DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

[Application No. D–12022]

Z–RIN 1210 ZA07

Amendment to Prohibited Transaction Class Exemption 84–14 for Transactions Determined by Independent Qualified Professional Asset Managers (the QPAM Exemption)

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

ACTION: Final amendment to class exemption.

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

DATES: The amendment is effective June 17, 2024.

FOR FURTHER INFORMATION CONTACT: Brian Mica, telephone (202) 693–8540, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

Title I of ERISA broadly prohibits transactions between plans and any ''party in interest''—who, in general, are people or entities closely connected to ERISA-covered employee benefit plans as defined in ERISA section 3(3). Title II of ERISA, codified in the Code, includes parallel prohibitions applicable to ''disqualified persons'' [1] who, in general, are persons or entities closely connected to plans [2] as defined in Code section 4975(e)(1).

Absent an exemption, ERISA section 406(a)(1)(A) through (D) and Code section 4975(c)(1)(A) through (D) prohibit, among other things, sales, leases, loans, and the provision of services between these parties. Congress enacted these prohibitions to protect plans, their participants and beneficiaries, and IRA owners [3] from the potential for abuse that arises when plans and IRAs engage in transactions with closely connected parties.

The Department grants this exemption, which was proposed on its own motion, pursuant to its authority under ERISA section 408(a) and Code section 4975(c)(2).[4] As required by ERISA section 408(a) and Code section 4975(c)(2), the Department finds that the exemption is administratively feasible, in the interests of Plans and their participants and beneficiaries and protective of the rights of participants and beneficiaries of Plans and IRA owners.

The QPAM Exemption permits an investment fund [5] holding assets of Plans and IRAs that is managed by a ''qualified professional asset manager'' (QPAM) to engage in transactions with a ''party in interest'' or ''disqualified person'' to Plans or an IRAs, subject to protective conditions.[6] This amendment modifies Section I(g) of the exemption, a provision under which a QPAM may become ineligible to rely on the QPAM Exemption for a period of 10 years if the QPAM, various affiliates, or certain owners of the QPAM are convicted of certain crimes. As discussed in detail below, this amendment: (1) requires a QPAM to provide a one-time notice to the Department that the QPAM is relying upon the exemption; (2) updates the list of crimes enumerated in the prior version of Section I(g) to explicitly include foreign crimes that are substantially equivalent to the listed crimes; (3) expands the circumstances that may lead to ineligibility; and (4) provides a one-year winding down (transition) period to help Plans and IRAs avoid or minimize possible negative impacts of terminating or switching QPAMs or adjusting asset management arrangements when a QPAM becomes ineligible pursuant to Section I(g), and gives QPAMs a reasonable period to seek an individual exemption, if appropriate.[7]

This amendment also: (1) provides clarifying updates to Section I(c) regarding a QPAM's authority over investment decisions; (2) adjusts the asset management and equity thresholds in the QPAM definition in Section VI(a); and (3) adds a new recordkeeping provision in Section VI(u). The amendment will affect participants and beneficiaries of Plans, IRA owners, the sponsoring employers of such Plans or IRAs (if applicable) and other plan sponsors, QPAMs, and counterparties engaging in transactions covered under the QPAM Exemption.

Background of the QPAM Exemption

In 1984, the Department published the QPAM Exemption, which permits an investment fund managed by a QPAM to engage in a broad range of transactions with parties in interest with respect to a Plan, subject to protective conditions. The Department developed and granted the QPAM Exemption based on the premise that it could provide broad exemptive relief from the prohibitions of ERISA section 406(a)(1)(A) through (D) and Code section 4975(c)(1)(A) through (D) for transactions in which a Plan engages with a Party in Interest only if the commitments and investments of Plan assets and the negotiations leading thereto are the sole responsibility of an independent investment manager.

Section I of the QPAM Exemption (the General Exemption) [8] provides broad

[1] The term ''disqualified person'' is defined in Code Section 4975(e)(2) and is similar to definition of the term ''party in interest'' codified in ERISA section 3(14). All references to ''party in interest'' in this Preamble and the QPAM exemption include ''disqualified person.''

[2] For purposes of the exemption that term ''Plans'' includes plans and Individual Retirement Accounts (IRAs) described in Code section 4975(e)(1) and ERISA-covered employee benefit plans described in ERISA section 3(3) (referred to as ''Plans,'' and ''IRAs'' herein). Although the Department is using the same definition of ''plan'' in the final amendment that previously existed in the QPAM Exemption, the Department is finalizing a ministerial change which will capitalize this term when referring to plans impacted by the amendment.

[3] For purposes of this Final Amendment, the term ''IRA owner'' refers to the individual for whom an IRA (as defined in the Final Amendment) is established.

[4] The exemption also is granted in accordance with procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637 (October 27, 2011)). Please note that effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. (2018), transferred the authority of the Secretary of the Treasury to issue exemptions to the Secretary of Labor. Therefore, this notice of amendment to the QPAM Exemption is issued solely by the Department.

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

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

[7] As further discussed below, the Department has substituted the term ''transition period'' for the term ''winding-down period'' that it used in the proposed amendment. The terms have the same meaning.

[8] The Department proposed a ministerial change to replace ''Part'' with ''Section'' in the QPAM Exemption. For consistency, the Department is using only the term ''Section'' throughout this preamble. The Department also proposed a ministerial change to capitalize defined terms in the QPAM Exemption and is using those capitalized

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

The General Exemption covers many different types of transactions. For example, the exemption provides relief for a QPAM to use fund assets to purchase an asset from certain Parties in Interest [9] to a Plan that is invested in the fund. The General Exemption also facilitates much more complex transactions, such as when a QPAM designs a fund to replicate the return of certain commodities indices by investing in futures, structured notes, total return swaps, and other derivatives where a Party in Interest to a Plan that invested in the fund is involved in the transaction.[10] In addition to the General Exemption, the QPAM Exemption also contains ''Specific Exemptions'' in Sections II, III, and IV, which the Department is not modifying in this amendment.

When it proposed the QPAM Exemption in 1982, the Department expressly indicated that any entity acting as a QPAM, and those who are in a position to influence the QPAM's policies, are expected to maintain a high standard of integrity.[11] Accordingly, the exemption includes Section I(g), which provides that a QPAM is ineligible to rely on the exemption for a period of 10 years if the QPAM, various affiliates, or owners of a five (5) percent or more interest in the QPAM are convicted of certain crimes. Ineligibility begins as of the date of the judgment of the trial court, regardless of whether the judgment remains under appeal.

The Qualified Professional Asset Manager

A QPAM is defined as a bank, savings and loan association, insurance company, or registered investment adviser that meets specified asset and equity thresholds set forth in the exemption and acknowledges in a Written Management Agreement that it is a fiduciary with respect to each of its client Plans. The Department noted in the 1982 proposed exemption that these categories of asset managers are subject to regulation by federal or state agencies and expressed the view that large financial services institutions would be able to withstand improper influence from Parties in Interest (*i.e.,* maintain independence).[12] As a general matter, the Department's position continues to be that transactions entered into on behalf of Plans with a Party in Interest are most likely to conform to ERISA's general fiduciary standards when the decision to enter into the transaction is made by an independent fiduciary.

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

Purpose and Approach for the Final Amendment

Substantial changes have occurred in the financial services industry since the Department granted the QPAM Exemption in 1984. These changes include industry consolidation and an increasingly global reach for financial services institutions, both in their affiliations and their investment strategies, including those for Plan assets. In the years since 1984, the Department has repeatedly considered applications for individual exemptions in connection with convictions for crimes causing ineligibility under Section I(g). Through processing these applications, the Department has gained extensive experience analyzing QPAMs' failures to comply with Section I(g) of the QPAM Exemption as a result of corporate convictions in domestic and foreign jurisdictions. This experience has affirmed the Department's position that an ineligibility condition tied to criminal convictions provides necessary protection to Plans, their participants and beneficiaries, and IRA owners.

In practice, Section I(g) has effectively required QPAMs that become ineligible to seek an individual exemption to continue their reliance on the QPAM Exemption. Since 2013, the Department has received an increasing number of individual exemption requests involving Section I(g) ineligibility due to criminal convictions occurring within the corporate family of large financial institutions. To ensure that these exemptions are protective of Plans and participants and beneficiaries and in their interests as required by ERISA section 408(a) and Code section 4975(c)(2), the Department has required applicants to fully and accurately disclose: (1) the criminal conduct that led to their ineligibility, including whether the QPAM was involved; (2) the specific reasons they should be permitted to continue acting as a QPAM notwithstanding the criminal conduct; (3) the efforts they have undertaken to promote a culture of compliance in their corporate family; and (4) the steps they will take in the future to ensure Plans, their participants and beneficiaries, and IRA owners are protected. In these individual QPAM exemptions, the Department included additional protections, such as a comprehensive independent compliance audit and allowing client Plans to withdraw from their asset management arrangements with the ineligible QPAM without penalty. These exemptions have also required the QPAM to indemnify or hold their client Plans harmless in the event that the QPAM, or an Affiliate, or

terms throughout this preamble as they are being finalized in this amendment.

[9] The plural form has the same meaning as the singular defined term ''Party in Interest.''

[10] *See e.g.,* Notice of Proposed Exemption involving Credit Suisse AG, 79 FR 52365, 52367 (Sept. 3, 2014).

[11] Proposed Class Exemption for Plan Asset Transactions Determined by Independent Qualified Professional Asset Managers, 47 FR 56945, 56947 (Dec. 21, 1982).

[12] *Id.* at 56947.

owner of a five (5) percent or more interest engages in future misconduct.

Exemption applicants have consistently represented to the Department that Plan investors would be harmed if a QPAM abruptly loses exemptive relief as of the conviction date, as dictated by Section I(g). Although Section I(g) ineligibility does not bar a QPAM from acting as a discretionary asset manager for Plan assets after a conviction, applicants have informed the Department that the loss of exemptive relief under the QPAM Exemption has the potential to disrupt Plan investments and investment strategies, especially for transactions involving Plan counterparties that also are relying upon the relief provided in the QPAM Exemption.[13] According to these applicants, Plans may also experience transition costs if a Plan fiduciary needs to find an alternative asset manager on short notice after a QPAM becomes ineligible.

To protect Plans against the immediate disruption and costs caused by their QPAMs losing eligibility immediately upon conviction, the Department has granted several one-year temporary individual exemptions to QPAMs facing ineligibility. These individual exemptions provided the Department with sufficient time to engage in a more intensive review of information submitted by the applicants to determine whether a longer-term individual exemption was warranted to provide extended relief at the end of the one-year period.[14] Moreover, since 2013, both the one-year and longer-term exemptions have provided Plans with the important opportunity to exit from their asset management arrangements with a QPAM without the imposition of certain fees, penalties, or charges.

Regulatory Administrative Record for the Proposed Amendment

The developments discussed above prompted the Department to propose the amendment to the QPAM Exemption on July 27, 2022, with an initial 60-day comment period that was set to expire on September 26, 2022 (the Proposed Amendment).[15] After the Department published the Proposed Amendment, it received two letters requesting an extension of the comment period.[16] The Department responded to the requests by extending the initial comment period for an additional 15 days until October 11, 2022, in a **Federal Register** Notice published on September 7, 2022,[17] and received 31 comment letters during this initial extended comment period.

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA), the Acting Assistant Secretary of the Employee Benefits Security Administration (EBSA) certified that the Proposed Amendment would not have a significant economic impact on a substantial number of small entities. After consulting with the Small Business Administration's Office of Advocacy (SBA), however, the Department decided to publish a Supplementary Initial Regulatory Flexibility Analysis (IRFA) that explained the Proposed Amendment's potential impact on small entities.[18] The Department requested comments on the IRFA by October 11, 2022, the same deadline as the extended comment period for the Proposed Amendment.

In the September 7, 2022, **Federal Register** notice, the Department announced that it would hold a virtual public hearing on its own motion on November 17, 2022 (and if necessary, on November 18, 2022), to provide an opportunity for all interested parties to testify on material information and issues regarding the Proposed Amendment.[19] The Department received 13 requests to testify at the hearing. The notice also indicated the Department would: (1) reopen the public comment period from the hearing date until approximately 14 days after the Department publishes the hearing transcript on EBSA's website; and (2) publish a **Federal Register** notice announcing that the Department posted the hearing transcript to EBSA's website and providing the closing date for the reopened comment period.

The Department held the virtual public hearing on November 17, 2022, and reopened the comment period on the hearing date.[20] The reopened comment period closed on January 6, 2023, and the Department received 150 additional comments.[21]

On March 23, 2023, the Department reopened the Proposed Amendment's comment period again because it understood that at least one interested party may have had additional information to provide the Department that was not submitted by the January 6, 2023 comment period deadline.[22] The reopened comment period provided an opportunity for all interested parties to submit additional information until April 6, 2023, and the Department received seven comments during this reopened comment period.[23]

The rulemaking process has provided the Department with a robust administrative record. After careful consideration of the approximately 200 comments received during the public comment periods and testimony presented at the public hearing, the Department is finalizing the Proposed Amendment (the Final Amendment), with the revisions discussed below.

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

Reporting to the Department—Note: This Requirement has been moved from Subsection I(g)(1) of the Proposed Amendment to Section I(k) of this Final Amendment.

The Proposed Amendment would have required each QPAM that relies upon the exemption to report its legal name (and any name the QPAM may be operating under) by email to the Department at *QPAM@dol.gov*.[24] The Department proposed that the QPAM would need to provide this notification to the Department only once unless the legal or operating name(s) of the QPAM relying upon the exemption was changed. The Department also indicated its intent to maintain a current list of entities relying upon the QPAM Exemption on its publicly available website.

[13] *See e.g.,* Notice of Proposed Exemption involving JP Morgan Chase & Co., 81 FR 83372, 83363 (Nov. 21, 2016).

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

[15] 87 FR 45204.

[16] *See* Public Comment #1 from American Bankers Association et al. and Public Comment #2 from American Retirement Association. The extension requests can be accessed here: *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA07/.*

[17] 87 FR 54715.

[18] 87 FR 56912 (Sep. 16, 2022).

[19] 87 FR 54715.

[20] The hearing did not continue on November 18, 2022, because the Department was able to schedule all witnesses that requested to testify on one day.

[21] *See https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA07.*

[22] 88 FR 17466.

[23] *See https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA07.*

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

The Department received a variety of comments on this proposed reporting requirement. Some commenters opposed the requirement in part because no other prohibited transaction exemption requires ''registration'' or a listing on a publicly available website. Commenters also indicated that the publication of a list of QPAMs on the Department's website has the potential to mislead Plan participants and beneficiaries and IRA owners into thinking that a manager's inclusion or exclusion signifies whether the Department has endorsed its eligibility to rely on the exemption.

After considering these comments, the Department is finalizing the notice provision with the modifications discussed below. The notice requirement provides the Department with knowledge of the investment managers that are relying on the exemption and will serve as an important reminder to investment managers relying on the QPAM Exemption that the ''QPAM'' title and status are tied to an administrative prohibited transaction exemption that requires compliance with the exemption's conditions.

With respect to publishing the list on its website, the Department has significant experience publicly posting information in a manner that is not misleading. Additionally, the Department notes that a wide variety of information regarding investment advisers, including disciplinary violations, currently is publicly available through BrokerCheck.[25] The importance of having this information publicly available to provide Plan fiduciaries and participants and beneficiaries, and IRA owners with the ability to know whether their investment managers (or potential managers) are relying on the QPAM Exemption outweighs any harm that could occur if the information were misleading.

Commenters also noted that it is important for the Department to ensure that it has appropriate resources to maintain the list of QPAMs and keep it current. The Department appreciates this concern. Although there will likely be an initial wave of QPAMs reporting to the Department, the Department anticipates that minimal resources will be necessary to keep an updated list over the long-term.

Commenters also expressed concern that a QPAM could easily overlook the requirement to update the Department when it changes its legal or trade name, which could lead it to commit a series of inadvertent prohibited transactions that would only end when the QPAM reports its updated name to the Department. Related to this concern, commenters also requested the Department clarify that an inadvertent failure to report would not be considered Prohibited Misconduct[26] or otherwise jeopardize a manager's ability to rely on the QPAM Exemption.

The Department did not intend for the reporting requirement to create compliance issues for QPAMs that could jeopardize the availability of the prohibited transaction relief in the QPAM Exemption. Therefore, to avoid inadvertent failures during the period immediately after an entity begins relying on the QPAM Exemption or changes its name, the Department has revised the proposed provision to provide QPAMs with an initial 90-day period to report to the Department and an additional 90-day period to cure inadvertent failures to report. If the QPAM fails to report within the initial 90-day period, it must submit an explanation during the 90-day cure period for why it failed to provide timely notice. If, at the end of the 180 days, a QPAM still has failed to report, or has not provided the required explanation, the exemption will not be available for transactions that occur until the failure is fully cured. Furthermore, the Department confirms that an isolated instance of failing to report generally would not be considered Prohibited Misconduct that would result in ineligibility under Section I(g)(1)(B).

Several commenters also indicated that the Proposed Amendment did not appear to provide any mechanism for an entity to ''de-register'' after it initially reports to the Department. In response to this comment, the Department added new language to the end of Section I(k) (Subsection I(g)(1) of the Proposed Amendment) to allow an entity that reported to the Department to notify the Department that it no longer is relying on the exemption. After the Department receives this notice, it will remove the entity from its list of QPAMs that are relying on the QPAM Exemption.

Another commenter recommended that if the Department is seeking a list of entities operating as QPAMs, the Department could assign a new separate identifying code to QPAMs that would be used to report the QPAMs' services to a Plan on Schedule C of the Form 5500. While the Department appreciates this comment and suggestion, modifying the Form 5500 is not part of this amendment, and the Department's objective would not be met using the current Form 5500 for this purpose.

Finally, a proponent of the requirement noted that the Department cannot effectively monitor QPAM compliance if it cannot even identify QPAMs or estimate the number and amount of assets managed by QPAMs. The Department notes that in addition to assisting the Department in monitoring compliance, the reporting requirement will ensure the Department has better information regarding the number of QPAMs that are relying on the exemption, which will provide important data the Department can use to estimate impacts if it considers future amendments to the exemption. Therefore, the Department has retained this requirement in the Final Amendment because it is important for firms that are relying on the exemption to provide identifying information to the Department and for such firms to establish a compliance framework that is sufficient to ensure that they can always satisfy the exemption's conditions.

Written Management Agreement (WMA)—Proposed Subsection I(g)(2)[27]

As previously stated in this preamble, the fundamental premise of Section I(g) has always been for a QPAM and those in a position to control or influence its policies to act with integrity. The Proposed Amendment included a new requirement for all QPAMs to update their WMAs to include a provision that in the event the QPAM, its Affiliate, or five percent or more owners engage in conduct resulting in a Criminal Conviction or Participation In Prohibited Misconduct, the QPAM would not restrict its client Plans' ability to terminate or withdraw from their arrangement with the QPAM.[28] The proposed requirement also would have prevented QPAMs from imposing certain fees, penalties, or charges on client Plans in connection with terminating or withdrawing from a QPAM-managed Investment Fund.[29]

[25] BrokerCheck is an online tool provided by FINRA that provides information regarding brokers and investment advisers such as employment history, certifications, licenses, and any violations. *https://brokercheck.finra.org/*.

[26] Prohibited Misconduct was defined in proposed Section VI(s). See below for additional discussion of comments regarding the Proposed and Final Amendment definition.

[27] Subsection I(g) of the Proposed Amendment has been renumbered and the requirements in Proposed Section I(g)(2) are now contained in Section I(i) in this Final Amendment.

[28] The terms ''Criminal Conviction'' and ''Prohibited Misconduct'' are discussed in more detail below.

[29] This would not apply to reasonable fees, appropriately disclosed in advance, that are

Continued

Finally, the Proposed Amendment would have required QPAMs to include a provision in their WMAs that they would indemnify, hold harmless, and promptly restore actual losses to each client Plan for any damages directly resulting from a violation of applicable laws, a breach of contract, or any claim arising out of the failure of such QPAM to remain eligible for relief under the QPAM Exemption as a result of conduct that leads to a Criminal Conviction or Participation in Prohibited Misconduct.

Many commenters expressed concerns with these proposed WMA provisions. They were particularly opposed to the WMA condition being imposed on all QPAMs immediately upon the effective date of the provision, and not only those QPAMs who become ineligible under Section I(g).[30] Other commenters indicated that these WMA provisions should simply be imposed as conditions that are not required to be included in contracts or as contractual guarantees.

Many commenters indicated that the process to update WMAs is difficult and complicated and would take much longer to comply with than the Department's proposed 60-day effective date. Some commenters indicated that at least 18 months would be required to come into compliance, and that the amendment process would be very costly. These commenters noted that even if a manager made only the required amendments to its WMA, such amendments typically would require investor consent, including consent by non-Plan investors who might be adversely affected by the changes. Additionally, if QPAMs were required to include a new indemnification clause in their WMA, commenters indicated that QPAMs would likely also need to update and revise their agreements with many other parties to address the same contingencies that necessitate the new indemnifications and other required changes for their client Plans. Finally, some commenters suggested that if the Department requires QPAMs to include these provisions in their WMAs, the requirement should apply only to contracts that are executed or materially modified after the effective date of the Final Amendment.

After carefully considering these comments, the Department has decided to remove the requirement for all QPAMs to revise their WMAs. Instead, the Department has moved the condition into the Transition Period provision of this Final Amendment. This modification means that after the effective date of the Final Amendment, only QPAMs that become ineligible to rely on the exemption will have to comply with the indemnification and penalty-free withdrawal provisions. As a result, the Final Amendment's Transition Period provision will operate in a similar manner to recent Section I(g) individual exemptions granted by the Department, which have imposed indemnification and penalty-free withdrawal requirements on QPAMs only after they become ineligible under Section I(g).

The Final Amendment indicates that any QPAM that experiences a Section I(g) triggering event must provide client Plans with a One-Year Transition Period and comply with the associated conditions that are discussed below. In this Final Amendment, the Department made some minor non-substantive adjustments to the language in the Proposed Amendment regarding the prohibited transaction relief available and obligations of the QPAM during the Transition Period. The Final Amendment indicates that relief under the exemption during the Transition Period is available for a maximum period of one year after the Ineligibility Date if the QPAM complies with each condition of the exemption throughout the one-year period. No relief will be available for any transactions (including past transactions) effected during the One-Year Transition Period unless the QPAM complies with each condition of the exemption during such one-year period.

A few commenters opined that the requirement that the QPAM agree not to restrict a Plan's ability to withdraw from an Investment Fund that invests in illiquid assets such as a private equity or real estate fund, may present additional challenges and harm Plans' investment returns. The Department understands the additional challenges associated with funds that are less liquid. However, as noted in the Proposed Amendment, a QPAM that faces ineligibility may seek supplemental individual exemption relief from the Department. As also noted in the Proposed Amendment, an applicant may request a more limited scope of relief for a supplemental individual exemption that captures only those transactions that present liquidity problems. The individual exemption process is best suited for addressing those concerns and the Department stresses the importance of submitting an individual exemption application as soon as possible after a QPAM learns that a Section I(g) triggering event is expected to occur. Applying promptly is not only consistent with the QPAM's fiduciary obligations, but also helps ensure that the Department has sufficient time to review the exemption application before the end of the One-Year Transition Period.

Some commenters maintained that QPAMs should not have to indemnify and restore losses beyond what is already required under ERISA because ERISA already provides sufficient protections for Plans to recover losses. The Department disagrees. Until now, the exemption lacked additional safeguards to ensure Plans and IRA owners are not exposed to substantial collateral costs that result from criminal or other misconduct that is beyond their control. When QPAMs breached their obligations and faced the loss of QPAM status, they commonly argued that the Department should grant relief, notwithstanding their misconduct, lest the Plans and IRA owners sustained the collateral costs and injury associated with the loss of QPAM status. The express obligation to indemnify and restore losses caused by the QPAM's own misconduct mitigates this danger and prevents Plans from being locked into disadvantageous relationships with firms that have proved unable or unwilling to meet the exemption's conditions.

Commenters also indicated that client Plans and QPAMs should be allowed to negotiate indemnification because liability and indemnification provisions are often already in place, which are intended to protect Plans if a non-exempt prohibited transaction or breach of fiduciary duty occurs. The Department is concerned that all client Plans do not have the same bargaining leverage to negotiate the type of indemnification provisions included in the Final Amendment. Moreover, such commenters did not provide any specific examples of the types of indemnification provisions that may

---

specifically designed to prevent generally recognized abusive investment practices or specifically designed to ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other investors would be excepted. If such fees, penalties, or charges occur, they must be applied consistently and in a like manner to all such investors.

[30] Many commenters used terms such as ''disqualified'' or ''disqualification'' in their comment letters to describe ineligibility under Section I(g). The Department has used the terms ''ineligibility'' and ''ineligible'' throughout this preamble for consistency with the heading for Section I(g) in this Final Amendment and to avoid confusion that the term ''disqualified'' indicates that the definition of ''qualified professional asset manager'' is not satisfied.

already be included in their agreements with Plan customers. Nevertheless, the Department's modification in the Final Amendment to limit the WMA requirements to the Transition Period should mitigate this concern because the requirement will only be imposed upon entities experiencing an event that triggers Section I(g).

Some commenters focused on the term ''actual losses'' and argued that this standard should not include the costs for Plans to transition to an alternative asset manager because such costs are not normally paid for by a terminated manager. The Department believes that this argument is misplaced. Whether a cost is normally paid for by a terminated manager is not determinative of whether the Department should include a provision in the Final Amendment to protect Plans as mandated by ERISA section 408(a) and Code section 4975(c)(2). When an asset manager becomes ineligible to rely upon the relief provided in the QPAM Exemption due to a violation of Section I(g), which is outside the control of the client Plan, it is appropriate for the wrongdoer to bear the associated costs.

Commenters also noted the ambiguity regarding the full range of costs that are required to be indemnified. Relatedly, commenters indicated that asset managers will be unable to insure against such losses. They argued that it is very difficult, if not impossible, to quantify ''investment losses resulting from foregone investment opportunities'' for a variety of reasons, including the type of investment manager, the ebbs and flows of investment needs and opportunities, and the costs or needs of a replacement manager.

The Department acknowledges that there is uncertainty regarding the full range of such costs, but notes that it has consistently imposed these indemnification and loss restoration obligations in recent individual exemptions following violations of Section I(g), and that the affected firms have nevertheless chosen to continue acting as QPAMs after receiving relief from the Department. Commenters have provided no evidence that the condition has resulted in the imposition of unwarranted costs upon Plans or QPAMs, or that there had been any significant adverse impacts stemming from imposition of the condition in the context of individual exemptions. Nor have they provided any compelling evidence suggesting that the costs caused by further breaches after felony convictions, or the associated uncertainties, are better borne by the affected Plans than by the QPAMs. In the Department's view, it is wholly appropriate that the QPAM, rather than the Plan, sustain the costs stemming from the QPAM's failure to meet the exemption's conditions or violations of the law. Moreover, by limiting the WMA requirements to the Transition Period provisions in the Final Amendment, the Department sharply reduces the scope of the QPAM's potential liability and the need to determine possible costs up front. As noted above, this Final Amendment simply adopts the same overall approach to Section I(g) ineligibility that has been a core component of the Department's recently granted Section I(g) individual exemptions.[31]

One commenter also noted that the WMA requirement in subsection I(g)(2)(C) of the Proposed Amendment referenced Code section 4975 excise taxes. The commenter indicated that since the indemnification runs to the Plan and a Plan is not liable for excise taxes, this provision does not make sense. After considering this comment, the Department has retained the reference to the excise taxes. This provision is intended to ensure that a QPAM does not impose costs or fees on a Plan in connection with excise taxes incurred by the QPAM.

Finally, a commenter argued that the provision should not cover non-prosecution agreements (NPAs), deferred prosecution agreements (DPAs), or any other ineligibility trigger captured within the definition of Prohibited Misconduct. As discussed below, the Department has modified the scope of NPAs and DPAs captured within the definition of Prohibited Misconduct. The Department believes that conduct severe enough to warrant an NPA or DPA should trigger the same conditions as Criminal Convictions. Therefore, while the Final Amendment reflects the modified scope of the NPAs and DPAs that are affected, the Department declines to remove this protection as it applies to NPAs and DPAs covered under the Final Amendment.

[31] *See e.g.,* Exemption From Certain Prohibited Transaction Restrictions Involving Pacific Investment Management Company LLC, 88 FR 42953 (July, 5, 2023); Exemption for Certain Prohibited Transaction Restrictions Involving Citigroup, Inc., 88 FR 4023 (Jan. 23, 2023); Exemption for Certain Prohibited Transaction Restrictions Involving DWS Investment Management Americas, Inc. (DIMA or the Applicant) and Certain Current and Future Asset Management Affiliates of Deutsche Bank AG, 86 FR 20410 (April 18, 2021).

Types of Misconduct and Entities That Cause Ineligibility—Proposed Subsection I(g)(3)[32] and Sections VI(r) and VI(s)

Criminal Convictions

Since 1984 when the QPAM Exemption was initially granted, Section I(g) ineligibility has captured convictions of QPAMs, their Affiliates, and five percent or more owners of the QPAM. As noted above, because the Department relies upon the QPAM as a key protection in the exemption, it is critically important that the QPAM, and those who are positioned to influence its policies, maintain a high standard of integrity. QPAMs, affiliates, and related parties that engage in serious criminal misconduct do not display the requisite standard of integrity expected of such entities under the exemption.

While the Department did not propose any changes to the scope of entities captured by Section I(g),[33] some comments focused on the breadth of Section I(g), including the proposed expansion of Section I(g) to capture the Participation In Prohibited Misconduct by a QPAM, its Affiliates, or its owners of a five (5) percent or more interest. Some commenters noted that the financial services industry has experienced significant consolidation in the decades since the QPAM Exemption was granted, with the result that a QPAM may be a small part of a very large organization. One commenter also suggested that the Department's proposed expansion of the ineligibility provision to include Prohibited Misconduct would impose an unjustified penalty based on the size and complexity of firms relying on the exemption.

Some commenters contended that existing Section I(g) of the QPAM Exemption results in unjust application of automatic ineligibility. Commenters suggested that Section I(g) should focus on crimes committed by affiliates that are positioned to influence the QPAM's policies or have power or influence to compromise the QPAM's ERISA compliance, or crimes that involve the QPAM itself. According to one commenter, there should be a direct relationship between the crime and the services provided by the QPAM. A

[32] Subsection I(g)(3) of the Proposed Amendment has been renumbered as Subsection I(g)(1) of the Final Amendment.

[33] The Department recognizes that the proposed inclusion of Prohibited Misconduct may seem to broaden the scope of entities captured, but the Department characterizes that as broadening the scope of misconduct. The Proposed Amendment did not change the five percent ownership threshold or definition of Affiliate that is applicable to Section I(g).

variety of commenters expressed disagreement with what they perceived to be the Department's position, *i.e.,* that remote convictions call a QPAM's integrity into question. These commenters asserted that Section I(g) imposes ineligibility in circumstances where the entities or individuals engaging in criminal conduct are not, in fact, in a position to influence the QPAM's policies. One commenter also opined that remote convictions resulting in ineligibility run counter to the purposes of ERISA section 408(a). Another commenter suggested that the Department should reserve ineligibility only for the most egregious convictions of the QPAM involving ERISA assets. Others preferred the Department's narrow approach in PTE 2020–02 because it limits ineligibility to the entity providing investment advice or other affiliates engaged in the business of providing investment advice to Plans.

At the same time, some of these commenters indicated that inclusion of criminal convictions as an ineligibility trigger at the QPAM entity level could be appropriate. Similarly, some commenters agreed that crimes committed by a parent entity that can exercise management and control over the QPAM's day-to-day business and decision-making could be relevant for an ineligibility provision based on criminal convictions. A few commenters suggested that the Department rely on the ''controlled group of corporations'' or ''under common control'' standards as defined in Code section 414(b) and (c) if it decides to retain the current breadth of Section I(g).

The Department disagrees with the suggestion that disqualification is appropriate only when the QPAM itself was directly involved in the crime or only when the crime specifically involves plan assets or services to ERISA-covered plans. Serious crimes of the sort enumerated in Section I(g) are directly relevant to a corporate family's culture of compliance. When a company with multiple affiliated entities has engaged in such conduct or ignored criminal misconduct when it is occurring (or possibly even endorsed the misconduct), the likelihood that the same or similar conduct will be ignored when engaged in at the QPAM entity increases. This is particularly true where the bad actor is the corporate parent of the QPAM, but also rings true when it is an affiliated company that is controlled by the same corporate parent as the QPAM.

Affiliated and related companies commonly hold themselves out as an integrated entity, have common or overlapping supervisory and control structures, and share a common corporate culture. Accordingly, serious criminal misconduct is a red flag indicating potential compliance problems that extend beyond the specific actors that directly engaged in the misconduct. Similarly, the commission of any of the enumerated criminal offenses is relevant to the assessment of likely future misconduct beyond the narrow confines of the particular customers and service providers directly affected by the conduct that resulted in a conviction. If, for example, a company engaged in embezzlement or price-fixing with respect to non-plan customers, there is little basis for plan customers to be sanguine about the improbability of such conduct with respect to plan customers and plan assets.

Moreover, the practical impact of the exemption's disqualification provisions is not that QPAMs are precluded from making their case to the Department that the criminal conviction should not result in a lengthy bar from reliance on the exemption. Rather, the consequence is that the disqualified QPAM would have to apply for an individual exemption if it wishes to rely on the class exemption for a period that extends beyond the Transition Period. In the context of such an individual exemption application, the QPAM would be in a better position to present evidence on the scope of its involvement in the criminal conduct, its independence from any bad actors, current corporate culture and compliance structures, and other information relevant to assessing whether it should be permitted to continue relying on this exemption, notwithstanding the conviction. Similarly, the Department would have the time and ability to consider such issues on a case-specific and context-sensitive basis that takes into account the evidence submitted as part of a formal record. Also, based on the Department's experience processing individual exemption applications, many of the convictions and criminal misconduct the Department has dealt with over the past decade have not involved conduct that is isolated to remotely related affiliates within the QPAM's corporate ownership structure.[34]

Financial Industry Consolidation

The Department recognizes that the legal landscape for the financial services industry has changed since 1984. When the QPAM Exemption was originally granted, there were established legal and regulatory barriers in the U.S. that prevented banking, securities, and insurance companies from consolidating. However, the passage of the Graham-Leach-Bliley Act in 1999[35] removed these barriers, which led many commercial banks, investment banks, securities firms, and insurance companies to consolidate. The Department understands that significant consolidation has occurred since 1999 and that the scope of entities captured by Section I(g) has not been revisited since those and other changes occurred in the financial services industry. The Department continues to stand by the original premise for Section I(g), which largely is focused on entities who are in control-based relationships with a QPAM, can influence the activities of a QPAM or are likely to share a common corporate culture.

The Department reminds QPAMs, as it did in the Proposed Amendment, that control-based relationships remain directly relevant for triggering ineligibility under Section I(g) because of the Affiliate definition.[36] Meaningful control can exist even when entities that have small ownership interests in a QPAM are positioned to influence the QPAM's decision to engage or refrain from engaging in conduct that can form the basis for a Criminal Conviction or Participation In Prohibited Misconduct. The Department continues to believe that corporate malfeasance at entities that control, are under common control with, or are controlled by the QPAM indicates the possibility of increased risk of harm to client Plans and IRA owners . The Department notes that a controlling relationship exists when one entity directly or indirectly has or exercises a significant influence over the management or policies of another entity. Control in this context does not require that the first entity has the ability to exercise complete domination or absolute authority over all aspects of the management or policies of the second entity.

Foreign Criminal Convictions

The Department has a longstanding practice of considering individual exemption applications from QPAMs in connection with foreign convictions.[37]

[34] Even in situations where the convicted entity appeared remote, the Department has seen pervasive compliance failures at various other entities within the corporate family, including at parent entities.

[35] Public Law 106–102; 113 Stat. 1338.

[36] The Affiliate definition continues to include ''[a]ny person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with'' the QPAM. *See* Section VI(d) for a complete definition.

[37] *See, e.g.,* Prohibited Transaction Exemption (PTE) 2020–01, 85 FR 8020 (Feb. 12, 2020); PTE

The Proposed Amendment would have added a definition of Criminal Conviction that was intended to remove any doubt that Section I(g) applies to foreign convictions that are substantially equivalent to the listed U.S. federal or state crimes. In the Proposed Amendment, the Department specifically requested comments on this section, including whether there are certain types or aspects of criminal behavior that deserve additional focus. The Department also indicated that QPAMs should interpret the scope of this provision broadly with respect to foreign convictions and consistent with the Department's statutorily mandated focus on the protection of Plans in ERISA section 408(a) and Code section 4975(c)(2).

The Department stated that in situations where a crime raises particularly unique issues related to the substantial equivalence of the foreign Criminal Conviction, the QPAM may seek the Department's views regarding whether the foreign crime, conviction, or misconduct is substantially equivalent to a U.S. federal or state crime. However, the Department cautioned that any QPAM submitting a request for review should do so promptly, and whenever possible, before a judgment is entered in a foreign conviction so the QPAM has sufficient time to complete the notice obligations under the One-Year Transition Period.

The Department also requested comment on whether there should be an additional process for requesting the Department's determination regarding whether a foreign conviction is substantially equivalent to a domestic conviction. The Department asked whether particular factors, such as the elements of the crime and the nature of the tribunal or investigating entity, should be considered in making such a determination.

Many commenters provided input regarding the explicit inclusion of foreign crimes in the Proposed Amendment. At least one commenter indicated that it did not agree that the status of foreign convictions under Section I(g) (as it has existed since 1984) has been a settled matter. As amended, Section I(g) will remove all doubt regarding the coverage of foreign criminal convictions, which are now specifically referenced in the exemption's text.

Some commenters indicated that the Proposed Amendment did not provide the intended certainty regarding foreign convictions because there could be difficulty determining whether any given foreign crime is a felony, or whether it is substantially equivalent to a felony under U.S. law.[38] Some commenters also expressed skepticism that the Department has the competence and jurisdiction to interpret foreign law fairly and accurately for these purposes. A variety of commenters also raised questions regarding the proposed ''substantially equivalent'' standard, and expressed concern that foreign jurisdictions may not adhere to basic due process protections. Multiple commenters suggested that the Department should establish a formal process by which a QPAM may request a determination from the Department regarding whether a foreign conviction is substantially equivalent to a domestic conviction before it results in ineligibility. One commenter recommended that this should include an opportunity for the QPAM to present its position as to why a foreign conviction may not be substantially equivalent to a domestic conviction. Another commenter suggested the ''substantially equivalent'' standard for foreign criminal convictions should apply only where the factual record of such conviction, when applied to United States federal criminal law, would likely lead to a criminal conviction in the United States. Other commenters expressed further concerns that the Proposed Amendment would inappropriately equate criminal convictions levied in countries that have less robust or reliable legal systems with those convictions handed down by U.S. courts. One commenter suggested that the Proposed Amendment has the potential to play into the hands of foreign nations that intend to harm investment managers having substantial operations in the United States or its allies. The Department notes that although the crimes listed explicitly in Section I(g) use the term ''felony,'' the crimes adopted by reference from ERISA section 411 are not, nor have they ever been, limited to felonies.

To add clarity and ensure consistency between Section (r)(1) and (r)(2), the Department added the phrase ''or released from imprisonment, whichever is later'' to the sentence, ''(r) 'Criminal Conviction' means the person or entity that: (2) is convicted by a foreign court of competent jurisdiction or released from imprisonment, whichever is later, as a result of a crime, however denominated by the laws of the relevant foreign government, that is substantially equivalent to an offense described in (r)(1), above. . . .''

With respect to the ''substantially equivalent'' standard for foreign crimes, the Department did not add a formal process to the Final Amendment to make such determinations. The Department does not expect that questions of this nature will arise frequently, but when they do, impacted entities may contact the Office of Exemption Determinations for guidance, as they have done for many years. In general, the Department has not had difficulty determining whether the foreign crimes were substantially equivalent to domestic crimes and does not expect to have any difficulty with these determinations in the future. Additionally, the One-Year Transition Period, and the ability to apply for an individual exemption, provide parties with the time and the opportunity to address any issues about the import of any specific foreign conviction and its relevance to ongoing relief from full application of the prohibited transaction provisions. The Department is not aware that any convictions have occurred in foreign nations with the intent to harm U.S.-based investment managers and believes there is a low likelihood that this has occurred. Further, the types of foreign crimes that the Department has seen in recent QPAM individual exemption requests have consistently related to the subject financial institution's management of financial transactions and/or culture of compliance. These underlying foreign crimes have included the following:

- attempting to peg, fix, or stabilize the price of an equity in anticipation of a block offering in Japan (PTE 2023–13, 88 FR 26336 (April 28, 2023));
- illicit solicitation and money laundering for the purposes aiding tax evasion in France (PTE 2019–01, 84 FR 6163 (February 26, 2019)); and
- spot/futures-linked market price manipulation in South Korea (PTE 2015–15, 80 FR 53574 (September 4, 2015)).

Nevertheless, to address the concern expressed in the public comments that convictions have occurred in foreign nations with the intent to harm U.S.-based investment managers, the Department has revised the definition Criminal Conviction in Section VI(r)(2) of this Final Amendment to exclude

2019–01, 84 FR 6163 (Feb. 26, 2019); PTE 2016–11, 81 FR 75150 (Oct. 28, 2016); PTE 2016–10, 81 FR 75147 (Oct. 28, 2016); PTE 2012–08, 77 FR 19344 (March 30, 2012); PTE 2004–13, 69 FR 54812 (Sept. 10, 2004); and PTE 96–62 (''EXPRO'') Final Authorization Numbers 2003–10E, 2001–02E, and 2000–30E, available at *https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/exemptions/expro-exemptions-under-pte-96-62*.

[38] One commenter also noted that several jurisdictions such as the United Kingdom, Canada, Ireland, Australia, and New Zealand do not rely on a legal category of ''felony'' which could compound issues for making a substantially equivalent determination in such cases.

foreign convictions and imprisonments that occur within foreign jurisdictions that are included on the Department of Commerce's list of ''foreign adversaries.'' [39]

A few commenters also indicated that the proposed changes to Section I(g) are unnecessarily broad in application and will impose unnecessary costs and burdens on Plans. The Department's experience, however, is that the overall number of QPAMs and client Plans that have been impacted by Section I(g) violations has been small compared to the total number of QPAMs and client Plans,[40] and the Department believes that this will continue to be the case. Thus, there should not be a significant change to the costs or burdens imposed on Plans as a result of explicitly including foreign convictions in Section I(g). In any event, when misconduct rises to the level that it results in ineligibility under Section I(g), the resultant costs and burdens are appropriate to ensure that a QPAM's client Plans are adequately protected when a QPAM becomes ineligible.

Some commenters recognized that when the foreign affiliate itself is providing investment management services to a Plan, the integrity of the foreign affiliate may be relevant. Commenters indicated that if the Department includes foreign convictions, ineligibility should be limited at least to entities that fall into the tax code definition of ''Controlled Group'' with respect to a QPAM. The Department appreciates the recognition by these commenters that at least some misconduct in foreign jurisdictions is relevant to the QPAM's integrity. However, the Department disagrees that the correct standard for determining when misconduct could be relevant should be limited to the ''Controlled Group'' definition. The Department believes that the approach taken in the exemption with regards to the scope of entities captured by Section I(g) in the ownership test and definition of Affiliate provides significant protections for Plans and participants and the commenter has not provided a reasoned basis why altering this scope would provide additional protections. Therefore, the Department has not altered the scope of entities captured by Section I(g) with respect to Criminal Convictions.

Proponents of the Proposed Amendment's addition of foreign crimes to Section I(g) indicated that large financial institutions that engage in financial crimes usually do so across multiple jurisdictions, arbitraging regulatory loopholes and pressuring weaker jurisdictions to curtail regulation. They urged the Department not to ignore foreign activity due to the modern realities of multinational financial institutions.

The Department agrees that criminal convictions for the types of crimes identified in the QPAM Exemption are relevant to a QPAM's willingness and ability to manage Plan assets with integrity, care, and undivided loyalty, regardless of whether the crime occurs in a domestic or foreign jurisdiction. Foreign crimes of the sort described in the Final Amendment call into question a firm's culture of compliance just as much as domestic crimes. Fraud, embezzlement, tax evasion, and the other listed crimes are signs of potential serious compliance and integrity failures, whether prosecuted domestically or in foreign jurisdictions. In the modern era of increased globalization and multinational companies, corporate parents and affiliates may reside in jurisdictions other than the United States. Their criminal misconduct in other jurisdictions is no less concerning to the Department than when such misconduct occurs in the United States. In fact, if foreign convictions were not included in Section I(g), the exemption would potentially impose more lenient conditions on foreign-based conglomerates than it does on U.S.-based entities, which is not the Department's intention, because it is not sufficiently protective of Plans.

A few commenters suggested alternatives to the Department's approach to foreign convictions in the Proposed Amendment. One commenter suggested that the Department should adopt an approach modeled after the Security and Exchange Commission's (SEC's) consideration of foreign crimes when determining whether to disqualify persons from serving in various capacities at an Investment Company under the Investment Company Act of 1940. It is the Department's understanding that, under the Investment Company Act of 1940, disqualification is automatic for specified domestic crimes, but that the SEC provides notice and a hearing before disqualification for foreign crimes.[41]

After consideration of the comment and the differences in statutory text and purposes at issue under ERISA, the Code, and the Investment Company Act of 1940, the Department has decided not to adopt the commenter's suggestion. The QPAM Exemption permits entities to enter into transactions that ERISA and the Code otherwise prohibit because of the danger they pose to Plans, their plan participants and beneficiaries, and IRA Owners. Before the Department grants an exemption from the law's strict prohibitions, it has an obligation to find that the exemption is in the interest of participants and protective of their rights. Under the QPAM Exemption, these findings crucially turn on the financial institution's culture of compliance. Misconduct that results in a criminal conviction of an entity under Section I(g) of the QPAM Exemption, whether domestic or foreign, calls into serious question whether the QPAM has the integrity and culture of compliance on which the exemption is premised. Accordingly, after conviction of a serious crime, a financial institution, its affiliates, and related parties should not expect to have the automatic right to continue to engage in transactions that are otherwise illegal, but for the exemption. Nevertheless, the firm may always apply to the Department for an individual exemption based on a full and fair consideration of the firm's criminal conduct and the relevant facts, circumstances, and context, if the firm believes that it should still receive a dispensation from application of the otherwise generally applicable prohibited transaction provisions, as companies have done over the years.

Relatedly, a commenter suggested the QPAM could be required to certify that its failure to meet the requirements of the QPAM Exemption arose solely from the foreign affiliate's criminal conduct and that no entities holding Plan assets

[39] 15 CFR 7.4. The list of foreign adversaries currently includes the following foreign governments and non-government persons: The People's Republic of China, including the Hong Kong Special Administrative Region (China); the Republic of Cuba (Cuba); the Islamic Republic of Iran (Iran); the Democratic People's Republic of Korea (North Korea); the Russian Federation (Russia); and Venezuelan politician Nicolás Maduro (Maduro Regime). The Secretary of Commerce's determination is based on multiple sources, including the National Security Strategy of the United States, the Office of the Director of National Intelligence's 2016–2019 Worldwide Threat Assessments of the U.S. Intelligence Community, and the 2018 National Cyber Strategy of the United States of America, as well as other reports and assessments from the U.S. Intelligence Community, the U.S. Departments of Justice, State and Homeland Security, and other relevant sources. The Secretary of Commerce periodically reviews this list in consultation with appropriate agency heads and may add to, subtract from, supplement, or otherwise amend the list. Section VI(r)(2) of the Final Amendment will automatically adjust to reflect amendments the Secretary of Commerce makes to the list.

[40] This belief is based on the number of QPAMs suggested by commenters and represented in an updated estimate in this Final Amendment versus the number of QPAMs and client Plans identified in individual exemption applications.

[41] *See* Investment Company Act of 1940, 15 U.S.C. 80a–9.

actively Participated In the criminal conduct that is the subject of the conviction. Based on the certification, the Department could inquire further and make its decision based on the facts of the specific situation. Another alternative offered by a commenter was simply to require a QPAM to notify a Plan of the conviction, and then allow the Plan sponsor to decide whether to continue its arrangement with the QPAM.

The Department's focus is on the protection of Plans and their participants and beneficiaries, as it decides whether to give QPAMs relief from the requirements of otherwise applicable law (*i.e.,* the categorical prohibitions of ERISA Section 406(a) and Code section 4975(c)(1)). The Department declines to take the other recommended approaches because as explained in other parts of this preamble, the Department is not merely concerned about crimes that have already impacted Plan assets, but compliance frameworks that have an increased potential to place Plan assets at risk. Criminal Convictions, even in foreign jurisdictions, for the types of crimes and by the entities captured by Section I(g) raise significant concerns. The Department disagrees with the suggestion that it would be sufficiently protective of Plans, their participants, and beneficiaries simply to require notice of the QPAM's criminal conviction and leave it to the fiduciaries to decide whether to engage in otherwise prohibited transactions with the QPAM. When Congress enacted ERISA, it chose not to broadly empower plan fiduciaries to opt out of the prohibited transaction provisions on a voluntary basis, but rather charged the Department with the responsibility to craft protective conditions that meet the statutory standards set forth in ERISA section 408(a).

The crimes enumerated in Section I(g) are serious violations that call into question the willingness and ability of the QPAM to adhere consistently to the fiduciary norms and standards that are critical to entrusting them with license to engage in otherwise illegal transactions. To the extent a QPAM believes that it should be permitted to engage in such transactions after the expiration of the Transition Period, notwithstanding its conviction, the Department has concluded that the interests of Plan participants and beneficiaries and IRA Owners are best protected by the procedural protections, public record, and notice and comment process associated with individual exemption applications. In the context of an individual exemption application, the Department has unique authority to efficiently gather evidence, consider the issues, and craft protective conditions that meet the statutory standard. If the Department concludes, consistent with the statutory standards set forth in ERISA 408(a) and Code section 4975(c)(2), that an individual exemption is appropriate, Plan fiduciaries remain free to make their own independent determinations whether to engage in transactions with the QPAM. In the first instance, however, the Department must consider the unique facts and circumstances surrounding the conviction based on its statutory role and obligations, and craft appropriate conditions if it appears that an exemption is proper. The Department has a critical role in providing appropriate regulatory protections, even in situations where a Plan fiduciary has some authority, discretion, and obligations of its own.

Prohibited Misconduct

The Department proposed to add a new category of misconduct that could lead to ineligibility under Section I(g), described as ''participating in Prohibited Misconduct.'' [42] Proposed Section VI(s) defined Prohibited Misconduct as:

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

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

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

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

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

The Department explained in the preamble of the Proposed Amendment that the term ''participating in'' referred not only to actively participating in the Prohibited Misconduct but also to knowingly approving of the conduct or having knowledge of such conduct without taking appropriate and proactive steps to prevent such conduct from occurring, including reporting the conduct to appropriate compliance personnel. The Department proposed that, where a QPAM's ineligibility is linked to Prohibited Misconduct under any portion of Section VI(s), the Department would provide affected entities with a written warning and an opportunity to be heard.

The Department requested comments on the extent to which Proposed Section VI(s) was appropriately tailored to target non-criminal activity by the QPAM (or its owners of a five (5) percent or more interest, or Affiliates) that raised integrity issues that had the potential to harm Plans and whether additional or alternative elements were warranted. The Department also requested comments regarding whether to add any conduct as Prohibited Misconduct, and if so, to include an explanation for how such actions would implicate a QPAM's integrity. The Department also requested comments as to whether any of the proposed Prohibited Misconduct should be removed and an explanation of why such conduct does not affect the QPAM's integrity.

With respect to these provisions, the Department explained in the Proposed Amendment that it intended to rely on its enforcement authority and program to detect a QPAM's Participation In the types of Prohibited Misconduct included in proposed subsections VI(s)(3) through (5).[43] In the Proposed Amendment, the Department built in due process components so that ineligibility would occur only in limited circumstances, and even in those circumstances, the process to make the QPAM ineligible would have begun only after two initial steps: (1) an investigation by the appropriate field office, and (2) receipt by the QPAM thereafter of a written warning that the Department was contemplating issuing a Written Ineligibility Notice. The Proposed Amendment's Written Ineligibility Notice process would have allowed the QPAM the opportunity to be heard before the Department were to issue an actual notice, which would have made the QPAM ineligible to use the exemption from the date the Department issued the notice, except that the mandatory One-Year Transition Period would have been applicable in the same manner as with ineligibility caused by a Criminal Conviction.

General Comments on Proposed Prohibited Misconduct Provision

One supporter of the Proposed Amendment indicated that inclusion of additional categories of misconduct was appropriate because the commenter

[42] As proposed, this definition applied to Participation In Prohibited Misconduct by the QPAM or its five percent or more owners and Affiliates.

[43] Section VI(s) has been renumbered in the Final Amendment as section VI(s)(1), (2)(A), (B), and (C).

believed that Section I(g)'s limited focus on crimes that resulted in a conviction had contributed to serial misconduct by corporate wrongdoers. The commenter expressed concern that some corporate wrongdoers could take advantage of loopholes to avoid a conviction when the conduct was ultimately serious enough to warrant a conviction.

Many opponents of the amendment recommended that the ''Prohibited Misconduct'' standard and provisions be deleted entirely. They stated that the expansion of Section I(g) to include Prohibited Misconduct erodes certainty that the QPAM Exemption provides regarding eligibility.

Specific Comments Regarding Including Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs) as Prohibited Misconduct

Some commenters recommended that the Department consult with the Department of Justice (DOJ) and the SEC to get a better sense of how the proposed inclusion of NPAs and DPAs as Prohibited Misconduct would impact their enforcement abilities. Some commenters also noted that financial institutions may agree to a NPA or DPA for reasons that are unrelated to ERISA. These commenters opined that the Department seemed to be mischaracterizing the nature and use of NPAs and DPAs, as well as their objectives (such as avoiding the collateral consequences of penalizing innocent parties). According to some commenters, prosecutors do not enter into these agreements lightly or with the intention of allowing financial institutions to ''sidestep'' the consequences of their actions. Some commenters also asserted that even where an institution believes it has not engaged in wrongdoing and would prevail on the merits in a court of law, they may prefer to enter into a NPA or DPA for a variety of reasons. For example, one commenter indicated that even where an institution believes it has not engaged in wrongdoing and would prevail on the merits in a court of law, it may prefer to enter into a NPA or DPA if it is concerned with its reputation on unrelated matters (that do not rise to the level of covered convictions) that could be introduced during a protracted trial.

Some commenters also offered alternatives to ineligibility in connection with NPAs or DPAs. For instance, one commenter suggested that the Department could require a QPAM that enters into one of these agreements to notify each Plan it manages that: (1) the QPAM has entered such an agreement; and (2) the Plan can terminate its relationship with the QPAM if it chooses to do so, without penalty.

Some commenters expressed additional concern that financial institutions will be less willing to enter into NPAs or DPAs if doing so would result in ineligibility under the QPAM Exemption. These commenters indicated that they believed this outcome may not be in the public interest. For instance, one commenter suggested that if entering into a DPA or NPA would effectively end a firm's ERISA investment management business, the firm may not be able to enter into the agreement, even when doing so is the best resolution for the government prosecutor involved.

A proponent of the Department's Proposed Amendment to include NPAs and DPAs as ineligibility triggers noted that since the exemption was proposed in 1982, the use of NPAs and DPAs has skyrocketed, with many companies avoiding prosecution for serious misconduct due to factors unrelated to their culpability. The commenter opined that to fully protect Plans from unscrupulous behavior by asset managers, the Department must, as proposed, include NPAs and DPAs within the definition of Prohibited Misconduct that triggers QPAM ineligibility when the conduct at issue involves a listed crime.

Another commenter identified a lack of clarity as to whether an NPA or DPA would have to involve the manager's parent or whether it could involve the manager's most remote affiliate or an entity with only a five percent ownership interest in the manager.

Several commenters also expressed specific concerns over expanding QPAM ineligibility to agreements with foreign governments that are substantially equivalent to domestic NPAs and DPA. These commenters expressed concern that the proposal provided the Department with unfettered discretion to determine whether a foreign NPA or DPA entered into by the QPAM or an Affiliate was substantially equivalent to a domestic NPA or DPA, and they questioned whether the Department has the necessary proficiency in criminal justice and international law, or jurisdictional authority to make such determinations.

Other commenters also suggested that it would be difficult for the Department to apply the substantially equivalent standard in the context of foreign NPAs and DPAs due to the claimed vagaries of foreign laws and prosecutorial practices and the effect of expanding the reach of Section I(g) in this manner on law enforcement efforts by other U.S. agencies and the possible extraterritorial impact on non-U.S. law enforcement and U.S. relations with foreign governments.

One commenter stated that Department should not treat the conduct of an affiliate which has no or little nexus or relationship to the QPAM as disqualifying and pointed out the practical considerations that are necessary to identifying foreign equivalents of these agreements as well as the significant risk that these agreements may be imposed in foreign jurisdictions that do not provide due process protections. Another commenter asserted that the connection of foreign agreements to a QPAM's compliance culture is speculative and tenuous and does not provide any meaningful protection to participants and beneficiaries.

One commenter claimed that including foreign equivalents of NPAs and DPAs has the potential to play into the hands of foreign nations that wish to harm the operations of U.S.-based investment managers. For example, the commenter suggested that rogue foreign nations could bring dubious claims against a U.S.-based investment manager and force them to execute a DPA or NPA with that government in order to continue operations in that foreign country.

Another commenter questioned how the Department would know if something would be ''successfully'' prosecuted for purposes of the requirement in Section VI(s) that the NPA or DPA be based on allegations that, if successfully prosecuted, would have constituted a crime described in Section VI(r) of the exemption.

The Department's Response to Comments and Treatment of DPAs and NPAs Under the Final Amendment

In response to these comments, the Department consulted with the DOJ and the SEC to affirm its understanding of NPAs and DPAs, particularly the level of culpability on the part of the QPAM that would accompany such an agreement. Based on these consultations, the Department understands that, as a matter of course, these domestic NPAs and DPAs are accompanied by Statements of Fact that establish the basis for criminal liability. In most cases, the offending party avoids prosecution for the crime on the basis of the party's agreement to enter into, and comply with, the terms of the agreement.

After considering comments on the Proposed Amendment's inclusion of NPAs and DPAs as Prohibited Misconduct in the Proposed Amendment, the Department has

determined to include this provision in the Final Amendment with a modification discussed below.

In cases where the QPAM, any Affiliate thereof (as defined in Section VI(d)), or any owner, direct or indirect, of a five (5) percent or more interest in the QPAM has executed an NPA or DPA, the Department has precisely the same concerns about the QPAM's compliance culture, and its ability and willingness to adhere to its fiduciary obligations and the exemption conditions, as it does when any of these parties have been formally convicted of the crime. The cause for concern about the QPAM is not the conviction *per se,* but rather the serious misconduct that underlies the conviction. In these cases, responsible federal or state officials have resolved serious claims of misconduct against parties through the execution of a formal agreement voluntarily entered into with the parties. In these circumstances, if the alleged misconduct is sufficient to form the basis for an NPA or DPA that is entered into by the QPAM, any Affiliate thereof (as defined in Section VI(d)), or any owner, direct or indirect, of a five (5) percent or more interest in the QPAM, it is appropriate to treat the agreement as cause for ineligibility under Section I(g), subject to the parties' ability to apply for an individual exemption before, during, or after the One-Year Transition Period provided for in this exemption.

Moreover, any due process concerns with including NPAs and DPAs as Prohibited Misconduct are addressed by the change to the Prohibited Misconduct provision in the Final Amendment providing that ineligibility does not occur until after a QPAM, any Affiliate thereof (as defined in Section VI(d)), or any owner, direct or indirect, of a five (5) percent or more interest in the QPAM has executed an NPA or DPA. Those agreements result from criminal investigations and are voluntarily entered into by the parties. QPAMs and other affected entities that enter into an NPA or DPA generally will be afforded the numerous due process protections that are associated with criminal investigations and negotiating these agreements.

Under the revised provision in the Final Amendment, QPAMs, their Affiliates, or five (5) percent or more owners that enter into an NPA or DPA should have sufficient time to prepare for the implications of becoming ineligible under this Final Amendment as a result of the process surrounding the negotiation and execution of the agreement. In either case, the QPAM must commence the One-Year Transition Period and submit an individual exemption application for extended relief a soon as possible if it wants to continue using the QPAM exemption after the One-Year Transition Period expires.

After considering comments on the Proposed Amendment's inclusion of foreign-equivalent NPAs and DPAs in the Proposed Prohibited Misconduct definition, the Department has decided to remove foreign equivalent agreements from the definition of Prohibited Misconduct in Section VI(s) of the Final Amendment. While the Department is confident in its ability to apply the foreign equivalence standard to NPAs and DPAs entered into by the QPAM or its Affiliates, and although the Department has concerns about conduct that might give rise to a foreign equivalent NPA or DPA, it has concluded that it has insufficient information on those agreements to treat them as a cause for ineligibility under Section I(g). In this context, the Department notes that it has not received individual exemption requests from QPAMs or their Affiliates in which a foreign equivalent agreement was implicated.

The Department also is not aware of any instances where foreign governments have used agreements that are substantially equivalent to domestic NPAs and DPAs to harm U.S.-based investment managers and, as with foreign criminal convictions, we believe there is a low likelihood that this activity has occurred. However, in light of the comments, the Department has concluded that it does not have sufficient certainty about the use of these agreements outside the U.S., and about the procedural protections associated with the agreements in foreign jurisdictions, to justify finalizing this particular part of the proposed Prohibited Misconduct provision at this time. Therefore, the Department's position is that the uncertainties surrounding foreign agreements raised by some commenters outweigh the protective benefits that would accrue to Plans and their participants and beneficiaries by including foreign agreements in the Prohibited Misconduct provision.

Although the Department is removing the foreign equivalent of NPAs or DPAs as an ineligibility trigger, the Final Amendment to Section I(g)(2) requires the QPAM to notify the Department when the QPAM, any Affiliate thereof (as defined in Section VI(d)), or any owner, direct or indirect, of a five (5) percent or more interest in the QPAM executes a domestic or foreign equivalent NPA or DPA. This notice will give the Department the ability to take appropriate additional action in specific cases and will provide the Department with broader information about these practices as the QPAM exemption continues to be relied upon by parties in the future. The Department notes that QPAMs should err on the side of caution when determining whether an agreement with a foreign government entity is the substantial equivalent of a domestic NPA or DPA that must be reported to the Department pursuant to amended Section I(g)(2).

After reviewing and considering the comments offering alternatives to ineligibility in connection with NPAs or DPAs, in particular only requiring QPAMs to provide a notice to Plans, the Department's position is that mere notice to the Plans is not sufficiently protective to address circumstances where a NPA or DPA with a U.S. federal or state prosecutor's office or regulatory agency reflects serious misconduct by the QPAM. Further, solely relying on a QPAM's notification to Plans that the QPAM committed serious misconduct would not be an appropriate justification for the Department to ignore such serious misconduct and to forego taking appropriate action.

In response to the comment asserting that a lack of clarity exists regarding whether an NPA or DPA would have to involve the QPAM's parent or whether it could involve the QPAM's most remote affiliate or an entity with only a five (5) percent ownership interest in the manager, the Department has clarified in the Final Amendment that the Prohibited Misconduct provision in Section VI(s)(1) includes NPAs and DPAs entered into by the QPAM, or any Affiliates, or owners of five (5) percent or more of the QPAM, with a U.S. federal or state prosecutor's office or regulatory agency.

In response to comments that questioned how the Department would know if something would be ''successfully'' prosecuted, the Department notes that the focus of the provision is not on whether a criminal prosecution would have been successful if the case had not been settled, but rather whether the allegations by state or federal officials that resulted in the NPA or DPA described one of the disqualifying crimes set forth in VI(r). The provision does not require the Department to know if something would be successfully prosecuted. Instead, it requires the Department to determine whether the conduct associated with the NPA or DPA would ''if successfully prosecuted'' constitute Prohibited Misconduct as defined in paragraph VI(s)(1). In such cases, the parties have

voluntarily entered into a settlement based on allegations of disqualifying misconduct. There is sufficient cause for concern in all such cases about the entities' culture of compliance to trigger ineligibility, start the One-Year Transition Period, and require the parties to seek an individual exemption if they would like to continue to receive an exemption permitting them to engage in conduct that is otherwise prohibited by ERISA and the Code. Moreover, as noted above, NPAs and DPAs are commonly supported by Statements of Fact that establish the basis for criminal liability by the parties entering into the agreements.

While the Department is removing foreign equivalents of NPAs and DPAs as Section I(g) ineligibility events in the Final Amendment, as discussed above it is adding a notice requirement that applies when the QPAM, its owners of a five (5) percent or more *interest,* or Affiliates enter into a foreign equivalent of an NPA or DPA or Participate In Prohibited Misconduct as defined in Section VI(s). Specifically, Section I(g)(2) requires the QPAM to submit a notice to *QPAM@dol.gov* within 30 calendar days after the Ineligibility Date for the Prohibited Misconduct as determined under Section (I)(h)(2) or the execution date of the substantially-equivalent foreign NPA or DPA, if the QPAM, any Affiliate thereof (as defined in Section VI(d)), or any owner, direct or indirect, of a five (5) percent or more interest in the QPAM, Participates In any Prohibited Misconduct as defined in Section VI(s) or enters into an agreement with a foreign government that is substantially equivalent to a NPA or DPA described in section VI(s)(1). The QPAM must include a description of the Prohibited Misconduct in the notice and provide the name of and contact information for the person or entity that is responsible for handling this matter to the Department.

The Department clarifies that the Prohibited Misconduct conditions in Section VI(s)(1), regarding entering into an NPA or DPA with a U.S. federal or state prosecutor's office or regulatory agency, and the corresponding notification requirement in Section I(g)(2), are prospective only, and therefore only apply to QPAMs, their Affiliates, and owners of a five (5) percent or more interest who have executed NPAs or DPAs on or after June 17, 2024 based on facts that, if successfully prosecuted, would have constituted a crime specified in VI(r) of the Final Amendment.

Specific Comments Regarding Prohibited Misconduct Under the Written Warning Letter and Ineligibility Notice Process

In the Proposed Amendment, the Department specifically requested comments on the sufficiency of the due process protections provided in connection with the Prohibited Misconduct provision. Several commenters expressed concern that the due process protections of the written warning letter and Written Ineligibility Notice provisions were insufficient. For example, some commenters stated that:

- the proposed standards were inadequate to protect the due process rights of QPAMs, because the process provided the Department with potentially unlimited discretion to decide what types of misconduct would trigger ineligibility to be made by an independent, disinterested decision-maker;
- the Department's ineligibility process lacks sufficient due process and a final determination by a neutral third-party judge, and therefore, provides the Department with unilateral discretion;
- due process requires an adversarial process that is adjudicated by an independent third party;
- if the ineligibility process for Prohibited Misconduct is retained, the Department should develop a process that includes: (1) rules for establishing a factual record, including adequate time and opportunity for the accused institution to review, challenge, and supplement the record; (2) formal rules for soliciting input from federal, state, and/or foreign prosecutors involved in the negotiated agreement at issue, if any; (3) procedures for selecting an independent decision-maker responsible for making factual and legal determinations; (4) procedural guardrails to ensure that Department officials involved in alleging Prohibited Misconduct are not able to engage in conduct that would bias the decision-maker (*e.g.,* prohibiting ex parte communications); and (5) an automatic stay of any agency determinations during the pendency of federal litigation challenging the determination;
- If the Department does not remove the written warning letter and Written Ineligibility Notice process from the final exemption, the final exemption must provide an opportunity for review by an administrative law judge, court, or similar truly independent decision maker with the authority to decide whether a QPAM will be disqualified, as opposed to providing that authority to itself.

Additionally, some commenters expressed concern that proposed definition of the phrase ''participating in'' was vague and overbroad.

The Department's Response to Specific Comments Regarding the Written Warning Letter and Written Ineligibility Notice

After considering the due process concerns expressed in comments regarding the Proposed Amendment, the Department is removing from the Final Amendment the written warning letter and Written Ineligibility Notice process that was associated with Prohibited Misconduct. The Department now is requiring the requisite factual determinations for Prohibited Misconduct defined in Section V(s)(2) to have been made in specified judicial proceedings.

Specifically, under the Final Amendment, a QPAM will become ineligible under Section I(g) as a result of Prohibited Misconduct as defined in Section VI(s)(2) if the QPAM, any Affiliates thereof (as defined in Section VI(d)), or any owner, direct or indirect, of a five (5) percent or more interest in the QPAM is found or determined in a final judgment, or court-approved settlement by a federal or state criminal or civil court in a proceeding brought by the Department, the Department of Treasury, the Internal Revenue Service, the Securities and Exchange Commission, the Department of Justice, the Federal Reserve Bank, the Office of the Comptroller of the Currency, the Federal Depository Insurance Corporation, the Commodities Futures Trading Commission, a state regulator, or state attorney general to have Participated In one or more of the following categories of conduct irrespective of whether the court specifically considers this exemption or its terms:

(A) engaging in a systematic pattern or practice of conduct that violates the conditions of this exemption in connection with otherwise non-exempt prohibited transactions;

(B) intentionally engaging in conduct violates the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; or

(C) providing materially misleading information to the Department or the Department of Treasury, the Internal Revenue Service, the Securities and Exchange Commission, the Department of Justice, the Federal Reserve Bank, the Office of the Comptroller of the Currency, the Federal Depository Insurance Corporation, the Commodities Futures Trading Commission, a state regulator or a state attorney general in

connection with this exemption's conditions.

By removing the warning letter and Written Ineligibility Notice process and instead providing for ineligibility only after a Conviction, a court's final judgment, or a court-approved settlement, QPAMs, their Affiliates, and/or owners of a five (5) percent or more interest thereby are disqualified only after the culpable entity was afforded full due process in a legal proceeding overseen by a court. Section V(s)(2) is much narrower than the proposal inasmuch as it covers the types of misconduct specified in the proposal only when the misconduct is established in court proceedings brought by state or federal regulators. It ensures that the finding of misconduct was subject to the robust procedural protections provided by such proceedings.

Furthermore, by removing the warning letter and Written Ineligibility Notice process, and redefining Prohibited Misconduct in Section VI(s)(2) to be based on legal process that results in a court's final judgment or court-approved settlement, the QPAM will have been provided with sufficient notice that the conduct at issue is Prohibited Misconduct that causes ineligibility. This will give QPAMs sufficient time to apply for an individual exemption during the One-Year Transition Period.

More generally, the Department notes that the modification in the Final Amendment removes the Department from the process of making a factual determination that Prohibited Misconduct has occurred. Instead, for purposes of ineligibility due to Prohibited Misconduct in Section VI(s)(2), the court's final judgment (or approved settlement) must resolve the factual issue of whether any of these parties Participated In the conduct that constitutes Prohibited Misconduct as defined in Section VI(s)(2). Under the provision, the court does not have to make a specific legal finding regarding whether such conduct constitutes Prohibited Misconduct as defined in Section VI(s)(2) of the exemption, but rather whether, as a factual matter, the parties engaged in the specific conduct defined as Prohibited Misconduct in Section VI(s)(2). The Department has made changes to Section VI(s)(2) to make this distinction clear. The Department cautions QPAMs, their Affiliates, and owners of a five (5) percent or more interest that final judgments and court-approved settlements that include a finding that such conduct has occurred will cause immediate ineligibility under Section I(g). In these situations, a QPAM that intends to continue to rely on the QPAM exemption following the One-Year Transition Period that begins on the Ineligibility Date should submit an exemption application to the Department as soon as possible.

As mentioned above, some commenters expressed concern that the proposed definition of the phrase ''participating in'' was vague and overbroad. The Department disagrees with this concern. The parameters of the definition are similar to other definitions and conditions the Department has included in administrative exemptions it has issued since ERISA's enactment almost fifty years ago. Additionally, the commonly accepted definition of what it means to ''participate in'' conduct is well understood. The Proposed Amendment specifically provided additional guidance in the text of Proposed Section I(g)(3)(B) regarding what the Department meant by using the term ''participating in.'' [44] Therefore, the Department has not changed the definition of ''Participating In'' in the Final Amendment but has included in the definition the defined terms ''Participate In,'' ''Participates In,'' ''Participated In,'' and ''Participation In'' for clarity and accuracy and has moved the definition to the Definitions and General Rules in Section VI(t).[45]

Costs Associated With Ineligibility Based on Participating In Prohibited Misconduct

Several commenters also noted that regardless of the reason for ineligibility, Plans would be exposed to substantial costs if a QPAM becomes ineligible. These commenters recommended that the Department exercise extreme caution before causing more QPAMs to face ineligibility. Some commenters also expressed concerns that the imposition of ineligibility is harmful to the Plans and their participants and beneficiaries and prevents appointing fiduciaries from exercising discretion to determine the best course of action for the Plan by placing constraints on the Plan's choice of QPAMs.

The Department notes that the Proposed Amendment and this Final Amendment appropriately place the burden associated with the costs of ineligibility on the QPAM. In response to the comment, the Department included the One-Year Transition Period in the Final Amendment to reduce the costs and burdens associated with the possibility of ineligibility, and to provide affected QPAMs with an opportunity to apply for individual exemptions with appropriate conditions. Therefore, the Department disagrees that the ineligibility provision unduly prevents fiduciaries from exercising their discretion.

In crafting the amendments, the Department was also mindful that the conduct that constitutes Prohibited Misconduct under the terms of the exemption is quite serious and that engaging in such conduct calls into question the QPAM's culture of compliance. The grant of an exemption involves a discretionary determination by the Department to permit parties to engage in conduct that is otherwise categorically prohibited by ERISA and the Code and it requires specific findings aimed at ensuring that the exemption is appropriately protective of the Plan and participant interests at stake in the regulation of tax-preferred retirement plans. While the prohibited transaction provisions constrain fiduciary choice, those constraints are expressly imposed by the statute for the protection of plan participants and beneficiaries. An exemption is not justified merely by pointing to a constraint expressly imposed by law and noting that it interferes with fiduciary discretion; all prohibited transaction provisions constrain fiduciary choice. The conditions of the QPAM Exemption are publicly and widely available, and the possibility that a QPAM could become ineligible if it participates in serious misconduct is clear. Moreover, if a fiduciary does not want to provide the additional protections included in this Final Amendment, it may pursue other options to receive prohibited transaction relief, such as using another relevant class prohibited transaction exemption or seeking an individual prohibited transaction exemption. Additionally, the sophistication of fiduciaries varies dramatically based on a variety of factors. The Department has an obligation to protect Plans and their participants and beneficiaries, even if an individual Plan fiduciary views such protections as unnecessary.

However, as noted above, the Department modified the scope of the Prohibited Misconduct provision in the Final Amendment; first, by removing foreign agreements that are equivalent to

[44] The preamble also specifically stated, ''For purposes of proposed Section VI(s), the term 'participating in' refers not only to actively participating in the Prohibited Misconduct but also to knowingly approving of the conduct or having knowledge of such conduct without taking appropriate and proactive steps to prevent such conduct from occurring, including reporting the conduct to appropriate compliance personnel.'' 87 FR at 45209.

[45] Due to this change, the Recordkeeping provision is redesignated as Section VI(u).

NPAs and DPAs from the definition of Prohibited Misconduct in Section VI(s)(1) and second, by basing ineligibility as a result of Prohibited Misconduct defined in Section VI(s)(2) on a factual finding or determination by a court that the conduct described in Section VI(s)(2)(A) through (C) occurred, which should reduce the number of QPAMs that become ineligible. Moreover, the indemnification provision will ensure that Plans are not bearing the costs of ineligibility for QPAMs that become ineligible.

Both Categories of Prohibited Misconduct Only Will Apply Prospectively

Finally, several commenters requested clarification that the Prohibited Misconduct provisions of Section VI(s)(1) and (2) will result in ineligibility of a QPAM only on a prospective basis. In response, the Department confirms that ineligibility tied to Prohibited Misconduct related to executing NPAs and DPAs in Section VI(s)(1) of the Final Amendment will be applied only on a prospective basis that commences on the execution date of NPAs or DPAs with a U.S. federal or state prosecutor's office or regulatory agency that falls on or after June 17, 2024.

Similarly, under the Final Amendment, Section VI(s)(2) determinations of Prohibited Misconduct will apply prospectively as of the date of a court's final judgment or court-approved settlements that fall on or after June 17, 2024.

Violations of the Exemption and Misleading Statements

One commenter requested that the Department provide examples of Prohibited Misconduct for violations of the exemption or misleading statements so that firms are not caught off guard for Participating In Prohibited Misconduct. Another commenter requested clarification that inadvertent technical errors, such as failure to timely notify the Department of a legal name change, should not be deemed to be providing materially misleading information to the Department. As a general matter, the Department's position is that such inadvertent technical errors do not result in Prohibited Misconduct, particularly when such errors are corrected consistent with ERISA and Code standards, as applicable. Similar to Convictions, the exemption's Prohibited Misconduct provisions are aimed at protecting Plans and IRA owners from conduct that calls into question a QPAMs integrity and compliance culture and inadvertent technical errors, especially such errors that are promptly corrected, should not amount to such conduct.

With respect to mistakes in timely reporting a legal name change, the Department modified the reporting requirement in this Final Amendment to address such issues, as discussed above in connection with the reporting requirement. As discussed in detail above, the modifications in the Final Amendment to the definition of Prohibited Misconduct in Section V(s)(2) whereby requisite factual determinations are made through a judicial proceeding will put a QPAM and its Affiliates on notice regarding conduct that is defined as Prohibited Misconduct in Section V(s)(2)(A) through (C).

Section I(h)—Timing of Ineligibility

The Proposed Amendment did not include any direct changes to the ten-year ineligibility period under current Section I(g).[46] The Department added a new provision, Section I(h), that specified the timing of ineligibility. In the Proposed Amendment, for Prohibited Misconduct, the ineligibility period would have begun as of the date of a Written Ineligibility Notice, whereas, for a Criminal Conviction, it would have begun on the date the trial court enters its judgment.[47] The Proposed Amendment clearly stated that for a foreign conviction, ineligibility would begin on ''the date of the judgment of any court in a foreign jurisdiction that is the equivalent of a U.S. federal or state trial court. . . .'' This refers to a trial court of original or primary jurisdiction, such as a court of first instance.[48] The period of ineligibility would have begun on the conviction date, regardless of whether the judgment is appealed or the appeal has suspensive effect. Only upon a subsequent final judgment reversing the conviction would a person no longer be considered ''convicted'' for purposes of this exemption.

This Final Amendment retains the ineligibility start date for a Criminal Conviction as the date the trial court enters its judgment. However, because the Final Amendment does not include the proposed warning and Written Ineligibility Notice process, the timing for Prohibited Misconduct in Section I(h)(2) of the Final Amendment has been modified. In the Final Amendment, the ineligibility period for Participating In Prohibited Misconduct begins on the date, on or after June 17, 2024 that the QPAM, any Affiliate thereof (as defined in Section VI(d)), or any owner, direct or indirect, of a five (5) percent or more interest in the QPAM:

(A) executes an NPA or DPA described in Section VI(s)(1)); or

(B) is found or determined in a final judgment in certain federal or state court proceedings (regardless of whether the judgment is appealed) or a court-approved settlement to have Participated In the conduct that meets the definition of Prohibited Misconduct in Section VI(s)(2).

In the Proposed Amendment the Department specifically sought comments on the timing of ineligibility. One commenter suggested that the Winding-Down (Transition) Period should be restructured into two distinct periods: the first to allow a QPAM to apply for an individual exemption, and the second period to prevent disruption and assist Plans in the event a transition is needed to a new QPAM. The Department believes it has functionally provided this structure in the Final Amendment. The One-Year Transition Period provides time for transition that was not previously included in the exemption. As noted earlier in this preamble, an ineligible QPAM should initiate an individual exemption request as soon as it reasonably believes its Plan clients likely will be harmed without additional prohibited transaction relief after the Transition Period ends. The Department notes that it will continue to consider individual exemption requests for ineligible QPAMs to be able to continue providing services, as well as requests for additional transitional relief to allow their client Plans to search for and hire a new asset manager.

Proposed Section I(i)[49]—Warning and Opportunity to be Heard in Connection With Prohibited Misconduct—Written Ineligibility Notice

The Department proposed an additional process that would be tied to a determination that a QPAM had participated in Prohibited Misconduct. In the proposal, before issuing a Written Ineligibility Notice in connection with Prohibited Misconduct to the QPAM, the Department indicated it would have issued a written warning, identified the Prohibited Misconduct, and provided 20

[46] The One-Year Transition Period, however, has an impact on how a QPAM approaches the first year after experiencing an ineligibility trigger.

[47] For convictions that also result in imprisonment of a person, the end of the ten-year period is counted from the date of release from imprisonment.

[48] This is generally considered to be the lowest level court in a particular jurisdiction that has the power to render a judgment of conviction.

[49] Certain sections of the Final Amendment have been renumbered and Section I(i) in the Final Amendment has been redesignated as the *One-Year Transition Period Due to Ineligibility.*

days for the QPAM to respond. The Proposed Amendment also indicated that if the QPAM failed to respond to the written warning within 20 days, the Department would have issued the Written Ineligibility Notice. However, if the QPAM responded within the 20-day timeframe, the Department would have provided the QPAM with the opportunity to be heard either in person (including by phone or a videoconference) or in writing, or a combination of both, before the Department decided whether it would have issued the Written Ineligibility Notice.

As discussed under the *Specific Comments Regarding Prohibited Misconduct under the Written Ineligibility Notice Process* heading above, some commenters questioned the sufficiency of the process leading to a warning letter and Written Ineligibility Notice, citing due process concerns and specifically, the lack of an adversarial process adjudicated by an independent third party (such as review by an administrative law judge or federal court). Relatedly, another commenter indicated that these provisions within the Proposed Amendment would have provided the Department with too much discretion to cause a QPAM's ineligibility. One commenter specifically noted the additional due process protections provided through the court system for Criminal Convictions are not present for a QPAM that Participates In Prohibited Misconduct. Another commenter noted that the lack of an appeals process as part of the proposed Written Ineligibility Notice process could provide the Department with unchecked power.

As more fully discussed above under the *Specific Comments Regarding Prohibited Misconduct under the Written Ineligibility Notice Process* heading, in response to the process concerns expressed by commenters, the Department has removed the proposed warning letter and Written Ineligibility Notice process and modified the definition of Prohibited Misconduct under Section VI(s). Removing the proposed warning letter and Written Ineligibility Notice process from this Final Amendment, and instead providing that a QPAM's ineligibility under Section VI(s)(2) only occurs after a Conviction, a court's final judgment, or a court-approved settlement, will afford QPAMs, their Affiliates, and owners of a five (5) percent or more interest with substantial due process in a legal proceeding that is overseen by a court, not the Department. Also, this Final Amendment provides that ineligibility occurs under Section VI(s)(1) when a QPAM, any Affiliate thereof (as defined in Section VI(d)), or any owner, direct or indirect, of a five (5) percent or more interest in the QPAM executes an NPA or DPA with a U.S. federal or state prosecutor's office or regulatory agency, which generally will afford QPAMs and their Affiliate(s) and owner(s) with the due process protections that are associated with related criminal investigations.

Section I(i)—Mandatory One-Year Transition Period

Certain sections of the Final Amendment have been renumbered and Proposed Section I(j) is now Section I(i) in the Final Amendment. As part of the Proposed Amendment, the Department included a mandatory one-year Winding-Down Period that would have begun on the Ineligibility Date. The Winding-Down Period was designed to provide Plans with the ability to wind down their relationships with a QPAM immediately after the QPAM becomes ineligible to rely on the exemption. Satisfaction of the conditions of the Winding-Down Period would affect the availability of relief for all transactions covered by this exemption. As proposed, the Department intended to include relief for past transactions and any transaction continued during a one-year Winding-Down Period.

One commenter indicated that the term ''winding-down'' was pejorative and should be replaced with more neutral nomenclature such as a term indicating it is a transition period. The Department did not intend for the term to be pejorative. Therefore, the Department has substituted the word ''Transition'' for ''Winding-Down'' to avoid the possible unintended implication that the Department intended the term ''Winding-Down'' to mean that the QPAM was necessarily going out of business as a QPAM on the Ineligibility Date. The Department stresses, however, that future relief based on an individual exemption application is not guaranteed, and the new term should not be read to suggest otherwise.

As noted above, the QPAM is free to apply for an individual exemption that would enable it to continue its eligibility to act as a QPAM and engage in transactions that would otherwise be prohibited after the expiration of the Transition Period, although there is no guarantee that the Department will grant such an exemption. Prohibited transaction relief during the Transition period would be subject to compliance with all conditions of the exemption except Section I(g)(3), which is renumbered Section I(g)(1) in this Final Amendment.

The Proposed Amendment provided that once the Transition Period begins, relief under the QPAM Exemption would only be available for transactions undertaken for the QPAM's existing clients—*i.e.,* the QPAM's client Plans that had a pre-existing Written Management Agreement (as required under Section VI(a)) on the Ineligibility Date for transactions entered into before the Ineligibility Date. Thus, after the Ineligibility Date, the QPAM would be prohibited from engaging in new transactions in reliance on the QPAM Exemption for existing client Plans. Additionally, if the QPAM obtained new client Plans during the Transition Period, the Proposed Amendment would not provide relief under the QPAM Exemption for any transactions the QPAM entered into on their behalf, unless such relief was granted in a separate individual exemption.

The Department designed the proposed Transition Period to mitigate the cost and disruption to Plans, their participants and beneficiaries, and IRA owners that can occur when a QPAM becomes ineligible for relief. The proposed One-Year Transition Period was intended to give a QPAM's client Plans time to decide whether to hire an alternative discretionary asset manager that is eligible to operate as a QPAM or continue their relationship with the ineligible QPAM. The Department believed that a One-Year Transition Period would be necessary to ensure that Plans have sufficient time to engage in a search for an alternative QPAM or discretionary asset manager if they decide it is in the Plan's best interest to do so.

The proposed Transition Period conditions required the QPAM to provide notice of its ineligibility to its existing client Plans and the Department (via *QPAM@dol.gov*) within 30 days after the Ineligibility Date. The proposed notice was required to: (1) include an objective description of the facts and circumstances upon which the Criminal Conviction or Written Ineligibility Notice [50] is based; (2) be written with sufficient detail, consistent with the QPAM's duties of prudence and undivided loyalty under ERISA, to fully inform a Plan fiduciary of the nature and severity of the criminal conduct or Prohibited Misconduct; and (3) be sufficient enough to enable such Plan fiduciary to satisfy its fiduciary duties of

[50] The Written Ineligibility Notice has been removed from this Final Amendment therefore, the term ''Written Ineligibility Notice'' in Section I(i) has been replaced with the term ''Prohibited Misconduct'' in the Final Exemption.

prudence and loyalty under Title I of ERISA when hiring, monitoring, evaluating, and retaining the QPAM.

The Proposed Amendment required that within 30 days after the Ineligibility Date, the QPAM would have to notify its client Plans that, as required by the proposed WMA provisions, the QPAM will not restrict the client's ability to terminate or withdraw from its arrangement with the QPAM. Thus, the QPAM would not be permitted to impose any fees, penalties, or charges on client Plans in connection with the process of terminating or withdrawing from a QPAM-managed Investment Fund except for reasonable fees, appropriately disclosed in advance, that are specifically designed to prevent generally recognized abusive investment practices or specifically designed to ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other investors. If such fees, penalties, or charges occur, they must be applied consistently and in a like manner to all such investors.

The Proposed Amendment also required the QPAM to indemnify, hold harmless, and promptly restore losses to each client Plan for any damages resulting from a violation of applicable laws, a breach of contract, or any claim arising out the QPAM's ineligibility. For purposes of this provision, the Proposed Amendment indicated that actual losses specifically include losses and costs arising from unwinding transactions with third parties and from transitioning Plan assets to an alternative discretionary asset manager.

Additionally, to ensure Plans were protected from bad actors, the Proposed Amendment required the QPAM not to employ or knowingly engage any individual that Participated In conduct that is the subject of a Criminal Conviction or Prohibited Misconduct. For Criminal Convictions, this would apply regardless of whether the individual is separately convicted in connection with the criminal conduct. The Proposed Amendment indicated that the QPAM must adhere to this requirement no later than the Ineligibility Date.

Finally, the Proposed Amendment prohibited the QPAM from relying on the relief provided in the QPAM Exemption after the One-Year Transition Period unless the Department granted the QPAM an individual exemption allowing it to continue relying upon the exemption. The Proposed Amendment provided that the Transition Period would not be suspended while an individual exemption application is pending with the Department.

The Department requested comments on the Transition Period, including whether one year is the appropriate length of time and whether there are additional protections for Plan participants and beneficiaries and IRA owners that the Department should consider.

Many commenters argued that the proposed prohibition on the QPAM engaging in any new transactions during the Transition Period, even for existing clients, should be removed. These commenters indicated that QPAMs who become ineligible should be permitted to make new investments during the Transition Period on behalf of their client Plans that conform to investment guidelines approved by a Plan fiduciary during the Transition Period. In support of this position, commenters indicated that when QPAMs have been engaged to carry out an investment strategy that requires them to continually make new investments, the proposed prohibition on engaging in new transactions for existing clients could be particularly detrimental. For instance, there could be a series of transactions that require ongoing adjustments (such as in the case of swaps and other derivatives), and an inability to adjust these transactions could detrimentally impact the QPAM's client Plans and counterparties alike.

After considering these comments, the Department agrees that to avoid the potential harm that QPAMs' client Plans could suffer if their investments are effectively frozen, it is appropriate to remove the prohibition on QPAMs entering into new transactions for existing client Plans during the Transition Period. The Department reminds QPAMs that they must meet their fiduciary obligations of prudence and loyalty set forth in ERISA section 404 when making investment decisions on behalf of their ERISA-covered Plan clients and IRA clients (to the extent that ERISA section 404 is applicable) during the Transition Period.

One commenter suggested that the Department included the Transition Period provisions in the Proposed Amendment because it clearly assumed that QPAMs' client Plans would want to fire their asset manager. The Department did not intend to convey this view in the Proposed Amendment. The Department included this provision in the Proposed Amendment to provide an ineligible QPAM's client Plans with an off-ramp if they choose to terminate their relationship with the asset manager. The Department's sole reason for including the Transition Period provisions is to protect the affected Plans. Thus, for example, if a Plan chooses to retain its relationship with a QPAM that becomes ineligible, it may do so, but the Department's intention is to prevent Plans from being locked into a contractual arrangement with an ineligible QPAM.

Multiple commenters indicated that the process for replacing a larger Plan's investment manager typically takes more than one year and suggested alternative timeframes for the Transition Period. For example, commenters suggested the Department extend the Transition Period to at least 18 months or two years, and another commenter offered the alternative of having the Transition Period last at least until after the Department makes a final determination regarding whether to grant or deny the QPAM's individual exemption application.

After considering these comments, the Department decided not to change the timeframe for the Transition Period in the Final Amendment. The Department recognizes that in some cases a longer Transition Period could be necessary but determined the best way to address this circumstance is through the individual exemption process on a case-by-case basis. Performing the necessary analysis during the individual exemption process will ensure the Department has sufficient information to appropriately consider whether additional protections are necessary for impacted Plans based on the QPAM's particular facts and circumstances. The Department does not believe it is appropriate to extend the Transition Period until a formal decision on an individual exemption has been made as the Department processes individual exemption applications on a case-by-case basis and the timeframes for each case vary. Therefore, the duration of the Transition Period would be uncertain.

One commenter noted that the Department's participant disclosure regulation requires any change to a defined contributions plan's designated investment alternatives to be disclosed to participants at least 30 days (but not more than 90 days) in advance. The commenter indicated that it appeared that the Department has not considered the practical limitations of such notices on the duration of the Transition Period. The one-year duration of the Transition Period, however, provides more than sufficient time to accommodate the requirements of the participant disclosure regulation. If additional relief is needed beyond the one-year period, the QPAM may request a supplemental individual exemption to ensure that such a change is made accordingly.

One commenter asserted that the Proposed Amendment did not clearly indicate the QPAM's obligations to non-ERISA investors in a pooled fund or how these investors would be treated. Another commenter suggested that the Department should focus on the issue of pooled funds, where QPAMs will need to balance the interests of Plans leaving the fund with those Plans remaining in the fund. The Proposed Amendment and this Final Amendment treat non-ERISA and Plan investors in a similar manner to the way the Department has addressed this issue in individual exemptions related to Section I(g) ineligibility. Specifically, the provision prohibiting a QPAM from imposing fees, penalties, or charges in the Proposed Amendment includes an explicit exception for ''reasonable fees, appropriately disclosed in advance, that are specifically designed to: (a) prevent generally recognized abusive investment practices or (b) ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other investors, provided that such fees are applied consistently and in a like manner to all such investors.'' The Department has retained this exception in this Final Amendment, which addresses the commenter's concern.

Some commenters indicated that Plans should be given more control over the decision to continue relying on the QPAMs. The commenters suggested that the Department give Plans the ability to decide whether to terminate or withdraw from their relationship with a QPAM and the flexibility to determine a timeline for withdrawal. One commenter asserted that Plans choose asset managers based on their reputation and expertise in specific areas of asset management. The commenter added that the Plan is in the best position to determine whether it is in the Plan's best interests to terminate or withdraw from their relationship with the QPAM. As discussed above, however, ultimately the decision on whether to grant relief from ERISA and the Code's prohibited transaction provisions rests with the Department. In the Department's view, the individual exemption process provides a full, fair, and open process for the Department to determine whether a QPAM should be permitted to engage in otherwise prohibited transactions post-conviction, and if so, the conditions which should be placed on such relief. To the extent QPAMs obtain such individual exemptions, Plans remain free to rely upon them to engage in transactions that would otherwise be prohibited if the QPAMs meet the conditions that are specified in the exemptions.

Finally, one commenter noted that to fully effectuate the intent of the Transition Period provisions for stable value investment contracts, the length of the period should be based on the duration of the underlying investment portfolio or as otherwise provided under the terms of the contract for an extended or amortized termination. The Department declines to give preferential treatment to QPAMs responsible for such investment contracts in this manner. Here too, the individual exemption process is best suited to address any specific issues or concerns based on the nature of the QPAM's investments or investment practices.

Finally, the Department made a few additional ministerial changes to the Transition Period provisions in the Final Amendment. First, the Department capitalized the term ''Transition Period.'' [51] Second, the Department modified the first sentence of the Transition Period provision to clarify its focus on client Plans, by replacing the phrase ''engage in'' with ''provide,'' and by dividing the first sentence into two sentences to improve readability. Third, the Department replaced the Proposed Amendment's reference to subsection I(g)(2) (regarding the WMA) with a reference to subsection I(i) because the Department moved the WMA requirements to this subsection. Finally, as noted above, since the Written Ineligibility Notice provisions have been removed from the Final Amendment, the term ''Written Ineligibility Notice'' as used in this Section in the Proposed Amendment, now has been replaced with the term ''Prohibited Misconduct.''

Section I(j)—Requesting an Individual Exemption

The Proposed Amendment included a new Section I(k),[52] which provided that a QPAM that is ineligible or anticipates becoming ineligible may apply for supplemental individual exemption relief. The Proposed Amendment's Section I(k) instructed an applicant, as part of such a request, to review the Department's most recently granted individual exemptions involving Section I(g) ineligibility with the expectation that similar conditions will be required if an exemption is proposed and granted. Proposed Section I(k) also indicated that if an applicant wished to exclude any term or condition from its exemption, the applicant would need to accompany such request with a detailed explanation of the reason such change is necessary and in the interest of and protective of the Plan, its participants and beneficiaries, and IRA owners. Proposed Section I(k) indicated that the Department would review such requests consistent with the requirements of ERISA section 408(a) and Code section 4975(c)(2).

To facilitate the processing of an individual exemption application, proposed Section I(k) also instructed applicants to provide detailed information in their applications quantifying the specific cost or harms in dollar amounts, if any, that Plans would suffer if a QPAM could not rely on the exemption after the Transition Period, including the specific dollar amounts of investment losses resulting from foregone investment opportunities and any evidence supporting the proposition that investment opportunities would only be available to Plans on less advantageous terms.

Proposed Section I(k) also indicated that an applicant should not construe the Department's acceptance of an individual exemption application as a guarantee that the Department will grant an individual exemption. Therefore, a QPAM that submits an individual exemption application must ensure that it manages Plan assets prudently and loyally during the Transition Period with the understanding that final approval of an individual exemption is not guaranteed.

The Proposed Amendment reinforced that for the Department to make the necessary statutory findings under ERISA section 408(a) and Code section 4975(c)(2), applicants also should anticipate that the Department may condition individual exemptive relief on a certification by a senior executive officer of the QPAM (or comparable person) that: (1) all of the conditions of the Transition Period were met, and (2) an independent audit reviewing the QPAM's compliance with the conditions of the Transition Period has been completed.[53] QPAMs affected by a conviction also should not wait until late in the Transition Period to apply for an individual exemption.

The Department received a few comments on this new provision. One commenter noted that the conditions that have been incorporated into the most recent individual exemption that

[51] The Department capitalized the term in other Sections of the Final Amendment as well.

[52] Section I(k) of the Proposed Amendment has been renumbered in the Final Amendment as Section I(j).

[53] The Department additionally clarifies that the certification of the independent audit would come at some point after an individual exemption is granted and the One-Year Transition Period has ended.

apply to a particular QPAM may not be appropriately tailored to a subsequent application and fact pattern. Another commenter indicated that the Department is increasingly adopting onerous conditions for granting individual exemptions and seems even less likely to grant them. Yet another commenter opined that an ineligible QPAM may be unlikely to receive an individual exemption that is usable.

Considering the serious corporate criminal misconduct the Department has seen in Section I(g) individual exemption applications and audits submitted to the Department as required by granted individual exemptions, the Department remains convinced that the proper starting point for individual exemption conditions should be the Department's most recently-issued individual exemptions. This procedural standpoint is neither new nor undisclosed. For decades, the Department has generally crafted proposed exemptions for similarly situated applicants that contain similar conditions, subject to the Department's periodic reevaluation of the exemption conditions to ensure that they remain appropriately protective for the Department to make the findings required by ERISA section 408(a) and Code section 4975(c)(2).

The Department will consider the individual facts and circumstances of each application, but Section I(j) (formerly section I(k) in the Proposed Amendment) is intended to clearly provide the appropriate starting point for applicants that are preparing an exemption application in connection with Section I(g) ineligibility. Regarding the commenter's reference to the Department's onerous conditions, over the past decade, the Department's experience indicates that QPAM ineligibility under Section I(g) has occurred in most cases due to serious corporate criminal misconduct. The Department believes that it has tailored the conditions of the most recent Section I(g) individual exemptions to appropriately address the potential for significant financial harm to Plans, while providing workable relief. Moreover, if a QPAM is concerned about the usability of a Section I(g) individual exemption, then the QPAM, its Affiliates, and owners of a five (5) percent or more interest may structure their conduct to avoid engaging in transactions that are otherwise legally prohibited or rely on exemptions other than the QPAM Exemption to avoid the consequences that result from Section I(g) ineligibility.

The Department also notes that applicants may request more limited relief than the QPAM Exemption otherwise provides. For example, a QPAM may only need prohibited transaction relief for a particular limited category of transactions, such as an on-going lease that was entered into on behalf of an Investment Fund which is expected to continue past the One-Year Transition Period. In such circumstances, due to the limited nature of the transaction(s) for which relief is sought, applicants should discuss the terms and conditions of prior individual exemptions involving Section I(g) in connection with a request for more limited prohibited transaction relief. The applicant also should include a detailed explanation in its application regarding how Plans will be otherwise protected and why the transaction cannot be unwound before the end of the Transition Period without harm or losses to such Plans.

Finally, the Department reminds any applicant anticipating that it will need relief beyond the end of the One-Year Transition Period to apply to the Department for an individual exemption as soon as practicable. As a fiduciary, the QPAM has obligations with respect to Plans beyond those required by the QPAM Exemption and should approach the Department at the earliest point it appears a conviction will occur, such as when a plea agreement has been entered into—even if the conviction date has not yet been set—to ensure that appropriate steps can be taken by or on behalf of its client Plans ultimately impacted by the QPAM's loss of exemptive relief.

Section I(c)—Involvement in Investment Decisions by a Party in Interest

The Proposed Amendment included modifications to Section I(c) of the QPAM exemption that are consistent with the Department's original intent when granting the exemption. In the 1984 grant notice, the Department stated that an essential premise of the exemption is that broad prohibited transaction relief can be afforded only if the negotiations leading to, and the commitments and investments of, plan assets are the sole responsibility of an independent investment manager. The Department reasoned in the 1984 grant notice that the potential for decision making with regard to plan assets that would inure to the benefit of a party in interest would be increased if exemptive relief were provide in circumstances where the QPAM has less than ultimate discretion over acquisitions for an investment fund that it manages.[54]

The proposed new language in Section I(c) was intended to make clear that a QPAM must not permit a Party in Interest to make decisions regarding Plan investments under the QPAM's control. The Proposed Amendment included in the opening of Section I(c) a statement providing that the terms of the transaction, ''commitments, investment of fund assets, and any corresponding negotiations on behalf of the Investment Fund are the sole responsibility of the QPAM. . . .'' [55] The Department also proposed to add language at the end of Section I(c) stating that the prohibited transaction relief in the exemption applies ''only in connection with an Investment Fund that is established primarily for investment purposes'' and that ''[n]o relief is provided under this exemption for any transaction that has been planned, negotiated, or initiated by a Party in Interest, in whole or in part, and presented to a QPAM for approval because the QPAM would not have sole responsibility with respect to the transaction as required by this section I(c).'' [56] For example, as stated in 1982 proposal for the QPAM Exemption, a plan sponsor that negotiates a transaction and then presents it to a QPAM for approval would not qualify for the relief in the class exemption. The 1982 proposal further states that the relief in the proposed exemption would be available even though the transfer of assets by a plan to a QPAM is subject to general investment guidelines, so long as there is no arrangement, direct or indirect, for the QPAM to negotiate, or engage in, any specific transaction or to benefit any specific person.[57]

The Department received numerous comments regarding the proposed changes to the wording of Section I(c). Some of these commenters indicated their understanding of the Department's view that a QPAM should not act as a rubber stamp to approve transactions designed by the Party in Interest who appointed the QPAM. Similarly, commenters indicated they shared the goal of preventing the QPAM Exemption from being abused, *i.e.,* a QPAM being used to ''sanitize'' a transaction where there is an underlying goal to avoid the restrictions of the prohibited transaction rules. One commenter also indicated that it understood the Department has long maintained that QPAMs should not simply act as ''mere independent approvers'' but should be intimately involved in the negotiation and approval of the transaction. The

[54] 49 FR at 9497.

[55] 87 FR at 45227.

[56] *Id.*

[57] 47 FR at 56947.

commenter believed that this interpretation is widespread in the market and needs no clarification. Another commenter also indicated that the original QPAM Exemption was clear and understood by practitioners—a named fiduciary could not appoint a QPAM to approve a pre-negotiated transaction nor could the appointing fiduciary retain a veto or approval right over any transaction.

Commenters also raised a variety of other general issues and concerns with the proposed changes to Section I(c). One commenter noted that the Department has not identified any evidence of harm necessitating changes to the language of Section I(c). Another commenter suggested that any proposal to make changes to the way various Plan fiduciaries interact with QPAMs should be the subject of a separate, carefully crafted proposal with stakeholder input and regulatory cost analysis. A commenter also asked whether the Department's clarifications were meant to refer to Plan sponsors instead of a Party in Interest with no ability to meaningfully influence a transaction.

The Department has an ongoing interest and responsibility under ERISA section 408(a) and Code section 4975(c)(2) to revisit and update exemptions on an ongoing basis to ensure that that they maintain their protective purpose. Although Section I(a) of the exemption directly addresses Plan sponsors, Section I(c) provides additional protections that also apply to the Plan sponsor. These conditions are intended to work together, not separately, to prevent a Plan sponsor from attempting to influence a transaction. To the extent QPAMs are already fully complying with the Department's expectation of independent judgment, and not acting as mere rubber stamps, appropriate clarifying language should impose no additional burden. It is essential to the achievement of the exemption's aims, however, that the Department's expectations be clear in this regard.

Modifications to Section I(c) are appropriate to ensure the Department's intent is understood by practitioners, QPAMs, and their client Plans. It is also important for QPAMs to be mindful of the requirements of the exemption rather than simply deriving the benefits of calling themselves QPAMs while ignoring the QPAM Exemption's core requirements and protective intent. Moreover, the Department notes that Section I(c) requires the asset manager to act independently, as a general matter, from Plan sponsors and Parties in Interest. Without an overarching compliance-focused approach to its asset management arrangement and Section I(c), the protective purpose of ensuring the QPAM's independence is undermined.

Commenters raised a variety of other topics, such as: (1) the amount of permitted involvement by a Party in Interest/Plan sponsor in investment decisions, including voting proxies; (2) arrangements that involve multiple investment managers; (3) transactions initiated or negotiated by a Party in Interest; (4) sub-advisers and collective investment trusts; (5) pension risk transfers; (6) an Investment Fund established primarily for investment purposes; (7) eliminating all the changes in the Proposed Amendment; and (8) alternatives to the changes in the Proposed Amendment. The Department revised the wording of Section I(c) in this Final Amendment in response to some of these comments, as discussed below. However, the Department reemphasizes that the role of the QPAM under the terms of the exemption is not to act as a mere independent approver of transactions. Rather, the QPAM must have and exercise sole discretion over the commitments and investments of Plan assets and the related negotiations on behalf of the Plan with respect to an Investment Fund that is established primarily for investment purposes for the relief provided under the exemption to apply.

Involvement in Investment Decisions

One commenter opined that Plan sponsors and Plan fiduciaries should be able to have meaningful involvement in the process of negotiating an investment contract's investment guidelines without affecting the ability of the investment manager to rely on the QPAM Exemption. Another commenter requested that the Department clarify that routine monitoring meetings and inquiries by Plan fiduciaries with respect to a manager's trading strategies do not constitute ''planning.'' One commenter also requested clarification that nothing in the Proposed Amendment would prevent the trustees of multiemployer plans from retaining or delegating the right to vote proxies held by the QPAM, or to exercise other similar shareholder rights, even if such proxies or rights relate to investments in a Party in Interest.

The Department notes that routine monitoring of meetings and inquiries by Plan fiduciaries would not be considered ''planning'' for purposes of Section I(c). This type of involvement is consistent with a fiduciary's obligations under ERISA section 404 and the Department's prior guidance regarding investment guidelines that may be provided to the QPAM. For clarity, the Department is changing the word ''because'' to ''to the extent'' in the proposed sentence:

No relief is provided under this exemption for any transaction that has been planned, negotiated, or initiated by a Party in Interest, in whole or in part, and presented to a QPAM for approval because the QPAM would not have sole responsibility with respect to the transaction as required by this Section I(c).

That sentence now reads:

No relief is provided under this exemption for any transaction that has been planned, negotiated, or initiated by a Party in Interest, in whole or in part, and presented to a QPAM for approval to the extent the QPAM would not have sole responsibility with respect to the transaction as required by this Section I(c).

With respect to proxies and exercising other shareholder rights, the Department notes that the QPAM Exemption was never intended to cover transactions in which a Party in Interest is making the decisions pertaining to specific transactions. The possibility that Plan fiduciaries have been relying upon the QPAM Exemption for such transactions highlights one of the reasons the Department proposed changes to Section I(c). The Department would generally consider reliance on the QPAM Exemption in these cases to be an abuse or misuse of the QPAM Exemption.[58] Importantly, as the Department stated in the preamble of the original granted exemption in 1984, the Department ''does not interpret Section I(c) as exempting a subsidiary transaction unless such transaction is itself subject to relief under the class exemption and the applicable conditions are met.'' [59]

Multiple Investment Managers

Commenters indicated that Plan sponsors often hire multiple investment managers to execute the Plan's overall investment strategy with each manager being given certain assets to manage in a particular manner. And since only the Plan sponsor knows the overall strategy, it is natural and beneficial for the Plan sponsor to be able to have ongoing dialogues with their managers without those dialogues disqualifying the manager from serving as a QPAM.

The Department notes that the proposed changes to Section I(c) were not intended to prevent Plan sponsors

[58] Any parties that require more detailed guidance on the applicability of the QPAM Exemption to certain transactions may submit an advisory opinion request to the Department.

[59] 49 FR at 9497.

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

Initiating, Planning, and Negotiation Transactions

Many commenters raised concerns regarding the use of the word ''initiate'' in the Department's proposed changes to Section I(c). Some commenters expressed concern because Investment Fund transactions in derivatives or other investment products that are developed and pitched to a QPAM by a financial institution acting as a service provider to the QPAM—a common scenario in the derivatives market—could be interpreted as initiated by a Party in Interest. Commenters also indicated that even if a transaction is not of a type that is customarily negotiated, the counterparty Party in Interest would still be involved. A few commenters opined that the reference to a transaction being ''negotiated'' by the Party in Interest and then ''presented to a QPAM for approval'' is sufficient to achieve the Department's objective. Further, a commenter indicated that the proposed amendments mischaracterize the actual application of a QPAM's discretionary authority. This commenter indicated that if not eliminated, the terms ''planned,'' ''negotiated,'' and ''initiated'' should be clarified to address the Department's concerns more directly. For example, if the Department is concerned about the practice of hiring a QPAM for the sole purpose of approving a particular transaction already contemplated and/or negotiated by another Plan fiduciary, the Department should craft language more narrowly aimed at preventing this situation.

The Department notes that whether a particular sales pitch or an offer of an investment product from a Party in Interest would run afoul of the intent of Section I(c), including the proposed changes, depends on the associated facts and circumstances. It would be inappropriate for the Department to embed these facts and circumstances into an exemption condition, because the exemption would become unduly complex and unworkable. As a general matter in this regard, QPAMs should interpret the protective nature of Section I(c) expansively and avoid responding to any sales pitch or offer with respect to a proposed transaction that would call into question whether the QPAM is ultimately solely responsible for planning, negotiating, and initiating the transaction.

In order to further clarify this concept, the Department has added the following sentences to Section I(c): ''In exercising its authority, the QPAM must ensure that any transaction, commitment, or investment of fund assets for which it is responsible are based on its own independent exercise of fiduciary judgment and free from any bias in favor of the interests of the Plan sponsor or other parties in interest. The QPAM may not be appointed or relied upon to uncritically approve transactions, commitments, or investments negotiated, proposed, or approved by the Plan sponsor, or other parties in interest.''

Sub-Advisers and Collective Investment Trusts

A few commenters indicated that the Department's proposed language could be interpreted to restrict the use of sub-advisers by a QPAM, including in the context of collective investment trusts (CITs). Commenters indicated that utilizing sub-advisers to make recommendations for certain investments in which they specialize or possess expertise is important because a QPAM may otherwise be compelled to do its own research before investing Plan assets, even when the QPAM can more readily rely upon a sub-adviser with specialized expertise regarding certain types of assets. Commenters noted that QPAMs regularly delegate certain investment responsibilities to a sub-adviser but retain authority to approve transactions. With respect to CITs, commenters indicated that in order to comply with securities and banking laws, the sponsoring trust company generally retains ultimate investment authority, but typically appoints a sub-adviser who invests the CIT's assets on a day-to-day basis. Commenters felt the proposed revision to Section I(c) would present a structural conundrum for CITs and their providers given the standards imposed by the federal securities laws and OCC regulations. According to commenters, the proposed language requires that the QPAM have the ''sole authority'' over the transaction. Commenters indicated that neither the sponsoring trust company nor sub-adviser have the sole authority, although both are fiduciaries under ERISA and may need to rely on the QPAM Exemption.

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

Furthermore, parties that participate in arrangements that do not clearly identify which party has the ultimate responsibility and authority to engage in a particular transaction should not assume that the transaction is permitted by the QPAM Exemption. The Department recommends that affected parties involved in such transactions seek an advisory opinion or request other guidance from the Department regarding whether the QPAM Exemption is available for such transactions.

Pension Risk Transfers

One commenter suggested the proposed changes to Section I(c) could render the QPAM Exemption unavailable for pension risk transfers where a Plan purchases an annuity from an insurance company in connection with the termination of the Plan or to annuitize a subset of the Plan's participant population. The commenter did not provide specific details as to what aspects of proposed Section I(c) would potentially create problems for this type of transaction, however. The QPAM Exemption is designed to accommodate a broad range of prudent investment transactions, and the Department does not believe that the exemption poses any special impediment to such transactions as they may relate to pension risk transfers. If

the commenter's concerns remain after it considers the Department's modifications to Section I(c) in the Final Amendment, the affected parties may seek an advisory opinion or request other guidance from the Department regarding whether the QPAM Exemption is available for such transactions.

Fund Established Primarily for Investment Purposes

In connection with the Department's proposed language that the Investment Fund must be established primarily for investment purposes, one commenter requested the Department clarify that this includes a fund that is established for mixed-use purposes that contains an investment component. The commenter indicated the fund may have certain non-investment purposes, such as the payment of benefits and Plan expenses. Another commenter indicated that the QPAM Exemption long has been used by Plans to hire managers, as well as trustees, custodians, and recordkeepers, regardless of the type of Plan (pension, savings, or welfare).

The Department notes that a fund that contains only a minor investment component would not be eligible for the relief provided by the QPAM Exemption. This is true regardless of the Plan type. If a Plan has mixed-use purposes, the Plan sponsor should establish a separate account for any investments held directly by the Plan in order to rely upon the QPAM Exemption for that portion of the Plan's assets. Relatedly, a fund or other pool of Plan assets that contains no investment assets would not be able to rely upon the QPAM Exemption. However, as provided in Section I(c) of this Final Amendment, an Investment Fund that makes distributions and/or engages in other activities that are ancillary to the fund's primary investment purpose will not fail to be an Investment Fund established primarily for investment purposes. The Department provides this additional clarification in the Final Amendment because distributions and other ancillary services are generally necessary in order for investment funds to operate.

Recommended Alternatives

One commenter made a specific recommendation regarding the wording of Section I(c) that would specify that the QPAM ''represents the interest of the Investment Fund.'' The Department accepts this suggested modification in addition to the other modifications discussed above.

Another commenter suggested the Department should issue separate guidance on Section I(c) that makes clear that a QPAM is expected to act prudently on behalf of its Plan clients for any investment opportunity that the QPAM may become aware of and where the QPAM is not conflicted—regardless of how it became aware of the opportunity. The commenter added that as long as the QPAM has the ultimate discretionary authority and responsibility for deciding whether to enter into a given transaction, the QPAM should not be prohibited from transactions merely because such transaction is planned, negotiated, or initiated by a Party in Interest.

The Department believes many of the revisions to Section I(c) in this Final Amendment and related preamble discussion provide the requested guidance. If questions remain regarding the source of investment opportunities in relation to the QPAM's discretionary authority, the Department encourages interested parties to submit an advisory opinion request that details the particular facts and circumstances that raise issues under Section I(c).

Section VI(a)—Asset Management and Equity Thresholds

The QPAM Exemption was originally granted, in part, on the premise that large financial services institutions would be able to withstand improper influence from Parties in Interest. The Department included the asset management and equity thresholds in the exemption to set minimum size thresholds that would help ensure a QPAM would be able to withstand such influence. In 2005, the Department finalized an amendment to the QPAM Exemption that updated the asset management and shareholders' and partners' equity thresholds for registered investment advisers in the QPAM definition in subsection VI(a)(4).[60] In connection with that amendment, the Department indicated that the original thresholds ''may no longer provide significant protections for Plans in the current financial marketplace'' and adjusted the figures based on changes in the Consumer Price Index.[61]

The Department has determined that the same rationale necessitates further updates to the registered investment adviser thresholds and those of other types of QPAMs, such as banks and insurance companies, because they have not been updated since 1984. Therefore, the Department is adjusting all of the thresholds in Section VI(a) based on the original published figures in the 1984 grant notice. This will ensure that changes to the thresholds for all types of financial institutions reflect the same baseline change to the Consumer Price Index (*i.e.,* 1984 vs. 2021).[62]

The Proposed Amendment would have adjusted the $1,000,000 threshold in subsection VI(a)(1) through (3) to $2,720,000 and the assets under management threshold of $85,000,000 and the shareholders' and partners' equity and the broker-dealer net worth thresholds of $1,000,000 in subsection VI(a)(4) to $135,870,000 and $2,000,000, respectively. In this Final Amendment, the Department decided to increase the thresholds in three-year increments beginning in the year 2024 and ending in 2030. The final incremental adjustment will raise the thresholds to the amounts included in the Proposed Amendment. The incrementally adjusted threshold amounts are provided in subsection VI(a)(1) through (4) of the Final Amendment. By publication through notice in the **Federal Register** no later than January 31st every year, the Department will make subsequent annual adjustments for inflation to the Equity Capital, Net Worth, and asset management thresholds in subsection VI(a)(1) through (4) that are rounded to the nearest $10,000.

As a minor ministerial change, the Department proposed to replace the reference to ''Federal Savings and Loan Insurance Corporation'' with ''Federal Deposit Insurance Corporation'' in subsection VI(a)(2), because the Federal Savings and Loan Insurance Corporation was abolished by Congress in 1989, and its responsibilities were transferred to the Federal Deposit Insurance Corporation.[63] The Department received no comments on this ministerial change and retains it in this Final Amendment.

The Department received several comments regarding the proposed asset management and equity thresholds. One commenter noted that the proposed increases may have a material impact on the market for both small and large managers. The commenters stated the sudden increase in the thresholds could force small organizations out of the market, which would prevent small managers and start-up managers from utilizing the QPAM Exemption and put them at a competitive disadvantage.

[60] 70 FR 49305.

[61] Proposed Amendment to PTE 84–14, 68 FR 52419, 52423 (Sept. 3, 2003).

[62] For purposes of these changes, the Department used March 1984 and December 2021 as the relevant dates in the U.S. Bureau of Labor Statistics CPI Inflation Calculator available at: *https://www.bls.gov/data/inflation_calculator.htm.*

[63] *See* Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Public Law 101–73 (1989).

As the Department previously stated, the QPAM Exemption was never intended for small investment managers, and the exemption's minimum asset and equity thresholds are intended to ensure that the fiduciaries managing Plan assets are established institutions that are large enough not to be unduly influenced in their discretionary decision-making process by Parties in Interest. By spreading out the proposed increases occurring with this Final Amendment incrementally from 2024 through 2030, the impact of a sudden increase in the threshold will be greatly reduced. This longer implementation period will provide ample opportunity for QPAMs to prepare and be on notice that the thresholds are increasing in this manner and on an annual basis thereafter. The Department notes that small asset managers or start-ups can apply for individual exemptive relief to use the QPAM Exemption if they are detrimentally impacted by the Final Amendment's increase to the equity and asset thresholds, and the Department will consider those requests on a case-by-case basis. An individual exemption, if granted, would allow the Department to develop conditions for this circumstance that would ensure the QPAM retains the appropriate independence and the means to provide remedies to harmed Plans.

Another commenter stated that changes of such significance should not be undertaken in the absence of an identifiable harm or evidence supporting such harm to Plans, participants, and/or beneficiaries. The Department disagrees and notes that the original intent and protection of the exemption will erode if the asset and equity thresholds are allowed to become irrelevant with the passage of time. What was considered a large institution that could serve the protective purposes of the exemption in 1984 would not be considered sufficiently large by current standards. For the protective nature of the QPAM Exemption to remain effective and relevant, the Department must update the asset and equity thresholds to ensure that they keep pace with financial and economic growth in the marketplace.

A commenter suggested the Department should conduct a survey or issue a request for information designed to gather data necessary to make an informed decision as to whether the thresholds should be increased and, if so, to what extent. It is clear, however, that the asset and equity thresholds have not kept pace with the economic and financial growth of the marketplace, and the Department has undertaken a robust and thorough rulemaking process for this Final Amendment.

Another commenter recommended that at the least, the Department should grandfather QPAMs that met the pre-existing requirements and allow them to continue to rely on the QPAM Exemption. The Department declines to make this modification because allowing entities that fail to meet the thresholds to avail themselves of the relief in the QPAM Exemption would undermine the exemption's core purpose.

The Department received a comment stating that annual indexing of the equity and asset thresholds will create situations where an entity is a QPAM on one day, and not thereafter, leaving its client Plans in a precarious position if the Plans are invested in continuing transactions dependent on the QPAM Exemption. By incrementally increasing the asset and equity thresholds, the Department is effectively putting QPAMs on notice that the thresholds will increase according to a predictable metric (the CPI), which will provide an opportunity to prepare and manage their ERISA assets accordingly before the increases are fully implemented.[64]

Another comment stated that the indexing should only happen once every five years, with a one-year effective date transition. The Department declines to adopt this approach to the indexing. Five-year indexing periods could lead to substantial deficiencies with respect to QPAMs' compliance with the equity and threshold requirements of this exemption. As a general matter, asset managers seeking to rely on this exemption should be constantly aware of all the requirements of this exemption, including the equity and threshold requirements, and take appropriate action in response to the risk of non-compliance, including by not engaging in prohibited transactions or by relying on and complying with alternative exemptions. Further, the current asset and equity thresholds are very outdated, and their ineffectiveness would be exacerbated by waiting an additional five years to increase them.

Finally, a commenter recommended that the Department clarify that the new dollar thresholds published by January 31st annually in the **Federal Register** will not be applicable until January 1st of the following year. The Department has made this clarification in the Final Amendment by providing that each increase in the thresholds will be effective as of the last day of the QPAM's fiscal year in which the increase takes effect. The Department also will include the annual notice of increases on the class exemption section of EBSA's website.[65]

Section VI(u)—Recordkeeping

The Proposed Amendment also included a new recordkeeping requirement in Section VI(t), which would require QPAMs to maintain records for six years demonstrating compliance with this exemption. The Recordkeeping requirement has been redesignated as Section VI(u) in this Final Amendment.[66] The Department proposed this addition to make the QPAM Exemption consistent with other exemptions that generally impose a recordkeeping requirement on parties relying on an exemption and to ensure they will be able to demonstrate, and that the Department will be able to verify, compliance with the exemption conditions.

The Recordkeeping requirement of the Proposed Amendment would require that the records be kept in a manner that is reasonably accessible for examination. The records must be made available, to the extent permitted by law, to any authorized employee of the Department or the Internal Revenue Service or another federal or state regulator; any fiduciary of a Plan invested in an Investment Fund managed by the QPAM; any contributing employer and any employee organization whose members are covered by a Plan invested in an Investment Fund managed by the QPAM; and any participant or beneficiary of a Plan and an IRA Owner invested in an Investment Fund managed by the QPAM.

QPAMs also would be required to make such records reasonably available for examination at their customary location during normal business hours. Participants and beneficiaries of a Plan, IRA owners, Plan fiduciaries, and contributing employers/employee organizations would be able to request only information applicable to their own transactions and not a QPAM's privileged trade secrets or privileged commercial or financial information, or confidential information regarding other individuals. If the QPAM refuses to disclose information to a party other than the Department on the basis that

[64] This includes possibly seeking individual exemption relief in such circumstances.

[65] Available at: *https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/exemptions/class.*

[66] The Department moved the definition of ''Participating In'' that appeared in Section I(g)(3) of the Proposed Amendment into the Definitions and General Rules at Section VI(t) of this Final Amendment.

the information is exempt from disclosure, the Department would require the QPAM to provide a written notice, within 30 days, advising the requestor of the reasons for the refusal and that the Department may request such information. The requestor would then be able to contact the Department if it believes it would be useful for the Department to request the information.

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

The Department received several comments opposing the Proposed Amendment's recordkeeping requirement. Some commenters indicated that the specific recordkeeping requirements are unnecessary given the existing recordkeeping requirements under ERISA section 107. Other commenters added that the requirement does not add materially to the protective provisions already in place in the exemption and unnecessarily increases regulatory compliance costs. Commenters also pointed to other status-based exemptions that do not impose any recordkeeping requirement on a transaction-by-transaction basis, while others, like the insurance company general account exemption (PTE 95–60)[67] and INHAM exemption (PTE 96–23)[68] do not have a recordkeeping requirement at all.

Some commenters noted that only the Department (with respect to ERISA Title I plans) and the IRS (with respect to ERISA Title II plans, including IRAs) have the authority to enforce the terms of the QPAM Exemption. Therefore, those commenters argued that requiring that records be made available to employers, unions, and participants, beneficiaries, and IRA owners, raises the risk of unnecessary litigation and could cause QPAMs to increase the fees they charge to Plans as a result. One commenter added that there are practical reasons why having to retain records sufficient for a determination of compliance is unworkable or otherwise not cost effective. For example, a commenter argued that despite the Department's expectation that the recordkeeping requirements would impose a negligible burden, this requirement will, in fact, prove burdensome and costly because QPAMs will need to be able to demonstrate compliance for every transaction and, in some cases, to prove a negative. Another commenter asked for a simplified recordkeeping requirement that would require QPAMs to undertake prudent efforts to maintain accurate records reflecting their QPAM duties and responsibilities while another commenter suggested the Department should modify the Proposed Amendment to require process-based records of compliance rather than transactional records. Another commenter asked for clarification that the six-year recordkeeping requirement does not create any new obligation to document the basis for satisfaction of the exemption conditions. One commenter indicated it is unclear what it means to ''verify'' compliance with the conditions of the QPAM Exemption.

The Department's response to these comments is that these concerns are overstated and inconsistent with how recordkeeping requirements operate in prohibited transaction exemptions. The extent to which transaction-by-transaction records are necessary depends on the facts and circumstances. The Department often includes a recordkeeping requirement in its administrative prohibited transaction exemptions to ensure that the parties relying on an exemption can demonstrate, and the Department can verify, compliance with the exemption's conditions. Given the broad relief provided by this exemption, including a specific recordkeeping requirement is necessary for the Department to verify that the exemption conditions are being satisfied rather than relying on ERISA's general recordkeeping requirement to maintain records. Given the large number and variety of transactions entered into in reliance on the QPAM Exemption, the Department did not intend for this provision to require transaction-by-transaction recordkeeping. Rather, the condition is focused on requiring the QPAM to retain records satisfactory to prove compliance with the applicable conditions for any section of the exemption the QPAM relied upon, such as satisfying the definition of QPAM, and records supporting the limitation on the involvement of Parties in Interest in investment transactions. The QPAM's reliance on specific transactions covered by Sections II through V of the exemption will require it to maintain more detailed records such as, but not limited to, copies of leases, sales agreements, service contracts, audit reports, policies and procedures, and detailed descriptions of real estate. Financial institutions are accustomed to keeping records of their transactions as a part of their regular business practices and generally have recordkeeping systems already in place.

Additionally, a commenter noted that the National Bank visitorial powers provision and the Office of the Comptroller of the Currency (OCC) regulations would prevent Plan investors from accessing the records of national banks and federal savings associations. The commenter asserted that this could lead to an unintended discriminatory effect between these banks and state-chartered banks, which may not have the same available safeguards on the release of a QPAM bank's records. The Department notes that if the OCC regulations, in fact, bar Plan investors from accessing this information, that is no reason to bar others from accessing the records. If the commenter's purported restriction on access to national bank records is meaningful to Plan sponsor fiduciaries, then they are free to choose a QPAM that is not restricted from providing access to such records.

One commenter asked the Department to withdraw the recordkeeping requirement entirely, or if not, to modify it to be consistent with the recordkeeping requirement in PTE 2020–02. As stated above, the Department often includes a recordkeeping condition in administrative prohibited transaction exemptions to ensure compliance with the exemption. The recordkeeping requirement in PTE 2020–02 was developed specifically for that exemption and the specific relief for investment advice provided pursuant to certain conditions.

A commenter also requested that the 30-day window for producing records should be expanded to at least 90 days and a QPAM should have 90 days to provide notice of grounds for non-production. The Department notes that because QPAMs are fiduciaries, the Department is unpersuaded that additional time is necessary or consistent with the QPAM's fiduciary status. The Department believes a longer period would be required only if a QPAM is not already maintaining the records necessary to demonstrate compliance with this condition. To allow a QPAM additional time to produce, or indicate that it is not producing, records would be directly contrary to the purpose of the recordkeeping condition.

[67] As amended and restated at 87 FR 12985, 12996 (Mar. 8, 2022).

[68] As amended and restated at 76 FR 18255 (Apr. 1, 2011).

Other Ministerial Changes

The Department did not receive any comments regarding the ministerial changes in the Proposed Amendment. Therefore, the Department is finalizing the proposed ministerial changes as proposed, which include: (1) changing the headings of each portion of the exemption from ''Part'' to ''Section,'' (2) removing many internal cross-references to definitional provisions and instead capitalizing the terms used in those definitional provisions throughout the exemption,[69] and (3) adding internal references to ''above'' and ''below'' throughout to direct readers where to find certain cross-referenced provisions.

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

Regulatory Impact Analysis

The Department has examined the effects of the Final Amendment as required by Executive Order 12866,[70] Executive Order 13563,[71] the Congressional Review Act,[72] the Paperwork Reduction Act of 1995,[73] the Regulatory Flexibility Act,[74] section 202 of the Unfunded Mandates Reform Act of 1995,[75] and Executive Order 13132.[76]

Executive Order 12866 (Regulatory Planning and Review), Executive Order 14094 (Modernizing Regulatory Review), and 13563 (Improving Regulation and Regulatory Review)

Under Executive Order 12866 (as amended by Executive Order 14094), the Office of Management and Budget (OMB)'s Office of Information and Regulatory Affairs determines whether a regulatory action is significant and, therefore, subject to the requirements of the executive review by OMB. As amended by Executive Order 14094, section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as a regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of $200 million or more; 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 impact of entitlements, 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. OMB has determined that the Final Amendment is a significant regulatory action under Section 3(f)(1) of Executive Order 12866.

Executive Order 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; the regulation is tailored to impose the least burden on society, consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, the agency has selected those approaches that maximize net benefits. Executive Order 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitative values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

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

Need for Regulation

Substantial changes have occurred in the financial services industry since the Department granted the QPAM Exemption in 1984. Today's asset management industry has been marked by industry consolidation and an increasingly global reach. As a result, QPAM affiliations and investment strategies, including those involving Plan assets, have changed significantly since 1984. This Final Amendment updates some of the key elements of the QPAM Exemption to ensure that Plans affected by the exemption remain protected in light of the changes in the industry, and that the QPAM Exemption remains consistent with the original intent.

The Final Amendment addresses ambiguity as to whether foreign convictions are included in the scope of the ineligibility provision under Section I(g). QPAMs today often have corporate or relationship ties to a broad range of entities, some of which are located internationally. Additionally, some global financial service institutions may be headquartered, or have parent entities, in foreign jurisdictions. These entities may have significant control and influence over the operation of all entities within its organizational structure, including those operating as QPAMs. Moreover, the international ties of QPAMs extend to their investment strategies, including those involving Plan assets.

The Final Amendment also expands ineligibility to include QPAMs (and as applicable, an Affiliate or owner of a five (5) percent or more interest) that Participate In Prohibited Misconduct, such as conduct that has resulted in QPAMs entering into an NPA or DPA with a U.S. federal or state prosecutor's office or regulatory agency; a systematic pattern or practice of violating the exemption's conditions; intentionally violating the exemption's conditions in connection with otherwise non-exempt prohibited transactions; or providing materially misleading information to the Department and other regulators in connection with the exemption conditions. The Final Amendment ensures that QPAMs are not able to avoid the conditions related to integrity and ineligibility that are central to the QPAM Exemption by entering into NPAs and DPAs with prosecutors to side-step the consequences that otherwise would result from a Criminal Conviction. Plans may suffer significant

[69] However, for the sake of clarity, cross-references have been retained for the term ''Affiliate'' because it is defined in different ways under Section VI(c) and (d) of the exemption.

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

[71] Improving Regulation and Regulatory Review, 76 FR 3821 (Jan. 21, 2011).

[72] 5 U.S.C. 804(2) (1996).

[73] 44 U.S.C. 3506(c)(2)(A) (1995).

[74] 5 U.S.C. 601 *et seq.* (1980).

[75] 2 U.S.C. 1501 *et seq.* (1995).

[76] Federalism, 64 FR 43255 (Aug. 10, 1999).

harm if they are exposed to serious misconduct committed by unscrupulous firms or individuals that ultimately results in an NPA or DPA rather than Criminal Conviction and consequent ineligibility under Section I(g). Likewise, intentionally or systematically violating the exemption conditions exposes Plans to significant potential harm caused by the misconduct of those with influence or control over managing the investment of their assets. In the Department's view, QPAMs, and those in a position to influence or control a QPAM's policies, that repeatedly engage in serious misconduct do not display the requisite standards of integrity necessary to provide the protection intended for Plans that they are responsible for under the exemption.

Through its administration of the individual exemption program, the Department also determined that certain aspects of the QPAM Exemption would benefit from a focus on mitigating potential costs and disruption to Plans that occurs when a QPAM becomes ineligible for the exemptive relief because of ineligibility under Section I(g). The Final Amendment requires QPAMs to provide a One-Year Transition Period to its client Plans to avoid unnecessary disruptions to Plans that could occur upon a Criminal Conviction or for Participating In Prohibited Misconduct. The Transition Period will help bridge the gap between the QPAM Exemption and the Department's administration of its individual exemption program in connection with Section I(g) ineligibility.

The Department believes the changes to Section I(c) in the Final Amendment are needed to clarify and remind QPAMs and Parties in Interest of the level of involvement Parties in Interest may have in investment decisions and prevent possible abuses of the exemption.

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

Finally, the Final Amendment adds a recordkeeping requirement to ensure QPAMs will be able to demonstrate, and the Department will be able to verify, compliance with the exemption conditions. This requirement is similar to a recordkeeping requirement the Department generally includes in its individual Section I(g) exemptions.

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

Affected Entities

The Final Amendment affects financial institutions acting as a QPAM, and client Plans of QPAMs, including their participants and beneficiaries.

Qualified Professional Asset Managers (QPAMs)

As discussed above in this preamble, to qualify as a QPAM, the financial institution must be a bank, savings and loan association, insurance company, or a registered investment adviser that meets specified standards regarding financial size. The financial institution must also acknowledge in a Written Management Agreement (WMA) that it is a fiduciary with respect to each Plan that retains it as a QPAM. Before this Final Amendment, the following entities were able to act as a QPAM under the terms of the exemption:

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

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

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

(4) Investment advisers—registered under the Investment Advisers Act of 1940 with total client assets under management in excess of $85,000,000 and either (1) shareholders' or partners' equity in excess of $1,000,000 or (2) payment of liabilities guaranteed by an affiliate, another entity that could qualify as a QPAM, or a broker-dealer with net worth of more than $1,000,000.

As amended, the thresholds in Section VI(a) will be indexed to the CPI, rounded to the nearest $10,000. The amendment will update these thresholds based on the price inflation since 1984. The increases in thresholds will be phased-in incrementally between 2024 and 2030. This Final Amendment increases the thresholds as follows:

(1) Banks—as defined in section 202(a)(2) of the Investment Advisers Act of 1940, with equity capital in excess of $1,570,300 effective as of the last day of the fiscal year ending no later than December 31, 2024, $2,140,600 effective as of the last day of the fiscal year ending no later than December 31, 2027, and $2,720,000 effective as of the last day of the fiscal year ending no later than December 31, 2030.

(2) Savings and loan associations—the accounts of which are insured by the Federal Deposit Insurance Corporation, with equity capital or net worth in excess of $1,570,300 as of the last day of the fiscal year ending no later than December 31, 2024, $2,140,600 effective as of the last day of the fiscal year ending no later than December 31, 2027, and $2,720,000 effective as of the last day of the fiscal year ending no later than December 31, 2030.

(3) Insurance companies—subject to supervision under state law, with net worth in excess of $1,570,300 effective as of the last day of the fiscal year ending no later than December 31, 2024, $2,140,600 effective as of the last day of the fiscal year ending no later than December 31, 2027, and $2,720,000 effective as of the last day of the fiscal year ending no later than December 31, 2030.

(4) Investment advisers—registered under the Investment Advisers Act of 1940 with total client assets under management in excess of $101,956,000 effective as of the last day of the fiscal year ending no later than December 31, 2004, $118,912,000 effective as of the last day of the fiscal year ending no later than December 31, 2027, and $135,868,000 effective as of the last day of the fiscal year ending no later than December 31, 2030. In addition, the investment adviser must either have shareholders' or partners' equity—or payment of liabilities guaranteed by an affiliate, another entity that could qualify as a QPAM, or a broker-dealer with net worth—in excess of $1,570,300 effective as of the last day of the fiscal year ending no later than December 31, 2024, $2,140,600 effective as of the last day of the fiscal year ending no later than December 31, 2027, and $2,720,000 effective as of the last day of the fiscal year ending no later than December 31, 2030.

The Department will make subsequent annual adjustments for inflation to the equity capital, net worth, and asset management thresholds, rounded to the nearest $10,000, no later than January 31st of each year by publication of a notice in the **Federal Register**.

QPAMs that met the *prior* thresholds, but that otherwise will not meet the new threshold requirements, will also be

affected by the Final Amendment, because they no longer will be able to rely on the QPAM Exemption.[77] The Department proposed introducing the entire increase at the end of the first year after granting the amendment. However, after considering comments received in response to the Proposed Amendment, the Department decided to implement the increase incrementally over three-year periods, which provides Plans and QPAMs with significantly more time to adjust and prepare if the QPAM is unable to continue meeting the updated thresholds.

Several comments on the Proposed Amendment stated that the Department underestimated the number of QPAMs in the economic analysis for the Proposed Amendment, with one commenter remarking that the actual number of QPAMs was likely 10 to 20 times larger than the Department's original estimate of 616 QPAMs.[78] Another commenter estimated that more than 90 percent of investment managers investing Plan assets rely on the QPAM Exemption. They recommended an alternative estimation methodology that involved multiplying the number of investment managers reported on the Form 5500 Schedule C by 90 percent.[79] This results in an estimate of 3,876 QPAMs.[80] After considering these comments, the Department has revised its estimates as described below.

Multiple QPAMs can exist within the same organizational hierarchy. Accordingly, when estimating the effect of this exemption, the Department focused not on the firm level, but rather at each distinct entity within the organizational hierarchy providing services as a QPAM. For example, multiple subsidiaries under a parent company may act as QPAMs in addition to the parent company itself. The methodology suggested by the commenter would count each subsidiary and the parent company itself as if each were acting as separate QPAMs. Therefore, to estimate the number of QPAMs, the Department identified the number of unique entities that provided investment management services in the 2020 Form 5500 Schedule C dataset.[81] This analysis yielded 5,702 unique investment managers.

Small Plans are not required to file a Schedule C; therefore, in order to account for asset managers used by small Plans, the Department looked at the Form 5500 Schedule C that were voluntarily filed by small Plans. Among the 1,267 small Plans that filed a Schedule C, the Department found 10 unique asset managers that were not used by large Plans. Applying this ratio to the universe of small Plans, the Department estimates that 5,153 additional unique QPAMs may be used by small Plans.[82] The Department believes that this adjustment likely overstates the number of unique asset managers servicing the universe of small Plans because it assumes unique asset managers would continue to be found at the same rate for the entire universe, but the Department is using this estimate to derive a conservative estimate for purposes of this analysis. Therefore, based on the foregoing, the Department estimates that 10,855 unique QPAMs could be affected by the Final Amendment.[83]

Several comments expressed concern that the proposal would decrease the number of entities acting as QPAMs due to the costs and risks associated with the proposed requirements to add penalty-free withdrawal and indemnification provisions for QPAMs that become ineligible due to a Section I(g) triggering event. In response, the Department moved these conditions into the transition provision of the Final Amendment so that only QPAMs that experience an ineligibility trigger will be required to agree to these provisions with their client Plans. Based on this revision, the Department expects that the Final Amendment will not have a significant effect on the number of entities acting as QPAMs.

Plans, Participants, Beneficiaries, and IRA Owners

The Final Amendment will affect Plans whose assets are held by an Investment Fund that is managed by a QPAM. The Department does not collect data on Plans that use QPAMs to manage their assets. In the proposal, the Department estimated that a single QPAM would service, on average, 32 client Plans.[84] A few commenters stated that the Department underestimated the number of Plans that have hired a QPAM. Commenters remarked that investment managers may manage assets for hundreds to thousands of Plans, while one commenter stated that the largest investment managers manage assets for between 2,000 and 4,000 client Plans.[85] Another commenter estimated that the average number of contracts per QPAM is 14,180 with a median of 14,500 based on the number of QPAMs that are members of its association.[86]

In response to these comments, the Department conducted further analysis on QPAM-Plan relationships. In its analysis of the 2020 Form 5500, the Department found that the largest QPAMs can have thousands of client Plans, with the largest having 3,158 clients. However, the average number of client Plans per QPAM was significantly lower. Examining the number of unique QPAM-Plan relationships within the Form 5500 universe, the Department estimates that there are 547,546 client Plans with QPAM relationships, resulting in an average of 50 client Plans per QPAM.[87] Additionally, the Department estimates that 215,135 unique Plans have a relationship with a QPAM.[88]

[77] As noted earlier in this preamble, such QPAMs may submit an individual exemption application requesting relief to continue relying upon the QPAM Exemption.

[78] Comment submitted by SIFMA on 11 October 2022. (*See https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA07/00009.pdf*).

[79] Comment submitted by the Seward and Kissel. (*See https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA07/00025.pdf*).

[80] In the 2020 Form 5500, the Department identified 4,307 unique investment managers providing services under service code 28 (investment management) to Plans. This is estimated as: $4,307 \times 90\% = 3,876$. As discussed later in this section, small Plans do not file the Form 5500 Schedule C, so relying solely on the Form 5500 Schedule C will likely underestimate the number of QPAMs.

[81] The Department included service providers that were listed under service codes 28 (investment management), 51 (investment management fees paid directly by the plan), or 52 (investment management fees paid indirectly by the plan).

[82] If the ratio of 10 unique providers for 1,267 small Plans is held constant for the whole universe of small plans, then that would indicate a further $(10/1,267) \times 652,934 = 5,153$ additional unique QPAMs used exclusively by small Plans.

[83] The number of unique QPAMs is calculated as: 5,702 QPAMs found on the 2020 Form 5500 Schedule C + 5,153 QPAMs estimated as servicing exclusively small Plans = 10,855 QPAMs.

[84] 87 FR at 45220.

[85] Comment submitted by SIFMA on 11 October 2022. (*See https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA07/00009.pdf*).

[86] Comment submitted by the American Bankers Association on 6 January 2023. (*See https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA07-2/00142.pdf*).

[87] In the 2020 Form 5500, the Department found 64,216 QPAM relationships amongst a total of 87,559 Plans that filed the Form 5500 Schedule C. To estimate the number of total Plans with QPAM relationships, the Department applies this ratio to the entire Plan universe. This assumption implies that small plans have the same number of relationships with QPAMs as the larger plans that file Schedule C. The number of total Plans with QPAM relationships is estimated as: $(64,216/87,559) \times 746,610 = 547,566$ Plan client relationships. This equates to an average of 50 clients per QPAM, calculated as: 547,566 Plan client relationships/10,855 unique QPAMs = 50.44 Plan clients per QPAM, rounded to 50.

[88] In the 2020 Form 5500, the Department found 25,230 unique plans using QPAMs among amongst a total of 87,559 Plans that filed the Form 5500

While this estimate is larger than the Department's estimate for the Proposed Amendment, it is substantially smaller than the estimates provided by the commenters. The Department believes variance in the estimates is likely due to the definition of Investment Fund in the exemption and the various ways Plans may invest through those funds, including as individual investment options for participant-directed plans. The Department does not have sufficient data to differentiate between single and pooled customer funds and/or whether those funds are provided to different types of plans, such as defined benefit plans or defined contribution plans (including individual account plans).

The Department reiterates that the scope of this exemption, and the unit of analysis, is each distinct legal entity. A firm can have multiple distinct legal entities that all act as QPAMs. The number of clients per entity would be expected to be lower than the number of client Plans per firm. The commenters did not clarify the types of Plans or arrangements they were considering in connection with the estimates they provided.

The definition of ''Plan'' also includes IRAs, and therefore, the Final Amendment also affects IRA owners who hire a discretionary asset manager that is a QPAM or invest in a pooled fund that relies upon a QPAM. In 2020, nearly 65 million U.S. taxpayers had an IRA.[89] A survey of U.S. households conducted by the Investment Company Institute found that approximately half of the households with a traditional IRA consulted a professional financial adviser on how to manage income and assets in retirement.[90] The Department does not have data on the proportion of IRAs that rely on a discretionary asset manager; however, the Department assumes that such relationships are rare or that the involvement of a QPAM is through a pooled investment fund managed on a discretionary basis. The Department did not receive any comments concerning the number of IRA owners that would be affected.

Accounting Table

In accordance with OMB Circular A–4, Table 1 summarizing the Departments' assessment of the benefits, costs, and transfers associated with this regulatory action in an accounting statement. The Department is unable to quantify all benefits, costs, and transfers of this Final Amendment but has sought, where possible, to describe qualitatively all non-quantified impacts.

Many of the expected benefits to Plans and their participants and beneficiaries stem from provisions in the Final Amendment that will impose minimal or no costs on QPAMs but will benefit them by providing more certainty, protection, and transitional support, such as the provision clarifying that foreign convictions are included in Section I(g), clarification that QPAMs must not permit other Parties in Interest to make decisions regarding Plan investments under the QPAM's control, and the addition of a One-Year Transition Period for Plans after an ineligibility trigger under Section I(g) has occurred.

TABLE 1—ACCOUNTING STATEMENT

Benefits:

Non-Quantified:

- Ensure the QPAM's integrity is enhanced compared to the regulatory baseline before the Final Amendment, which will protect Plans affected by the exemption better than prior Section I(g).
- Provide more clarity, certainty, protection, and transitional support for client Plans of an ineligible QPAM.
- Update the asset management and equity thresholds to ensure that QPAMs are sufficiently large to be able to withstand improper influence from Parties in Interest.

Costs	Estimate	Year dollar	Discount rate (%)	Period covered
Annualized Monetized ($Million/year)	$1.56	2023	7	2024–2033
	1.44	2023	3	2024–2033

Quantified Costs:

- Quantified costs include rule familiarization, the QPAM's adoption of additional protections after an ineligibility trigger occurs, satisfying the exemption's record-keeping requirements, and individual exemption application costs for entities losing eligibility due to Participating In Prohibited Misconduct.

Non-Quantified Costs:

- QPAMs that become ineligible for Participating In Prohibited Misconduct may incur costs associated with indemnifying their client Plans for ''actual'' losses if they move to a new asset manager.
- Some Plans may incur costs if they conduct a request for proposal sooner than they otherwise would have if their asset manager no longer qualified as a QPAM due to the updated equity and asset thresholds in the Final Amendment.

Transfers:

Non-Quantified:

- Client Plans of ineligible QPAMs may choose to transfer assets and revenue away from the ineligible asset managers to its competitors when a QPAM becomes ineligible due to occurrence of a Section I(g) triggering event.

Benefits

The new and amended conditions will benefit Plans and their participants and beneficiaries by providing more clarity, certainty, protection, and transitional support. The heightened standards in this Final Amendment may result in entities being more careful about ensuring that their compliance programs are sufficiently robust to prevent Prohibited Misconduct or Criminal Convictions from occurring. In this respect, the exemption would provide clear guardrails that would make the costs associated with QPAMs

Schedule C. To estimate the number of total Plans with QPAM relationships, the Department applies this ratio to the entire Plan universe. This assumption implies that small plans use QPAMs at the same rate as the larger plans that file Schedule C. the number of unique plans using QPAMs is estimated as (25,230/87,559) × 746,610 = 215,135.

[89] Internal Revenue Service. ''SOI Tax Stats—Accumulation and distribution of Individual Retirement Arrangements (IRA).'' Table 1. (2020). *https://www.irs.gov/statistics/soi-tax-stats-accumulation-and-distribution-of-individual-retirement-arrangements.*

[90] The study found that 67 percent of traditional IRA-owning households have a strategy for managing income and asset in retirement and that 77 percent of those households consulted with a professional financial advisor on how to manage income and assets. The percent of IRA-owning households that consulted with a professional financial advisor is estimated as: 67% × 77% = 52%. (*See* Investment Company Institute. ''The Role of IRAs in US Households' Saving for Retirement, 2022.'' *ICI Research Perspective:* Vol. 29, No. 1. (February 2023). *https://www.ici.org/system/files/2023-02/per29-01_0.pdf.*)

becoming ineligible clearly avoidable. The specific benefits expected to result from the rulemaking are discussed below.

Ineligibility Due to Foreign Criminal Convictions—Subsection I(g)(1)(A) and Subsection VI(r)(2)

One of the primary underlying principles of the QPAM Exemption is that any entity acting as a QPAM, or that is in a position to influence a QPAM's policies, should maintain a high standard of integrity.[91] This principle is called into question when a QPAM, or an entity that may be in a position to influence its policies, is convicted of certain crimes. With this concern in mind, the Department makes entities ineligible for the prohibited transaction relief in the QPAM Exemption as of the date of the trial court judgment for any of the crimes listed in Section VI(r).[92]

The baseline version of the exemption did not explicitly address foreign convictions. Since the initial grant of the QPAM Exemption, the Department has granted ten individual exemption requests from QPAM applicants in connection with a foreign conviction, the first being in 2000.[93] The amended exemption directly references foreign-equivalent crimes, clarifying that a conviction ''by a foreign court of competent jurisdiction or released from imprisonment, whichever is later, as a result of a crime, however denominated by the laws of the relevant foreign government'' will be considered a Criminal Conviction for purposes of ineligibility under Section I(g).

The Department believes this clarification in the Final Amendment aligns the QPAM Exemption with the realities of modern investment practices engaged in by many Plans. Further, it removes all doubt that foreign-equivalent crimes are a basis for ineligibility, providing necessary protections for Plans as required by ERISA section 408(a) and Code section 4975(c)(2). This ultimately provides a benefit to a QPAM's client Plans and their participants and beneficiaries that rely upon QPAMs that are owned by or affiliated with entities operating in foreign jurisdictions by not depriving them of the protection provided by the amendment to this exemption, particularly including the indemnification and penalty-free withdrawal conditions in the Transition Period provisions.

Ineligibility Due to Participating In Prohibited Misconduct—Subsection I(g)(1)(B) and Section VI(s)[94]

To reinforce the Department's premise regarding the integrity standard, the Department is expanding the circumstances that lead to ineligibility. The Final Amendment extends ineligibility under Section I(g)(1)(B) to include QPAMs and their Affiliates and owners of a five (5) percent or more interest that ''Participate In'' Prohibited Misconduct. A more in-depth discussion on how the Department narrowed the scope of entities whose ''Prohibited Misconduct'' could lead to ineligibility in the Final Amendment is provided in an earlier section of this preamble.

This extension of Section I(g) ineligibility will strengthen the protections to Plans and their participants and beneficiaries that rely upon QPAMs. The unamended exemption leaves Plans and their participants and beneficiaries vulnerable to the activities of corporate families with significant compliance failures that pose equal risk of loss to Plan assets. Additionally, the Department expects that this Final Amendment will prevent unfair and unequal treatment of entities and corporate families that have a record of engaging in malfeasance that ultimately may not result in a Criminal Conviction.

Mandatory One-Year Transition Period—Section I(i)

Under the previous and amended text of Section I(g), the immediate ineligibility of a QPAM upon a judgment of conviction may expose Plans to potential costs and losses without the necessary time to make alternative investment arrangements. Before this Final Amendment, the only way to avoid immediate ineligibility after a conviction was for the QPAM to submit an individual exemption application to the Department requesting relief to continue relying upon the QPAM Exemption. The QPAM's client Plans had no additional protections under the baseline version of the exemption to address the immediate loss of the QPAM Exemption.

The Transition Period included in the Final Amendment is designed to benefit client Plans by guarantying transitional relief and protections if they decide to wind-down their arrangements with a QPAM that becomes ineligible. The Transition Period ensures that responsible Plan fiduciaries have the time and ability to choose an alternative discretionary asset manager or investment strategy without incurring undue costs. If Plan fiduciaries decide to retain an ineligible QPAM as a discretionary asset manager, the One-Year Transition Period will provide Plan fiduciaries with time to determine and prepare for any changes that may become necessary for Plan investments.

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

Requesting an Individual Exemption—Section I(j)

In addition to providing more certainty to QPAMs and Plans, the Final Amendment also requires QPAMs that seek individual exemption relief to review the Department's most recently granted individual exemptions with the expectation that similar conditions will be required if an exemption is proposed and granted. If an applicant requests the Department to exclude any term or condition from its exemption that is included in a recently issued similar individual exemption, the applicant must accompany such request with a detailed explanation of the reason such change is necessary, in the interest of, and protective of the Plans and their participants and beneficiaries. Applicants also should provide detailed information in their applications quantifying the specific cost in dollar amounts, if any, of the harms Plans would suffer if a QPAM could not rely on the exemption after the Transition Period.

Currently, the Department requests such information from an applicant if it does not include such information in its exemption application requesting extended relief under the QPAM Exemption when the QPAM becomes ineligible. Therefore, this provision will streamline the application process and reduce costs because there will be fewer back-and-forth discussions between the Department and the applicant.

[91] 47 FR at 56947.

[92] Criminal Conviction as defined in Section VI(r) of this Final Amendment.

[93] *See* Prohibited Transaction Exemption (PTE) 2023–13, 88 FR 26336 (Apr. 28, 2023); PTE 2020–01, 85 FR 8020 (Feb. 12, 2020); PTE 2019–01, 84 FR 6163 (Feb. 26, 2019); PTE 2016–11, 81 FR 75150 (Oct. 28, 2016); PTE 2016–10, 81 FR 75147 (Oct. 28, 2016); PTE 2012–08, 77 FR 19344 (March 30, 2012); PTE 2004–13, 69 FR 54812 (Sept. 10, 2004); and PTE 96–62 (''EXPRO'') Final Authorization Numbers 2003–10E, 2001–02E, and 2000–30E, *See https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/exemptions/expro-exemptions-under-pte-96-62.*

[94] Subsection I(g)(1) was proposed as subsection I(g)(3).

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

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

Asset Management and Equity Thresholds—Section VI(a)

As discussed earlier in this document, the Final Amendment updates the asset management and equity thresholds in the exemption's definition of the entities that are eligible to act as a QPAM to account for inflation as measured by the CPI. After an initial phase-in, the thresholds will be updated on an annual basis according to the CPI.

A few commenters expressed concern that the Department did not provide evidence in the Proposed Amendment to support the increase in size thresholds and that the increased thresholds may create a high barrier to entry for financial institutions providing QPAM services. In proposing this update, the Department considered its original intent when granting the QPAM Exemption. The exemption was based on the premise that an asset manager of a certain size would be large enough to withstand improper influence from Parties in Interest (*i.e.,* maintain independence). Between March 1984, when the exemption was published, and April 2023, the CPI increased by 194.4 percent. During this period, the Department did not increase the equity thresholds for banks, savings and loan associations, and insurance companies. The asset management and equity thresholds for registered investment advisers were increased only once during this period.

The Department maintains that while some entities may no longer be able to satisfy the updated asset management and/or equity thresholds, this Final Amendment is necessary for the Department to continue to ensure that QPAMs are indeed large enough to maintain their independence. This change will enhance the protections to Plans and their participants and beneficiaries relying on a QPAM.

Costs

This analysis estimates the additional cost incurred by affected entities because of the Final Amendment. The Department recognizes that financial institutions providing QPAM services are already required to comply with certain regulatory requirements in addition to the conditions to qualify for exemptive relief under the QPAM Exemption, such as those outlined by ERISA's fiduciary duty requirements to the extent applicable, or an individual exemption granted in connection with Section I(g) ineligibility. The Department considers these requirements to be the regulatory baseline. The following analysis considers only the additional costs imposed by the Final Amendment.

The Department estimates that the Final Amendment will impose total costs of $6.8 million in the first year and $0.8 million in each subsequent year. Over 10 years, the costs associated with the amendment will total approximately $11.0 million, annualized to $1.6 million per year (using a seven percent discount rate).[95]

Preliminary Assumptions and Cost Estimate Inputs

The Department assumes that different types of personnel will be responsible for satisfying the requirements in the Final Amendment. To account for the labor costs associated with different types of personnel, the Department estimates the hourly labor costs for each type of personnel. In the analysis below the Department applies the hourly labor costs of $63.45 for clerical personnel, $159.34 for internal legal professionals, $190.63 for financial managers, and $535.85 for outside legal professionals.[96]

The Final Amendment requires QPAMs to distribute various notices to client Plans after an ineligibility trigger, as described below. The Department does not have sufficient data to estimate how many QPAMs will elect to send such notices electronically or by mail. For the purposes of this analysis, the Department estimates that 80 percent of these notices will be delivered by first-class mail at a first-class mail postage rate of $0.68.[97]

Costs Incurred by All QPAMs

The following analysis considers the marginal costs of the amendments on all financial institutions acting as QPAMs. As discussed in the Affected Entities section, the Department estimates that 10,855 financial institutions act as QPAMs and rely on the QPAM Exemption.

Rule Familiarization Costs

The Department expects that QPAMs are likely to rely on outside specialized legal counsel to ensure compliance with the Final Amendment. The specialized legal counsel likely will review the amendment and present updates to multiple clients. On average, the Department estimates that each QPAM will incur a cost equivalent to the cost of consulting with an outside legal professional for one hour. This results in an equivalent cost estimate of $5.82 million in the first year.[98]

Reporting Reliance on the QPAM Exemption—Section I(k)

Section I(k) of the Final Amendment will require QPAMs to report their reliance on the QPAM Exemption by emailing the Department at *QPAM@dol.gov.* The email must include the legal name of the entity and any name the QPAM may be operating under. This one-time cost is expected to result in a minor clerical cost for QPAMs. The Department estimates drafting and sending the email will take a clerical worker employed by each QPAM 15 minutes, on average, resulting in an estimated cost of $0.17 million in the first year.[99] In subsequent years, new QPAMs or QPAMs that change their name will be required to send the notification. The Department does not have data on how many QPAMs will be required to send this notification in subsequent years. For the purposes of this analysis, the Department assumes

[95] The costs would be $12.3 million over a 10-year period, annualized to $1.4 million per year using a three percent discount rate.

[96] Labor costs for clerical personnel, accountants or auditors, internal legal professionals, and financial managers are based off internal Department of Labor calculations based on 2023 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.* Labor costs for outside legal professionals is calculated as a composite weighted average based on the Laffey Matrix for Wage Rates for the time period 6/01/2022–5/31/2023, *see http://www.laffeymatrix.com/see.html.* The labor cost is estimated as: (40% × $413) + (35% × $508) + (15% × $733) + (10% × $829) = $535.85.

[97] USPS. ''Mailing & Shipping Prices.'' (2024). *https://www.usps.com/business/prices.htm.*

[98] The hour burden is estimated as: 10,855 QPAMs × 1 hour = 10,855 hours. The labor cost of $535.85 is applied for an external legal professional. The equivalent cost is estimated as: 10,855 hours × $535.85 = $5,816,652, rounded to $5.82 million.

[99] The hour burden is estimated as: 10,855 QPAMs × 15 minutes = 2,713.75 hours. The labor cost of $63.45 is applied for a clerical worker. The equivalent cost is estimated as: 10,855 QPAMs × 15 minutes × $63.45 = $172,187, rounded to $0.17 million.

that one percent of QPAMs, or 109 QPAMs, will either be new or have a name change.[100] Accordingly, the reporting requirement is estimated to total 27.3 hours with an equivalent cost of $1,729.[101]

If a QPAM fails to report its reliance on the exemption within 90 days, the QPAM must send a notice to the Department within an additional 90 days that includes its reliance on the exemption or name change and explains the reason(s) for its failure to provide notice. The Department does not have sufficient information to determine the percentage of QPAMs that are likely to fail to report reliance. For the purposes of this analysis, the Department estimates that two percent of QPAMs, or 217 QPAMs in the first year and two QPAMs in subsequent years will fail to report reliance.[102] The Department estimates that preparing the notice will require a legal professional to spend 30 minutes. Based on the foregoing, the Department estimates that the burden is 108.5 hours with an equivalent cost of approximately $17,288 in the first year[103] and one hour with an equivalent cost of approximately $159 in subsequent years.[104] The cost for a clerical professional to draft and send an email notifying the Department of its reliance or name change is included in the cost estimate of sending notice of reliance above.

Recordkeeping—Section VI(u)

Under this new provision, QPAMs will be required to maintain records sufficient to determine whether the conditions of the exemption have been met for a given transaction. QPAMs also will be required to make those records available to the persons identified in Subsection VI(u)(2) for six years. If a QPAM refuses to disclose information to any of the parties listed in Section VI(u) on the basis that information is exempt from disclosure, the QPAM must provide a written notice advising the requestor of the reason for the refusal and that the Department may request such information.

In the Proposed Amendment, the Department posited that QPAMs, as fiduciaries, already maintain records as part of their regular business practices consistent with this requirement. Further, the Department stated that the recordkeeping requirement corresponds to the six-year retention requirement in ERISA section 107. Therefore, the Department estimated that the recordkeeping requirement would impose a negligible burden, because most QPAMs already are maintaining records in accordance with the proposed amendment's recordkeeping requirement.[105]

The Department received several comments that the Department underestimated the cost associated with the recordkeeping requirement in the economic analysis for the Proposed Amendment. Several commenters expressed concern that the requirements in the Proposed Amendment were vague or confusing. In response to these comments, the Department has provided additional guidance on recordkeeping earlier in this preamble to alleviate potential confusion. The additional guidance clarifies that recordkeeping should be based on a ''facts and circumstances'' test. After further consideration, the Department maintains that these requirements are consistent with common business practices for entities relying on the QPAM Exemption.

The Department recognizes that some QPAMs may not be maintaining records that satisfy the requirements of the Final Amendment and accordingly will experience higher marginal costs to comply with this requirement. However, the Department expects that most QPAMs are already fully compliant. The Department estimates that, on average, the additional recordkeeping requirement will require clerical personnel at a QPAM to spend one hour annually resulting in an estimated equivalent cost of approximately $689,000.[106]

The Department does not have data on how often a QPAM might refuse to disclose information to any of the parties listed in Section VI(u); however, the Department believes such instances will be rare. The Department did not receive comments on the frequency or the costs. For the purposes of this analysis, the Department estimates that two percent of QPAMs, or 217 QPAMs, will refuse to disclose requested information annually. The Department estimates that drafting a written notice advising the requestor of the reason for the refusal and that the Department may request such information will require an internal legal professional to spend one hour, which results in an estimated equivalent cost of approximately $35,000.[107]

Additionally, some commenters expressed concern that this requirement would lead to heightened litigation risk from those who request the records, which would further increase costs for QPAMs. This concern fails to account for the fact that a QPAM is a fiduciary with obligations to its client Plans, including their participants and beneficiaries. The Department has included a similar recordkeeping requirement in many administrative prohibited transaction exemptions and is not aware that such requirements have resulted in increased litigation for those entities subject to the requirements. Commenters did not provide data or estimates of the direct cost that might be associated with the purported increased litigation risk. Therefore, the Department believes that such cost will be minimal or nonexistent when compared to the baseline litigation risk associated with being a fiduciary asset manager.

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

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

Costs Incurred by QPAMs Losing Eligibility for the Exemption for a Criminal Conviction or Prohibited Misconduct

According to past QPAM Section I(g) individual exemption applicants, the QPAM Exemption serves as one of the most advantageous exemptions for financial institutions that are involved with discretionary asset management. Even if other exemptions are available, financial institutions may seek QPAM

[100] The number of QPAMs is estimated as: 10,855 QPAMs × 1% = 108.6, rounded to 109.

[101] The hour burden is estimated as: 109 QPAMs × 15 minutes = 27.3 hours. The labor cost of $63.45 is applied for a clerical worker. The equivalent cost is estimated as: 109 QPAMs × 15 minutes × $63.45 = $1,729.

[102] The number of QPAMs in the first year is estimated as: 10,855 × 2% = 217.1, rounded to 217. The number of QPAMs in subsequent years is estimated as: 109 QPAMs × 2% = 2.2, rounded to 2.

[103] The number of QPAMs in the first year is 217. The labor cost of $159.34 is applied for an internal legal professional. The equivalent cost is estimated as: 217 QPAMs × 0.5 hours × $159.34 = $17,288, rounded to $17,000.

[104] The hour burden is estimated as: 2 QPAMs × 0.5 hour = 1 hour. The labor cost of $159.34 is applied for an internal legal professional. The equivalent cost is estimated as: 1 hour × $159.34 = $159.34, rounded to $159.

[105] 87 FR at 45224.

[106] The hour burden is estimated as: 10,855 QPAMs × 1 hour = 688,750 hours. The labor cost of $63.45 is applied for clerical personnel. The equivalent cost is estimated as: 10,855 QPAMs × 1 hour × $63.45 = $688,750, rounded to $689,000.

[107] The number of QPAMs is estimated as 10,855 × 2% = 217 QPAMs. The hour burden is estimated as: 217 QPAMs × 1 hour = 217 hours. The labor cost of $159.34 is applied for a legal professional. The equivalent cost is estimated as: 217 QPAMs × 1 hour × $159.34 = $34,577, rounded to $35,000.

status to mitigate risk of exposure to excise taxes under Code sections 4975(a) and (b) for engaging in non-exempt prohibited transactions if they fail to meet the conditions of those exemptions.

Financial Institutions also use QPAM status to attract and maintain client Plans. Although a QPAM that fails to satisfy Section I(g) may continue to operate as an asset manager for Plans, the Department understands that some entities use QPAM status as an indicator of size and/or sophistication to potential client Plans. According to past individual exemption applicants, if an entity is no longer able to represent that it is a QPAM, Plans are less likely to retain the QPAM as their manager, even in situations where the client technically does not need the relief provided by the exemption.

The loss of eligibility for the QPAM Exemption may create perceived or actual costs in the form of lost opportunities for the financial institution. The costs associated with the loss of reliance on the QPAM Exemption are not added costs imposed by this Final Amendment, but rather costs attributable to the criminal behavior of a QPAM or its Affiliate or owner of a five (5) percent or more interest. Such costs are not considered as part of this analysis, which only considers costs that are directly imposed by this amendment.

Estimate of the Number of Financial Institutions Experiencing Ineligibility Due to a Criminal Conviction or Prohibited Misconduct

The Department believes the individual exemptions granted in the past provide the best basis for estimating how many QPAMs will experience an ineligibility trigger in the future. The Department only has data on the number of QPAMs covered by each individual exemption since 2013. As shown in Table 2 below, the Department granted individual exemptions to 65 QPAMs facing ineligibility under current Section I(g) in connection with 14 separate convictions or possible convictions.[108]

The number of QPAMs affected in any given year is a function of the number of convictions covered by Section I(g) and the number of entities within a corporate family operating as QPAMs. As shown by past experience, this number is likely to fluctuate between years. Based on the experience shown in Table 2, the Department estimates that, on average, eight QPAMs each year will lose eligibility due to a Criminal Conviction.[109] As this is an average, the number of affected QPAMs impacted by ineligibility due to a Criminal Conviction could be higher than eight in some years and lower than eight in others.

TABLE 2—PAST CONVICTIONS AND AFFECTED QPAMS*

	Number of convictions	Number of affected QPAMs
2013	1	4
2014	1	3
2015	1	20
2016	6	25
2017	.....	.....
2018	.....	.....
2019	.....	.....
2020	.....	.....
2021	1	13
Total	10	65
Average	1.1	7.2
Estimated Yearly Average** (rounded)	2	8

*The average number of affected QPAMs includes zeros for years without convictions, 2017 through 2020.
**The corresponding calculated averages include decimals; therefore, to err on the side of caution and inclusion the estimated yearly average is rounded to the upper integer.

The Department's expansion of the ineligibility provision to include Prohibited Misconduct under Subsection I(g)(1)(B) and Section VI(s) will likely increase the number of QPAMs that become ineligible under Section I(g). For the Proposed Amendment, the Department estimated that eight additional QPAMs each year would experience ineligibility due to the Prohibited Misconduct provisions, which equals the average annual number of QPAMs that have experienced ineligibility due to a Criminal Conviction. The Final Amendment reduced the scope of entities whose Prohibited Misconduct could cause ineligibility for a QPAM as compared to the Proposed Amendment and as discussed in more detail in an earlier section of the preamble. The Department does not have sufficient data to determine the exact number of QPAMs that will become ineligible due to this change. For the purposes of this analysis, the Department assumes four additional QPAMs will become ineligible.[110]

The Final Amendment also clarifies that Section I(g) applies to foreign

[108] Ineligible QPAMs that request individual exemptions generally request relief for the entire ten-year ineligibility period. However, to engage in a thorough fact-finding process and to verify compliance with certain audit provisions in the individual exemptions, the Department has granted exemptions that include less than ten years of relief in many situations. Ineligible QPAMs then typically apply for an extension of relief even though no additional conviction has occurred. Additionally, in situations where an ineligible QPAM is impacted by a subsequent conviction before the expiration of the ten-year ineligibility period for the initial conviction, the Transition Period would also not be implicated, so there is no additional cost burden associated with subsequent convictions. There was a total of three subsequent convictions after an initial conviction for some entities in 2017, 2018, and 2019.

[109] The Department did not include in this estimate any of the possible QPAMs that have remote relationships with a convicted entity that are identified in the individual exemptions as ''Related QPAMs.'' The Department has never received comments, questions, requests for guidance, or separate individual exemption applications from any entities that would fall into that definition, and therefore, assumes such entities are not operating as QPAMs.

[110] Due to the reduced scope of entities captured by Participating In Prohibited Misconduct, the Department lowered the estimate to four as compared to the estimate of eight in the Proposed Amendment.

convictions that are substantially equivalent to U.S. federal or state crimes that are enumerated in Section I(g) of the exemption. The Department and QPAMs have treated foreign convictions as causing ineligibility under Section I(g) since at least 2000.[111] Therefore, the Department believes that the clarifying reference that includes foreign convictions within the scope of Section I(g) will not change the number of financial institutions losing eligibility.

In total, the Department estimates that 12 QPAMs, on average, will become ineligible due to a Criminal Conviction or Prohibited Misconduct annually. The Department received a few comments confirming that the expansion of ineligibility would increase the number of financial institutions that would lose eligibility; however, the comments did not provide data that directly address the Department's estimates.

Notice to the Department of Prohibited Misconduct or Foreign NPA or DPA of the QPAM and Its Affiliates or Owners

The Department is including a requirement in this Final Amendment that whenever a QPAM, its Affiliates, or owners of a five (5) percent or more interest Participates In Prohibited Misconduct or executes a foreign NPA or DPA, they must notify the Department at *QPAM@dol.gov*. The Department does not have sufficient data to estimate how frequently such Prohibited Misconduct would occur, but the Department assumes it will occur infrequently. For the purposes of this analysis, the Department assumes that four instances of Prohibited Misconduct each year will require such a notice, at a cost of approximately $300.[112]

Mandatory One-Year Transition Period—Section I(i)

The amendment includes a mandatory One-Year Transition Period that the QPAM must provide to its client Plans that begins on the Ineligibility Date. During this period, relief under the QPAM Exemption would only be available for existing client Plans of the QPAM. The Department modeled the Transition Period provisions from the conditions included in the Department's recent individual Section I(g) exemptions.

This Final Amendment does not include the provisions from the Proposed Amendment that would have prevented QPAMs from engaging in new transactions on behalf of existing client Plans during the Transition Period. The Department has not included a similar requirement in past one-year QPAM individual exemptions it has issued, and several commenters expressed concern that this provision would be harmful to Plans that rely on QPAMs. After considering these comments, the Department has removed this restriction in the Final Amendment.

As amended, the Department expects that QPAMs will not incur increased costs as a result of a Criminal Conviction due to the Transition Period provisions because these costs would be equivalent to the costs incurred by QPAMs who have obtained an individual exemption that includes similar conditions. However, an increased cost will be associated with the expansion of the ineligibility provisions. As discussed above, the Department estimates that four additional QPAMs will become ineligible each year due to Participating In Prohibited Misconduct.

Notice to Plans—Subsection I(i)(1)

Within 30 days of the Ineligibility Date, the QPAM must provide notice to the Department and each of its client Plans. The preamble provides more detail regarding the information the QPAM is required to include in this notice.

QPAMs that experience ineligibility and apply for individual exemption relief already are required to provide this type of notice, therefore, the Department is not attributing an incremental burden to this requirement. However, due to the expanded scope of ineligibility, QPAMs that become ineligible due to Participating In Prohibited Misconduct will incur the cost of sending notices to their client Plans.

As discussed in the Affected Entities section above, the Department estimates that each QPAM provides discretionary asset management services to an average of 50 Plans. The Department estimates that a legal professional at each QPAM will spend, on average, 30 minutes preparing the notice, and clerical personnel will spend two minutes preparing each notice to be sent to a Plan by mail, resulting in an equivalent labor cost of approximately $700.[113] Additionally, the Department assumes that notices sent by mail will require two pages of paper each, resulting in a material and postage cost of approximately $100.[114]

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

Indemnification

As discussed above, QPAMs will be required to indemnify, hold harmless, and promptly restore actual losses to each client Plan for any damages directly resulting from a QPAM losing eligibility for the exemption due to a Criminal Conviction or Prohibited Misconduct. Damages may include losses and related costs arising from unwinding transactions with third parties and transitioning Plan assets to an alternative asset manager.

When the Department has granted individual exemptions for Section I(g) ineligibility, it has included these additional protections and required QPAMs to ensure that Plans are permitted to withdraw from their asset management arrangement with an ineligible QPAM without penalty and be indemnified and held harmless in the event of future misconduct. Accordingly, the Department has not attributed any incremental burden to this requirement.

However, due to the expanded scope of ineligibility, QPAMs that become ineligible as a result of Participating In Prohibited Misconduct may incur costs associated with indemnifying their client Plans for losses that would occur if they moved to a new asset manager. In the proposal, the Department requested comments on the cost of the indemnification provision. The Department received several comments asserting that the indemnity obligation

---

[111] *See* Prohibited Transaction Exemption (PTE) 2023–13, 88 FR 26336 (Apr. 28, 2023); PTE 2020–01, 85 FR 8020 (Feb. 12, 2020); PTE 2019–01, 84 FR 6163 (Feb. 26, 2019); PTE 2016–11, 81 FR 75150 (Oct. 28, 2016); PTE 2016–10, 81 FR 75147 (Oct. 28, 2016); PTE 2012–08, 77 FR 19344 (March 30, 2012); PTE 2004–13, 69 FR 54812 (Sept. 10, 2004); and PTE 96–62 (''EXPRO'') Final Authorization Numbers 2003–10E, 2001–02E, and 2000–30E, *See https://www.dol.gov/agencies/ebsa/laws-and-regulations/rules-and-regulations/exemptions/expro-exemptions-under-pte-96-62.*

[112] The Department estimates that preparing and sending each notice will require an in-house legal professional 30 minutes and a clerical staff 5 minutes. The hour burden is estimated as: 4 notices × (30 minutes + 5 minutes) = 2 hour and 20 minutes. The labor cost of $159.34 is applied for an in-house legal professional, and a labor cost of $63.45 is applied for clerical staff. The equivalent cost is estimated as: 4 notices × [(30 minutes × $159.34) + (5 minutes × $63.45)] = $324, rounded to $300.

[113] The hour burden is estimated as: (4 QPAMs × 0.5 hours of professional legal time) + (4 QPAMs × 50 Plans × 80% of notices being mailed × 2/60 hours of clerical personnel time) = 7.3 hours. The labor cost of $159.34 is applied for a legal professional, and the labor cost of $63.45 is applied for clerical personnel. The equivalent cost is estimated as: (4 QPAMs × 0.5 hours of professional legal time × $159.34) + (4 QPAMs × 50 Plans × 80% of notices being mailed × 2/60 hours of clerical personnel time × $63.45) = $657, rounded to $700.

[114] The material and postage cost are estimated as: (4 QPAMs × 50 Plans × 80% of notices being mailed) × [(2 pages × $0.05 per page) + $0.68] = $124, rounded to $100.

will increase the risk and cost associated with being a QPAM, and that these costs will be passed onto Plans in the form of higher fees. The Department did not receive any comments providing data directly addressing the amount of the cost for indemnification.[115]

Costs Incurred by QPAMs Requesting an Individual Exemption—Section I(j)

The Final Amendment retains Section I(j)[116] from the Proposed Amendment, which provides that a QPAM that is ineligible or anticipates that it will become ineligible may apply for an individual exemption from the Department. This individual exemption would allow the QPAM to continue relying on the relief provided in the QPAM Exemption for a longer period than the One-Year Transition Period.

Costs for all QPAMs Seeking an Individual Exemption

The Department estimates that, on average, three individual exemption applications will be submitted to the Department each year. The Department estimates that four QPAMs annually will be covered by each exemption application (12 QPAMs total; with four losing eligibility due to Prohibited Misconduct and eight losing eligibility due to a Criminal Conviction). The Final Amendment instructs applicants that apply for an individual exemption to provide the Department with detailed information quantifying the cost of the harm, if any, its client Plans would suffer if a QPAM could not rely on the QPAM Exemption after the Transition Period. Section I(j) also instructs all applicants to include in their exemption applications the specific dollar amounts of investment losses resulting from foregone investment opportunities that would result from ineligibility and any evidence supporting the proposition that investment opportunities will only be available to client Plans on less advantageous terms. For this requirement, the Department assumes a financial professional will spend four hours preparing this supporting information. Therefore, the Department estimates that for the three applications covering the estimated 12 QPAMs losing eligibility annually, the cost associated with the additional requirement will be approximately $2,300.[117]

Finally, Section I(j) of the Final Amendment provides that if an applicant would like to request the Department to exclude any term or condition from its individual exemption that is included in a recently granted individual exemption, the applicant must provide a detailed statement explaining why the variation is necessary and in the interest of and protective of affected Plans, their participants and beneficiaries, and IRA owners. The Department expects QPAMs that become ineligible due to a Criminal Conviction already will conduct this analysis and thus would not incur incremental costs. Alternatively, if this information is not included in an application, the Department will generally require it before proceeding with a final determination regarding the exemption request.

The Department assumes the four QPAMs that are estimated to become ineligible due to Participating In Prohibited Misconduct would incur incremental costs due to the requirement to review the Department's most recently granted individual exemptions involving Section I(g) ineligibility. To satisfy the requirement, the Department estimates that an outside legal professional will spend three hours drafting this addition to the individual exemption application. Preparing an individual exemption application is specialized work, and the Department assumes that most legal professionals that are retained by QPAMs will have prior experience. Based on the foregoing, the Department estimates that the costs associated with the additional requirement totals approximately $1,600 for the application covering the four ineligible QPAMs due to Participating In Prohibited Misconduct.[118]

Costs for QPAMs That Become Ineligible Due to Prohibited Misconduct

In the Final Amendment, the Department expanded the scope of ineligibility to include Participating In Prohibited Misconduct. This provision could cause additional financial institutions to lose eligibility for the QPAM Exemption and may require them to incur the additional costs associated with preparing and filing an exemption application with the Department.

In the Proposed Amendment, the Department estimated that two additional applicants each year would apply for an individual exemption, each covering four ineligible QPAMs, resulting in a total cost of approximately $30,000,[119] or a per-application cost of approximately $15,000. The Department received one comment stating that the Department underestimated this cost, and that provided an alternative estimate that the cost for filing an individual exemption will total between $250,000 and $500,000.[120] This commenter did not support its estimates with specific information detailing how the cost estimate was derived. However, after considering the comment, the Department has revised its estimate as discussed below.

The Department has limited information on the process for preparing an exemption application. Based on the applications received, the Department believes that each QPAM affected may need to dedicate clerical and in-house legal time to gather information for the application. For this Final Amendment, the Department estimates that gathering the information for the application will require, on average, an in-house legal professional and clerical personnel each to spend 20 hours gathering and preparing information for the application. The Department assumes that the formal exemption application will be prepared by an outside legal professional specializing in such matters who will spend 15 hours, on average, preparing the application. For the four QPAMs becoming ineligible due to Participating In Prohibited Misconduct, the Department estimates that this provision will result in an estimated cost of approximately $26,000.[121]

[115] The Department received several comments addressing the specific costs associated with amending WMAs, as required under the Proposed Amendment. These costs did not directly address indemnification costs but rather contract negotiation and updating the WMAs. The Department moved the proposed requirements for the WMA into the Transition Period provisions in response to commenters and believes the cost to ineligible QPAMs regarding this will generally be captured within the required notices to client Plans after an ineligibility trigger.

[116] Proposed Section I(k) has been redesignated as Section I(j) in the Final Amendment.

[117] The hour burden is estimated as: 3 applications × 4 hours = 12 hours. At an hourly rate of $190.63 is applied for financial professional. The equivalent cost is estimated as: (3 applications × 4 hours × $190.63 financial professional rate) = $2,288, rounded to $2,300.

[118] The hour burden is estimated as: (1 application × 3 hours) = 3 hours. A labor cost of $535.85 is applied for an outside legal professional. The equivalent cost is estimated as: (1 application × 3 hours × $535.85 outside legal professional labor) = $1,608 rounded to $1,600.

[119] 87 FR 45204, pp. 45220.

[120] Comment submitted by SIFMA on 11 October 2022. (*See https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA07/00009.pdf*).

[121] The hour burden is estimated as: [4 QPAMs × (20 hours from an in-house legal professional + 20 hours for clerical personnel)] + (1 application × 15 hours from an external legal professional) = 175 hours. The labor cost of $159.34 is applied for an in-house legal professional, a labor cost of $63.45 is applied for clerical personnel, and a labor cost of $535.85 is applied for an outside legal professional. The equivalent cost is estimated as: (4 QPAMs × 20 hours × $159.34) + (4 QPAMs × 20

Continued

While this estimate is higher than the Department's estimate in the Proposed Amendment, it is significantly lower than the estimate provided by the commenter. As previously stated, the commenter did not elaborate on the methodology it used to derive its cost estimate. The Department's analysis only includes the costs directly associated with preparing documentation for the application and preparing the application itself.[122] Additionally, the commenter did not elaborate on the type of entity that would be requesting exemptive relief. Applications may vary in complexity, depending on the nature of the Prohibited Misconduct and the number of QPAMs affected. The Department believes that its updated estimate for the Final Amendment reflects a fair representation of the cost to prepare an exemption application in a typical scenario.

Applicants that receive a final granted individual exemption must prepare and distribute a notice to interested parties. Similarly, each of the four QPAMs will be required to send an objective description of the facts and circumstances upon which the misconduct is based to each client Plan. The Department estimates that approximately 200 notices will be distributed annually, corresponding to an average of 50 client Plans for each of the four QPAMs estimated to be affected by the application. The Department estimates that clerical personnel will spend 10 minutes distributing the notices and objective descriptions, resulting in a labor cost of approximately $2,100.[123] In addition, the Department estimates that material and mailing costs for these notices will total approximately $400.[124]

Costs Incurred by Plans and Participants, Beneficiaries

The Department received several comments stating that the Proposed Amendment would increase Plan expenses. Commenters identified the following as factors that are likely to increase Plan expenses: (1) increased resources devoted to avoiding non-exempt prohibited transactions; (2) disruptions during the Transition Period; (3) increased fees due to the risk of ineligibility, and (4) transition costs associated with replacing an ineligible QPAM.

The Department also received several comments stating that the Proposed Amendment would decrease the investment options available to Plans, specifically regarding a counterparty in a trade who is a Party in Interest. Several commenters expressed concern that the proposed modifications to Section I(c) would limit access to primary investment markets and could limit access to asset classes that are not typically traded on large exchanges, such as asset-backed securities. In response to these comments, the Department did not include many of the proposed modifications in the Final Amendment. Therefore, the Department believes there will be no related costs incurred by Plans and their participants and beneficiaries due to the modifications to Section I(c) in the Final Amendment.

Asset Management and Equity Thresholds—Section VI(a)

As a result of the adjustments to the asset management and equity thresholds in the QPAM definition in Section VI(a), the Department acknowledges that some QPAMs may not meet the new threshold requirements, and, consequently, would no longer be able to rely on the QPAM Exemption. The Department expects Plans that utilize these QPAMs will incur costs due to this transition but does not have sufficient data to estimate the impact.[125]

The Department requested similar data in connection with individual exemption applications when a QPAM becomes ineligible due to convictions covered by Section I(g), but the data provided, and cost identified by applicants has been limited. Additionally, the Department requested comments and data in the Proposed Amendment regarding the number of QPAMs who will potentially become unable to rely upon the QPAM Exemption and the number of Plans and the value of Plan assets that will be impacted by the increase in asset management and equity thresholds.

As discussed in the Benefits section above, several commenters expressed concern that the Department did not provide evidence to support the increase in the asset and equity thresholds. Additionally, commenters noted that the increased thresholds may create a high barrier to entry for financial institutions or would disqualify small financial institutions, which would impose transition costs for client Plans that search for a new investment manager to replace an ineligible QPAM. One commenter noted that the inflation increases would introduce uncertainty regarding a QPAM's eligibility.[126] One commenter noted that a Plan transitioning to a new asset manager would incur costs associated with searching for a new asset manager to replace the QPAM (such as the costs and time required for a request for proposal process; costs associated with consultants to assist or manage the process, legal review and negotiation of a new management agreement, and other due diligence expenses; brokerage and other transaction costs associated with the sale of portfolio investments to accommodate the investment policies and strategy of the new asset manager; the opportunity costs of holding cash pending investment by the new asset manager; and lost investment opportunities in connection with a change of asset manager). Another commenter estimated that a formal request for proposal for a new QPAM would cost between $10,000 and $50,000 with legal fees ranging between $10,000 and $20,000 for a typical asset class or $20,000 to $40,000 for a more specialized strategy.

However, none of the commenters directly addressed the number of QPAMs that will lose eligibility due to the increased thresholds or relatedly, the number of client Plans serviced by those QPAMs. The Department received one comment stating that an incremental increase approach would give smaller investment fiduciaries, who would be most affected by the threshold

hours × $63.45) + (1 application × 15 hours × $535.85) = $25,861, rounded to $26,000.

[122] It is unclear if the commenter was also considering the ongoing costs associated with complying with the individual exemption. For purposes of this portion of the Department's analysis, ongoing costs associated with complying with a granted individual exemption are not included as a cost of filing the exemption application under Section I(j).

[123] The hour burden is estimated as: 4 QPAMs × 50 Plans per QPAM × (10/60) hours = 33.3 hours. A labor cost of $63.45 is applied for clerical personnel The equivalent cost is estimated as: 4 QPAMs × 50 Plans per QPAM × (10/60) hours × $63.45 = $2,116, rounded to $2,100.

[124] The Department further assumes that notices and the descriptions of facts and circumstances will be delivered separately, comprising 15 and 5 pages, respectively. With a printing cost of $0.05 per page and a mailing cost of $0.66 per notice, the Department estimates the mailing cost as 4 QPAMs × 50 Plans per QPAM × 80% of notices mailed × {[(15 × $0.05) + $0.68] + [(5 × $0.05) + $0.68]} = $378, rounded to $400.

[125] Some QPAMs have suggested in the past that there could be costs associated with unwinding transactions that relied on the QPAM Exemption and reinvesting assets in other ways. The loss of QPAM status could also require an asset manager to keep lists of Parties in Interest to its client Plans to ensure the asset manager does not engage in prohibited transactions. However, even without the QPAM Exemption, a wide variety of investments are available that do not involve non-exempt prohibited transactions.

[126] Comment submitted by the Spark Institute on 11 October 2022. (*See https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-ZA07/00026.pdf*).

changes, more time to prepare for and respond to threshold changes and minimize the negative impact on these entities.

As discussed in the preamble and after considering these comments, the Department decided to phase in the initial increase to asset and equity thresholds incrementally over an extended period rather than implement the entire increase in a single year in order to reduce the immediate impact on QPAMs and their client Plans. QPAMs and Plans relying on those QPAMs that will lose the ability to rely upon the QPAM Exemption, particularly in the second and third portions of the phase-in period will have time to make needed adjustments.

Although Plans may continue to rely on asset managers who do not satisfy the definition of QPAM, the Department acknowledges that some Plans may choose to hire a different asset manager if their current asset manager is not able to rely on the QPAM Exemption. The Department understands that it is common industry practice to conduct a request for proposal every three to five years, and some Plans may choose to do so sooner than they otherwise would have because of the new threshold requirements. These Plans will incur costs with preparing and reviewing proposals from potential new asset managers. The Department lacks sufficient data to estimate the number of Plans and QPAMs that would be affected by the increased thresholds in the definition of QPAM.

Summary of Costs

The total estimated annual costs associated with the Final Amendment will be approximately $6.8 million in the first year and $0.8 million in subsequent years. Table 3 summarizes the costs for each requirement.

TABLE 3—COST SUMMARY

Requirement	Aggregate cost change (in dollars)	
	First year	*Subsequent year*
All QPAMs:		
Rule Familiarization	$5,816,652	
Reporting Reliance on the QPAM Exemption	172,187	$1,729
Notice of Failure to Report Reliance on the QPAM Exemption	17,288	159
Recordkeeping	688,750	688,750
Refusal to Disclose Requested Information	34,577	34,577
QPAMs Losing Eligibility:		
Notice to Plans	782	782
Notice to the Department of Prohibited Misconduct and Foreign NPA/DPA	340	340
QPAMs Applying for Individual Exemptions:		
Quantification of Costs Plans Will Suffer	2,288	2,288
Review of Past Exemptions	1,608	1,608
Exemption Application	25,861	25,861
Individual Exemption Notices	2,494	2,494
Total Estimated Annual Cost	6,762,827	758,588

Note: *Only quantifiable costs are displayed.*

Transfers

If an asset manager cannot rely on the relief under the QPAM Exemption (*e.g.,* because it is ineligible due to its Participation In Prohibited Misconduct or due to the change in asset or equity thresholds), its client Plans may choose to transfer assets and revenue away from the asset manager to its competitors. From the Plan's perspective, the reduction in assets entrusted to the original asset manager (and associated revenue reduction) are offset by the increase in assets managed by another asset manager or managers (and associated revenue increase). Even if the impact of the switch is minimal or neutral from the point of view of the Plan, it is nevertheless appropriately characterized as a transfer from a societal perspective.[127]

Although the Department does not have sufficient data to quantify the likely size of such revenue transfers, they could have an annual effect that exceeds $200 million due to the significant pool of Plan assets that QPAMs manage. To the extent the Final Amendment results in the movement of assets from asset managers that cannot rely on the exemption to other asset managers, the associated revenue transfers promote the Department's objectives in issuing this amendment to the QPAM Exemption and enhance the security of Plan investments.

In the Proposed Amendment, the Department requested comments on whether a QPAM's client Plans would be likely to move all or some of their assets to an alternative asset manager after a QPAM becomes ineligible due to expansion of the ineligibility provision. The Department did not receive comments directly addressing this issue. The cost of conducting a request for proposal and searching for a new asset manager are discussed in greater detail above, in the Cost section.

Regulatory Alternatives

Section 6(a)(3)(C) of Executive Order 12866 requires the Department to assess the cost and benefits of feasible alternatives for rules that are determined to be ''significant'' under Section 3(f)(1) of the executive order. Therefore, the Department considered several alternatives to the provisions in the Final Amendment that are discussed in this section.

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

The Department considered not expanding the scope of Section I(g) and maintaining its practice of addressing ineligibility under Section I(g) only

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

through the individual exemption process. However, it is the Department's understanding that its issuance of a subsequently revoked opinion caused uncertainty in the regulated community regarding whether foreign convictions are within the scope of Section I(g) of the QPAM Exemption. This amendment provides clarity on that point. Further, immediate ineligibility under Section I(g) has become a source of uncertainty and potential disruption to Plans. As the financial services industry has become increasingly consolidated, the number of entities becoming ineligible for relief under the QPAM Exemption has grown, prompting more entities to face ineligibility. Through the individual exemption process, client Plans would continue to be exposed to the potential for immediate disruption and transition costs that might otherwise be avoided through this Final Amendment.

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

Amend the QPAM Exemption to expressly exclude foreign convictions.

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

Amend the QPAM Exemption to require QPAMs to amend Written Management Agreements with up-front terms that apply in the event of ineligibility.

In the proposal, the Department included a requirement for all QPAMs to amend their WMAs with client Plans to include:

(1) A provision providing that in the event the QPAM, its Affiliates, and five percent or more owners engage in conduct resulting in a Criminal Conviction or receipt of a Written Ineligibility Notice, the QPAM would not restrict its client Plan's ability to terminate or withdraw from its arrangement with the QPAM;

(2) A provision requiring the QPAM to indemnify, hold harmless, and promptly restore actual losses to each client Plan for any damages directly resulting from a violation of applicable laws, a breach of contract, or any claim arising out of the failure of such QPAM to remain eligible for relief under the QPAM Exemption as a result of conduct that leads to a Criminal Conviction or Prohibited Misconduct; and

(3) A provision requiring the QPAM to agree not to employ or knowingly engage any individual that Participated In the conduct that is the subject of a Criminal Conviction or Prohibited Misconduct.

In the Proposed Amendment, the Department remarked that these provisions would benefit Plans by providing them with additional certainty that the Plan and its assets will be insulated from losses if a Criminal Conviction or Prohibited Misconduct occurs.

The Department estimated that the cost associated with amending the WMAs would result in a total equivalent cost of $135,540,[128] resulting in an average cost of approximately $220 for each QPAM. Comments on the Proposed Amendment criticized the Department's estimation methods, stating that the Department had significantly underestimated the burden this requirement would impose. For instance, one commenter estimated that the Department's estimate was off at least by a factor of 100. Another commenter estimated that it would cost between $1 billion and $12.3 billion.

In its estimate, the Department assumed that amendments to WMAs would be uniform across client Plans, and accordingly, the Department estimated that the associated costs would be relatively small. However, several commenters disagreed with this assumption, stating that the necessary amendments would differ by the type of relationship and investment strategy. Some commenters noted that such amendments would require QPAMs to open contract negotiations with each QPAM client Plan, potentially leading to a time-consuming process. Other commenters indicated that some QPAMs would incur costs associated with consulting outside counsel on these provisions and contract negotiations. Further, several of the commenters stated that amending necessary contracts would not be possible within the 60-day effective period proposed.

The Department believes that these provisions provide an important protection to Plans, participants, beneficiaries, and IRA owners. Namely, these provisions ensure that Plans and IRA owners can terminate the arrangement or withdraw from a QPAM-managed Investment Fund without penalty, protecting Plans and IRA owners from unnecessary costs when relief under the exemption is lost through no fault of their own. However, based on the feedback from commenters, the Department removed the requirement to amend WMAs. Instead, the Final Amendment requires QPAMs to notify and agree to these provisions with Plans in the Notice to Plans required within 30 days of the Ineligibility Date. The Department determined the approach in the Final Amendment provides the same protection to Plans while significantly reducing the cost burden.

Asset Management and Equity Thresholds

The Department considered two alternatives related to the asset management and equity thresholds, described below.

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

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

Update the asset management and equity thresholds to full CPI-adjusted values at once.

The proposal included CPI-adjusted values that would have been fully updated to 2022 values. The Department received a variety of comments regarding the possible unintended impact to QPAMs and their client Plans who would not be able to satisfy such significant increases at once. In response to those concerns, the Department determined that a more appropriate way to update the thresholds is through a phase-in to the proposed values, which is included in this Final Amendment.

[128] 87 FR 45204, pp. 45218.

Amend the QPAM Exemption to include entering into NPAs or DPAs of owners and Affiliates of QPAMs as a possible Section I(g) ineligibility trigger.

In the Proposed Amendment, Section I(g) would have been implicated if the QPAM, its owners of a five (5) percent or more interest, or Affiliates enter into an NPA or DPA and subsequently received a Written Ineligibility Notice from the Department. The approach in the Proposed Amendment was intended to ensure QPAMs could not avoid the consequences that otherwise would result from a Criminal Conviction under Section I(g) by entering into NPAs or DPAs with prosecutors. In this Final Amendment, the Department limited the scope of Prohibited Misconduct to NPAs or DPAs that are entered into with a U.S. Federal or State prosecutor's office or regulatory agency and Prohibited Misconduct that is found in or determined by a court or court-approved settlement.

In the Proposed Amendment, the Department estimated that eight QPAMs would be affected by the ineligibility provisions due to Participating In Prohibited Misconduct.[129] As discussed in the cost section, due to the narrowing of the Prohibited Misconduct provision, the Department estimates that four QPAMs annually may become ineligible due to the reduced scope of entities captured in the Final Amendment rather than the eight QPAMs that were estimated in the Proposed Amendment.

Uncertainty Associated With the Final Amendment

The Department is uncertain regarding the total number of QPAMs and examined multiple alternative estimation methodologies before utilizing the one outlined in this amendment.

The first alternative considered was adding additional service codes from form 5500 data. The Department looked at service providers identified under service code 28 and found that they were also frequently identified under service code 50 and 27 (direct payment from the plan and investment advisory respectively). However, after examining these codes in detail, the Department found them too definitionally dissimilar from investment management and that the firms under these codes seemed less likely to meet the asset and equity thresholds required by the QPAM Exemption. Thus, the Department only included codes 28, 51, and 52.

The Department also examined completely different methodologies for generating the number of QPAMs. One proposed methodology was to use data from the SEC and FDIC to estimate the number of QPAMs. The Department could use the FDIC data to see banks with defined benefit plan or defined contribution plan funds in trustee accounts and could use asset data to estimate the number of entities above and below the asset threshold, but that data was generated at the firm-level. Since a firm can contain multiple distinct entities, all acting as QPAMs, the Department believed that use of this data would lead to a significant undercount of QPAMs.

The Department is also uncertain about the extent to which the changes in asset management and equity thresholds would give rise to new costs because some QPAMs that meet the current thresholds no longer would be able to rely on the exemption if they do not meet the increased thresholds. Some of these small QPAMs may lose this portion of their business. However, there still may be other exemptions that they could use, or they could seek an individual exemption that could allow them to continue offering services.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995, the Department solicited comments concerning the information collection request included in the Proposed Amendment entitled ''Proposed Amendment to Prohibited Transaction Class Exemption 84–14 (the QPAM Exemption).'' [130] At the same time, the Department also submitted an information collection request to the (OMB), in accordance with 44 U.S.C. 3507(d).

The Department received one comment addressing the audit cost estimates in the paperwork burden analysis of the information collections. Other comments submitted contained information relevant to the costs and administrative burdens attendant to the Proposed Amendment. The Department considered these public comments in connection with making changes to the Final Amendment, analyzing the economic impact of the Proposed Amendment and developing the revised paperwork burden analysis summarized below.

ICRs are available at *RegInfo.gov* (*reginfo.gov/public/do/PRAMain*). Requests for copies of the ICR can be sent to the PRA addressee:

By mail: James Butikofer, Office of Research and Analysis, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Room N–5718, Washington, DC 20210
By email: ebsa.opr@dol.gov

Prohibited Transaction Exemption 84–14, 49 FR 9494 (March 13, 1984), as corrected at 50 FR 41430 (October 10, 1985) and amended at 70 FR 49305 (August 23, 2005) and at 75 FR 38837 (July 6, 2010) (the QPAM Exemption) permits various parties related to Plans to engage in transactions involving Plan assets if, among other conditions, the assets are managed by a QPAM. The following analysis considers the paperwork burden associated with the existing QPAM Exemption as well as the incremental cost associated with the Final Amendment.

Affected Entities

As discussed in the Affected Entities section of the regulatory impact analysis, the Department estimates that there are 10,855 QPAMs. Additionally, the Department estimates that each QPAM, on average, provides services to 50 Plans and that there are 215,135 total Plans with relationships with QPAMs.[131]

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

The existing information collection requirements of the QPAM Exemption require in-house QPAMs to develop written policies and procedures designed to ensure compliance with the conditions of the exemption. Existing in-house QPAMs will have already prepared their policies and procedures in accordance with the QPAM Exemption. However, some in-house QPAMs may also update their policies and procedures in a given year.

The latest Form 5500 estimates from the year 2020 indicate that there are approximately 50 in-house QPAMs.[132] The Department estimates that the burden associated with preparing policies and procedures will affect ten percent of all in-house QPAMs, including all new in-house QPAMs and some existing in-house QPAMs. Therefore, the Department estimates that about five QPAMs will need to

[129] 87 FR at 45218.

[130] 87 FR 45204.

[131] For more information on how the number of QPAMs, average number of relationships between QPAMs and Plans, and unique number of Plans was estimated, refer to the Affected Entities section of the regulatory impact analysis.

[132] The Department estimated the number of in-house QPAMs by examining Schedule C of the 2020 Form 5500. Small Plans are not required to file the Schedule C. This estimate could underestimate the number of in-house QPAMs with small Plans, but the Department believes that in-house QPAMs with small Plans would be rare. In order for this to occur, an investment manager would have to simultaneously be large enough to qualify as a QPAM and small enough to qualify as a small plan for the Form 5500–SF.

update their policies and procedures each year.[133] The Department estimates that the burden associated with new QPAMs meeting the policies and procedures requirements of the QPAM Exemption will be five hours with an equivalent cost of $797.[134]

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

Additionally, the exemption requires in-house QPAMs to engage an independent auditor to conduct an annual exemption audit and issue an audit report to the Plan. The Department estimates that each of the 50 in-house QPAMs will use in-house legal professionals, financial managers, and clerical time to provide documents and respond to questions from the auditor. The Department assumes QPAMs use either a law firm or a consulting firm to conduct the exemption audits, and the Department assumes that the average cost of an exemption audit is $25,000.[135] This results in a total estimated cost of $1,250,000.[136] Additionally, each exemption audit is assumed to require about 5 hours of a legal professional's time, 13 hours of a financial manager's time, and six hours of clerical time for each of the 50 QPAMs to provide needed materials for the audit. This results in a burden estimate of 1,200 hours with an equivalent cost of $182,780.[137]

This results in a per-entity cost of $28,656 for each audit. The Department received one comment on its cost estimate for the audit, noting that legal expenses associated with QPAMs would approach or exceed $100,000. This commenter did not provide additional information to support this estimate.

Property Manager Written Guidelines—Section I(c)

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

Reporting Reliance on the QPAM Exemption—Subsection I(k)

QPAMs will have to report their reliance on the QPAM Exemption via email to *QPAM@dol.gov.* This notification would occur only once for most QPAMs. The information required under subsection I(k) is limited to the legal name of the entity relying upon the exemption and any name the QPAM may be operating under. The Department expects it will take 15 minutes, on average, for each QPAM to both prepare and send this electronic notification. This burden is estimated to amount to 2,713.8 hours with an equivalent cost of $172,187 in the first year.[138] In subsequent years, new QPAMs or QPAMs that change their name will be required to send the notification. The Department does not have data on how many QPAMs will be required to send this notification in subsequent years. For the purposes of this analysis, the Department assumes that one percent of QPAMs, or 109 QPAMs, will either be new or have a name change.[139] Accordingly, this is estimated to amount to 27.3 hours, with an equivalent cost of $1,729.[140]

If a QPAM fails to report its reliance on the exemption within 90 days, the QPAM must send a notice to the Department within an additional 90 days, indicating its reliance on the exemption or name change, as well as an explanation for the failure to provide notice. The Department does not have information on what percent of QPAMs are likely to fail to report reliance. For the purposes of this analysis, the Department estimates that two percent of QPAMs required to report will fail to report reliance each year, or 217 QPAMs in the first year and two QPAMs in subsequent years.[141] The Department estimates that preparing the notice will require a legal professional 30 minutes. The burden is estimated to be 108.5 hours with an equivalent cost of approximately $17,288 in the first year[142] and one hour with an equivalent cost of approximately $159 in subsequent years.[143] The cost for a clerical professional to draft and send an email notifying the Department of its reliance or name change is included in the cost estimate of sending notice of reliance above.

Recordkeeping—Section VI(u)

The amendment adds a new recordkeeping provision that will apply to all 10,855 QPAMs. Due to the fiduciary status of QPAMs and the existing regulatory environment in which they exist, the Department assumes that QPAMs already maintain many of the required records as part of their regular business practices. In addition, the recordkeeping requirements correspond to the six-year period in ERISA sections 107 and 413. The Department expects that the recordkeeping requirement would impose, on average, a burden of one hour per QPAM. Therefore, the Department estimates that the overall hour burden of this recordkeeping requirement for all 10,855 QPAMs will be 10,855 hours with an equivalent cost of $688,750.[144]

If a QPAM refuses to disclose information to any of the parties listed in Section VI(u) on the basis that such information is exempt from disclosure, the QPAM must provide a written notice advising the requestor of the reason for the refusal and that the Department may request such information. The Department does not have data on how often such a refusal is likely to occur. For the purposes of this illustration, the Department

[133] This is estimated as: 50 in-house QPAMs × 10% = 5.

[134] The burden is estimated as follows: (5 QPAMs × 1 hour) = 5 hours. A labor rate of $159.34 is used for legal counsel and applied in the following calculation: (5 QPAMs × 1 hour × $159.34) = $797.

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

[136] Assuming that the average cost of an exemption audit would be $25,000: 50 in-house QPAMs × $25,000 = $1,250,000.

[137] The burden is estimated as follows: (50 × 5 hours) + (50 × 13 hours) + (50 × 6 hours) = 1,200 hours. A labor rate of $159.34 is used for legal counsel, a labor rate of $190.63 is used for a financial professional, and a labor rate of $63.45 is used for a clerical worker. These labor rates are applied in the following calculation: (50 × 5 hours × $159.34) + (50 × 13 hours × $190.63) + (50 × 6 hours × $63.45) = $182,780.

[138] The hour burden is estimated as: 10,855 QPAMs × 15 minutes = 2,713.8 hours. The labor cost of $63.45 is applied for a clerical worker. The equivalent cost is estimated as: 10,855 QPAMs × 15 minutes × $63.45 = $172,187.

[139] The number of QPAMs is estimated as: 10,855 QPAMs × 1% = 108.6, rounded to 109.

[140] The hour burden is estimated as: 109 QPAMs × 15 minutes = 27.3 hours. The labor cost of $63.45 is applied for a clerical worker. The equivalent cost is estimated as: 109 QPAMs × 15 minutes x $63.45 = $1,729.

[141] The number of QPAMs in the first year is estimated as: 10,855 × 2% = 217.1, rounded to 217. The number of QPAMs in subsequent years is estimated as: 109 QPAMs × 2% = 2.2, rounded to 2.

[142] The hour burden is estimated as: 217 QPAMs × 0.5 hour = 108.5 hours. The labor cost of $159.34 is applied for an internal legal professional. The equivalent cost is estimated as: 108.5 hours × $159.34 = $17,288, rounded to $17,000.

[143] The hour burden is estimated as: 2 QPAMs × 0.5 hour = 1 hour. The labor cost of $159.34 is applied for an internal legal professional. The equivalent cost is estimated as: 1 hour × $159.34 = $159.34, rounded to $159.

[144] The hour burden is estimated as: 10,855 QPAMs × 1 hour = 10,855 hours. The labor cost of $63.45 is applied for clerical personnel. The equivalent cost is estimated as: 10,855 QPAMs × 1 hour × $63.45 = $688,750.

estimates that two percent of QPAMs, or 217 QPAMs, will refuse to disclose requested information annually. The Department estimates that drafting a written notice advising the requestor of the reason for the refusal and that the Department may request such information will require an internal legal professional to spend one hour, resulting in a burden of 217 hours with an equivalent cost of approximately $34,577.[145]

Notice to Plans—Subsection I(i)(1)

Within 30 days after the Ineligibility Date, the QPAM must provide notice to the Department and each of its client Plans. The preamble provides more detail on what the QPAM is required to include in this notice. As discussed in the Cost section of the regulatory impact analysis, the Department estimates that 12 QPAMs will lose eligibility each year, eight due to a Criminal Conviction and four due to Participating In Prohibited Misconduct.

As discussed in the Affected Entities section, the Department estimates that each QPAM provides services to 50 Plans, on average. The Department estimates that a legal professional at each ineligible QPAM will spend one hour preparing the notice and two minutes for clerical personnel will spend two minutes preparing each notice to be sent to a Plan by mail, resulting in an hour burden of 22 hours with an equivalent cost of $1,971.[146] Additionally, the Department assumes that notices sent by mail will require two pages of paper each, resulting in a material and postage cost of approximately $374.[147]

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

Notice to the Department of Prohibited Misconduct and Foreign NPA or DPA

If a QPAM, an Affiliate, or owner of a five (5) percent or more interest in a QPAM Participates in Prohibited Misconduct or enters into a foreign equivalent of an NPA or DPA, the QPAM is required to provide notice to the Department of the agreement. The Department does not have data on how frequently these entities enter into such agreements but assumes it will be infrequent. For the purposes of this analysis, the Department assumes that four instances each year will require such a notice. The Department estimates that this will result in a cost of approximately $340.[148]

Requesting an Individual Exemption—Section I(j)

Participating In Prohibited Misconduct could lead a QPAM to request an individual exemption. The burden for filing an application requesting an individual exemption is included in the ICR for the Exemption Procedure Regulation, which has been approved under OMB Control Number 1210–0060. Instead of amending that ICR, the estimated burden for applications from QPAMs Participating In Prohibited Misconduct is included here.[149]

The Department estimates that there will, on average, be one application each year related to Prohibited Misconduct, affecting four QPAMs. The Department estimates that gathering and preparing the information for the application will take, on average, 20 hours of in-house legal professional labor and 20 hours of clerical personnel labor at each QPAM. The Department assumes that the application will be prepared by an outside legal professional specializing in such matters. The Department estimates that it will require 15 hours, on average, of outside legal professional labor to prepare the application. For the four QPAMs losing eligibility due to Prohibited Misconduct, this will result in an hour burden of 175 hours with an equivalent cost of $25,861.[150]

For applications that reach the stage of publication of a proposed individual exemption in the **Federal Register**, a notice must be prepared and distributed to interested parties. Similarly, if the exemption is ultimately granted, each of these four QPAMs will be required to send an objective description of the facts and circumstances upon which the misconduct is based to each client Plan. The Department estimates that approximately 200 notices will be distributed annually, corresponding to an average of 50 client Plans for each of the four QPAMs estimated to be affected by the application. The Department estimates that it will take 10 minutes for clerical personnel to distribute the notices and objective descriptions, resulting in an hour burden of 33.3 hours with an equivalent cost of approximately $2,116.[151] In addition, material and mailing costs for all of these notices totals approximately $378.[152] The Department estimates that approximately 40 (20 percent of the total number of notices) will be distributed electronically.

Additional Requirement for QPAMs Requesting an Individual Exemption

New Section I(j) indicates that a QPAM that is ineligible or anticipates that it will become ineligible due to an actual or possible Criminal Conviction or Participating In Prohibited Misconduct may apply for an individual exemption from the Department to continue to rely on the relief provided in this exemption for a longer period than the One-Year Transition Period. In such an event, an applicant should review the Department's most recently granted individual exemptions

[145] The number of QPAMs is estimated as 10,855 × 2% = 217 QPAMs. The hour burden is estimated as: 217 QPAMs × 1 hour = 217 hours. The labor cost of $159.34 is applied for a legal professional. The equivalent cost is estimated as: 217 QPAMs × 1 hour × $159.34 = $34,577.

[146] The hour burden is estimated as: (12 QPAMs × 0.5 hours of professional legal time) + (12 QPAMs × 50 Plans × 80% of notices being mailed × 2/60 hours of clerical personnel time) = 22 hours. The labor cost of $159.34 is applied for a legal professional, and the labor cost of $63.45 is applied for clerical personnel. The equivalent cost is estimated as: (12 QPAMs × 0.5 hours of professional legal time × $159.34) + (12 QPAMs x 50 Plans x 80% of notices being mailed x 2/60 hours of clerical personnel time × $63.45) = $1,971.

[147] The material and postage cost are estimated as: (12 QPAMs x 50 Plans × 80% of notices being mailed) × [(2 pages × $0.05 per page) + $0.68] = $374.

[148] If preparing and sending each notice were to require an in-house legal professional 30 minutes and a clerical staff 5 minutes. The hour burden is estimated as: 4 notices × (30 minutes + 5 minutes) = 2 hour and 20 minutes. The labor cost of $159.34 is applied for an in-house legal professional, and a labor cost of $63.45 is applied for clerical staff. The equivalent cost is estimated as: 4 notices × [(30 minutes × $159.34) + (5 minutes × $63.45)] = $340. The Department assumes such notices will be sent electronically and will not create material or postage costs.

[149] In three years when control number 1210–0060 is extended, the increase in requests for individual exemptions will be captured in the historical data used for the renewal and the burden going forward will be captured there.

[150] The hour burden is estimated as: [4 QPAMs × (20 hours from an in-house legal professional + 20 hours for clerical personnel)] + (1 application × 15 hours from an external legal professional) = 175 hours. The labor cost of $159.34 is applied for an in-house legal professional, a labor cost of $63.45 is applied for clerical personnel, and a labor cost of $535.85 is applied for an outside legal professional. The equivalent cost is estimated as: (4 QPAMs × 20 hours × $159.34) + (4 QPAMs × 20 hours × $63.45) + (1 application × 15 hours × $535.85) = $25,861.

[151] The hour burden is estimated as: 4 QPAMs × 50 Plans per QPAM × (10/60) hours = 33.3 hours. A labor cost of $63.45 is applied for clerical personnel The equivalent cost is estimated as: 4 QPAMs × 50 Plans per QPAM × (10/60) hours × $63.45 = $2,116, rounded to $2,100.

[152] The Department further assumes that notices and the descriptions of facts and circumstances will be delivered separately, comprising 15 and 5 pages, respectively. With a printing cost of $0.05 per page and a mailing cost of $0.66 per notice, the Department estimates the mailing cost as 4 QPAMs × 50 Plans per QPAM × 80% of notices mailed × {[(15 × $0.05) + $0.68] + [(5 × $0.05) + $0.68]} = $378.

involving Section I(g) ineligibility. If an applicant requests the Department to exclude any term or condition from its exemption that is included in a recently granted individual exemption, the applicant must include a detailed statement with its exemption application explaining the reason(s) why the variation is necessary and in the interest and protective of affected Plans and their participants and beneficiaries. For the three applications covering the 12 ineligible QPAMs, the burden is estimated to be 9 hours with an equivalent cost of $4,823.[153]

Such applicants also should provide detailed information in their applications quantifying the specific cost or harms in dollar amounts, if any, Plans would suffer if a QPAM could not rely on the exemption after the Transition Period, including the specific dollar amounts of investment losses resulting from foregone investment opportunities and any evidence supporting the proposition that investment opportunities would only be available to Plans on less advantageous terms. All three applications will need to include this information if they submit an exemption application. The Department estimates that it will require four hours of a financial professional's time to prepare such information. Therefore, for the three applications covering the estimated 12 QPAMs losing eligibility annually, the cost associated with the additional requirement results in an hour burden of 12 hours with an equivalent cost of $2,288.[154]

Summary

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

Agency: DOL–EBSA.

Type of Review: Revision.

Title of Collection: Plan Asset Transactions Determined by Independent Qualified Professional Asset Managers under Prohibited Transaction Exemption 1984–14.

OMB Control Number: 1210–0128.

Affected Public: Business or other for-profits.

Estimated Number of Respondents: 10,855.

Estimated Number of Annual Responses: 23,093.

Frequency of Response: Annual or as needed.

Estimated Total Annual Burden Hours: 15,353.

Estimated Total Annual Burden Cost: $1,250,752.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)[155] imposes certain requirements with respect to federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act and are likely to have a significant economic impact on a substantial number of small entities.[156] Unless an agency determines that a regulation or amendment will not have a significant economic impact on a substantial number of small entities, section 604 of the RFA requires the agency to present a final regulatory flexibility analysis of the Final Amendment.

The Department emphasizes that the QPAM Exemption was always premised on the QPAM being an entity of sufficient size to withstand undue influence from Parties in Interest. The Department clearly makes this point in the preamble to 1982 QPAM proposal where it stated that the minimum capital and funds-under-management standards are intended to ensure that the eligible fiduciaries managing the accounts or investment funds are established institutions which are large enough to discourage the exercise of undue influence upon their decision-making processes by parties in interest.[157]

This is consistent with the Department's past actions. When the exemption was granted, the Department declined to reduce or delete the asset and equity thresholds as requested by some commenters.[158] Furthermore, when the Department raised the thresholds for investment advisers in 2005, it stated that the thresholds had ''not been revised since 1984 and may no longer provide significant protections for plans in the current financial marketplace.'' [159]

As discussed in greater detail below, the Department lacks data to be able to identify how many asset managers providing services to Plans fall below the SBA size thresholds and above the QPAM eligibility thresholds. However, given the nature of the QPAM Exemption and based on the premise of the entity being large enough to remain independent, the requirements of this Final Amendment are applicable to all entities, regardless of size.

On September 16, 2022, the Department published a supplementary Initial Regulatory Flexibility Analysis explaining the possible impact on small entities of the amended exemption.[160]

The Department has considered the comments submitted to the Department as well as the information discussed in hearings conducted by the Department to update this analysis. Specifically, the Department responded to the following comments in this analysis:

- Several commenters on the Proposed Amendment stated that the Department underestimated the number of QPAMs in the supplementary Initial Regulatory Flexibility Analysis for the Proposed Amendment. In response to these comments, the Department has revised its methodology to estimate the number of QPAMs leading to an increase in the estimate of QPAMs.
- A few commenters stated that the Department underestimated the number of Plans that have hired a QPAM. In response to these comments, the Department has revised its estimates of the number of QPAM–Plan relationships.
- The Department received several comments that the Department underestimated the cost associated with the recordkeeping requirement in the supplementary Initial Regulatory Flexibility Analysis for the Proposed Amendment. In response to these comments, the Department has provided additional guidance on recordkeeping earlier in this preamble to alleviate potential confusion.

There were no comments filed by the SBA's Office of Advocacy.

Despite the importance of a QPAM being sufficiently large to withstand undue influence from parties in interest, the Department has determined that the Final Amendment could have a significant impact on a substantial number of small entities in an abundance of caution, because it does not have sufficient information to determine it would not. Therefore, the Department presents its Final Regulatory Flexibility Analysis below.

Need for and Objectives of the Amendment

Substantial changes have occurred in the financial services industry since the

[153] The hour burden is estimated as: (3 applications × 3 hours) = 9 hours. A labor cost of $535.85 is applied for an outside legal professional. The equivalent cost is estimated as: (3 application × 3 hours × $535.85 outside legal professional labor) = $4,823.

[154] The hour burden is estimated as: 3 applications × 4 hours = 12 hours. At an hourly rate of $190.63 is applied for financial professional. The equivalent cost is estimated as: (3 applications × 4 hours × $190.63 financial professional rate) = $2,288.

[155] 5 U.S.C. 601 *et seq.* (1980).

[156] 5 U.S.C. 551 *et seq.* (1946).

[157] 47 FR 56945, 56947 (Dec. 21, 1982).

[158] *See* 49 FR at 9502.

[159] *See* Proposed Amendment, 68 FR 52419, 52423 (Sept. 3, 2003).

[160] 87 FR 56912.

Department granted the QPAM Exemption in 1984. These changes include industry consolidation and an increasingly global reach for financial services institutions, both in their affiliations and in their investment strategies.

The baseline version of the QPAM Exemption is ambiguous regarding whether foreign convictions are included in the scope of the ineligibility provision under Section I(g). Today, QPAMs often have corporate or relationship ties to a broad range of entities, some of which are located internationally. Additionally, some global financial service institutions are headquartered or have parent entities that reside in foreign jurisdictions. These entities may have significant control and influence over the operation and management of all entities within a large financial institution's organizational structure, including those entities operating as QPAMs. Additionally, the international ties of QPAMs come not just from their affiliations and parent entities, but also their investment strategies, including those involving Plan assets.

The Department is also concerned about QPAMs that engage in significant misconduct of a similar type and nature as the conduct that might lead to a Criminal Conviction,[161] but ultimately does not result in a conviction. Under the baseline version of the exemption, a QPAM could theoretically avoid the conditions related to integrity and ineligibility under Section I(g) by entering into an NPA or DPA with prosecutors, which would allow it to side-step the consequences that otherwise would result from a Criminal Conviction. Plans may suffer significant harm if they are exposed to serious misconduct committed by a QPAM, its Affiliates, or owners of a five (5) percent or more interest that ultimately results in a an NPA or DPA rather than a Criminal Conviction and consequent ineligibility under Section I(g).

Likewise, intentionally or systematically violating the conditions of the exemption exposes Plans to significant potential harm at the hands of those with influence or control over their assets. In the Department's view, QPAMs that repeatedly engage in these types of serious misconduct do not display the requisite standards of integrity necessary to warrant their eligibility for the broad relief provided in the QPAM Exemption.

Through its administration of the individual exemption program, the Department also determined that certain aspects of the QPAM Exemption would benefit from a focus on mitigating potential costs and disruption to Plans when a QPAM becomes ineligible for the exemptive relief due to Section I(g). The Final Amendment would reduce the harmful impact on Plans by requiring QPAMs that become ineligible to allow their client Plans to withdraw from their arrangement with the QPAM penalty-free and indemnify their client Plans for certain losses during a One-Year Transition Period to avoid unnecessary disruptions to Plans when a QPAM becomes ineligible due to a Criminal Conviction or Participation In Prohibited Misconduct. The Transition Period will help bridge the gap between the QPAM Exemption and the Department's administration of its individual exemption program in connection with Section I(g) ineligibility.

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

Finally, the Final Amendment is needed to add a standard recordkeeping requirement to ensure QPAMs will be able to demonstrate, and the Department will be able to verify, compliance with the exemption conditions.

As a whole, the changes to the QPAM Exemption in this Final Amendment are necessary to ensure it remains in the interest of and protective of the rights of Plans and their participants and beneficiaries as required by ERISA section 408(a) and Code section 4975(c)(2).

Affected Small Entities

Qualified Professional Asset Managers (QPAMs)

To qualify as a QPAM, financial institutions must meet equity capital, net worth, and/or asset under management requirements. The Final Amendment will update these thresholds based on the price inflation since 1984, incrementally phasing in the thresholds from the Proposed Amendment over the period between 2024 and 2030. This Final Amendment increases the thresholds as follows:

(1) Banks—as defined in section 202(a)(2) of the Investment Advisers Act of 1940, with equity capital in excess of $1,570,300 as of the last day of the fiscal year ending no later than December 31, 2024, $2,140,600 effective as of the last day of the fiscal year ending no later than December 31, 2027, and $2,720,000 effective as of the last day of the fiscal year ending no later than December 31, 2030.

(2) Savings and loan associations—the accounts of which are insured by the Federal Deposit Insurance Corporation, with equity capital or net worth in excess of $1,570,300 effective as of the last day of the fiscal year ending no later than December 31, 2024, $2,140,600 effective as of the last day of the fiscal year ending no later than December 31, 2027, and $2,720,000 effective as of the last day of the fiscal year ending no later than December 31, 2030.

(3) Insurance companies—subject to supervision under state law, with net worth in excess of $1,570,300 effective as of the last day of the fiscal year ending no later than December 31, 2024, $2,140,600 effective as of the last day of the fiscal year ending no later than December 31, 2027, and $2,720,000 effective as of the last day of the fiscal year ending no later than December 31, 2030.

(4) *Investment advisers*—registered under the Investment Advisers Act of 1940 with total client assets under management in excess of $101,956,000 effective as of the last day of the fiscal year ending no later than December 31, 2024, $118,912,000 effective as of the last day of the fiscal year ending no later than December 31, 2027, and $135,868,000 effective as of the last day of the fiscal year ending no later than December 31, 2030. In addition, the investment adviser must either have shareholders' or partners' equity— or payment of liabilities guaranteed by an affiliate, another entity that could qualify as a QPAM, or a broker-dealer with net worth— in excess of $1,570,300 effective as of the last day of the fiscal year ending no later than December 31, 2024, $2,140,600 effective as of the last day of the fiscal year ending no later than December 31, 2027, and $2,720,000 effective as of the last day of the fiscal year ending no later than December 31, 2030.

The Department will make subsequent annual adjustments for inflation to the equity capital, net worth, and asset management thresholds, rounded to the nearest $10,000, no later than January 31 of each year by publication in the **Federal Register**.

As discussed in the Affected Entities section above, the Department estimates that there are 10,855 QPAMs. The Department does not know how many

[161] The term ''Criminal Conviction'' is defined in Section VI(r) of this Final Amendment.

QPAMs fit the SBA's small entity definition for the finance and insurance sector. SBA outlines size standards to determine whether an entity is a small entity. The size standards and NAICS codes are summarized in the table below.

TABLE 4—SBA SIZE THRESHOLDS AND NAICS CODES BY POTENTIAL QPAM TYPE

Entity type	NAICS codes	SBA size threshold	
		Receipts in millions of dollars	Assets in millions of dollars
Investment Banks	523150	47.0	.....
Commercial Banks	522110	.....	$850
Savings and Loan Associations	522180	.....	850
Insurance Companies	524113	47.0	.....
Investment Advisers	523940	47.0	.....

The Department lacks sufficient data to identify how many of the estimated asset managers providing services to Plans fall below the SBA size thresholds and are above the QPAM eligibility thresholds. However, the Department believes some small entities that meet the SBA's definition could be significantly impacted by the Final Amendment to the QPAM Exemption.

For example, some smaller QPAMs may no longer be able to rely upon the exemption due to the increases in the asset and equity thresholds in the definition of ''QPAM'' in Section VI(a) of the Final Amendment. After considering public comments and testimony at the public hearing regarding the Proposed Amendment, the Department has decided to implement the proposed increase in thresholds incrementally between 2024 and 2030 to reduce the potential impact on small entities. Additionally, to the extent that Plans that are small entities are more likely to hire a QPAM that is a small entity, the Final Amendment could also impact them by reducing the market of available QPAMs.

Plans, Participants, Beneficiaries, and IRA Owners

The Final Amendment will affect Plans whose assets are held by an Investment Fund that is managed by a QPAM. The Department does not collect data on Plans that use QPAMs to manage their assets. As discussed in the Affected Entities section of the regulatory impact analysis above, the Department estimates that a single QPAM services, on average, 50 client Plans, resulting in an estimate of 547,566 total client Plan relationships. The Department estimates that 483,350 of these relationships are with small Plans.[162] Additionally, the Department estimates that 215,135 unique Plans have a relationship with a QPAM, of which 189,905 are assumed to be small Plans.[163]

Impacts of the Rule

In analyzing compliance costs associated with the Final Amendment, the Department considers the QPAM's existing compliance costs as the regulatory baseline. This includes ERISA's fiduciary duty requirements (to the extent applicable), requirements under the prior version of the QPAM Exemption, typical requirements in the individual exemption process, and individual exemptions granted in connection with Section I(g) ineligibility. The Department does not expect that the Final Amendment will lead to more than a modest increase to the existing costs associated with QPAM ineligibility and individual exemption requests related to Criminal Convictions. The Department is uncertain, however, regarding the number of QPAMs that would become ineligible under the expansion of the ineligibility provision related to Participating In Prohibited Misconduct. The Department also is uncertain about the extent to which the changes to asset management and equity thresholds in the Final Amendment will cause new costs for a small, unknown number of QPAMs that would lose their eligibility to rely on the exemption because they do not meet the increased thresholds. In order to mitigate such costs, the Department has phased-in the increase in the equity and asset thresholds in three-year increments beginning in 2024 and ending in 2030.

As discussed above, the Department lacks information and data to estimate the number of small QPAMs that would no longer be able to rely upon the exemption due to the expansion of the ineligibility provision related to Participating In Prohibited Misconduct or due to the increased size thresholds. The Department expects that small QPAMs remaining able to rely upon the amended QPAM Exemption will experience a similar impact as larger entities. Accordingly, the following analysis considers the cost that each QPAM is estimated to incur, depending on whether that QPAM loses the ability to rely upon the QPAM Exemption.

Although the Department has provided a cost analysis below, the heightened standards in this Final Amendment may result in entities being more diligent in compliance. Further, the Final Amendment will provide clear guardrails that would make the costs associated with QPAMs becoming ineligible under Section I(g) more clearly avoidable.

Preliminary Assumptions and Cost Estimate Inputs

The Department assumes that different types of personnel will be responsible for satisfying the requirements in the Final Amendment. To account for the labor costs associated with different types of personnel, the Department estimates the hourly labor costs for each type of personnel. In the analysis below, the Department applies the hourly labor costs of $63.45 for clerical personnel, $159.34 for internal legal professionals, $190.63 for financial managers, and $535.85 for outside legal professionals.[164]

[162] In the 2020 Form 5500, the Department found 64,216 QPAM relationships amongst a total of 87,559 Plans that filed the Form 5500 Schedule C. Small Plans are not required to file Schedule C. The number of client-Plan relationships for small Plans is estimated as: 547,566 − 64,216 = 483,350.

[163] In the 2020 Form 5500, the Department found 25,230 Plans that used QPAM service providers of 87,559 Plans that filed the Form 5500 Schedule C. Small Plans are not required to file Schedule C. The number of client-Plan relationships for small Plans is estimated as: 215,135 − 25,230 = 189,905.

[164] Labor costs for clerical personnel, accountants or auditors, internal legal professionals, and financial managers are based off internal Department of Labor calculations based on 2023 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/*

The Final Amendment requires QPAMs to distribute various notices to client Plans in certain situations, as described below. The Department does not have sufficient data to estimate how often QPAMs will elect to send such notices electronically or by mail. For the purposes of this analysis, the Department estimates that 80 percent of these notices will be delivered by first-class mail. The Department assumes the postage cost associated with sending notices through first-class mail is $0.66.[165]

Costs Incurred by All QPAMs

Rule Familiarization Costs

The Department expects that QPAMs are likely to rely on outside specialized legal counsel to ensure compliance with the Final Amendment. On average, the Department estimates that each QPAM will incur a cost equivalent to the cost of consulting with an outside legal professional for one hour. This results in an average cost of $536 per entity in the first year.[166]

Reporting Reliance on the QPAM Exemption—Subsection I(k)

The Department believes that the one-time requirement to report reliance on the QPAM Exemption via email to *QPAM@dol.gov* will result in a minor additional clerical cost. The information required under subsection I(k) is limited to the legal name of the entity relying upon the exemption and any name the QPAM may be operating under. This notification would occur only once for most QPAMs. In subsequent years, new QPAMs or QPAMs that change their name will be required to send the notification. The Department expects it will take one hour, on average, for each QPAM to prepare and send this electronic notification. This cost is estimated to be approximately $63 per entity either upon enactment of the Final Amendment, origination of a new QPAM, or a name change.[167]

If a QPAM fails to report their reliance on the exemption within 90 days, the Final Amendment provides the QPAM with an additional 90 days to send the notice to the Department. This notice must include an explanation for the QPAM's failure to provide timely notice. The Department estimates that preparing the notice will require a legal professional to spend 30 minutes on average resulting in a cost estimate of $80 per entity upon the effective date of the Final Amendment, origination of a new QPAM, or a name change.[168] The Department includes the cost for a clerical professional to draft and send an email notifying the Department of its reliance or name change in the cost estimate.

Recordkeeping—Section VI(u)

The Final Amendment includes a new recordkeeping provision that will apply to all QPAMs. Due to the fiduciary status of QPAMs and the existing regulatory environment, the Department assumes that QPAMs already maintain such records as part of their regular business practices. In addition, the recordkeeping requirements correspond to the six-year record retention period in ERISA section 107. The Department recognizes that some QPAMs may not be keeping records that satisfy the requirements and accordingly will experience a larger marginal cost for this requirement. However, the Department expects that most QPAMs are already fully compliant. The Department estimates that, on average, the additional recordkeeping requirements will require a QPAM's clerical personnel to spend one hour, resulting in a per-QPAM cost of $63.[169]

If a QPAM refuses to disclose information to any of the parties listed in Section VI(u), on the basis that information is exempt from disclosure, the QPAM must provide a written notice advising the requestor of the reason for the refusal and that the Department may request such information. The Department does not have sufficient data to estimate how often such a refusal is likely to occur; however, the Department believes such instances will be rare. In the case when a QPAM refuses to disclose the information, the Department estimates that an internal legal professional will spend one hour, resulting in a per-QPAM cost of $159.[170]

Costs Incurred by QPAMs Losing Eligibility for the Exemption for a Criminal Conviction or Prohibited Misconduct

In the regulatory impact analysis, the Department estimated that eight QPAMs would lose eligibility due to Criminal Convictions and four QPAMs would lose eligibility due to Prohibited Misconduct each year. The Department does not have sufficient data to estimate how many QPAMs losing eligibility are small entities. The following analysis examines the per-entity cost of a typical QPAM losing eligibility. The Department does not expect the cost for small and large QPAMs losing eligibility to be significantly different.

Notice to the Department of Prohibited Misconduct and Foreign NPAs or DPAs

If the QPAM, its Affiliates, or owners of a five percent or more interest in a QPAM Participates in Prohibited Misconduct or enters into a foreign equivalent of an NPA or DPA, the QPAM must notify the Department of the agreement. The Department assumes that this notice will require a legal professional to spend 30 minutes producing the notice and a clerical worker five minutes to send the notice, resulting in a per-entity cost of $85.[171]

Mandatory One-Year Transition Period—Section I(i)

As amended, the Department expects that the costs incurred by a QPAM during the Transition Period would be equivalent to the costs incurred by a QPAM obtaining an individual exemption. However, there will be an increased cost associated with the expansion of the ineligibility provisions. As discussed above, the Department estimates that four additional QPAMs will become ineligible each year due to Prohibited Misconduct.

Notice to Plans—Subsection I(i)(1)

Within 30 days after the Ineligibility Date, the QPAM must provide notice to the Department and each of its client Plans. The preamble provides more detail on the information the QPAM is required to include in this notice.

QPAMs that experience ineligibility and apply for individual exemption relief are already required to provide

technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf. Labor costs for outside legal professionals is calculated as a composite weighted average based on the Laffey Matrix for Wage Rates for the time period 6/01/2022–5/31/2023, see *http://www.laffeymatrix.com/see.html.* The labor cost is estimated as: (40% × $413) + (35% × $508) + (15% × $733) + (10% × $829) = $535.85.

[165] *See* USPS. ''Mailing & Shipping Prices.'' (2023). *https://www.usps.com/business/prices.htm.*

[166] The labor cost of $535.85 is applied for an external legal professional. The cost burden is estimated as: 1 hour × $535.85 = $535.85, rounded to $536.

[167] The labor rate of $63.45 is applied for a clerical worker. The cost is estimated as: (15/60) hours × $63.45 = $15.86, rounded to $16.

[168] The labor rate of $159.34 is applied for an internal legal professional. The cost is estimated as: 0.5 hour × $159.34 = $79.67, rounded to $80.

[169] The labor rate of $63.45 is applied for a clerical professional. The cost is estimated as: 1 hour × $63.45 = $63.45, rounded to $63.

[170] The labor rate of $159.34 is applied for an internal legal professional. The cost is estimated as: 1 hour × $159.34 = $159.34, rounded to $159.

[171] If preparing and sending each notice were to require an in-house legal professional 30 minutes and a clerical staff 5 minutes. The hour burden is estimated as: 1 notices × (30 minutes + 5 minutes) = 35 minutes. The labor cost of $159.34 is applied for an in-house legal professional, and a labor cost of $63.45 is applied for clerical staff. The cost is estimated as: (30 minutes × $159.34) + (5 minutes × $63.45) = $85. The Department assumes such notices will be sent electronically and will not create material or postage costs.

this type of notice. Therefore, the Department has attributed no incremental burden to this requirement for QPAMs that become ineligible due to a Criminal Conviction. However due to the expanded scope of ineligibility, QPAMs that become ineligible due to Participating In Prohibited Misconduct will incur costs to send notices to their client Plans.

The Department estimates that a legal professional will spend 30 minutes preparing the notification for each QPAM, and clerical staff will spend two minutes preparing and distributing the notifications by mail. Additionally, the Department assumes that each notice will require two sheets of paper. The total incremental cost related to ineligibility for Participating in Prohibited Misconduct is $196 per entity, including mailing expenses.[172]

The cost to send this notice to the Department will be negligible because it is required to be sent electronically, and the QPAM will have already prepared and sent the notice to its client Plans.

Indemnification

As discussed above, the Final Amendment requires QPAMs to agree to indemnify, hold harmless, and promptly restore actual losses to each client Plan for any damages directly resulting from a QPAM losing eligibility for the exemption due to a Criminal Conviction or Prohibited Misconduct. Damages may include losses and related costs arising from unwinding transactions with third parties, transitioning Plan assets to an alternative asset manager, and exposure to excise taxes under Code section 4975.

When the Department has granted individual exemptions regarding section I(g) ineligibility, it has required applicants to comply with additional protections for their plan and IRA clients that allow them to withdraw from the asset management arrangement without penalty and indemnify and hold them harmless in the event future misconduct occurs. Accordingly, in this analysis, no incremental burden is attributed to this requirement for QPAMs that become ineligible due to a Criminal Conviction.

However due to the expanded scope of ineligibility, QPAMs that become ineligible due to Participating In Prohibited Misconduct may incur costs associated with indemnifying their client Plans for losses that would occur if they moved to a new asset manager. In the Proposed Amendment, the Department requested comments on the costs of the indemnification provisions. The Department received several comments noting that the indemnity obligation will increase the risk and cost associated with being a QPAM and that these costs will be passed onto Plans in higher fees. The Department, however, did not receive any comments directly addressing the amount of the indemnification costs, and the Department does not have sufficient information and data to estimate these costs.[173]

Costs Incurred by QPAMs Requesting an Individual Exemption—Section I(j)

The amendment adds Section I(j), which states that a QPAM that is ineligible or anticipates that it will become ineligible may apply for an individual exemption from the Department. This individual exemption would allow the QPAM to continue relying on the relief provided in the QPAM Exemption for a longer period than the One-Year Transition Period.

Costs for all QPAMs Seeking an Individual Exemption

The Department estimates that, on average, QPAMs will submit three applications annually. In these three applications, the Department estimates that 12 QPAMs annually will become ineligible, with four losing eligibility due to Prohibited Misconduct and eight losing eligibility due to a Criminal Conviction.

The Final Amendment will require all QPAMs to include in their exemption applications the specific dollar amounts of investment losses resulting from foregone investment opportunities and any evidence supporting the proposition that investment opportunities would only be available to client Plans on less advantageous terms. For this requirement, the Department assumes a financial professional will spend four hours preparing the report, resulting in a per-application cost of $763, and a per-entity cost of $191.[174]

If an applicant requests the Department to exclude any term or condition from its exemption that is included in a recently granted individual exemption, the applicant must include a detailed statement with its exemption application explaining the reason(s) why the variation is necessary and in the interest and protective of affected Plans, their participants and beneficiaries, and IRA owners. While the Department is including this requirement in the Final Amendment, it expects that applicants who are ineligible due to Criminal Conduct already are conducting this analysis and thus would not incur an incremental cost.

QPAMs that become ineligible due to Participating In Prohibited Misconduct will incur incremental costs due to the requirement to review the Department's most recently granted individual exemptions involving Section I(g) ineligibility. The Department estimates that an outside legal professional would spend three hours reviewing past individual exemptions and draft this addition to the individual exemption application, resulting in a per-application cost of $1,600.[175] The Department estimates that each application would cover four QPAMs, resulting in a per-entity cost of $402.

Due to the expanded scope of ineligibility to include Participating In Prohibited Misconduct, additional financial institutions may lose eligibility for the QPAM Exemption and may seek an individual exemption. These entities would incur the additional costs of filing the application.

For this Final Amendment, the Department estimates that gathering the information for the application will require, on average, an in-house legal professional and clerical personnel to spend 10 hours each gathering and preparing information for the application at each QPAM. The Department assumes that the application will be prepared by an outside legal professional specializing in such matters. Once it receives information from the affected QPAMs, the Department estimates that an outside legal professional will spend 15 hours preparing the application. For the four QPAMs losing eligibility due to Prohibited Misconduct, this will result

[172] The labor cost of $159.34 is applied for a legal professional, and the labor cost of $63.45 is applied for clerical personnel. The equivalent cost is estimated as: (0.5 hours of professional legal time × $159.34) + (50 Plans × 80% of notices being mailed × 2/60 hours of clerical personnel time × $63.45) = $165. The material and postage cost are estimated as: (50 Plans × 80% of notices being mailed) × [(2 pages × $0.05 per page) + $0.68] = $31. The total cost is estimated to be $196 ($165 + $31).

[173] The Department received several comments addressing the specific costs associated with amending WMAs, as required under the Proposed Amendment. These costs did not directly address indemnification costs but rather contract negotiation and updating the WMAs. The Department moved the proposed requirements for the WMA into the Transition Period provisions in response to commenters and believes the cost to ineligible QPAMs regarding this will generally be captured within the required notices to client Plan after an ineligibility trigger.

[174] An hourly rate of $190.63 is applied for financial professional. The equivalent cost is estimated as: (4 hours × $190.63 financial professional rate) = $763.

[175] A labor cost of $535.85 is applied for an outside legal professional. The equivalent cost is estimated as: (3 hours × $535.85 outside legal professional labor) = $1,608.

in a per-application cost of $26,000 [176] or a per-QPAM cost of $6,465.

For applications that are published as proposed exemptions, the QPAM must prepare and distribute a notice to interested persons. Similarly, if the exemptions are ultimately granted, each of these four QPAMs will be required to send an objective description of the facts and circumstances upon which the misconduct is based to each client Plan. The Department estimates four QPAMs will be required to notify interested parties and client Plans under these circumstances, with each QPAM having an average of 50 client Plans. The Department estimates that clerical personnel will spend 10 minutes to distribute the notices and objective descriptions, resulting in a per-QPAM cost of $264 [177] In addition, material and mailing costs for these notices totals approximately $94.[178]

Costs Incurred by Plans and Participants and Beneficiaries

As a result of the adjustments to the asset management and equity thresholds to the QPAM definition in Section VI(a), the Department acknowledges some QPAMs may not meet the new threshold requirements, and, consequently, would no longer be able to rely on the QPAM Exemption. The Department expects QPAMs and Plans that utilize these QPAMs to incur costs due to this transition, but it lacks sufficient data to estimate the impact.[179] The Department has requested similar data in connection with individual exemption applications following convictions covered by Section I(g), but the data provided by applicants and costs identified by them has been limited. The Department requested comments on these costs in the Proposed Amendment but did not receive comments identifying specific costs that would be incurred due to a possible transition to a new QPAM by small or large entities.

Summary of Costs

The Department estimates that the total, per-entity, estimated incremental annual costs associated with the amendment will range between $854 and $10,282 in the first year and between $318 and $9,746 in subsequent years. Table 5 summarizes the per entity costs for each requirement and the estimated annual costs associated with the amendment for QPAMs to comply with the exemption, QPAMs who trigger the conditions associated with Participating In Prohibited Misconduct, and QPAMs that become ineligible due to a Criminal Conviction.

TABLE 5—INCREMENTAL COST SUMMARY ASSOCIATED WITH AMENDMENTS, PER ENTITY

Requirement	Cost for QPAMs to comply with exemption	Cost for QPAMs with prohibited misconduct *(estimated 4 per year)*	Cost for QPAMs with a conviction *(estimated 8 per year)*
Rule Familiarization	$536	$536	$536
Reporting Reliance on the QPAM Exemption [1]	$16	$16	$16
Notice of Failure To Report Reliance [2]	$80	$80	$80
Recordkeeping	$63	$63	$63
Notice of Refusal To Disclose Requested Information	$159	$159	$159
Notice of Prohibited Misconduct or Foreign NPA/DPA [3]	.....	$85	.....
Notice to Plans of Ineligibility	.....	$196	.....
Requesting an Individual Exemption Costs: [4]			
Preparation Labor Cost	.....	$6,465	.....
Notices Distribution	.....	$622	.....
Additional Requirement—Criminal Conviction	.....	.....	$191
Additional Requirement—Prohibited Misconduct	.....	$593	.....
First Year Total Estimated Annual Cost	$854	$8,815	$1,045
Cost as a Percentage of Equity Capital or Net Worth Threshold Effective December 31, 2024 [5]	*0.05%*	*0.65%*	*0.07%*
Subsequent Years Total Estimated Annual Cost [1]	$318	$9,746	$509
Cost as a Percentage of Equity Capital or Net Worth Threshold Effective December 31, 2024 [5]	*0.02%*	*0.62%*	*0.03%*

Notes: Only quantifiable costs are displayed.

[1] Most entities will only need to provide this notice once, either upon the effective date of the Final Amendment or when first relying on the QPAM Exemption. Entities will also need to provide the notice after a name change.

[2] Entities will only need to provide this notice after failing to report its reliance on the exemption within the allotted time.

[3] Entities will only need to provide such a notice if the QPAM, its Affiliates, or owners of a five (5) percent or more interest Participate In Prohibited Misconduct or execute a foreign equivalent of a non-prosecution or deferred prosecution agreement.

[4] One individual exemption application associated with ineligible QPAMs (caused by Prohibited Misconduct) are estimated each year, affecting 4 QPAMs. This cost reflects the total cost of the application divided by the number of QPAMs.

[176] The hour burden is estimated as: [4 QPAMs × (20 hours from an in-house legal professional + 20 hours for clerical personnel)] + (1 application × 15 hours from an external legal professional) = 175 hours. The labor cost of $159.34 is applied for an in-house legal professional, a labor cost of $63.45 is applied for clerical personnel, and a labor cost of $535.85 is applied for an outside legal professional. The equivalent cost is estimated as: (4 QPAMs × 20 hours × $159.34) + (4 QPAMs × 20 hours × $63.45) + (1 application × 15 hours × $535.85) = $25,861, rounded to $26,000.

[177] A labor cost of $63.45 is applied for clerical personnel The equivalent cost is estimated as: 50 Plans per QPAM × (10/60) hours × $63.45 = $264.

[178] The Department further assumes that notices and the descriptions of facts and circumstances will be delivered separately, comprising 15 and 5 pages, respectively. With a printing cost of $0.05 per page and a mailing cost of $0.68 per notice, the Department estimates the mailing cost as 50 Plans per QPAM × 80% of notices mailed × {[(15 × $0.05) + $0.68] + [(5 × $0.05) + $0.68]} = $94.

[179] Some QPAMs have suggested in the past that there could be costs associated with unwinding transactions that relied on the QPAM Exemption and reinvesting assets in other ways. The loss of QPAM status could also require an asset manager to keep lists of Parties in Interest to its client Plans to ensure the asset manager does not engage in prohibited transactions. However, even without the QPAM Exemption, a wide variety of investments are available that do not involve non-exempt prohibited transactions.

[5] Banks, savings and loan associations, insurance companies, and investment advisers each have different size threshold requirements, as discussed in more detail in the Affected Entities Section of the regulatory impact analysis. However, the size threshold requirements for each entity type include either an equity capital or net worth requirement. Effective no later than December 31, 2024, the equity capital and net worth requirements will be $1,570,300. For subsequent years, this estimate does not reflect future increases in equity capital and net worth threshold requirements. As these thresholds increase, the Department expects that the cost as a percentage of equity capital or net worth will decrease.

On January 1, 2025, each entity type will be required to have either equity capital or net worth exceeding $1,570,300. Table 5 shows the per entity cost as a percent of this equity capital or net worth threshold. While some entities face additional size threshold requirements, this measure can provide insight into the magnitude of costs faced by small QPAMs. This demonstrates that the smallest asset managers able to qualify for the QPAM Exemption, who are not facing ineligibility, are estimated to incur costs amounting to 0.05 percent of this threshold in the first year and 0.02 percent in subsequent years. The incremental costs incurred by the few QPAMs facing ineligibility due to Prohibited Misconduct or a Criminal Conviction are higher but remain below one percent of the threshold.

As discussed in the Affected Entities section, the Department lacks sufficient data to identify how many of the estimated asset managers providing services to Plans fall below the SBA's small business size thresholds and are above the QPAM eligibility thresholds. Table 6 shows the estimated cost as a percent of the SBA size threshold, in terms of annual receipts for investment banks, insurance companies and investment advisers and in terms of assets under management for commercial banks and savings and loans associations. For most QPAMs, the cost to comply with the Final Amendment is expected to amount to less than 0.01 percent of the respective SBA threshold. The few QPAMs facing ineligibility due to Prohibited Misconduct or a Criminal Conviction may incur costs around 0.02 percent of the respective SBA threshold. The table also shows the estimated cost relative to 50 percent and 10 percent of the SBA threshold for receipts and assets. Even for entities with receipts or assets amounting to 10 percent of the SBA threshold, the costs associated with the Final Amendment account for less than 0.5 percent of the SBA threshold.

TABLE 6—INCREMENTAL COST ASSOCIATED WITH AMENDMENTS, AS A PERCENT OF THE SBA SIZE STANDARD

Size standard	SBA threshold		50% of SBA threshold		10% of SBA threshold	
	$47.0 Million in receipts [1] (%)	$850 Million in assets [2] (%)	$23.5 Million in receipts [1] (%)	$425 Million in assets [2] (%)	$4.7 Million in receipts [1] (%)	$85.0 Million in assets [2] (%)
First Year Total Estimated Annual Cost						
Compliance With the Exemption	0.002	[3]	0.004	[3]	0.018	0.001
QPAMs With Prohibited Misconduct	0.022	0.001	0.044	0.002	0.219	0.012
QPAMs With a Conviction	0.002	[3]	0.004	[3]	0.022	0.001
Subsequent Years Total Estimated Annual						
Compliance With the Exemption	0.001	[3]	0.001	[3]	0.007	[3]
QPAMs With Prohibited Misconduct	0.021	0.001	0.041	0.002	0.207	0.011
QPAMs With a Conviction	0.001	[3]	0.002	[3]	0.011	0.001

[1] The entities subject to this SBA size threshold include investment banks, insurance companies, and investment advisers.
[2] The entities subject to this SBA size threshold include commercial banks and savings and loan associations.
[3] Less than 0.001%.

In summary, the Department lacks data on how QPAMs are distributed relative to the measures of size used by the SBA. However, due to the equity capital and net worth thresholds to qualify for the QPAM exemption, the Department expects that most QPAMs will be on the higher end of the receipts or assets distribution. Based on the analysis above, the Department does not expect the costs associated with the Final Amendment to represent a significant percentage of annual receipts or assets under management of QPAMs.

Regulatory Alternatives

This section of the Final Regulatory Flexibility Act analysis addresses alternatives the Department considered when developing the Final Amendment. The Department evaluates these alternatives and discusses how the alternatives would have affected small entities qualitatively and quantitatively where possible. A more in-depth discussion of the regulatory alternatives is included in the regulatory impact analysis above.

Do Not Amend the QPAM Exemption

The Department considered not expanding the scope of Section I(g) and maintaining its practice of addressing ineligibility under Section I(g) only through the individual exemption process. In considering whether to amend the QPAM Exemption, the Department compared the marginal costs imposed on QPAMs to the marginal benefits experienced by Plans. The Department decided against this alternative in favor of this Final Amendment, relying on its experience processing individual exemption applications to create a smoother transition between the QPAM Exemption and the individual exemption program so that a QPAM's client Plans have certainty regarding their rights after an ineligibility event occurs.

While QPAMs, including small QPAMs, will experience increased costs associated with the Final Amendment, for most QPAMs, these costs are expected to be small compared to the size thresholds required for an investment manager to qualify as a QPAM. This is demonstrated in Table 5 above.

Amend the QPAM Exemption to require QPAMs to amend Written Management Agreements with up-front terms that apply in the event of ineligibility.

In the Proposed Amendment, the Department included a requirement for all QPAMs to amend their WMAs with client Plans to include:

(1) A provision providing that in the event the QPAM, its Affiliates, and five percent or more owners engage in conduct resulting in a Criminal Conviction or receipt of a Written

Ineligibility Notice, the QPAM would not restrict its client Plan's ability to terminate or withdraw from its arrangement with the QPAM;

(2) A provision requiring the QPAM to indemnify, hold harmless, and promptly restore actual losses to each client Plan for any damages directly resulting from a violation of applicable laws, a breach of contract, or any claim arising out of the failure of such QPAM to remain eligible for relief under the QPAM Exemption as a result of conduct that leads to a Criminal Conviction or Prohibited Misconduct; and

(3) A provision requiring the QPAM to agree not to employ or knowingly engage any individual that Participated In the conduct that is the subject of a Criminal Conviction or Prohibited Misconduct.

As discussed in greater detail above in the preamble, the Department believes that these provisions provide an important protection to Plans, participants, beneficiaries, and IRA owners. However, based on the feedback from commenters, the Department has removed the requirement to amend WMAs. Instead, the Final Amendment requires QPAMs to notify and agree to these provisions with Plans in the Notice QPAMs must send to Plans within 30 days after the Ineligibility Date. The Department determined the approach in the Final Amendment provides the same protection to Plans while significantly reducing the cost burden for large and small QPAMs to amend their WMAs.

Asset Management and Equity Thresholds

The Department considered two alternatives related to the asset management and equity thresholds, described below.

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

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

Update the asset management and equity thresholds to full CPI-adjusted values at once.

The Proposed Amendment included CPI-adjusted values that would have been fully updated to 2022 values. The Department received a variety of comments regarding the possible unintended impact to QPAMs and their client Plans who would not be able to satisfy such significant increases at once. This could have resulted in smaller QPAMs losing relief and caused significant disruption and cost to those small QPAMs and their client Plans.

In order to minimize the impact of an immediate increase in the asset and equity thresholds on small QPAMs who may lose QPAMs status, the Department determined that the most appropriate method to update the thresholds in the Final Amendment is to increase them in three-year increments beginning in 2024 and ending in 2030. This approach will limit the disruption an uncertain number of small QPAMs could experience if they lose their eligibility to rely on the exemption due to the increased thresholds by providing them with an extended period to adjust their business models.

Steps the Agency Has Taken To Minimize the Impacts on Small Entities

The Department's decision to update the asset management and equity thresholds could have a significant impact on some small QPAMs that no longer qualify to use the exemption. As discussed in the Regulatory Alternatives section, to reduce the impact on small QPAMs, the thresholds were adjusted in three-year increments to give small QPAMs time to make decisions and adjust.

Some small QPAMs may lose the QPAM portion of their business. Others may adapt. There still may be other exemptions that these QPAMs could use to service their Plan clients, or they could seek an individual exemption that could allow them to continue offering QPAM services, depending upon the facts and circumstances presented to the Department in the exemption application.

Duplicate, Overlapping, or Relevant Federal Rules

The Department has attempted to avoid duplication of requirements. The required policies and procedures and exemption audit are unique to the circumstances of the particular transactions covered by the exemption and do not replicate any other requirements by state or federal regulations. The exemption permits respondents to satisfy the requirements for written guidelines between the QPAM and property manager with documents that are already in existence due to ordinary and customary business practices, provided such documents contain the required disclosures.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 requires each federal agency to prepare a written statement assessing the effects of any federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (adjusted annually for inflation with the base year 1995) in any one year by state, local, and tribal governments, in the aggregate, or by the private sector.[180] For purposes of the Unfunded Mandates Reform Act, as well as Executive Order 12875, this Final Amendment does not include any federal mandate that the Department expects would result in such expenditures by state, local, or tribal governments, or the private sector.[181]

Federalism Statement

Executive Order 13132 outlines fundamental principles of federalism, and requires adherence by federal agencies to specific criteria in the process of their formulation and implementation of policies that have ''substantial direct effects'' on the states, the relationship between the national government and states, or on the distribution of power and responsibilities among the various levels of government.[182] Federal agencies promulgating regulations that have federalism implications must consult with state and local officials and describe the extent of their consultation and the nature of the concerns of state and local officials in the preamble to the final rule.

In the Department's view, this Final Amendment will not have federalism implications because it would not have direct effects on the states, on the relationship between the national government and the states, nor on the distribution of power and responsibilities among various levels of government. The Department welcomed input from affected states regarding this assessment in the Proposed Amendment but received no comments.

General Information

The attention of interested persons is directed to the following:

[180] 2 U.S.C. 1501 *et seq.* (1995).

[181] Enhancing the Intergovernmental Partnership, 58 FR 58093 (Oct. 28, 1993).

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

(1) The fact that a transaction is the subject of an exemption under ERISA section 408(a) and/or Code section 4975(c)(2) does not relieve a fiduciary, or other Party in Interest with respect to a Plan or IRA, from certain other provisions of ERISA and the Code, including but not limited to any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of ERISA section 404 which require, among other things, that a fiduciary act prudently and discharge their duties respecting the Plan solely in the interests of the participants and beneficiaries of the Plan. Additionally, the fact that a transaction is the subject of an exemption does not affect the 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;

(2) In accordance with ERISA section 408(a) and Code section 4975(c)(2), and based on the entire record, the Department finds that this exemption is administratively feasible, in the interests of Plans, their participants and beneficiaries, and IRA owners, and protective of the rights of participants and beneficiaries of the Plan and IRA owners;

(3) The Final Amendment to the QPAM Exemption is applicable to a particular transaction only if the transaction satisfies the conditions specified in the exemption; and

(4) The Final Amendment to the QPAM Exemption is supplemental to, and not in derogation of, any other provisions of ERISA and the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

PTE 84–14

PTE 84–14 is amended to read as follows:

Section I—General Exemption

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

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

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

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

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

(b) The transaction is not described in—

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

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

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

(c) The terms of the transaction, commitments, and investment of fund assets, and any associated negotiations are determined by the QPAM (or under the authority and direction of the QPAM) which represents the interests of the Investment Fund. Either the QPAM, or (so long as the QPAM retains full fiduciary responsibility with respect to the transaction) a property manager acting in accordance with written guidelines established and administered by the QPAM, makes the decision on behalf of the Investment Fund to enter into the transaction, provided that the transaction is not part of an agreement, arrangement, or understanding designed to benefit a Party in Interest. In exercising its authority, the QPAM must ensure that any transaction, commitment, or investment of fund assets for which it is responsible is based on its own independent exercise of fiduciary judgment and free from any bias in favor of the interests of the plan sponsor or other parties in interest. The QPAM may not be appointed or relied upon to uncritically approve transactions, commitments, or investments negotiated, proposed, or approved by the plan sponsor, or other parties in interest. The prohibited transaction relief provided under this exemption applies only in connection with an Investment Fund that is established primarily for investment purposes. No relief is provided under this exemption for any transaction that has been planned, negotiated, or initiated by a Party in Interest, in whole or in part, and presented to a QPAM for approval to the extent the QPAM would not have sole responsibility with respect to the transaction as required by this Section I(c);

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

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

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

(g) *Integrity.*

(1) *Ineligibility due to a Criminal Conviction or Prohibited Misconduct.* Subject to the Ineligibility Date provision set forth in Section I(h), a QPAM is ineligible to rely on this exemption for 10 years following:

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

(B) The QPAM, any Affiliate thereof (as defined in Section VI(d)), or any owner, direct or indirect, of a five (5) percent or more interest in the QPAM Participates In Prohibited Misconduct as defined in Section VI(s) and VI(t); or

(2) *Notice to the Department regarding Participation In Prohibited Misconduct.* The QPAM must submit a notice to the Department at *QPAM@dol.gov* if the QPAM, any Affiliate (as defined in Section VI(d)), or any owner, direct or indirect, of a five (5) percent or more interest in the QPAM, Participates In Prohibited Misconduct as defined in Section VI(s) and VI(t), or enters into an agreement with a foreign government, however denominated by the laws of the relevant foreign government, that is substantially equivalent to a non-prosecution agreement (NPA) or deferred prosecution agreement (DPA) described in section VI(s)(1). The notice must be sent within 30 calendar days after the Ineligibility Date for the Prohibited Misconduct as determined pursuant to Section (I)(h)(2) below or the execution date of the substantially-equivalent foreign NPA or DPA, and the notice must include a description of the Prohibited Misconduct or the substantially-equivalent foreign NPA or DPA and the name of and contact information for the QPAM.

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

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

(2) (A) as of the date on or after June 17, 2024 that the QPAM, any Affiliate thereof (as defined in Section VI(d)), or any owner, direct or indirect, of a five (5) percent or more interest in the QPAM executes a non-prosecution agreement, or a deferred prosecution agreement described in Section VI(s)(1); or

(B) as of the date on or after June 17, 2024 that a final judgment (regardless of whether the judgment is appealed) or a court-approved settlement is ordered by a Federal or State criminal or civil court in connection with determining that the QPAM, any Affiliate thereof (as defined in Section VI(d)), or any owner, direct or indirect, of a five (5) percent or more interest in the QPAM has engaged in Prohibited Misconduct as defined in Section VI(s)(2) and VI(t).

A person will become eligible to rely on this exemption again only upon a subsequent judgment reversing such person's conviction or civil judgment, the effective date of any individual prohibited transaction exemption it receives that expressly permits the relief in this exemption, or the expiration of the 10-year ineligibility period.

(i) *One-Year Transition Period Due to Ineligibility* (One-Year Transition Period or Transition Period). Any QPAM that becomes ineligible under subsection I(g)(1) must provide a Transition Period for its client Plans. Relief is available for transactions (including past transactions) under this exemption during the Transition Period for a maximum period of one year after the Ineligibility Date, provided that the QPAM complies with each condition of the exemption throughout the one-year period (including those additional conditions specified in this subsection (i)). The relief is available during the Transition Period under this exemption only for the QPAM's client Plans that had a pre-existing Written Management Agreement required under subsection VI(a) with the QPAM on the Ineligibility Date. A QPAM must ensure that it manages Plan assets prudently and loyally during the Transition Period. During the Transition Period, the QPAM must comply with the following additional conditions:

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

(A) Its failure to satisfy subsection I(g)(1) and the resulting initiation of this One-Year Transition Period;

(B) That during the Transition Period, the QPAM:

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

(ii) Will not impose any fees, penalties, or charges on client Plans in connection with the process of terminating or withdrawing from an Investment Fund managed by the QPAM except for reasonable fees, appropriately disclosed in advance, that are specifically designed to: (a) prevent generally recognized abusive investment practices, or (b) ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other investors, provided that such fees are applied consistently and in a like manner to all such investors;

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

(iv) Will not employ or knowingly engage any individual that Participated In the conduct that is the subject of a Criminal Conviction or Prohibited Misconduct, regardless of whether the individual is separately convicted in connection with the criminal conduct.

(C) An objective description of the facts and circumstances upon which the Criminal Conviction or Prohibited Misconduct is based, written with sufficient detail to fully inform the client Plan's fiduciary of the nature and severity of the conduct so that the fiduciary can satisfy its duties of prudence and loyalty under section 404 of ERISA (29 U.S.C. 1104), as applicable, with respect to hiring, monitoring, evaluating, and retaining the QPAM in a non-QPAM capacity;

(2) As of the Ineligibility Date under Section I(h), the QPAM must not employ or knowingly engage any individual that Participated In the conduct that is the subject of a Criminal Conviction or that Participated In Prohibited Misconduct causing ineligibility of the QPAM under subsection I(g)(1); and

(3) After the One-Year Transition Period expires, and if the Criminal Conviction is not reversed on appeal, the entity may not rely on the relief provided in this exemption until the expiration of the 10-year ineligibility period unless it obtains an individual exemption permitting it to continue relying upon this exemption.

(j) *Requests for an Individual Exemption.* A QPAM that is ineligible or anticipates that it will become ineligible due to an actual or possible Criminal Conviction or Participating In Prohibited Misconduct as defined in Sections VI(r) and VI(s) may apply for an individual exemption from the Department to continue to rely on the relief provided in this exemption for a longer period than the One-Year Transition Period. An applicant should review the Department's most recently granted individual exemptions involving Section I(g) ineligibility with the expectation that similar conditions will be required of the applicant, if the Department proposes and grants a requested exemption. To that end, if an applicant requests the Department to exclude any term or condition from its

exemption that is included in a recently granted individual exemption, the applicant must include a detailed statement with its exemption application explaining the reason(s) why the proposed variation is necessary and in the interest and protective of affected Plans, their participants and beneficiaries, and individuals for whose benefit a Plan described in Code section 4975(e)(1)(B) or (C) is established (IRA owners). The Department will review such requests consist with the requirements of ERISA section 408(a) and Code section 4975(c)(2). Such applicants also should provide detailed information in their applications quantifying the specific cost or harms in dollar amounts, if any, their client Plans would suffer if the QPAM could not rely on the exemption after the Transition Period, including the specific dollar amounts of investment losses resulting from foregone investment opportunities and any evidence supporting the proposition that investment opportunities would be available to client Plans on less advantageous terms. An applicant should not construe the Department's acceptance of an individual exemption application as a guarantee that the Department will grant an individual exemption. A QPAM that submits an individual exemption application must ensure that it manages Plan assets prudently and loyally during the Transition Period in accordance with section 404 of ERISA (29 U.S.C. 1104), as applicable.

(k) Any QPAM that relies upon this exemption must notify the Department via email at *QPAM@dol.gov.* Each QPAM that relies upon the exemption must report the legal name of each business entity relying upon the exemption in the email to the Department and any name the QPAM may be operating under. This notification needs to be reported only once unless there is a change to the legal name or operating name(s) of the QPAM relying upon the exemption or the QPAM no longer is relying on the exemptive relief provided in the exemption. The QPAM must provide notice to the Department within ninety (90) calendar days of its reliance on the exemption or a change to its legal or operating name. If the QPAM inadvertently fails to provide notice to the Department within the initial 90 calendar day period, it may notify the Department of its reliance on the exemption or name change and failure to report without losing the relief provided by this exemption. This notice must be provided within an additional 90 calendar days along with an explanation for the QPAM's failure to provide notice. A QPAM may notify the Department if it is no longer relying upon this exemption at any time.

Section II—Specific Exemption for Employers

The restrictions of ERISA sections 406(a), 406(b)(1), and 407(a) and the taxes imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(A) through (E), shall not apply to:

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

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

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

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

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

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

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

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

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

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

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

(5) In the case of a Plan that is not an eligible individual account plan (as defined in ERISA section 407(d)(3)), immediately after the transaction is entered into, the aggregate fair market value of employer real property and employer securities held by the Investment Funds of the QPAM in which the Plan has an interest does not exceed ten (10) percent of the fair market value of the assets of the Plan held in those Investment Funds. In determining the aggregate fair market value of employer real property and employer securities as described herein, a Plan shall be considered to own the same proportionate undivided interest in each asset of the Investment Fund or funds as its proportionate interest in the total assets of the Investment Fund(s). For purposes of this requirement, the term ''employer real property'' means real property leased to, and the term ''employer securities'' means securities issued by an employer any of whose employees are covered by the Plan or a Party in Interest of the Plan by reason of a relationship to the employer described in ERISA section 3(14)(E) or (G); and

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

Section III—Specific Lease Exemption for QPAMs

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

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

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

(c) At the Time of the Transaction, and at the time of any subsequent renewal or modification thereof that requires the consent of the QPAM, the terms of the transaction are not more

favorable to the lessee than the terms generally available in arm's length transactions between unrelated parties; and

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

Section IV—Transactions Involving Places of Public Accommodation

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

Section V—Specific Exemption Involving QPAM-Sponsored Plans

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

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

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

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

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

Section VI—Definitions and General Rules

For purposes of this exemption:

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

(1) A bank, as defined in section 202(a)(2) of the Investment Advisers Act of 1940 that has the power to manage, acquire or dispose of assets of a Plan, which bank has, as of the last day of its most recent fiscal year, Equity Capital in excess of $1,000,000. Effective as of the last day of the fiscal year ending no later than December 31, 2024, substitute $1,570,300 for $1,000,000. Effective as of the last day of the fiscal year ending no later than December 31, 2027, substitute $2,140,600 for $1,000,000. Effective as of the last day of the fiscal year ending no later than December 31, 2030, substitute $2,720,000 for $1,000,000; or

(2) A savings and loan association, the accounts of which are insured by the Federal Deposit Insurance Corporation that has made application for and been granted trust powers to manage, acquire or dispose of assets of a Plan by a State or Federal authority having supervision over savings and loan associations, which savings and loan association has, as of the last day of its most recent fiscal year, Equity Capital or Net Worth in excess of $1,000,000. Effective as of the last day of the fiscal year ending no later than December 31, 2024, substitute $1,570,300 for $1,000,000. Effective as of the last day of the fiscal year ending no later than December 31, 2027, substitute $2,140,600 for $1,000,000. Effective as of the last day of the fiscal year ending no later than December 31, 2030, substitute $2,720,000 for $1,000,000; or

(3) An insurance company which is qualified under the laws of more than one State to manage, acquire, or dispose of any assets of a Plan, which company has, as of the last day of its most recent fiscal year, Net Worth in excess of $1,000,000 and which is subject to supervision and examination by a State authority having supervision over insurance companies. Effective as of the last day of the fiscal year ending no later than December 31, 2024, substitute $1,570,300 for $1,000,000. Effective as of the last day of the fiscal year ending no later than December 31, 2027, substitute $2,140,600 for $1,000,000. Effective as of the last day of the fiscal year ending no later than December 31, 2030, substitute $2,720,000 for $1,000,000; or

(4) An investment adviser registered under the Investment Advisers Act of 1940 that has total client assets under its management and control in excess of $85,000,000 as of the last day of its most recent fiscal year, and either (A) Shareholders' or Partners' Equity in excess of $1,000,000, or (B) payment of all of its liabilities including any liabilities that may arise by reason of a breach or violation of a duty described in ERISA sections 404 and 406 is unconditionally guaranteed by—(i) A person with a relationship to such investment adviser described in subsection VI(c)(1) below if the investment adviser and such Affiliate have Shareholders' or Partners' Equity, in the aggregate, in excess of $1,000,000; or (ii) A person described in (a)(1), (a)(2) or (a)(3) of Section VI above; or (iii) A broker-dealer registered under the Securities Exchange Act of 1934 that has, as of the last day of its most recent fiscal year, Net Worth in excess of $1,000,000. Effective as of the last day of the fiscal year ending no later than December 31, 2024, substitute $101,956,000 for $85,000,000 and $1,346,000 for $1,000,000. Effective as of the last day of the fiscal year ending no later than December 31, 2027, substitute $118,912,000 for $85,000,000 and $1,694,000 for $1,000,000. Effective as of the last day of the fiscal year ending no later than December 31, 2030, substitute $135,868,000 for $85,000,000 and $2,040,000 for $1,000,000;

Provided that such bank, savings and loan association, insurance company, or investment adviser has acknowledged in a ''Written Management Agreement'' that it is a fiduciary with respect to each Plan that has retained the QPAM.

(5) By publication through notice in the **Federal Register**, the Department will make subsequent annual adjustments for inflation to the Equity Capital, Net Worth, and asset management thresholds in subsection VI(a)(1) through (4), rounded to the nearest $10,000, no later than January 31 of each year. The adjustments will be effective as of the last day of the fiscal year in which the increase takes effect, ending no later than December 31 of such fiscal year.

(b) An ''Investment Fund'' includes single customer and pooled separate accounts maintained by an insurance company, individual trusts and common, collective or group trusts maintained by a bank, and any other

account or fund to the extent that the disposition of its assets (whether or not in the custody of the QPAM) is subject to the discretionary authority of the QPAM.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(k) For purposes of subsection VI(a)(1) and (2) above, the term ''Equity Capital'' means stock (common and preferred), surplus, undivided profits, contingency reserves, and other capital reserves.

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

(m) For purposes of subsection VI(a)(4) above, the term ''Shareholders' or Partners' Equity'' means the equity

shown in the most recent balance sheet prepared within the two years immediately preceding a transaction undertaken pursuant to this exemption, in accordance with generally accepted accounting principles.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) is convicted in a U.S. federal or state court or released from imprisonment, whichever is later, as a result of any felony involving abuse or misuse of such person's Plan position or employment, or position or employment with a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary; income tax evasion; any felony involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element; or any crime that is identified or described in ERISA section 411; or

(2) is convicted by a foreign court of competent jurisdiction or released from imprisonment, whichever is later, as a result of a crime, however denominated by the laws of the relevant foreign government, that is substantially equivalent to an offense described in(r)(1) above (excluding convictions and imprisonment that occur within a foreign country that is included on the Department of Commerce's list of ''foreign adversaries'' that is codified in 15 CFR 7.4, as amended).

(s) ''Prohibited Misconduct'' means when a QPAM, any Affiliate thereof (as defined in Section VI(d)), or any owner, direct or indirect, of a five (5) percent or more interest in the QPAM:

(1) Enters into a non-prosecution (NPA) or deferred prosecution agreement (DPA) on or after June 17, 2024 with a U.S. federal or state prosecutor's office or regulatory agency, where the factual allegations that form the basis for the NPA or DPA would have constituted a crime described in Section VI(r) if they were successfully prosecuted; or

(2) Is found or determined in a final judgment, or court-approved settlement by a Federal or State criminal or civil court that is entered on or after June 17, 2024 in a proceeding brought by the Department, the Department of Treasury, the Internal Revenue Service, the Securities and Exchange Commission, the Department of Justice, the Federal Reserve Bank, the Office of the Comptroller of the Currency, the Federal Depository Insurance Corporation, the Commodities Futures Trading Commission, a state regulator, or state attorney general to have Participated In one or more of the following categories of conduct irrespective of whether the court specifically considers this exemption or its terms:

(A) engaging in a systematic pattern or practice of conduct that violates the conditions of this exemption in connection with otherwise non-exempt prohibited transactions;

(B) intentionally engaging in conduct that violates the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; or

(C) providing materially misleading information to the Department, the Department of Treasury, the Internal Revenue Service, the Securities and Exchange Commission, the Department of Justice, the Federal Reserve Bank, the Office of the Comptroller of the Currency, the Federal Depository Insurance Corporation, the Commodities Futures Trading Commission, a state regulator or a state attorney general in

connection with the conditions of the exemption.

(t) ''Participate In,'' ''Participates In,'' ''Participating In,'' ''Participated In,'' and ''Participation In'' all refer not only to active participation in Prohibited Misconduct, but also to knowing approval of the conduct, or knowledge of such conduct without taking active steps to prohibit such conduct, including reporting the conduct to the appropriate compliance personnel.

(u) The QPAM maintains the records necessary to enable the persons described in subsection (u)(2) below to determine whether the conditions of this exemption have been met with respect to a transaction for a period of six years from the date of the transaction in a manner that is reasonably accessible for examination. No prohibited transaction will be considered to have occurred solely due to the unavailability of such records if they are lost or destroyed due to circumstances beyond the control of the QPAM before the end of the six-year period.

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

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

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

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

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

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

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

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

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

Signed at Washington, DC, this 18th day of March, 2024.

Lisa M. Gomez,

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

[FR Doc. 2024–06059 Filed 4–2–24; 8:45 am]

BILLING CODE 4510–29–P