proposed paragraph (a) on the grounds that being issued a direct denial would deprive applicants of an opportunity to respond to concerns raised by the Department. In response, the Department clarifies that it would not issue a direct denial where there is active engagement between the applicant and the Department. The Department proposed to include this language solely to clarify that there are certain instances where, for administrative expediency, the Department can issue a final denial letter without issuing a tentative denial letter if the facts and circumstances preclude the Department from processing the application submitted by the applicant, or if an applicant fails to provide anything more than cursory information. For example, if an applicant submits an exemption application that is only one or two pages long and is unresponsive to the Department's request for additional information, under the proposed new paragraph, the Department may issue a final denial letter either immediately or following an initial short conference during which the applicant fails to provide any additional or requested information. Further, the Department proposed that it may issue a direct denial letter if an applicant submits a request for a retroactive exemption where the participants and beneficiaries were substantially harmed by the subject transaction.

The Department also notes that it has modified § 2570.45 to provide that applications denied under § 2570.41(a) can be resubmitted for reconsideration. Those changes are discussed further below.

The Department also proposed to add a new paragraph (e), which would provide that the Department will issue a final denial letter where the applicant either (1) asks to withdraw the exemption application, or (2) communicates to the Department that it is not interested in continuing the application process. This revision is consistent with the changes the Department is making in § 2570.44. The Department proposed to add this text to formally memorialize the ultimate disposition of the application by issuing a final denial letter if the applicant decides it is no longer interested in an exemption, whether communicated through either a withdrawal or a statement of disinterest. The proposed revision would allow the Department to track and manage exemption applications more clearly.

The Department has included all of the Proposed Rule's revisions to § 2570.41 in the Final Amendment.

Section 2570.42

When the Department makes an initial determination that the issuance of an exemption is warranted, § 2570.42 provides that the Department must give interested parties notice and opportunity to comment through the publication of a proposed exemption in the **Federal Register**. The Department proposed to revise a portion of paragraph (d). Previously, the paragraph provided that when the proposed exemption includes relief from ERISA section 406(b), Code section 4975(c)(1)(E), or FERSA section 8477(c)(2), the proposed exemption must inform interested persons who would be adversely affected by the transaction of their right to request a hearing under § 2570.46. The Department proposed to delete the reference to interested persons who would be adversely affected by the exemption transaction, thus making the text applicable to all interested persons who have been materially affected by the exemption. This revision was made to both reflect the difficulty in determining which parties are adversely affected and to ensure that all parties that might have relevant information to the Department's final determination are provided with an opportunity to communicate that information.

The Department has retained its proposed revisions to § 2570.42 in the Final Amendment.

Section 2570.43

Upon publication of a proposed exemption in the **Federal Register**, § 2570.43 provides that the applicant must provide notice to interested persons of the pendency of the exemption. The section outlines the process by which the notice is drafted and provided. The Department proposed to revise paragraph (a) to delete ''adversely'' and replace it with ''materially'' when applying the term to the interested parties' right to a hearing to remain consistent with the proposal's revision to § 2570.42 discussed above. The Department also proposed to make minor changes regarding how a commenter may submit their comment and added language to the existing text advising commenters not to disclose personal data or submit confidential or otherwise protected information.

The Department has included these proposed amendments to § 2570.43 in the Final Amendment.

Section 2570.44

Section 2570.44 addresses the withdrawal of an exemption application. The current Exemption Procedure Regulation is silent as to whether an applicant can withdraw its exemption application without the Department's issuance of a formal final denial letter. It has, however, been the Department's practice that applicants can withdraw their applications without the issuance of a final denial letter. In a revision to this practice, the Department proposed to revise paragraph (b) to provide explicitly that the Department will terminate all proceedings regarding the application upon receiving an applicant's withdrawal request and issue a final denial letter. The issuance of the final denial letter would formally close the application and allow the Department to better manage its inventory of exemption applications.

The Department proposed to revise paragraph (d) to provide that if an applicant chooses to reapply after withdrawing their application, the applicant must update all previously furnished information with respect to the prior application and the exemption transaction. Applicants currently can

reapply without providing additional information after withdrawing their applications unless the request occurs more than two years after withdrawal. Applicants should be required to completely update all information when they reapply for an exemption, regardless of the time that has elapsed after their withdrawal. Therefore, the Proposed Rule would treat the withdrawal as a formal denial, which would shift the burden to the applicant to present an updated application to the Department for its review.

Commenters raised concerns that the proposed denial and resubmission revisions would presume malfeasance or bias against resubmitted applications. The Department disagrees. The denial is an administrative action only, and it presents no bias against an application. Clearly shifting the resubmission burden to the applicant, without relying on an older submission that was withdrawn, is appropriate because the exemption application process starts from the premise that applicants must show how they meet the Exemption Procedure Regulation requirements. Additionally, requiring current information upon resubmission will benefit both the applicants and the Department by streamlining the review of resubmitted applications.

Finally, the Department proposed to add a new paragraph (f) which states that, following the withdrawal of an exemption application, the administrative record will remain subject to public inspection pursuant to § 2570.51. The Department proposed this change to clearly set forth its policy that the administrative record for an exemption will always be available for public inspection after it is created. The language was intended to clarify current practice and to make this section consistent with other revisions regarding the administrative record described above.

After considering the comments, the Department has retained the Proposed Rule's revisions to § 2570.44 in the Final Amendment.

Section 2570.45

Section 2570.45 addresses formal requests for reconsideration following the Department's issuance of a final denial letter. The Department proposed to add new language to paragraph (a), which provides that applicants whose applications were denied without a tentative denial under § 2570.41(a) may request reconsideration, and a new paragraph (g), which provides that a request for reinstatement of an exemption application following a withdrawal pursuant to § 2570.44(d) is not a request for reconsideration governed by § 2570.45. The Department proposed to add this text to draw a clear distinction between §§ 2570.44 and 2570.45, and it has retained the proposed revisions in the Final Amendment.

In addition, in response to commenters' concerns about final denials pursuant to § 2570.41(a), the Department has added a new paragraph (h). Commenters expressed concern about § 2570.41(a) foreclosing applicants' opportunities to respond to the Department. New paragraph (h) provides that the Department will reconsider applications that were previously denied under § 2570.41(a)(1) or (2) for failure to timely respond to the Department's request for information or provide sufficient information, as long as the applications are cured upon submission for reconsideration. For applications that are cured upon resubmission, the Department will undertake the steps in the exemption procedure that remained when the Department issued the final denial letter. If the Department concludes that an exemption is not warranted, it will either hold a conference or issue a tentative denial letter before issuing a final denial. This change clarifies that those applicants whose applications are denied under § 2570.41(a)(1) or (2) without a tentative denial letter or an equivalent conference will be afforded an opportunity to respond to the Department upon reconsideration.

Section 2570.46

Section 2570.46 covers the right to a hearing with respect to a proposed exemption that provides relief from ERISA section 406(b), Code section 4975(c)(1)(E) or (F), or FERSA section 8477(c)(2) for any interested person who may be adversely affected by the exemption. The Department proposed to expand the right to a hearing to any person who may be materially affected by an exemption that provides the relief described in this section. The determination of whether a person is materially affected would be at the sole discretion of the Department. The proposal would delete the reference to interested persons to allow any party materially affected by the exemption to provide material information. Similarly, the Department proposed to change the word ''adversely'' to ''materially'' to capture all relevant information with respect to the exemption transaction. Combined, these revisions would assist the Department in its review of the exemption transaction by ensuring that potentially helpful information is not excluded.

The Department also proposed to make a minor revision to paragraph (b) that would explicitly state that the Department will hold a hearing when it is necessary to explore material factual information with respect to the proposed exemption. Factual information is limited to the proposed exemption to ensure that the hearing is relevant to the Department's exemption determination; information that is not material to the exemption transaction would not be sufficient to meet this requirement.

The Department has adopted the Proposed Rule's revisions to § 2570.46 in the Final Amendment.

Section 2570.47

The Department did not propose any changes to section § 2570.47, and the Final Amendment does not make any material revisions to § 2570.47.

Section 2570.48

Section 2570.48 restates the Department's ERISA section 408(a) statutory finding requirements. The Department's only proposed material change to this section is to clarify that the Department must make a finding that the exemption is administratively feasible ''for the Department,'' rather than administratively feasible for the applicant.

The Department has retained the Proposed Rule's revisions to § 2570.48 in the Final Amendment.

Section 2570.49

Section 2570.49 addresses the various effects of and limits on the grant of an exemption. The Department proposed to revise paragraph (e) to clarify that the determination regarding whether a particular statement contained in (or omitted from) an exemption application constitutes a material fact or representation based on the totality of the facts and circumstances would be made by the Department in its sole discretion. The proposed addition of the ''sole discretion'' language clarifies that the Department retains sole discretion with respect to the determination.

The Department has retained this revision to § 2570.49 in the Final Amendment.

Section 2570.50

Section 2570.50 addresses the revocation and modification of existing exemptions. The Department proposed to substantially revise paragraph (a) to provide that, if material changes in facts, circumstances, or representations occur after an exemption takes effect, including if a qualified independent fiduciary resigns, is terminated, or is

convicted of a crime, the Department, at its sole discretion, may take steps to revoke or modify the exemption. If the qualified independent fiduciary resigns, is terminated, or is convicted of a crime, the proposal required the applicant to notify the Department within 30 days of the resignation, termination, or conviction. The applicant's failure to provide such notice could result in a determination that the conditions of the exemption have not been met and lead to the exemption's revocation. Further, under the proposal, the Department would reserve the right to request the applicant to provide the Department with any of the information required pursuant to § 2570.34(e) and (f) at a time determined by the Department at its sole discretion.

The Department proposed to revise paragraph (a) beyond the material facts to address the qualified independent fiduciary. In many exemptions that employ qualified independent fiduciaries, the fiduciaries represent one of the exemption's core protective conditions. It is imperative that an applicant inform the Department if the independent fiduciary ceases to serve in that role because it resigns, is terminated, or is convicted of a crime. The Proposed Rule was written to ensure that the Department will be informed of the changed circumstances and require the applicant to take necessary actions to ensure the exemption continues to be in the interests of and protective of the rights of the plan and its participants and beneficiaries.

In connection with the qualified independent fiduciary issue, the proposal also would have reserved the Department's right to request that the applicant provide any of the information required pursuant to § 2570.34(e) and (f) at a time determined by the Department at its sole discretion. This change was proposed to assist the Department's ultimate disposition of the issue and ensure that the exemption remains protective.

Commenters objected to the cumulative changes in paragraph (a) on the grounds that disclosing information after the issuance of an exemption would be burdensome, and that such a requirement would transform the Office of Exemption Determinations into an enforcement arm of the Department. While the revised paragraph (a) imposes additional requirements on an applicant after the issuance of an exemption, the new language would ensure that granted exemptions remain protective of plans and their participants and beneficiaries. Ensuring that an exemption remains protective of plans and their participants and beneficiaries in the face of changed circumstances relates to the Department's ability to make its statutorily required findings. Without the revised language, material changes could undermine the basis or availability of an issued exemption, whether intentional or not, without the Department's knowledge. Further, the new provision will help prevent, or at least provide notice of, the swapping of an independent fiduciary that was specifically agreed upon with the Department as an exemption condition for a fiduciary the Department might not otherwise approve.

The Department proposed to amend paragraph (a) to provide a tool for the Department to evaluate exemptions on an ongoing basis, which would allow the Department to determine whether it can continue to make its statutory findings under ERISA section 408(a) with respect to an exemption it previously granted. While in some cases such submissions could result in the referral of potentially non-exempt prohibited transactions to EBSA's enforcement program, that is not the chief purpose of the submissions. Nevertheless, non-enforcement EBSA offices remain aware of potential ERISA violations and can, and do, appropriately refer parties to the Office of Enforcement or applicable regional offices when appropriate.

Lastly, the Proposed Rule would have revised paragraph (c), which currently permits the Department's to revoke or modify an exemption under certain circumstances, which possibly could give the modifications retroactive effect. The proposal deleted the reservation of the Department's right to make retroactive changes, and instead provided that changes may only be made prospectively. The revision reflects the Department's concern that the ability to make retroactive changes undermines the legitimate interests of applicants, plans, participants, and beneficiaries to rely on exemptions that have been granted pursuant to specific conditions. Commenters indicated that the proposed language may create uncertainty about whether the Department might choose to revoke an exemption. The Department disagrees. The current Exemption Procedure Regulation already permits revocation, and the new provision, in fact, provides more certainty by eliminating the retroactive revocation language. In addition, the Department emphasizes that, per new paragraph (b), a revocation cannot occur without notice and comment.

Accordingly, the Department has retained the Proposed Rule's revisions to § 2570.50 in the Final Amendment.

Section 2750.51

Section 2570.51 addresses public inspection and the provision of copies of the administrative record. The Department proposed to revise the current language in coordination with § 2570.32(d), which addresses the administrative record and the information included in the administrative record. In the proposal, the Department clarified that the administrative record is open for public inspection and available to copy from the date the administrative record is established, as determined by § 2570.32(d). In addition, the Department proposed to update paragraph (b) to allow copies of the administrative record to be furnished electronically.

The Department has retained the Proposed Rule's revisions to § 2570.51 in the Final Amendment.

Effective Date

This regulation is effective April 18, 2024.

Regulatory Impact Analysis

1.1. Background and Need for Regulation

As discussed above, the Department's Exemption Procedure Regulation sets forth the process by which the Department makes exemption determinations with respect to applications for administrative relief from the prohibited transaction provisions of ERISA and the Code. The Final Amendment revises the current Exemption Procedure Regulation to promote the Department's goal of promptly and efficiently making exemption determinations pursuant to a transparent process that is available for public inspection and subject to public scrutiny.

In order to accomplish this objective, the Final Amendment makes applicants aware of information the Department requires during the exemption application process based on recent practices the Department has used to process administrative exemption requests. The Final Amendment also revises the baseline Exemption Procedure Regulation to ensure creation of a thorough and complete administrative record. The revision will increase transparency and help any impacted party, including plan participants and beneficiaries, understand the information the Department considers when reviewing

exemption applications and the decisions the Department makes in making exemption determinations.

As discussed below, the Department has examined the effects of this Final Amendment as required by Executive Order 12866,[21] Executive Order 13563,[22] the Paperwork Reduction Act of 1995,[23] the Regulatory Flexibility Act,[24] section 202 of the Unfunded Mandates Reform Act of 1995,[25] Executive Order 13132,[26] and the Congressional Review Act.[27]

1.2. Executive Orders 12866 and 13563

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, 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 (the Executive order), ''significant'' regulatory actions are subject to review by the Office of Management and Budget (OMB).[28] As amended by Executive Order 14094,[29] entitled ''Modernizing Regulatory Review,'' Executive order section 3(f) 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 $200 million or more (adjusted every three years by the Administrator of Office of Information and Regulatory Affairs (OIRA) for changes in gross domestic product); or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial, or tribal governments or communities; (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 legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in the Executive order, as specifically authorized in a timely manner by the Administrator of OIRA in each case.

Pursuant to the terms of Executive Order 12866, OMB has determined that this action is ''significant'' within the meaning of section 3(f) of the Executive order. Therefore, the Department has provided an assessment of the potential costs, benefits, and transfers associated with the Final Amendment, which is presented below and has been reviewed by OMB in accordance with the requirements of the Executive order.

1.3. Affected Entities

The Final Amendment affects individual retirement accounts, employee benefit plans, plan sponsors and fiduciaries, and participants and beneficiaries that are subject to the prohibited transaction rules set forth in ERISA, the Code, or FERSA. Based on recent exemption application activity, the Department estimates that it receives approximately 21 exemption applications annually.[30]

1.4. Benefits of Final Amendment

The Department expects that the Final Amendment will achieve the Department's goal of bringing enhanced efficiency, clarity, and transparency to the exemption determination process. The Department will achieve this objective by including provisions in the Final Amendment that, among other things, (1) clarify the types of information and documentation required for a complete application, (2) revise the definitions of a qualified independent fiduciary and qualified independent appraiser to ensure their independence, (3) clarify the content of specific reports and documents applicants must submit to ensure that the Department receives sufficient information to make the requisite findings under ERISA section 408(a) to issue an exemption, (4) update various timing requirements to ensure clarity in the application review process, (5) clarify items that are included in the administrative record for an application and when the administrative record is available for public inspection, and (6) expand opportunities for applicants to submit information to the Department electronically.

Also, the Department is requiring applicants to include more information upfront as part of their exemption applications, which will lead to an efficient determination process. Specifically, the Department is requiring applicants to include information relevant to the cost and benefits of the transaction, alternative transactions to the exemption transaction that were considered, the benefits derived by the parties involved, and explicit descriptions of all known conflicts involved with the transaction.

The baseline Exemption Procedure Regulation already requires applicants to submit most of this information to the Department. The Department, however, is amending the Exemption Procedure Regulation to align more closely with the information the Department frequently requests from applicants to make its statutorily mandated findings, and to require such information to be submitted sooner in the process rather than after the Department requests it. Having the information provided with the application clarifies expectations about required information. Also, time is saved as back-and-forth discussions about required information are reduced. In doing this, the Department will make the exemption determination process more efficient. Increased efficiency also will result from the amendment to § 2570.36 of the Exemption Procedure Regulation, which allows applicants to submit applications and supporting materials to the Department electronically.

The Final Amendment also enhances the transparency of the exemption determination process by clarifying that the administrative record for an exemption application becomes open for public inspection and available for copying when an applicant submits its exemption application to the Department. At that time, in addition to the application itself, any information the applicant provided to the Department *before* it submitted its application, as well as any pre-submission communications regarding the exemption transaction, will become part of the administrative record.

1.5. Costs Associated With the Final Amendment

As discussed above, the Final Amendment requires applicants to include information in their exemption applications that frequently was requested during review. For example, under the Final Amendment, applicants must include in their applications a description of: (1) the reason(s) for engaging in the exemption transaction; (2) any material benefit that a party in interest involved in the exemption transaction may receive as a result of the

[21] Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993).

[22] Improving Regulation and Regulatory Review, 76 FR 3821 (Jan. 18, 2011).

[23] 44 U.S.C. 3506(c)(2)(A) (1995).

[24] 5 U.S.C. 601 *et seq.* (1980).

[25] 2 U.S.C. 1501 *et seq.* (1995).

[26] Federalism, 64 FR 153 (Aug. 4, 1999).

[27] 5 U.S.C. 804(2) (1996).

[28] Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993).

[29] Modernizing Regulatory Review, 88 FR 21879 (April 6, 2023).

[30] This estimate is the rounded five-year average of applications received.

subject transaction (including the avoidance of any materially adverse outcome by the party in interest as a result of engaging in the exemption transaction); (3) the costs and benefits of the exemption transaction to the affected plan(s), participants, and beneficiaries, including quantification of those costs and benefits to the extent possible; (4) a description of the alternatives to the exemption transaction that it considered or evaluated before submitting the exemption application and an explanation of why those alternatives were not pursued; and (5) a description of each conflict of interest or potential instance of self-dealing that would be permitted if the exemption is granted.

The Final Amendment also revises the baseline Exemption Procedure Regulation to expand the number of specialized parties from whom statements and documents must be included in exemption applications, such as auditors and accountants acting on the behalf of the plan (as well as independent fiduciaries and independent appraisers who already were covered). The required disclosures are expanded to cover any documents submitted by these parties in support of the application. These parties also are required to disclose, among other things, information regarding their contracts with the applicant, including, but not limited to, information on indemnification provisions, waivers, and relationships with other parties involved in the exemption transaction. In addition, the qualified independent fiduciaries and qualified independent appraisers are required to include specific information regarding conflicts of interest, fiduciary liability insurance, and whether the fiduciary has been under investigation or convicted of certain crimes.

While including this information in the application could impose additional costs on some applicants compared to the baseline requirements of the current Exemption Procedure Regulation, as discussed below, these increased costs are modest and justified by the Department's need for this critical information to make its findings under ERISA section 408(a) and to promote increased efficiency as explained previously. Such information also will facilitate the Department's understanding of the underlying rationale for the exemption transaction, including the costs and benefits for both the party in interest and the plan and its participants and beneficiaries.

The Final Amendment also requires information to be submitted by applicants with whom the Department engages on a pre-submission basis. Specifically, if an applicant communicated with the Department either orally or in writing before submitting an exemption application for the exemption transaction, the applicant or its representative must (1) identify and fully describe the exemption transaction; and (2) set forth the prohibited transactions that the applicant believes are applicable.

Applicants who communicated with the Department prior to submitting an application also must submit a statement setting forth the date(s) and with whom the applicant communicated before submission. Linking pre-submission communications to a current application ensures that the Department understands the entire context of an exemption application. The Department emphasizes, however, that this provision is only triggered when the applicant submits a formal exemption application.

Although the final amendment requires exemption applicants to submit information earlier than the baseline exemption procedure, as mentioned above, the Department expects that the final amendment will generate efficiency gains. Such gains will result because the open, transparent, and clear process implemented by final amendment will eliminate friction that is caused when the Department has back and forth discussion with applicants regarding information that is not included in an exemption application after the applicants submit their exemption application under the baseline Exemption Procedure Regulation. On balance, this final amendment will be cost neutral as a result of the efficiency gains that will be generated; however, the Department does not have sufficient data to quantify them. Based on the foregoing, the Department expects that this Final Amendment will result in modest increased labor costs to applicants compared to the baseline Exemption Procedure Regulation, which represent an upper bound because the efficiency gains that would offset such costs are not taken into account.

Specifically, the Department estimates a total estimated cost increase to prepare the application of approximately $29,000. This estimate does not include cost savings generated by efficiency gains. Each of the 21 affected applicants could experience an increase of six hours per application divided among various professionals. It does include the cost savings associated with increased electronic submission of applications and supporting materials that the Department had sufficient data to quantify. The cost of individual components of the Final Amendment are presented in Table 1 and explained below.

TABLE 1—LABOR HOURS AND EQUIVALENT COST CHANGES

	Additional hours (per plan)	Additional hours (total)	Additional costs (per plan)	Additional costs (total)
Prepare Application: In House Legal Professional	1	21	$159.34	$3,346
Prepare Application: Clerical	1	21	63.45	1,332
Prepare Application: Outside Legal Professional	1	21	535.85	11,253
Prepare Application: Outside Fiduciary/Experts	2	42	610.04	12,811
Pre-Submission Conference, Do Not Apply	1	5	159.34	797
Change to Submission Method (from mail to electronic)	0	0	−16.45	−345
Total	6	110	1,511.57	29,194

On average, an in-house attorney with a labor and overhead cost estimated at a rate of $159.34 per hour is expected to spend approximately one additional hour in preparing the application for a total cost of $159.34 per plan, or $3,346 total for the 21 plans estimated to apply each year.[31]

[31] Unless otherwise noted, all wage rates are based on internal Department calculations based on

An additional hour of an attorney's time required to organize and prepare information is estimated for plans that choose to have a pre-submission consultation and do not later apply. The Department assumes that five plans per year will conduct pre-submission consultations but not formally apply, at a per plan cost of $159.34 and $797 per year increase for this group of plans.

Outside professionals are hired by the plan to handle certain fiduciary and service provider duties associated with the transaction, the valuation(s), and the preparation of the application materials. The amendments are estimated to increase the net time an outside legal professional takes to prepare the application by one hour per plan at a billing rate of $535.85 per hour.[32] This results in a per plan cost of $535.85 and a total annual cost increase of $11,253 for the 21 plans assumed to apply. Both the outside fiduciary and appraiser or other service provider are assumed to require an additional hour to comply with the amended rules. The hourly rate for both is assumed to be $305.02, which results in an increase of $610.04 for each plan and a total of $12,811 for the 21 plans that are expected to apply annually.

The final labor component that is expected to change relates to clerical staff for whom the Department estimates labor and overhead cost of $63.45 per hour. The Department also estimates that an additional hour of clerical work will be associated with assisting outside professionals with preparation of the application, resulting in a cost increase of $63.45 per application, and a total of $1,332 for the 21 applications expected annually.

The changes to § 2570.36 of the baseline Exemption Procedure Regulation that allow for the application to be submitted electronically are expected to generate a cost savings of $16.45 per plan, for a total of $345 annually.

1.6. Uncertainty

The number of exemption applications the Department receives may vary over time due to the macroeconomic health of the economy, and they may vary over the business cycle. For example, prohibited transaction exemption applications may deal with the sale of illiquid assets for which there is a limited market. Because of this, these assets are more likely to be liquidated while the market is distressed. Therefore, exemption applications for this type of transaction may increase if the macroeconomic economy is unhealthy. This variation in the number of applications is supported by the Department's application data.

The Final Amendment itself may impact the number of applications the Department receives. For example, application volume could increase if potential applicants observe enhanced transparency in the exemption determination process and increased clarity about the information that is required to be included in an exemption application. As a result, the Department may receive more exemption applications because applicants may have increased confidence that their applications will be approved by the Department, since they are fully aware of the information the Department requires to be included in their applications and the Department's process for considering their applications.

Finally, as discussed above, the Department maintains that this Final Amendment will be cost neutral due to the efficiency gains it will generate relative to the baseline Exemption Procedure Regulation, but it is uncertain regarding the amount of cost savings that will result from the efficiency gains, as the Department does not have sufficient information to quantify them.

1.7. Alternatives

Although Executive order section 6(a)(3)(C) only requires the Department to assess the cost and benefits of feasible alternatives for rules that are significant under section 3(f)(1), the Department considered several alternatives to the provisions in the Final Amendment that are discussed in this section.

First, the Department considered retaining the status quo. However, the status quo was not a feasible alternative because the Department has found that the baseline Exemption Procedure Regulation has not been working with maximum efficiency since the Exemption Procedure Regulation was last amended in 2011. Under the current Exemption Procedure Regulation, the Department has had to adopt the practice of requiring applicants to submit additional information that was not specifically provided for in the baseline Exemption Procedure Regulation to ensure that it has sufficient information to make the statutorily mandated findings under ERISA section 408(a) that an exemption request is (1) administratively feasible, (2) in the interest of the plan that is requesting the exemption and its participants and beneficiaries, and (3) protective of the rights of the plan's participants and beneficiaries. The Department found that many exemption applications did not contain sufficient information for the Department to make these findings, and a lot of back-and-forth communication was taking place between applicants and the Department to make sure that adequate information was provided to the Department for it to make its findings. This led the Department to make a policy decision that the baseline Exemption Procedure Regulation needs to be amended to require the specific information the Department needs to process exemption applications. The Department expects the selected alternative of requiring more information submitted with the application will in many instances, but not all, either maintain or reduce the costs for applications that are granted relative to the status quo.

The Department also made a policy decision that an amendment to the Exemption Procedure Regulation is necessary to clarify when the administrative record opens for an exemption application and the items that are included in the administrative record. The creation of the administrative record for an exemption application is critically important because it commences the exemption determination process for an exemption application. The Department has received many questions from applicants over the years about when the administrative record opens and when the record is available for public review. Therefore, it is critical for the Department to clearly define when the administrative record is open in an amendment to the Exemption Procedure Regulation to ensure that the Department maintains an open and transparent exemption determination process.

The Department also considered finalizing the entire amendment as proposed but, instead, made major changes to the proposal in the Final Amendment based on the public input the Department received in comment letters and testimony that was provided at the public hearing. These changes were made, in part, to reduce the burdens imposed on applicants by the proposal. For example, the proposal added a new § 2570.34(a)(5) that would have required applicants to include with their exemption applications a detailed description of possible alternatives to the exemption transaction that would not involve a

2020 labor cost data. For a description of the Department's methodology for calculating wage rates, see *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf.*

[32] Outside legal billing rates are a blended rate based on the Laffey Matrix, which is available at *http://www.laffeymatrix.com/see.html.*

prohibited transaction, and why the applicant did not pursue those alternatives. Commenters objected, in part, to this language by asserting that it would be burdensome for an applicant to investigate and evaluate all potential approaches to a transaction before submitting an exemption application. The Department recognized this burden and modified the language in the Final Amendment to provide that an applicant must submit a description of the alternatives to the exemption transaction that it considered or evaluated before submitting the exemption application and explain why those alternatives were not pursued with its exemption application. The language no longer requires an exhaustive review; it only requires an applicant to explain to the Department the process by which the applicant arrived at its decision to propose an exemption application.

As another example, the Department proposed to add a new § 2570.34(d) that would have required an applicant to include detailed information regarding the appraiser selection process. In response to the proposal, commenters raised multiple objections. Therefore, paragraph (d) of the Final Amendment states that an applicant must include the following information with its exemption application: (1) a representation that the independent fiduciary prudently selected the appraiser after diligent review of the appraiser's technical training and proficiency with respect to the type of valuation at issue, the appraiser's independence from the plan's counterparties in the exemption transaction, and the absence of any material conflicts of interest with respect to the exemption transaction; (2) a representation that the appraiser is independent within the meaning of § 2570.31(i); and (3) a representation that the independent appraiser has appropriate technical training and proficiency with respect to the specific details of the exemption transaction. The Final Amendment's language has the effect of decreasing an applicant's burden by no longer requiring substantial disclosure and a specific delineated process. In addition to this burden reduction, the Department notes that it also made a similar change to § 2570.34(e), which had a similar burden-reducing effect.

The Department has determined that the totality of the expected benefits of the Final Amendment justify its costs. The Department's decision to publish the Final Amendment with modifications to the Proposed Rule will allow it to achieve its objective of making the exemption application process more efficient and transparent than the baseline process while minimizing the burden the Proposed Rule imposed on applicants. Accordingly, the Final Amendment is a necessary and beneficial regulation.

Paperwork Reduction Act Statement

In accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3506(c)(2)(A)), the Department solicited comments concerning the information collection request (ICR) included in the revision of the Exemption Procedure Regulation.[33] At the same time, the Department also submitted an ICR to the OMB under OMB Control Number 1210–0060, in accordance with 44 U.S.C. 3507(d). No comments were received that led to an adjustment in burden estimates.

In connection with the publication of the Final Amendment, the Department is submitting the ICR to OMB requesting a revision of the information collection under OMB control number 1210–0060 reflecting the changes made by the final rules. A copy of the ICR may be obtained by contacting the person listed in the PRA Addressee section below or at *www.RegInfo.gov.*

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: *ebsa.opr@dol.gov.* A copy of the ICR also may be obtained at *https://www.RegInfo.gov.*

Background

Both ERISA and the Code contain various statutory exemptions from the prohibited transaction rules. In addition, ERISA section 408(a) authorizes the Secretary to grant administrative exemptions from the restrictions of ERISA sections 406 and 407(a), while Code section 4975(c)(2) authorizes the Secretary of the Treasury or their delegate to grant exemptions from the prohibitions of Code section 4975(c)(1). ERISA section 408(a) and Code section 4975(c)(2) also direct the Secretary and the Secretary of the Treasury, respectively, to establish procedures to carry out the purposes of these sections.

Under section 102 of Reorganization Plan No. 4 of 1978, the authority of the Secretary of the Treasury to issue exemptions under Code section 4975 was transferred, with certain enumerated exceptions not discussed herein, to the Secretary. Accordingly, the Secretary now possesses the authority under Code section 4975(c)(2), as well as under ERISA section 408(a), to issue individual and class exemptions from the prohibited transaction rules of ERISA and the Code.

Under the baseline Exemption Procedure Regulation, the Department requires certain information to be provided in a written application for an exemption. The written application is an ICR for purposes of the PRA. Sections 2570.34 and 2570.35 of the baseline Exemption Procedure Regulation describe the information that must be supplied by the applicant, such as, but not limited to: identifying information (name, type of plan, Employer Identification Number (EIN) number, etc.); an estimate of the number of plan participants; a detailed description of the exemption transaction and the parties for which an exemption is requested; a statement regarding which section of ERISA is thought to be violated and whether transaction(s) involved have already been entered into; a statement of whether the transaction is customary in the industry; a statement of the hardship or economic loss, if any, which would result if the exemption were denied; and a statement explaining why the proposed exemption would be administratively feasible and in the interests of the plan and protective of the rights of plan participants and beneficiaries. In addition, the applicant must certify that the information supplied is accurate and complete.

The Final Amendment expands the ICR contained in §§ 2570.34 and 2570.35 in several respects. First, the Final Amendment expands the information sought about the proposed exemption transaction, such as requiring a more detailed description of the exemption transaction, including the benefits derived by the parties and the costs and benefits to the plan; alternative transactions considered; and descriptions of all conflicts of interest and self-dealing. Second, the Final Amendment requires the inclusion of additional information in exemption applications, such as a statement regarding whether the exemption transaction is in the best interest of the plan and its participants and beneficiaries; expanded disclosures about any Advisory Opinions that the applicant requests with respect to any issue related to the exemption transaction; and expanded disclosures about relevant investigations by any Federal, State, or regulatory body.

[33] 87 FR 14722.

The Final Amendment also revises the ICR to expand the number of specialized parties from whom statements and documents must be included in exemption applications. The specialized parties covered by the existing requirements are expanded to include not just independent appraisers and fiduciaries, but also auditors and accountants acting on behalf of the plan, and the documents required to be disclosed are expanded to cover any documents submitted by those parties in support of the application. Specialized parties are required to disclose, among other things, additional information regarding their contracts with the applicant, including, but not limited to, information on indemnification provisions, waivers, and relationships with other parties involved in the exemption transaction. In addition, the qualified independent fiduciaries and qualified independent appraisers are required to include specific information regarding conflicts of interest, fiduciary liability insurance, and whether the fiduciary has been under investigation or convicted of certain crimes.

In addition to the requirements created by the application described in §§ 2570.33 and 2570.35, additional requirements are added by amending § 2570.33(d) with respect to applicants that communicate with the Department on a pre-submission basis. Specifically, if an applicant desires to engage in a pre-submission conference or correspondence, the applicant or its representative must (1) identify and fully describe the exemption transaction; and (2) set forth the prohibited transactions that the applicant believes are applicable.

Pre-submission applicants also must submit in their applications a statement setting forth the date(s) and with whom the applicant communicated before submitting the application. Linking pre-submission communications to a current application ensures that the Department understands the entire context of an exemption application. The Department emphasizes, however, that this provision is only triggered when the applicant submits a formal exemption application.

Finally, the Department is amending § 2570.36 to provide that the application and supporting documents may be submitted electronically. The Department expects that no longer requiring paper copies of documents to be submitted should reduce the burden associated with this ICR.

In order to assess the hour and cost burden of the revision to the baseline ICR associated with the Exemption Procedure Regulation, the Department updated its estimate of the number of exemption requests it expects to receive, and the hour and cost burden associated with providing information required to be submitted by applicants, including the new information required. The Department also adjusted its estimate of the labor rates for professional and clerical help and the size of plans filing exemption requests with the Department. In the revised estimate, the costs of hiring outside service providers (such as law firms specializing in ERISA, outside appraisers, and financial experts) are accounted for as a cost burden. Requirements related to these services are more explicitly specified in the final rule than they were in the previous procedure, and any paperwork costs associated with these requirements are built into the estimated fees for outside services.

The costs associated with the Final Amendment are dependent on pre-submission conference and application activity. Pre-submission activity is a potential initial contact with the Department to discuss a potential exemption application. These have traditionally been informal discussions which were not cataloged or tracked by the Department. For purposes of this Final Amendment, we assume that five plans conduct pre-submission conferences but do not ultimately apply for an exemption. Given the change in structure of the pre-submission conferences, these five plans would incur an additional cost, which is captured in the ''Pre-Submission Application'' line item below. Based on 2018–2022 application activity, the Department assumes that it will receive 21 applications annually. Based on 2019–2021 data, the Department assumes that five exemption applications reach the pendency stage which requires publication in the **Federal Register** and distribution of notices to participants. These five exemption applications could be approved following the public comment period.

The typical plan size is assumed to be 700 participants, which is based on a weighted average plan size. The rule also requires that, in cases where the facts associated with the application are complex, the plan, at the point of publication in the **Federal Register**, provide a summary of the proposed exemption (SPE) with the notice. The Department assumes this to occur in roughly half the cases, therefore three summaries will be required to be prepared.

The estimated hours burden and equivalent costs associated with this level of activity are presented in Table 2.

TABLE 2—HOUR AND EQUIVALENT COST BURDEN

	Number of requests (A)	Hours (B)	Hourly labor cost (C)	Hour burden A * B	Equivalent costs A * B * C
Prepare Request: In House Legal Professional	21	11	$159.34	231	$36,808
Prepare Request: Clerical	21	11	63.45	231	14,657
Prepare Request: Outside Legal Professional	21	51	535.85	1,071	573,895
Prepare Request: Outside Fiduciary/Experts	21	42	305.03	882	269,036
Prepare Request (SPE): In House Legal Professional	3	2	159.34	6	956
Distribute Notice: Clerical	5	5/60	63.45	292	18,506
Pre-Submission Application	5	1	159.34	5	797
Total				2,718	914,655

As discussed above, the Final Amendment allows applicants to submit their applications and supporting material electronically, which the Department assumes all applicants will choose as their default application method. This results in an estimated cost savings of $16.45 per applicant, for a total of $345. The distribution of the notices to plan participants is expected to be $144 and is summarized in Table 3 below. The majority (95.8%) of the notices to participants are expected to be delivered electronically.[34]

TABLE 3—COST BURDEN

	Number of notices (A)	Number of pages per notice (C)	Material and printing costs (D)	Mailing costs (E)	Cost burden A * B * (C * D + E)
Distribute Notice	203	1	$0.05	$0.63	$138
Distribute SPE	122	1	0.05	Included with Notice	6
Total					144

The paperwork burden estimates are summarized below:

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications.

OMB Control Number: 1210–0060.

Affected Public: Businesses or other for-profits.

Type of Review: Revision.

Estimated Number of Respondents: 21.

Estimated Number of Annual Responses: 3,592.

Frequency of Response: Annual or as needed.

Estimated Total Annual Burden Hours: 2,718 hours.

Estimated Total Annual Burden Cost: $144.

2. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) 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 (5 U.S.C. 551 *et seq.*), and which are likely to have a significant economic impact on a substantial number of small entities. Unless the head of an agency certifies that a final rule will not have a significant economic impact on a substantial number of small entities, RFA section 604 requires that the agency present a final regulatory flexibility analysis at the time of the publication of the notice of final rulemaking describing the impact of the rule on small entities and seeking public comment on such impact.

Under RFA section 605, the Department certified at the proposed rule stage that the rule would not have a significant economic impact on a substantial number of small entities. After considering comments that were submitted to the Department on the proposed rule and testimony from witnesses at the public hearing, as well as changes the Department made to the proposal in the Final Amendment in response to such comments and testimony, the Department is confident that the certification remains valid with respect to the Final Amendment. Therefore, the Assistant Secretary of the Employee Benefits Security Administration hereby certifies that the Final Amendment will not have a significant economic impact on a substantial number of small entities. The Department presents its basis for making this determination below.

For purposes of the RFA, the Department continues to consider a small entity to be an employee benefit plan with fewer than 100 participants.[35] Further, while some large employers may have small plans, in general, small employers maintain most small plans. Thus, the Department maintains that assessing the impact of this Final Amendment on small plans is an appropriate substitute for evaluating the effect on small entities. The definition of small entity considered appropriate for this purpose differs, however, from the definition of ''small business'' that is based on size standards promulgated by the Small Business Administration (SBA) (13 CFR 121.201) pursuant to the Small Business Act (15 U.S.C. 631 *et seq.*). The Department requested comment at the proposed rule stage on the appropriateness of the size standard used in evaluating the impact on small entities and received no comments.

Using this standard, most plans seeking an exemption are large plans. Even if the Department assumes that all the 21 estimated plans seeking exemptions each year are small, based on the approximately 652,934 ERISA-

[34] The Department estimates approximately 95.8% of participants receive disclosures electronically under the combined effects of the 2002 electronic disclosures safe harbor and the 2020 electronic safe harbor. The Department estimates that 58.3% of participants will receive electronic disclosures under the 2002 safe harbor. According to the National Telecommunications and Information Agency (NTIA), 37.4% of individuals aged 25 and over have access to the internet at work. According to a Greenwald & Associates survey, 84.0% of plan participants find it acceptable to make electronic delivery the default option, which is used as the proxy for the number of participants who will not opt-out of electronic disclosure that are automatically enrolled (for a total of 31.4% receiving electronic disclosure at work). Additionally, the NTIA reports that 44.1% of individuals aged 25 and over have access to the internet outside of work. According to a Pew Research Center survey, 61.0% of internet users use online banking, which is used as the proxy for the number of internet users who will affirmatively consent to receiving electronic disclosures (for a total of 26.9% receiving electronic disclosure outside of work). Combining the 31.4% who receive electronic disclosure at work with the 26.9% who receive electronic disclosure outside of work produces a total of 58.3%. The remaining 41.7% of participants are subject to the 2020 safe harbor. According to the 2021 American Community Survey, 90.3% of the population has an internet subscription. The Department estimates that 0.5% of electronic disclosures will bounce back and will need to be sent a paper disclosure. Accordingly, for the 41.7% of participants not affected by the 2002 safe harbor, 89.8%, or an additional 37.4% (41.7% x 89.8%), are estimated to receive electronic disclosures under the 2020 safe harbor. In total, the Department estimates that 95.8% (58.3% + 37.4%) would receive electronic disclosures.

[35] The basis for this definition is found in ERISA section 104(a)(2), which permits the Secretary to prescribe simplified annual reports for pension plans that cover fewer than 100 participants. Pursuant to the authority of ERISA section 104(a)(3), the Department has previously issued at 29 CFR 2520.104–20, 2520.104–21, 2520.104–41, 2520.104–46 and 2520.104b–10 certain simplified reporting provisions and limited exemptions from reporting and disclosure requirements for small plans, including unfunded or insured welfare plans covering fewer than 100 participants and satisfying certain other requirements. The Department has consulted with the SBA Office of Advocacy concerning use of this participant count standard for RFA purposes and has a memorandum of understanding with the Office of Advocacy to use the standard. Memorandum received from the U.S. Small Business Administration, Office of Advocacy on July 10, 2020.

covered small pension plans, the 21 plans annually seeking an exemption make up a very small percentage of all plans (0.0031 percent of small plans). The Department does not consider this to constitute a substantial number of small entities that would be sufficient to invoke that application of the RFA.

3. Congressional Review Act

This Final Amendment is subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and will be transmitted to Congress and the Comptroller General for review.

4. Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), the Final Amendment does not include any Federal mandate that may result in expenditures by State, local, or tribal governments, or impose an annual burden exceeding $100 million or more, adjusted for inflation, on the private sector.

5. Federalism Statement

Executive Order 13132 (August 4, 1999) outlines fundamental principles of federalism and requires Federal agencies to adhere to specific criteria in the process of their formulation and implementation of policies that have substantial direct effects on the States, or the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. This Final Amendment does not have federalism implications because it has no substantial direct effect on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. ERISA section 514 provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA. The requirements implemented in the Final Amendment do not alter the fundamental provisions of the statute with respect to employee benefit plans, and as such would have no implications for the States or the relationship or distribution of power between the National Government and the States.

List of Subjects in 29 CFR Part 2570

Administrative practice and procedure, Employee benefit plans, Exemptions, Fiduciaries, Party in interest, Pensions, Prohibited transactions, Trusts and trustees.

For the reasons set forth in the preamble, the Department amends 29 CFR part 2570 as follows:

PART 2570—PROCEDURAL REGULATIONS UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT

■ 1. The authority citation for part 2570 continues to read as follows:

Authority: 5 U.S.C. 8477; 29 U.S.C. 1002(40), 1021, 1108, 1132, and 1135; sec. 102, Reorganization Plan No. 4 of 1978, 5 U.S.C. App at 672 (2006); Secretary of Labor's Order 3–2010, 75 FR 55354 (September 10, 2010).

Subpart I is also issued under 29 U.S.C. 1132(c)(8).

■ 2. Revise subpart B to read as follows:

Subpart B—Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications

Sec.

§ 2570.30 Scope of this subpart.

(a) The rules of procedure set forth in this subpart apply to applications for prohibited transaction exemptions issued by the Department under the authority of:

(1) Section 408(a) of the Employee Retirement Income Security Act of 1974 (ERISA);

(2) Section 4975(c)(2) of the Internal Revenue Code of 1986 (the Code); or

Note 1 to paragraph (a)(2). See H.R. Rep. No. 1280, 93d Cong., 2d Sess. 310 (1974), and also section 102 of Presidential Reorganization Plan No. 4 of 1978 (3 CFR, 1978 Comp., p. 332, reprinted in 5 U.S.C. app. at 672 (2006), and in 92 Stat. 3790 (1978)), effective December 31, 1978, which generally transferred the authority of the Secretary of the Treasury to issue administrative exemptions under section 4975(c)(2) of the Code to the Department.

(3) The Federal Employees' Retirement System Act of 1986 (FERSA) (5 U.S.C. 8477(c)(3)).

(b) Under the rules of procedure in this subpart, the Department may conditionally or unconditionally exempt any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the restrictions imposed by ERISA section 406 and the corresponding restrictions of the Code and FERSA. While administrative exemptions granted under the rules in this subpart are ordinarily prospective in nature, it is possible that an applicant may obtain retroactive relief for past prohibited transactions if, among other things, the Department determines that appropriate safeguards were in place at the time the exemption transaction was consummated, and no plan participants or beneficiaries were harmed by the exemption transaction.

(c) The rules in this subpart govern the filing and processing of applications for both individual and class exemptions that the Department may propose and grant pursuant to the authorities cited in paragraph (a) of this section. The Department may also propose and grant exemptions on its own motion, in which case the procedures relating to publication of notices, hearings, evaluation, and public inspection of the administrative record, and modification or revocation of previously granted exemptions will apply.

(d) The issuance of an administrative exemption by the Department under the procedural rules in this subpart does not relieve a fiduciary or other party in interest or disqualified person with respect to a plan from the obligation to comply with certain other provisions of ERISA, the Code, or FERSA, including any prohibited transaction provisions to which the exemption does not apply, and the general fiduciary responsibility provisions of ERISA, if applicable, which require, among other things, fiduciaries to discharge their duties respecting the plan solely in the

interests of the participants and beneficiaries of the plan and in a prudent fashion; nor does it affect the requirements of Code section 401(a), including that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries, or the rules with respect to other Code provisions, including that an administrative exemption with respect to a contribution to a pension plan does not affect the deductibility of the contribution under Code section 404.

(e) The Department will not propose or issue exemptions upon oral request alone, nor will the Department grant exemptions orally. An applicant for an administrative exemption may request and receive oral feedback from Department employees in preparing an exemption application, which will not be binding on the Department in its processing of an exemption application or in its examination or audit of a plan.

(f) The Department will generally treat any exemption application that is filed solely under ERISA section 408(a) or solely under Code section 4975(c)(2) as an exemption request filed under both ERISA section 408(a) and Code section 4975(c)(2) if it relates to a plan that is subject to both ERISA and the Code and the exemption transaction would be prohibited by both ERISA and the corresponding Code provisions.

(g) The Department issues an administrative exemption at its sole discretion based on the statutory criteria set forth in ERISA section 408(a) and Code section 4975(c)(2). The existence of previously issued administrative exemptions is not determinative of whether the Department will propose future exemptions for applications with the same or similar facts, or whether a proposed exemption will contain the same conditions as a previously issued administrative exemption. Previously issued administrative exemptions, however, may inform the Department's determination of whether to propose future exemptions based on the unique facts and circumstances of each application.

§ 2570.31 Definitions.

For purposes of the procedures in this subpart, the following definitions apply:

(a) 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. For purposes of this paragraph (a)(1), the term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual;

(2) Any officer, director, partner, employee, or relative (as defined in ERISA section 3(15)) of any such person; or

(3) Any corporation, partnership, trust, or unincorporated enterprise of which such person is an officer, director, partner, or five percent or more owner.

(b) A *class exemption* is an administrative exemption, granted under ERISA section 408(a), Code section 4975(c)(2), and/or 5 U.S.C. 8477(c)(3), which applies to any transaction and party in interest within the class of transactions and parties in interest specified in the exemption when the conditions of the exemption are satisfied.

(c) *Department* means the U.S. Department of Labor and includes the Secretary of Labor or their delegate exercising authority with respect to prohibited transaction exemptions to which this subpart applies.

(d) *Exemption transaction* means the transaction or transactions for which an exemption is requested.

(e) An *individual exemption* is an administrative exemption, granted under ERISA section 408(a), Code section 4975(c)(2), and/or 5 U.S.C. 8477(c)(3), which applies only to the specific parties in interest and exemption transactions named or otherwise defined in the exemption.

(f) A *party in interest* means a person described in ERISA section 3(14) or 5 U.S.C. 8477(a)(4) and includes a disqualified person, as defined in Code section 4975(e)(2).

(g) *Pooled fund* means an account or fund for the collective investment of the assets of two or more unrelated plans, including (but not limited to) a pooled separate account maintained by an insurance company and a common or collective trust fund maintained by a bank or similar financial institution.

(h) A *qualified appraisal report* is any appraisal report that:

(1) Is prepared by a qualified independent appraiser; and

(2) Satisfies all the requirements set forth in § 2570.34(c)(5).

(i) A *qualified independent appraiser* is any individual or entity with appropriate training, experience, and facilities to provide a qualified appraisal report regarding the particular asset or property appraised in the report, that is independent of and unrelated to any party in interest engaging in the exemption transaction (and their affiliates). In general, the Department determines an appraiser's independence based on all relevant facts and circumstances, such as the extent to which the plan's counterparty in the transaction participated in or influenced the selection of the appraiser. In making the independence determination, the Department will consider the amount of the appraiser's revenues and projected revenues for the current Federal income tax year (including amounts received for preparing the appraisal report) that will be derived from parties in interest (and their affiliates) relative to the appraiser's revenues from all sources for the appraiser's prior Federal income tax year. The Department generally will not conclude that an appraiser's independence is compromised solely based on the revenues it receives from the parties in interest (and their affiliates) that engaged in the exemption transaction, to the extent that the appraiser neither receives nor is projected to receive more than two (2) percent of its revenues within the current Federal income tax year from the parties in interest (and their affiliates). Although larger percentages merit more stringent scrutiny, an appraiser may be considered independent based upon other facts and circumstances provided that the appraiser neither receives nor is projected to receive more than five (5) percent of its revenues within the current Federal income tax year from parties in interest (and their affiliates) participating in the exemption transaction.

(j) A *qualified independent fiduciary* is any individual or entity with appropriate training, experience, and facilities to act on behalf of the plan regarding the exemption transaction in accordance with the fiduciary duties and responsibilities prescribed by ERISA, that is independent of and unrelated to any party in interest engaging in the exemption transaction (and its affiliates). In general, the Department will make the determination of whether a fiduciary is independent based on all relevant facts and circumstances, such as the extent to which the plan's counterparty in the transaction participated in or influenced the selection of the fiduciary. In making this determination, the Department will also take into account, among other things, the amount of both the fiduciary's revenues and projected revenues for the current Federal income tax year (including amounts received for preparing fiduciary reports) that will be derived from parties in interest engaging in the exemption transaction (and their affiliates) relative to the fiduciary's revenues from all sources for the prior Federal income tax year. The Department generally will not conclude that a fiduciary's independence is

compromised solely based on the revenues it receives from parties in interest (and their affiliates) that engaged in the exemption transaction, to the extent that the fiduciary neither receives nor is projected to receive more than two (2) percent of its revenues within the current Federal income tax year from the parties in interest (and their affiliates). Although larger percentages merit more stringent scrutiny, a fiduciary may be considered independent based upon other facts and circumstances provided that the fiduciary neither receives nor is projected to receive more than five (5) percent of its revenues within the current Federal income tax year from the parties in interest (and their affiliates) that engaged in the exemption transaction.

(k) A *pre-submission applicant* is a party that contacts the Department, either orally or in writing, to inquire whether a party with a particular fact pattern would need to submit an exemption application and, if so, what conditions and relief would be applicable. A party that contacts the Department to inquire broadly, without reference to a specific fact pattern, about prohibited transaction exemptions is not a pre-submission applicant.

§ 2570.32 Persons who may apply for exemptions and the administrative record.

(a) The following persons may apply for exemptions:

(1) Any party in interest to a plan who is or may be a party to the exemption transaction;

(2) Any plan which is a party to the exemption transaction; or

(3) In the case of an application for an exemption covering a class of parties in interest or a class of transactions, in addition to any person described in paragraphs (a)(1) and (2) of this section, an association or organization representing parties in interest who may be parties to the exemption transaction.

(b) An application by or for a person described in paragraph (a) of this section may be submitted by the applicant or by an authorized representative. An application submitted by an authorized representative of the applicant must include proof of authority in the form of:

(1) A power of attorney; or

(2) A written certification from the applicant that the representative is authorized to file the application.

(c) If the authorized representative of an applicant submits an exemption application to the Department together with proof of authority to file the application as required by paragraph (b) of this section, the Department will direct all correspondence and inquiries concerning the application to the representative unless requested to do otherwise by the applicant.

(d)(1) The administrative record is open for public inspection, pursuant to § 2570.51(a), from the date an applicant submits an application to the Office of Exemption Determinations.

(2) The administrative record includes, but is not limited to, the initial exemption application and any modifications or supplements thereto; all correspondence with the applicant after the applicant submits the exemption application; and any information provided by the applicant in connection with the exemption application, whether provided orally or in writing (as well as any comments and testimony received by the Department in connection with an application).

(3) Although the administrative record is open and available to the public only after an applicant submits an exemption application, the record includes any material documents or supporting information that was submitted to the Department in connection with the subject transaction of the application, whether orally or in writing, before formal submission of the application. The administrative record does not include records of communications with the Department which were either not with respect to the subject transaction of the application or not followed by the submission of an exemption application related to those communications.

(4) If documents are required to be provided in writing, by either the applicant or the Department, the documents may be provided either by mail or electronically, unless otherwise indicated by the Department at its sole discretion.

§ 2570.33 Applications the Department will not ordinarily consider.

(a) The Department ordinarily will not consider an application that fails to include all the information required by §§ 2570.34 and 2570.35 (or fails to include current information) or otherwise fails to conform to the requirements in this subpart.

(b) An application for an individual exemption relating to a specific exemption transaction or transactions ordinarily will not be considered if the Department has under consideration a class exemption relating to the same type of transaction or transactions. Notwithstanding the preceding sentence, the Department may consider such an application if the issuance of the final class exemption is not imminent, and the Department determines that time constraints necessitate consideration of the exemption transaction on an individual basis.

(c) If a party, excluding a Federal, state, or other governmental entity, designates any information submitted in connection with its exemption application as confidential, the Department will not process the application unless and until the applicant withdraws its claim of confidentiality. By submitting an exemption application, an applicant consents to public disclosure of the entire administrative record pursuant to § 2570.51.

(d) The Department will not engage a pre-submission applicant or its representative, whether through written correspondence or a conference, if the pre-submission applicant does not:

(1) Identify and fully describe the exemption transaction; and

(2) Set forth the prohibited transactions that the applicant believes are applicable.

§ 2570.34 Information to be included in every exemption application.

(a) All applications for exemptions must contain the following information:

(1) The name(s), address(es), phone number(s), and email address(es) of the applicant(s);

(2) A detailed description of the exemption transaction, including the identification of all the parties in interest involved, a description of any larger integrated transaction of which the exemption transaction is a part, and a chronology of the events leading up to the exemption transaction;

(3) The identity, address, phone number, and email address of any representatives for the affected plan(s) and parties in interest and what individuals or entities they represent;

(4) A description of:

(i) The reason(s) for engaging in the exemption transaction;

(ii) Any material benefit that may be received by a party in interest (or its affiliates) as a result of the exemption transaction (including the avoidance of any materially adverse outcome by a party in interest (or its affiliates) as a result of engaging in the exemption transaction); and

(iii) The costs and benefits of the exemption transaction to the affected plan(s), participants, and beneficiaries, including quantification of those costs and benefits to the extent possible;

(5) A description of the alternatives to the exemption transaction that did not involve a prohibited transaction that were considered or evaluated by the

applicant before submitting its exemption application and the reason(s) why those alternatives were not pursued;

(6) The prohibited transaction provisions from which exemptive relief is requested and the reason(s) why the exemption transaction would violate each such provision;

(7) A description of each conflict of interest or potential instance of self-dealing that would be permitted if the exemption is granted;

(8) Whether the exemption transaction is or has been the subject of an investigation or enforcement action by the Department, the Internal Revenue Service, or any other regulatory authority; and

(9) The hardship or economic loss, if any, which would result to the person or persons on behalf of whom the exemption is sought, to affected plans, and to their participants and beneficiaries from denial of the exemption.

(10) With respect to the exemption transaction's definition of affiliate, if applicable, either a statement that the definition of affiliate set forth in § 2570.31(a) is applicable or a statement setting forth why a different affiliate definition should be applied.

(b) All applications for exemption must also contain the following:

(1) A statement explaining why the requested exemption would meet the requirements of ERISA section 408(a) by being—

(i) Administratively feasible for the Department;

(ii) In the interests of affected plans and their participants and beneficiaries; and

(iii) Protective of the rights of participants and beneficiaries of affected plans.

(2) A statement that either:

(i)(A) The exemption transaction will be in the best interest of the plan and its participants and beneficiaries;

(B) That all compensation received, directly or indirectly, by a party in interest (and its affiliates) involved in the exemption transaction does not exceed reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2); and

(C) That all statements to the Department, the plan, or, if applicable, the qualified independent fiduciary or qualified independent appraiser about the exemption transaction and other relevant matters are not materially misleading at the time the statements are made; or

(ii) Explains why the exemption standards in paragraphs (b)(2)(i)(A) through (C) of this section are not applicable to the exemption transaction.

(iii) For purposes of this paragraph (b)(2), an exemption transaction is in the best interest of a plan if the plan fiduciary causing the plan to enter into the exemption transaction determines, with the care, skill, prudence, and diligence under the circumstances then prevailing, that a prudent person acting in a like capacity and familiar with such matters would, in the conduct of an enterprise of a like character and with like aims, enter into the exemption transaction based on the circumstances and needs of the plan. Such fiduciary shall not place the financial or other interests of itself, a party in interest, or any affiliate ahead of the interests of the plan or subordinate the plan's interests to itself, or any other party or affiliate.

(3) With respect to the notification of interested persons required by § 2570.43:

(i) A description of the interested persons to whom the applicant intends to provide notice;

(ii) The manner in which the applicant will provide such notice; and

(iii) An estimate of the time the applicant will need to furnish notice to all interested persons following publication of a notice of the proposed exemption in the **Federal Register**.

(4) If any party to the exemption transaction has requested either an advisory opinion from the Department or any similar opinion or guidance from another Federal, state, or regulatory body with respect to any issue relating to the exemption transaction—

(i) A copy of the opinion, letter, or similar document concluding the Department's or other entity's action on the request; or

(ii) If the Department or other entity has not yet concluded its action on the request:

(A) A copy of the request or the date on which it was submitted and, solely with respect to an advisory opinion request to the Department, the Department's correspondence control number as indicated in the acknowledgment letter; and

(B) An explanation of the effect the issuance of an advisory opinion by the Department or similar opinion or guidance from another Federal, state, or regulatory body would have upon the exemption transaction.

(5) If the application is to be signed by anyone other than the party in interest seeking exemptive relief on their own behalf, a statement which—

(i) Identifies the individual signing the application and their position or title; and

(ii) Briefly explains the basis of their familiarity with the matters discussed in the application.

(6)(i) A declaration in the following form:

I certify that I am familiar with the matters discussed in this application and, to the best of my knowledge and belief, the representations made in this application are true and correct.

(ii) This certification must be dated and signed by:

(A) The applicant, in its individual capacity, in the case of an individual party in interest seeking exemptive relief on their own behalf;

(B) A corporate officer or partner if the applicant is a corporation or partnership;

(C) A designated officer or official if the applicant is an association, organization, or other unincorporated enterprise; or

(D) The plan fiduciary that has the authority, responsibility, and control with respect to the exemption transaction if the applicant is a plan.

(7) If an applicant communicated with the Department either orally or in writing before submitting an exemption application for the exemption transaction, a statement setting forth the date(s) and with whom the applicant communicated before submitting the application.

(c) Statements and documents from a qualified independent appraiser, auditor, or accountant, such as appraisal reports, analyses of market conditions, audits, or financial documents submitted to support an application for exemption must be accompanied by a statement of consent from such appraiser, auditor, or accountant acknowledging that the statement is being submitted to the Department as part of an exemption application. The statements by the qualified independent appraiser, auditor, or accountant must also contain the following written information:

(1) A signed and dated certification stating that, to the best of the qualified independent appraiser's, auditor's, or accountant's knowledge and belief, the representations made in such statement are true and correct;

(2) A copy of the qualified independent appraiser's, auditor's, or accountant's engagement letter and, if applicable, contract with the plan describing the specific duties the appraiser, auditor, or accountant shall undertake. The letter or contract may not:

(i) Include any provision that provides for the direct or indirect indemnification or reimbursement of the independent appraiser, auditor, or

accountant by the plan or another party for any failure to adhere to its contractual obligations or to Federal and state laws applicable to the appraiser's, auditor's, or accountant's work. However, the letter or contract may include a provision providing for reimbursement of legal expenses with respect to claims for any failure to adhere to the appraiser's, auditor's, or accountant's contractual obligations or to Federal and state laws applicable to the appraiser's, auditor's, or accountant's work, provided that:

(A) The plan determines that the reimbursement is prudent following a good faith determination that the appraiser, auditor, or accountant likely did not fail to adhere to the independent fiduciary's contractual obligations or to Federal and state laws applicable to the appraiser's, auditor's, or accountant's work and will be able to repay the plan; and

(B) The letter or contract requires the appraiser, auditor, or accountant to repay all of the reimbursements, in a timely fashion, in the event the appraiser, auditor, or accountant enters into a settlement agreement regarding any asserted failure to adhere to its contractual obligations, or to state or Federal laws, or has been found liable for breach of contract or violation of any Federal or state laws applicable to the appraiser's, auditor's, or accountant's work; or

(ii) Waive any rights, claims, or remedies of the plan or its participants and beneficiaries under ERISA, the Code, or other Federal and state laws against the independent appraiser, auditor, or accountant with respect to the exemption transaction;

(3) A summary of the qualified independent appraiser's, auditor's, or accountant's qualifications to serve in such capacity;

(4) A detailed description of any relationship that the qualified independent appraiser, auditor, or accountant has had or may have with the plan or any party in interest involved in the exemption transaction or its affiliates that may influence the appraiser, auditor, or accountant, including a description of any past engagements with the appraiser, auditor, or accountant;

(5) A written appraisal report prepared by the qualified independent appraiser, which determines, to the best of the qualified independent appraiser's ability and in accordance with professional appraisal standards, the fair market value of the subject asset(s), without bias towards the plan's counterparty in the transaction or other interested parties:

(i) The report must describe the method(s) used in determining the fair market value of the subject asset(s) and an explanation of why such method best reflects the fair market value of the asset(s);

(ii) The report must consider any special benefit that a party in interest involved in the exemption transaction may derive from control of the asset(s), such as from owning an adjacent parcel of real property or gaining voting control over a company; and

(iii) The report must be current and not more than one year old from the date of the exemption transaction, and a written update must be prepared by the qualified independent appraiser affirming the accuracy of the appraisal as of the date of the exemption transaction;

(6) If the subject of the appraisal report is real property, the qualified independent appraiser shall submit a written representation that they are a member of a professional organization of appraisers that can sanction its members for misconduct;

(7) If the subject of the appraisal report is an asset other than real property, the qualified independent appraiser shall submit a written representation describing the appraiser's prior experience in valuing assets of the same type; and

(8) The qualified independent appraiser shall submit a written representation disclosing the percentage of its current revenue that is derived from any party in interest (or its affiliates) involved in the exemption transaction; in general, such percentage shall be computed with respect to the two separate disclosures by comparing, in fractional form:

(i) The amount of the appraiser's projected revenues from the current Federal income tax year (including amounts received from preparing the appraisal report) that will be derived from any party in interest (or its affiliates) involved in the exemption transaction (expressed as a numerator); and

(ii) The appraiser's revenues from all sources for the prior Federal income tax year (expressed as a denominator).

(d) For those exemption transactions requiring the retention of a qualified independent appraiser, the applicant must include:

(1) A representation that the independent fiduciary prudently selected the appraiser after diligent review of the appraiser's technical training and proficiency with respect to the type of valuation at issue, the appraiser's independence from the plan's counterparties in the exemption transaction, and the absence of any material conflicts of interest with respect to the exemption transaction;

(2) A representation that the appraiser is independent within the meaning of § 2571.31(i); and

(3) A representation that the independent appraiser has appropriate technical training and proficiency with respect to the specific details of the exemption transaction.

(e) For those exemption transactions requiring the retention of a qualified independent fiduciary to represent the interests of the plan, the applicant must include:

(1) A representation that an appropriate fiduciary, without material conflicts of interest, prudently selected the independent fiduciary after diligent review of the independent fiduciary's technical training and proficiency with respect to ERISA, the Code, and the specific details of the exemption transaction, as well as the sufficiency of the independent fiduciary's fiduciary liability insurance;

(2) A representation that the fiduciary retained to act as the independent fiduciary is independent within the meaning of § 2570.31(j);

(3) A representation that the independent fiduciary has appropriate technical training and proficiency with respect to:

(i) ERISA and the Code; and

(ii) The specific details of the exemption transaction.

(f) For exemption transactions requiring the retention of a qualified independent fiduciary to represent the interests of the plan, a statement must be submitted by such independent fiduciary that contains the following written information:

(1) A signed and dated certification that, to the best of the qualified independent fiduciary's knowledge and belief, all the representations made in such statement are true and correct;

(2) A copy of the qualified independent fiduciary's engagement letter and, if applicable, contract with the plan describing the fiduciary's specific duties. The letter or contract may not:

(i) Contain any provisions that violate ERISA section 410;

(ii) Include any provision that provides for the direct or indirect indemnification or reimbursement of the independent fiduciary by the plan or other party for any failure to adhere to its contractual obligations or to state or Federal laws applicable to the independent fiduciary's work, except that the letter or contract may include a provision providing for reimbursement of legal expenses with

respect to claims for any failure to adhere to the independent fiduciary's contractual obligations or to Federal and state laws applicable to the independent fiduciary's work, provided that:

(A) The plan determines that the provision is prudent following a good faith determination that the independent fiduciary likely did not fail to adhere to the independent fiduciary's contractual obligations or to Federal and state laws applicable to the independent fiduciary's work and will be able to repay the plan; and

(B) The letter or contract requires the independent fiduciary to repay all of the reimbursements, in a timely fashion, if the independent fiduciary enters into a settlement agreement regarding any asserted failure to adhere to its contractual obligations, or to state or Federal law, or has been found liable for breach of contract or violation of any Federal or state laws applicable to the independent fiduciary's work; or

(iii) Waive any rights, claims, or remedies of the plan under ERISA, state, or Federal law against the independent fiduciary with respect to the exemption transaction;

(3)(i) A description of any fiduciary liability insurance policy maintained by the independent fiduciary that includes:

(A) The amount of coverage available to indemnify the plan for damages resulting from a breach by the independent fiduciary of either ERISA, the Code, or any other Federal or state law or its contract or engagement letter; and

(B) Whether the insurance policy contains an exclusion for actions brought by the Secretary or any other Federal, state, or regulatory body; the plan; or plan participants or beneficiaries;

(4) An explanation of the bases for the conclusion that the fiduciary is a qualified independent fiduciary, which also must include a summary of that person's or entity's qualifications to serve in such capacity and a description of any prior experience by that person or entity or other demonstrated characteristics of the fiduciary (such as special areas of expertise) that render that person or entity suitable to perform its duties as a qualified independent fiduciary on behalf of the plan with respect to the exemption transaction;

(5) A detailed description of any relationship that the qualified independent fiduciary has had or may have with the plan and any party in interest involved in the exemption transaction (or its affiliates);

(6) An acknowledgement by the qualified independent fiduciary that it understands its duties and responsibilities under ERISA; is acting as a fiduciary of the plan with respect to the exemption transaction; has no material conflicts of interest with respect to the exemption transaction; and is not acting as an agent or representative of the plan sponsor;

(7) The qualified independent fiduciary's opinion on whether the exemption transaction would be in the interests of the plan and its participants and beneficiaries, protective of the rights of participants and beneficiaries of the plan, and in compliance with the standards set forth in paragraphs (b)(2)(i)(A) through (C) of this section, if applicable, along with a statement of the reasons on which the opinion is based;

(8) If the exemption transaction is continuing in nature, a declaration by the qualified independent fiduciary that it is authorized to take all appropriate actions to safeguard the interests of the plan, and will, during the pendency of the exemption transaction:

(i) Monitor the exemption transaction on behalf of the plan and its participants and beneficiaries on a continuing basis;

(ii) Ensure that the exemption transaction remains in the interests of the plan and its participants and beneficiaries and, if not, take any appropriate actions available under the particular circumstances; and

(iii) Enforce compliance with all conditions and obligations imposed on any party dealing with the plan with respect to the exemption transaction;

(9) The qualified independent fiduciary shall submit a written representation disclosing the percentage of its current revenue that is derived from any party in interest involved in the exemption transaction (or its affiliates) with respect to both the prior Federal income tax year and current Federal income tax year; in general, such percentage shall be computed with respect to the two disclosures by comparing in fractional form:

(i) The amount of the independent fiduciary's projected revenues from the current Federal income tax year that will be derived from parties in interest involved in the exemption transaction and their affiliates (expressed as a numerator); and

(ii) The independent fiduciary's revenues from all sources (excluding fixed, non-discretionary retirement income) for the prior Federal income tax year (expressed as a denominator);

(10) A statement that the independent fiduciary has no conflicts of interest with respect to the exemption transaction that could affect the exercise of its best judgment as a fiduciary;

(11) Either:

(i) A statement that, within the last five years, the independent fiduciary has not been under investigation or examination by, and has not engaged in litigation, or a continuing controversy with the Department, the Internal Revenue Service, the Justice Department, the Pension Benefit Guaranty Corporation, the Federal Retirement Thrift Investment Board, or any other Federal or state entity involving:

(A) Compliance with provisions of ERISA or FERSA;

(B) Its representation of or position or employment with any employee benefit plan, including investigations or controversies involving ERISA or the Code, or any other Federal or state law;

(C) Conduct of the business of a broker, dealer, investment adviser, bank, insurance company, or fiduciary;

(D) Income tax evasion; or

(E) Any felony or conspiracy involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; or

(ii) A statement describing the applicable investigation, examination, litigation, or controversy; and

(12)(i)(A) Either a statement that, within the last 13 years, the independent fiduciary has not been:

(*1*) Convicted or released from imprisonment, whichever is later, as a result of any felony involving abuse or misuse of such person's position or employment with an employee benefit plan or 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 of which any of the foregoing crimes is an element; or any crime identified in ERISA section 411, regardless of whether the conviction occurred in a U.S. or foreign jurisdiction; or

(*2*) Convicted by a foreign court of competent jurisdiction or released from imprisonment, whichever is later, as a result of any crime that is substantially equivalent to an offense described in paragraph (f)(12)(i)(A)(*1*) of this section; or

(B) A statement describing a conviction or release from imprisonment described in paragraph (f)(12)(i)(A) of this section.

(ii) For purposes of this paragraph (f), a person shall be deemed to have been ''convicted'' from 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 remains under appeal, and regardless of whether the foreign jurisdiction considers a trial court judgment final while under appeal.

(g) Statements, as applicable, from other third-party experts, including but not limited to economists or market specialists, submitted on behalf of the plan to support an exemption application must be accompanied by a statement of consent from such expert acknowledging that the statement prepared on behalf of the plan is being submitted to the Department as part of an exemption application. Such statements must also contain the following written information:

(1) A copy of the expert's engagement letter and, if applicable, contract with the plan describing the specific duties the expert will undertake;

(2) A summary of the expert's qualifications to serve in such capacity; and

(3) A detailed description of any relationship that the expert has had or may have with any party in interest (or its affiliates) involved in the exemption transaction that may influence the actions of the expert.

(h) An application for exemption may also include a draft of the requested exemption which describes the exemption transaction and parties in interest for which exemptive relief is sought and the specific conditions under which the exemption would apply.

§ 2570.35 Information to be included in applications for individual exemptions only.

(a) Except as provided in paragraph (c) of this section, every application for an individual exemption must include, in addition to the information specified in § 2570.34, the following information:

(1) The name, address, email address, telephone number, and type of plan or plans to which the requested exemption applies;

(2) The Employer Identification Number (EIN) and the plan number (PN) used by such plan or plans in all reporting and disclosure required by the Department (individuals should not submit Social Security numbers);

(3) Whether any plan or trust affected by the requested exemption is currently under investigation for violation of, or has ever been found by the Department, the Internal Revenue Service, or by a court to have violated, the exclusive benefit rule of Code section 401(a), Code section 4975(c)(1), ERISA sections 406 or 407(a), or 5 U.S.C. 8477(c)(3), including a description of the circumstances surrounding such violation;

(4) Whether any relief under ERISA section 408(a), Code section 4975(c)(2), or 5 U.S.C. 8477(c)(3) has been requested by, or provided to, the applicant or any parties in interest (or their affiliates) involved in the exemption transaction and, if so, the exemption application number or the prohibited transaction exemption number;

(5) Whether the applicant or any party in interest (or its affiliates) involved in the exemption transaction is currently, or has been within the last five years, a defendant in any lawsuits or criminal actions concerning its conduct as a fiduciary or party in interest with respect to any plan (other than lawsuits with respect to a routine claim for benefits), and a description of the circumstances of the lawsuits or criminal actions;

(6)(i) Whether the applicant (including any person described in § 2570.34(b)(6)(ii)) or any of the parties in interest involved in the exemption transaction has, within the last 13 years, been:

(A) Convicted or released from imprisonment, whichever is later, as a result of any felony involving abuse or misuse of such person's position or employment with an employee benefit plan or 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 of which any of the foregoing crimes is an element; or any crime identified in ERISA section 411, regardless of whether the conviction occurred in a U.S. or foreign jurisdiction; or

(B) Convicted by a foreign court of competent jurisdiction or released from imprisonment, whichever is later, as a result of any crime, however denominated by the laws of the relevant foreign government, that is substantially equivalent to an offense described in paragraph (a)(6)(i)(A) of this section and a description of the circumstances of any such conviction in paragraph (a)(6)(i)(A) or this paragraph (a)(6)(i)(B); and

(ii) For purposes of this paragraph (a), a person shall be deemed to have been ''convicted'' from 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 remains under appeal and regardless of whether the foreign jurisdiction considers a trial court judgment final while under appeal;

(7) Whether, within the last five years, any plan affected by the exemption transaction, the applicant, or any party in interest (or its affiliates) involved in the exemption transaction, has been under investigation or examination by, or has been engaged in litigation or a continuing controversy with, the Department, the Internal Revenue Service, the Justice Department, the Pension Benefit Guaranty Corporation, the Federal Retirement Thrift Investment Board, or any other regulatory body involving compliance with provisions of ERISA, FERSA, the Code, or any other Federal or state law involving:

(i) Compliance with provisions of ERISA or FERSA;

(ii) Representation of or position or employment with any employee benefit plan, including investigations or controversies involving ERISA or the Code, or any other Federal or state law;

(iii) Conduct of the business of a broker, dealer, investment adviser, bank, insurance company, or fiduciary;

(iv) Income tax evasion; or

(v) Any felony or conspiracy involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities. If so, the applicant must provide a brief statement describing the investigation, examination, litigation, or controversy. The Department reserves the right to require the production of additional information or documentation concerning any of the matters in this paragraph (a)(7). In this regard, a denial of the exemption application may result from an applicant's failure to provide additional information requested by the Department;

(8) Whether any plan affected by the requested exemption has experienced a reportable event under ERISA section 4043, and, if so, a description of the circumstances of any such reportable event;

(9) Whether a notice of intent to terminate has been filed under ERISA section 4041 with respect to any plan affected by the requested exemption, and, if so, a description of the

circumstances for the issuance of the notice;

(10) Names, addresses, phone numbers, and email addresses of all parties in interest (or their affiliates) involved in the exemption transaction;

(11) The estimated number of participants and beneficiaries in each plan affected by the requested exemption as of the date of the application;

(12) The percentage of the fair market value of the total assets of each affected plan that is involved in the exemption transaction. If the exemption transaction includes the acquisition of an asset by the plan, the fair market value of the asset to be acquired must be included in both the numerator and denominator of the fraction;

(13) Whether the exemption transaction has been consummated or will be consummated only if the exemption is granted;

(14) If the exemption transaction has already been consummated:

(i) The circumstances which resulted in plan fiduciaries causing the plan(s) to engage in the exemption transaction before obtaining an exemption from the Department;

(ii) Whether the exemption transaction has been terminated;

(iii) Whether the exemption transaction has been corrected as defined in Code section 4975(f)(5);

(iv) Whether Form 5330, Return of Excise Taxes Related to Employee Benefit Plans, has been filed with the Internal Revenue Service with respect to the exemption transaction; and

(v) Whether any excise taxes due under Code section 4975(a) and (b), or any civil penalties due under ERISA section 502(i) or (l) by reason of the exemption transaction have been paid. If so, the applicant should submit documentation (*e.g.,* a canceled check) demonstrating that the excise taxes or civil penalties were paid;

(15) The name of every person who has authority or investment discretion over any plan assets involved in the exemption transaction and the relationship of each such person to the parties in interest involved in the exemption transaction and the affiliates of such parties in interest;

(16) Whether the assets of the affected plan(s) are invested, directly or indirectly, in:

(i) loans to any party in interest (or its affiliates) involved in the exemption transaction;

(ii) Property leased to any party in interest (or its affiliates) involved in the exemption transaction; or

(iii) Securities issued by any party in interest (or its affiliates) involved in the exemption transaction, and, if such investments exist, a statement for each of these three types of investments which indicates:

(A) The type of investment to which the statement pertains;

(B) The aggregate fair market value of all investments of this type as reflected in the plan's most recent annual report;

(C) The approximate percentage of the fair market value of the plan's total assets as shown in such annual report that is represented by all investments of this type; and

(D) The statutory or administrative exemption covering these investments, if any;

(17) The approximate aggregate fair market value of the total assets of each affected plan;

(18) The person(s) or entity who will bear the costs of:

(i) The exemption application;

(ii) Any commissions, fees, or costs associated with the exemption transaction, and any related transaction; and

(iii) Notifying interested persons;

(19) Whether an independent fiduciary is or will be involved in the exemption transaction and, if so, the names of the persons who will bear the cost of the fee payable to such fiduciary; and

(20) Any prior transaction between:

(i) The plan or plan sponsor; and

(ii) Any party in interest (or its affiliates) involved in the exemption transaction.

(b) Each application for an individual exemption must also include:

(1) True copies of all contracts, deeds, agreements, and instruments, as well as relevant portions of plan documents, trust agreements, and any other documents bearing on the exemption transaction;

(2) A discussion of the facts relevant to the exemption transaction that are reflected in the documents listed in paragraph (b)(1) of this section and an analysis of their bearing on the requested exemption;

(3) A copy of the most recent financial statements of each plan affected by the requested exemption; and

(4) A net worth statement with respect to any party that is providing a personal guarantee with respect to the exemption transaction.

(c) Special rules for applications for individual exemption involving pooled funds are as follows:

(1) The information required by paragraphs (a)(8) through (12) of this section is not required to be furnished in an application for individual exemption involving one or more pooled funds.

(2) The information required by paragraphs (a)(1) through (7) and (13) through (19) of this section and by paragraphs (b)(1) through (3) of this section must be furnished in reference to the pooled fund, rather than to the plans participating therein. (For purposes of this paragraph (c)(2), the information required by paragraph (a)(16) of this section relates solely to other pooled fund transactions with, and investments in, parties in interest involved in the exemption transaction which are also sponsors of plans which invest in the pooled fund.)

(3) The following information must also be furnished—

(i) The estimated number of plans that are participating (or will participate) in the pooled fund; and

(ii) The minimum and maximum limits imposed by the pooled fund (if any) on the portion of the total assets of each plan that may be invested in the pooled fund.

(4) Additional requirements for applications for individual exemptions involving pooled funds in which certain plans participate are as follows:

(i) This paragraph (c)(4) applies to any application for an individual exemption involving one or more pooled funds in which any plan participating therein—

(A) Invests an amount which exceeds 20 percent of the total assets of the pooled fund; or

(B) Covers employees of:

(*1*) The party sponsoring or maintaining the pooled fund, or any affiliate of such party; or

(*2*) Any fiduciary with investment discretion over the pooled fund's assets, or any affiliate of such fiduciary.

(ii) The exemption application must include, with respect to each plan described in paragraph (c)(4)(i) of this section, the information required by paragraphs (a)(1) through (3), (5) through (7), (10), (12) through (16), (18), and (19) of this section. The information required by this paragraph (c)(4)(ii) must be furnished in reference to the plan's investment in the pooled fund (*e.g.,* the names, addresses, phone numbers, and email addresses of all fiduciaries responsible for the plan's investment in the pooled fund (paragraph (a)(10) of this section), the percentage of the assets of the plan invested in the pooled fund (paragraph (a)(12) of this section), whether the plan's investment in the pooled fund has been consummated or will be consummated only if the exemption is granted (paragraph (a)(13) of this section, etc.)).

(iii) The information required by this paragraph (c)(4) is in addition to the information required by paragraphs

(c)(2) and (3) of this section relating to information furnished by reference to the pooled fund.

(5) The special rule and the additional requirements described in paragraphs (c)(1) through (4) of this section do not apply to an individual exemption request solely for the investment by a plan in a pooled fund. Such an application must provide the information required by paragraphs (a) and (b) of this section.

(d)(1) Generally, the Department will consider exemption requests for retroactive relief only when:

(i) The safeguards necessary for the grant of a prospective exemption were in place at the time the parties entered into the exemption transaction; and

(ii) The plan and its participants and beneficiaries have not been harmed by the exemption transaction. An applicant for a retroactive exemption must demonstrate that the responsible plan fiduciaries acted in good faith by taking all appropriate steps necessary to protect the plan from abuse, loss, and risk at the time of the exemption transaction. An applicant should further explain and describe whether the exemption transaction could have been performed without engaging in a prohibited exemption transaction, and whether the goals of the transaction could have been achieved through an alternative transaction that served the aims of the plan equally well.

(2) Among the factors that the Department will consider in making a finding that an applicant acted in good faith include the following:

(i) The involvement of an independent fiduciary before an exemption transaction occurs who acts on behalf of the plan and is qualified to negotiate, approve, and monitor the exemption transaction; provided, however, the Department may consider, at its sole discretion, an independent fiduciary's appointment and retrospective review after completion of the exemption transaction due to exigent circumstances;

(ii) The existence of a contemporaneous appraisal by a qualified independent appraiser or reference to an objective third party source, such as a stock or bond index;

(iii) The existence of a bidding process or evidence of comparable fair market transactions with unrelated third parties;

(iv) That the applicant has submitted an accurate and complete exemption application that contains documentation of all necessary and relevant facts and representations upon which the applicant relied. In this regard, the Department will accord appropriate weight to facts and representations which are prepared and certified by a source independent of the applicant;

(v) That the applicant has submitted evidence that the plan fiduciary did not engage in an act or transaction with respect to which the fiduciary should have known, consistent with its ERISA fiduciary duties and responsibilities, was prohibited under ERISA section 406 and/or Code section 4975. In this regard, the Department will accord appropriate weight to the submission of a contemporaneous, reasoned legal opinion of counsel, upon which the plan fiduciary relied in good faith before engaging in the act or transaction;

(vi) That the applicant has submitted a statement of the circumstances which prompted the submission of the application for exemption and the steps taken by the applicant about the exemption transaction upon discovery of the violation;

(vii) That the applicant has submitted a statement, prepared and certified by an independent person familiar with the types of transactions for which relief is requested, demonstrating that the terms and conditions of the exemption transaction (including, in the case of an investment, the return in fact realized by the plan) were at least as favorable to the plan as that obtainable in a similar transaction with an unrelated party; and

(viii) Such other undertakings and assurances with respect to the plan and its participants that may be offered by the applicant which are relevant to the criteria under ERISA section 408(a) and Code section 4975(c)(2).

(3) The Department, as a general matter, will not consider requests for retroactive exemptions if transactions or conduct with respect to which an exemption is requested resulted in a loss to the plan, as determined pursuant to the facts existing at the time of the exemption application. In addition, the Department will not consider requests for exemptions if the transactions are inconsistent with the general fiduciary responsibility provisions of ERISA sections 403 or 404 or the exclusive benefit requirements of Code section 401(a).

§ 2570.36 Where to file an application.

The Department's prohibited transaction exemption program is administered by the Employee Benefits Security Administration (EBSA). Any exemption application governed by this subpart may be emailed to the Department at *e-OED@dol.gov.* The applicant is not required to submit a paper copy if an electronic copy is submitted. An applicant may submit a paper copy of the application by mailing it via first-class mail to: Employee Benefits Security Administration, Office of Exemption Determinations, U.S. Department of Labor, 200 Constitution Avenue NW, Suite 400 Washington, DC 20210 or via private carrier service to Employee Benefit Security Administration, U.S. Department of Labor, Office of Exemption Determinations, 122 C Street NW, Suite 400, Washington, DC 20001–2109. The mail or private carrier service addresses, however, are subject to change, and the applicant should confirm the address with the Office of Exemption Determinations before submitting a paper copy of an application.

§ 2570.37 Duty to amend and supplement exemption applications.

(a) During the Department's consideration of an exemption application and following any grant by the Department of an exemption request, an applicant must promptly notify the Department in writing if they discover that any material fact or representation contained in the application or in any documents or testimony provided in support of the application was inaccurate at the time it was provided to the Department in support of the application. If any material fact or representation changes during this period, or if anything occurs that may affect the continuing accuracy of any such fact or representation, the applicant must promptly notify the Department in writing of the change. In addition, an applicant must promptly notify the Department in writing if it learns that a material fact or representation has been omitted from the exemption application.

(b) If, at any time during the pendency of an exemption application, the applicant or any other party in interest who would participate in the exemption transaction becomes the subject of an investigation or enforcement action by the Department, the Internal Revenue Service, the Justice Department, the Pension Benefit Guaranty Corporation, the Federal Retirement Thrift Investment Board, or any other Federal or state governmental entity involving:

(1) Compliance with provisions of ERISA or FERSA;

(2) Representation of or position or employment with any employee benefit plan, including investigations or controversies involving ERISA or the Code, or any other Federal or state law;

(3) Conduct of the business of a broker, dealer, investment adviser, bank, insurance company, or fiduciary;

(4) Income tax evasion; or

(5) Any felony or conspiracy involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities, the applicant must promptly notify the Department.

(c) The Department may require an applicant to provide any documentation it considers necessary to verify any statements contained in the application or in supporting materials or documents.

§ 2570.38 Tentative denial letters.

(a) If, after reviewing an exemption file, the Department tentatively concludes that it will not propose or grant the exemption, it will notify the applicant in writing. At the same time the Department provides the notification, the Department will also provide a brief statement of the reasons for its tentative denial.

Note 1 to paragraph (a). As referenced in § 2570.33(a)(1), the Department will not hold a conference with, or issue a tentative denial letter to, an applicant who does not submit a complete application, or an applicant who does not provide current information.

(b) An applicant will have 20 days from the date of a tentative denial letter, unless the Department extends the time period at its sole discretion, to request a conference under § 2570.40 and/or to notify the Department of its intent to submit additional information under § 2570.39. If the Department does not receive a request for a conference or a notification of intent to submit additional information within that time, it will issue a final denial letter pursuant to § 2570.41.

§ 2570.39 Opportunities to submit additional information.

(a) An applicant may notify the Department of its intent to submit additional information supporting an exemption application by telephone, by letter sent to the address furnished in the applicant's tentative denial letter, or electronically to the email address provided in the applicant's tentative denial letter. At the same time, the applicant should indicate generally the type of information that will be submitted.

(b) The additional information an applicant intends to provide in support of the application must be in writing and received by the Department within 40 days from the date the Department issues the tentative denial letter unless the Department extends the time period at its sole discretion. All such information must be accompanied by a certification that all information provided to the Department is true and correct, and the certification must be dated and signed by a person qualified under § 2570.34(b)(6) to sign such a declaration. The information may be submitted either electronically or by mail to the address specified in the letter.

(c) If, for reasons beyond its control, an applicant is unable to submit all the additional information they intend to provide in support of their application within the period described in paragraph (b) of this section, they may request an extension of time to furnish the information. Such requests must be made before the expiration of the time period described in paragraph (b), and the request will be granted, in the Department's sole discretion, only in unusual circumstances and for a limited period as determined by the Department. The request may be made by telephone, mail, or electronically.

(d) The Department will issue, without further notice, either by mail or electronically, a final denial letter denying the requested exemption pursuant to § 2570.41 if—

(1) The Department has not received the additional information that the applicant stated their intention to submit within the period described in paragraph (b) of this section, or within any additional period granted pursuant to paragraph (c) of this section; and

(2) The applicant did not request a conference pursuant to § 2570.38(b).

§ 2570.40 Conferences.

(a) Any conference between the Department and an applicant pertaining to a requested exemption will be held in Washington, DC, except that a telephone or electronic conference will be held at the applicant's request.

(b) An applicant is entitled to only one conference with respect to any exemption application. The Department may hold additional conferences at its sole discretion if it determines additional conference(s) are appropriate. An applicant will not be entitled to a conference, however, if the Department has held a hearing on the exemption under either § 2570.46 or § 2570.47.

(c) Insofar as possible, conferences will be scheduled as joint conferences with all applicants present if:

(1) More than one applicant has requested an exemption with respect to the same or similar types of transactions;

(2) The Department is considering the applications together as a request for a class exemption;

(3) The Department contemplates not granting the exemption; and

(4) More than one applicant has requested a conference.

(d) In instances where the applicant has requested a conference pursuant to § 2570.38(b) and also has submitted additional information pursuant to § 2570.39, the Department will schedule a conference under this section for a date and time that occurs within 20 days after the date on which the Department has provided either oral or written notification to the applicant that, after reviewing the additional information, it still is not prepared to propose the requested exemption or a later date determined at the Department's sole discretion. If, for reasons beyond its control, the applicant cannot attend a conference within the time limit described in this paragraph (d), the applicant may request an extension of time for the scheduling of a conference, provided that such request is made before the expiration of the time limit. The Department, at its sole discretion, will only grant such an extension in unusual circumstances and for a brief period.

(e) In instances where the applicant has requested a conference pursuant to § 2570.38(b) but has not expressed an intent to submit additional information in support of the exemption application as provided in § 2570.39, the Department will schedule a conference under this section for a date and time that occurs within 40 days after the date of the issuance of the tentative denial letter described in § 2570.38(a) or a later date determined at the sole discretion of the Department. If, for reasons beyond its control, the applicant cannot attend a conference within the time limit described in this paragraph (e), the applicant may request an extension of time for the scheduling of a conference, provided that such request is made before the expiration of the time limit. The Department, at its sole discretion, will only grant such an extension in unusual circumstances and for a brief period.

(f) In instances where the applicant has requested a conference pursuant to § 2570.38(b), notified the Department of its intent to submit additional information pursuant to § 2570.39, and failed to furnish such information within 40 days after the date of issuance of the tentative denial letter, the Department will schedule a conference under this section for a date and time that occurs within 60 days after the date of the issuance of the tentative denial letter described in § 2570.38(a) or a later date as determined at the sole discretion of the Department. If, for reasons

beyond its control, the applicant cannot attend a conference within the time limit described in this paragraph (f), the applicant may request an extension of time to schedule a conference, provided that such request is made before the expiration of the time limit. The Department, at its sole discretion, will only grant such an extension in unusual circumstances and for a brief period.

(g) If the applicant fails to either timely schedule or appear for a conference agreed to by the Department pursuant to this section, the applicant will be deemed to have waived its right to a conference.

(h) Within 20 days after the date of any conference held under this section, or a later date determined at the sole discretion of the Department, the applicant may submit to the Department (electronically or in paper form) any additional written data, arguments, or legal authorities discussed at the conference but not previously or adequately presented in writing. If, for reasons beyond its control, the applicant is unable to submit the additional information within this time limit, the applicant may request an extension of time to furnish the information, provided that such request is made before the expiration of the time limit described in this paragraph (h). The Department, at its sole discretion, will only grant such an extension in unusual circumstances and for a brief period.

(i) The Department, at its sole discretion, may hold a conference with any party, including the qualified independent fiduciary or the qualified independent appraiser, regarding any matter related to an exemption request without the presence of the applicant or other parties involved in the exemption transaction, or their representatives. Any such conferences may occur in addition to the conference with the applicant described in paragraph (b) of this section.

§ 2570.41 Final denial letters.

The Department will issue a final denial letter denying a requested exemption, either by mail or electronically, if:

(a) Before issuing a tentative denial letter under § 2570.38 or conducting a hearing on the exemption under either § 2570.46 or § 2570.47, the Department determines at its sole discretion that:

(1) The applicant has failed to submit information requested by the Department in a timely manner;

(2) The information provided by the applicant does not meet the requirements of §§ 2570.34 and 2570.35; or

(3) A conference was held between the Department and the applicant before the Department issued a tentative denial letter during which the Department and the applicant addressed the reasons for denial that otherwise would have been set forth in a tentative denial letter pursuant to § 2570.38;

(b) The conditions for issuing a final denial letter specified in § 2570.38(b) or § 2570.39(d) are satisfied;

(c) After issuing a tentative denial letter under § 2570.38 and considering the entire record in the case, including all written information submitted pursuant to §§ 2570.39 and 2570.40, the Department decides not to propose an exemption or to withdraw an exemption it already proposed;

(d) After proposing an exemption and conducting a hearing on the exemption under either § 2570.46 or § 2570.47 and after considering the entire record in the case, including the record of the hearing and any public comments, the Department decides to withdraw the proposed exemption; or

(e) The applicant either:

(1) Requests for the Department to withdraw the exemption application; or

(2) Communicates to the Department that it is not interested in continuing the application process.

§ 2570.42 Notice of proposed exemption.

If the Department tentatively decides that an administrative exemption is warranted, it will publish a notice of a proposed exemption in the **Federal Register**. In addition to providing notice of the pendency of the exemption before the Department, the notice will:

(a) Explain the exemption transaction and summarize the information and reasons in support of proposing the exemption;

(b) Describe the scope of relief and any conditions of the proposed exemption;

(c) Inform interested persons of their right to submit comments to the Department (either electronically or in writing) relating to the proposed exemption and establish a deadline for receipt of such comments; and

(d) If the proposed exemption includes relief from the prohibitions of ERISA section 406(b), Code section 4975(c)(1)(E) or (F), or FERSA section 8477(c)(2), inform interested persons who are materially affected by the grant of the exemption of their right to request a hearing under § 2570.46 and establish a deadline for hearing requests to be submitted.

§ 2570.43 Notification of interested persons by applicant.

(a) If a notice of proposed exemption is published in the **Federal Register** in accordance with § 2570.42, the applicant must notify interested persons of the pendency of the exemption in the manner and within the time period specified in the application. If the Department determines that this notification would be inadequate, the applicant must obtain the Department's consent as to the manner and time period of providing the notice to interested persons. Any such notification must include:

(1) A copy of the notice of proposed exemption as published in the **Federal Register**; and

(2) A supplemental statement in the following form:

You are hereby notified that the United States Department of Labor is considering granting an exemption from the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974, the Internal Revenue Code of 1986, or the Federal Employees' Retirement System Act of 1986. The exemption under consideration is summarized in the enclosed [Summary of Proposed Exemption and described in greater detail in the accompanying] [1] Notice of Proposed Exemption. As a person who may be affected by this exemption, you have the right to comment on the proposed exemption by [date].[2] [If you may be materially affected by the grant of the exemption, you also have the right to request a hearing on the exemption by [date].] [3]

All comments and/or requests for a hearing should be addressed to the Office of Exemption Determinations, Employee Benefits Security Administration, Room N–5461,[4] U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210, ATTENTION: Application No.____.[5] Comments and hearing requests may also be transmitted to the Department electronically at *e-OED@dol.gov* or at *https://www.regulations.gov* (follow instructions for submission), and should prominently reference the application

[1] To be added in instances where the Department requires the applicant to furnish a Summary of Proposed Exemption to interested persons as described in paragraph (d) of this section.

[2] The applicant will write in this space the date of the last day of the time period specified in the notice of proposed exemption.

[3] To be added in the case of an exemption that provides relief from ERISA section 406(b) or corresponding sections of the Code or FERSA.

[4] The applicant will fill in the room number of the Office of Exemptions Determinations. As of January 24, 2024, the room number of the Office of Exemption Determinations is N–5461.

[5] The applicant will fill in the exemption application number, which is stated in the notice of proposed exemption, as well as in all correspondence from the Department to the applicant regarding the application.

number listed above. Individuals submitting comments or requests for a hearing on this matter are advised not to disclose sensitive personal data, such as social security numbers or information that they consider confidential or otherwise protected.

The Department will make no final decision on the proposed exemption until it reviews the comments received in response to the enclosed notice. If the Department decides to hold a hearing on the exemption request before making its final decision, you will be notified of the time and place of the hearing.

(b) The method used by an applicant to furnish notice to interested persons must be reasonably calculated to ensure that interested persons actually receive the notice. In all cases, personal delivery and delivery by first-class mail will be considered reasonable methods of furnishing notice. If the applicant elects to furnish notice electronically, they must provide satisfactory proof that the entire class of interested persons will be able to receive the notice.

(c) After furnishing the notification described in paragraph (a) of this section, an applicant must provide the Department with a written statement confirming that notice was furnished in accordance with the requirements in paragraph (b) of this section. This statement must be accompanied by a certification that the information provided in the statement and signed by a person qualified under § 2570.34(b)(6) to sign such a declaration is true and correct. No exemption will be granted until the applicant furnishes such a certification to the Department.

(d) In addition to the provision of notification required by paragraph (a) of this section, the Department, in its sole discretion, may also require an applicant to furnish interested persons with a brief summary of the proposed exemption (Summary of Proposed Exemption), written in a manner calculated to be understood by the average recipient, which objectively describes:

(1) The exemption transaction and the parties in interest thereto;

(2) Why the exemption transaction would violate the prohibited transaction provisions of ERISA, the Code, and/or FERSA from which relief is sought;

(3) The reasons why the plan seeks to engage in the exemption transaction; and

(4) The conditions and safeguards proposed to protect the plan and its participants and beneficiaries from potential abuse or unnecessary risk of loss in the event the Department grants the exemption.

(e) Applicants who are required to provide interested persons with the Summary of Proposed Exemption described in paragraph (d) of this section shall furnish the Department with a copy of such summary for review and approval before its distribution to interested persons. Such applicants shall also provide confirmation to the Department that the Summary of Proposed Exemption was furnished to interested persons as part of the written statement and declaration required of exemption applicants by paragraph (c) of this section.

§ 2570.44 Withdrawal of exemption applications.

(a) An applicant may withdraw an application for an exemption at any time by oral or written (including electronic) notice to the Department. A withdrawn application generally shall not prejudice any subsequent applications for the same exemption transaction submitted by an applicant.

(b) Upon receiving an applicant's notice of withdrawal regarding an application for an individual exemption, the Department will issue a final denial letter in accordance with § 2570.41(e) and will terminate all proceedings relating to the application. If a notice of proposed exemption has been published in the **Federal Register**, the Department will publish a notice in the **Federal Register** withdrawing the proposed exemption.

(c) Upon receiving an applicant's notice of withdrawal regarding an application for a class exemption or an individual exemption that is being considered with other applications as a request for a class exemption, the Department will inform any other applicants for the exemption of the withdrawal. The Department will continue to process other applications for the same exemption. If all applicants for a particular class exemption withdraw their applications, the Department may either terminate all proceedings relating to the exemption or propose the exemption on its own motion.

(d) If, following the withdrawal of an exemption application, an applicant decides to reapply for the same exemption, they may contact the Department in writing (including electronically) to request the Department to reinstate the application. The applicant should refer to the application number assigned to the original application. If, at the time the original application was withdrawn, any additional information required to be submitted to the Department under § 2570.39 was outstanding, that information must accompany the request for reinstatement of the application. The applicant must also update all previously furnished information to the Department in connection with a withdrawn application.

(e) Any request for reinstatement of a withdrawn application submitted in accordance with paragraph (d) of this section will be granted by the Department, and the Department will take whatever steps remained to process the application when the applicant withdrew the application.

(f) Following the withdrawal of an exemption application, the administrative record will remain subject to public inspection and copy pursuant to § 2570.51.

§ 2570.45 Requests for reconsideration.

(a) The Department will entertain one request for reconsideration of an exemption application that the Department has denied pursuant to § 2570.41 if the applicant either:

(1) Presents significant new facts or arguments in support of the application, which, for good reason, could not have been submitted for the Department's consideration during its initial review of the exemption application; or

(2) The applicant received a final denial letter pursuant to § 2570.41(a) before the Department issued a tentative denial letter under § 2570.38 or conducted a hearing on the exemption under either § 2570.46 or § 2570.47.

(b) An applicant must submit a request for reconsideration of a previously denied application within 180 days after the issuance of the final denial letter and include with the request a copy of the Department's final denial letter and a statement setting forth the new information and/or arguments that provide the basis for reconsideration.

(c) A request for reconsideration must also be accompanied by a certification that the new information provided to the Department is true and correct, which is signed by a person qualified under § 2570.34(b)(6) to sign the certification.

(d) If, after reviewing a request for reconsideration, the Department decides that the facts and arguments presented do not warrant reversal of its original decision to deny the exemption, it will send a letter to the applicant reaffirming that decision.

(e) If, after reviewing a request for reconsideration, the Department decides to reconsider its final denial letter based on the new facts and arguments submitted by the applicant, it will notify the applicant of its intent to reconsider

the application in light of the new information presented. The Department will then take whatever steps remained to be completed to process the exemption application when it issued its final denial letter.

(f) If, at any point during its subsequent processing of the application, the Department decides again that the exemption is unwarranted, it will issue a letter to the applicant affirming its final denial.

(g) The Department does not consider a request for reinstatement of an exemption application pursuant to § 2570.44(d) as a request for reconsideration governed by this section.

(h) If an applicant whose application was finally denied pursuant to § 2570.41(a)(1) or (2) cures the application by providing all required and requested information upon submission for reconsideration, the Department will reconsider the application under paragraph (e) of this section. If, upon reconsideration, the Department concludes that an exemption is not warranted, the Department will either hold a conference with the applicant under § 2570.40 or issue a tentative denial pursuant to the procedures in § 2570.38.

§ 2570.46 Hearings in opposition to exemptions from restrictions on fiduciary self-dealing and conflicts of interest.

(a) Any person who may be materially affected by an exemption which the Department proposes to grant from the restrictions of ERISA section 406(b), Code section 4975(c)(1)(E) or (F), or FERSA section 8477(c)(2) may request a hearing before the Department within the time period specified in the **Federal Register** notice of the proposed exemption. Any such request must state:

(1) The name, address, telephone number, and email address of the person making the request;

(2) The nature of the person's interest in the exemption and how the person would be materially affected by the exemption; and

(3) A statement of the issues to be addressed and a general description of the evidence to be presented at the hearing.

(b) The Department will grant a request for a hearing made in accordance with paragraph (a) of this section if a hearing is necessary to fully explore material factual issues with respect to the proposed exemption identified by the person requesting the hearing. The Department will publish a notice of such hearing in the **Federal Register**. The Department may decline to hold a hearing if:

(1) The request for the hearing is not timely, or otherwise fails to include the information required by paragraph (a) of this section;

(2) The only issues identified for exploration at the hearing are matters of law; or

(3) The factual issues identified can be fully explored through the submission of evidence in written (including electronic) form.

(c) An applicant for an exemption must notify interested persons if the Department schedules a hearing on the exemption. Such notification must be provided in the form, time, and manner prescribed by the Department. Ordinarily, however, adequate notification can be given by providing to interested persons a copy of the notice of hearing published by the Department in the **Federal Register** within 10 days after its publication, using any of the methods approved in § 2570.43(b).

(d) After furnishing the notice required by paragraph (c) of this section, an applicant must submit a statement confirming that notice was given in the form, manner, and time prescribed. This statement must be accompanied by a certification that the information provided in the statement is true and correct, which is signed by a person qualified under § 2570.34(b)(6) to sign a certification.

§ 2570.47 Other hearings.

(a) In its sole discretion, the Department may schedule a hearing on its own motion if it determines that issues relevant to the exemption can be most fully or expeditiously explored at a hearing. The Department shall publish a notice of such hearing in the **Federal Register**.

(b) An applicant for an exemption must notify interested persons of any hearing on an exemption scheduled by the Department in the manner described in § 2570.46(c). In addition, the applicant must submit a certification subscribed as true and correct like that required in § 2570.46(d).

§ 2570.48 Decision to grant exemptions.

(a) The Department may not grant an exemption under ERISA section 408(a), Code section 4975(c)(2), or 5 U.S.C. 8477(c)(3)(C) unless, following evaluation of the facts and representations comprising the administrative record of the proposed exemption (including any comments received in response to a notice of proposed exemption and the record of any hearing held in connection with the proposed exemption), it finds that the exemption meets the statutory requirements by being:

(1) Administratively feasible for the Department;

(2) In the interests of the plan (or the Thrift Savings Fund in the case of FERSA) and of its participants and beneficiaries; and

(3) Protective of the rights of participants and beneficiaries of such plan (or the Thrift Savings Fund in the case of FERSA).

(b) In each instance where the Department determines to grant an exemption, it shall publish a notice in the **Federal Register** which summarizes the transaction or transactions for which exemptive relief has been granted and specifies the conditions under which such exemptive relief is available.

§ 2570.49 Limits on the effect of exemptions.

(a) An exemption does not take effect with respect to the exemption transaction unless the material facts and representations contained in the application and in any materials and documents submitted in support of the application were true and complete at the time of the submission of such material.

(b) An exemption is effective only for the period of time specified and only under the conditions set forth in the exemption.

(c) Only the specific parties to whom an exemption grants relief may rely on the exemption. If the notice granting an exemption does not limit exemptive relief to specific parties, all parties to the exemption transaction may rely on the exemption.

(d) For exemption transactions that are continuing in nature, an exemption ceases to be effective if, during the continuation of the exemption transaction, there are material changes to the original facts and representations underlying such exemption or if one or more of the exemption's conditions cease to be met.

(e) The determination as to whether, under the totality of the facts and circumstances, a particular statement contained in (or omitted from) an exemption application constitutes a material fact or representation is made by the Department in its sole discretion.

§ 2570.50 Revocation or modification of exemptions.

(a) If, after an exemption takes effect, material changes in facts, circumstances, or representations occur, including whether a qualified independent fiduciary resigns, is terminated, or is convicted of a crime, the Department, at its sole discretion, may take steps to revoke or modify the exemption. If the qualified independent

fiduciary resigns, is terminated, or is convicted of a crime, the applicant must notify the Department within 30 days of the resignation, termination, or conviction, and the Department reserves the right to request the applicant to provide the Department with any of the information required pursuant to § 2570.34(e) and (f) pursuant to a time determined by the Department at its sole discretion.

(b) Before revoking or modifying an exemption, the Department will publish a notice of its proposed action in the **Federal Register** and provide interested persons with an opportunity to comment on the proposed revocation or modification. Before the Department publishes such notice, it will notify the applicant of the Department's proposed action and the reasons therefore. After the publication of the notice, the applicant will have the opportunity to comment on the proposed revocation or modification.

(c) The revocation or modification of an exemption will have prospective effect only.

§ 2570.51 Public inspection and copies.

(a) From the date the administrative record of each exemption is established pursuant to § 2570.32(d), the administrative record of each exemption will be open for public inspection and copying at the EBSA Public Disclosure Room, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210.

(b) Upon request, the staff of the Public Disclosure Room will furnish photocopies of an administrative record, or any specified portion of that record, for a specified charge per page; or, at the discretion of the Department, provide the administrative record electronically for a specified charge.

§ 2570.52 Effective date.

This subpart is effective with respect to all exemptions filed with or initiated by the Department under ERISA section 408(a), Code section 4975(c)(2), and/or 5 U.S.C. 8477(c)(3) at any time on or after April 8, 2024. Applications for exemptions under ERISA section 408(a), Code section 4975(c)(2), and/or 5 U.S.C. 8477(c)(3) filed on or after December 27, 2011, but before April 8, 2024, are governed by 29 CFR part 2570 (revised effective December 27, 2011).

Signed at Washington, DC, this 9th day of January 2024.

Lisa M. Gomez,

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

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