SUBMITTED ELECTRONICALLY

October 11, 2022

Acting Assistant Secretary Ali Khawar
Office of Regulations and Interpretations
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave.
Washington, DC 20001

Re: Application No. D–12022: Federal e-Rulemaking Portal: http://www.regulations.gov at Docket ID number: EBSA–2022–0008

Dear Secretary Khawar:

The Securities Industry Financial Markets Association ("SIFMA")[1] appreciates the opportunity to comment on the Department of Labor's Proposed Amendment to PTE 84-14, the class exemption for assets managed by a Qualified Professional Asset Managers (the "QPAM Exemption"). The QPAM Exemption has worked extraordinarily well in allowing plans to access the investment markets over the past almost 40 years, facilitating retirement plans' access to a variety of investments, and allowing plans to operate on an efficient and effective basis. The QPAM Exemption is well understood and accepted by asset managers and by counterparties in various transactions with plans, including with borrowers in the financial markets. QPAMs, plans and parties in interest have developed well accepted approaches for allocating responsibility among themselves that permit plans to access markets efficiently.

We believe these proposed changes are so extensive they would upend the current stability in the retirement plan marketplace without any benefit to plans and their participants. Further, the conditions being proposed have no precedent in any other exemption, statutory or class, including the nearly identical in scope status-based exemptions. Accordingly, we strongly believe that the proposed amendments should be withdrawn.

I. Executive Summary

The Department's proposal goes beyond merely updating the exemption, and below we highlight the following concerns with the proposal:

- The Department's changes to section I(c) will make it more difficult and more expensive for plans to trade with financial counterparties who are parties in interest and to retain investment managers that rely on affiliated entities for services and/or other matters.[2] Plans will lose out on access that other market participants have.

- We do not understand the rational for requiring amendments to every single plan client contract, nor do we understand the rationale for the new QPAM registration requirement or the Department's intent to create a list of QPAMs on the Department's website. These new requirements are unprecedented for an exemption and seem to provide no benefit to plans or their participants

- Further, the new contractual obligations also are unprecedented and amount to significant interference from the Department with regard to the relationships between plans and their providers.

- We urge the Department to abandon its proposal to grant to itself the discretion to take away a manager's ability to use the exemption for its clients. This proposal violates ordinary notions of due process, a problem that is not remedied by allowing an appeal to the very same unit that decided to make a manager ineligible.[=]Similarly, the Department should not have discretion to determine when a foreign crime is "substantially equivalent" to a domestic crime unilaterally making itself prosecutor and judge, which, again, is inconsistent with ordinary notions of due process.

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[1] SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's one million employees, we advocate on legislation, regulation and business policy affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

[2] Because the changes proposed by the Department suggest that the term "parties in interest" refers to the plan sponsor, we want to be clear that when we reference parties in interest and counterparties, we are referring to brokers, dealers, banks, insurers, clearing firms, futures merchants, and other financial intermediaries.

- The Department's proposal to disqualify a manager from using the QPAM Exemption if it enters into a deferred prosecution agreement ("DPA") or non-prosecution agreement ("NPA") is particularly inappropriate. This is particularly the case where the entity entering into the DPA or NPA is an affiliate of the asset manager that is not involved in managing plan assets. Treating DPAs and NPAs as if they were convictions, (even though, in the case of NPAs, there is neither a finding of criminal lability nor an admission of criminal liability) is simply wrong and will provide a strong disincentive to enter into those agreements.

- Similarly, we disagree with the Department's continued insistence that it has the authority to determine whether any foreign judicial determination is substantially equivalent to a U.S. felony. In addition, our members have raised questions on crime equivalency with the Department in the past and the Department's assessment process was often protracted and its conclusions at times not perceived as accurate. This process has already, and will continue to, create confusion, delay and expense in the marketplace and be perceived as unjustified.

- As detailed in this letter, we believe that the Department's economic analysis is incomplete and inaccurate and is in need of significant review.

In sum, the QPAM Exemption was intended to provide broad relief from the prohibited transaction provisions of ERISA and the Code for plans whose assets are managed by seasoned investment managers, providing these plans with the same access to the markets as other investors.[3] The Department's proposal denies plans that relief. It will harm plans and their participants by pushing out the providers they have been working with successfully to help individuals plan for retirement.

II. Introduction

Since 1984, the QPAM Exemption has become perhaps the primary tool for plan fiduciaries and counterparties to ensure that the appropriate relief from ERISA's and the Internal Revenue Code's prohibited transaction rules is available when a plan engaged in investment activities. The penalties for prohibited transactions are significant, and accordingly, all parties to a plan investment transaction have a common interest in making sure that an exemption applies. Fiduciaries understandably derive confidence from the fact that, regardless of whether the

[3] If the QPAM exemption becomes unusable, fewer asset managers may be willing to manage plan assets using strategies that rely on the QPAM Exemption and will turn to other, potentially less effective instruments or strategies that do not rely on the QPAM Exemption. For example, there may be instances in which trading via cleared derivatives would be more efficient for investors but, in the absence of the QPAM Exemption, the applicable securities may need to be purchased directly instead.

manager might be able to rely on another exemption, the QPAM exemption provides a well understood backup, limiting the amount of oversight that the plan fiduciary must conduct. A plan fiduciary may request a representation from a plan's investment managers that they qualifiy as a QPAM to ensure that as many prohibited transaction exemptions as possible are available when their plan invests, thus minimizing te risk that the plan's investment activities could be disrupted. Plan fiduciaries seek to hire managers that are qualified as QPAMs so as to minimize potential prohibited transaction risk to a plan, not as the Department seems to believe, as a proxy for determining any manager's qualifications, expertise, credibility, or integrity.

Similarly, counterparties in financial transactions seek to avoid undue risks, such as the excise tax risk and the risk of rescission that could result from a prohibited transaction. While other exemptions may be available for any particular transaction, the QPAM Exemption provides the simplest method of providing assurance to counterparties. With many market transactions, speed and efficiency can be critical. Additional complications because of these new proposed conditions in the QPAM Exemption will only make ERISA plans less attractive to counterparties, resulting in increased transaction and opportunity costs. We note that the Department's economic analysis does not address these real costs in any respect.

III. The Proposal Will Change the Opportunities Available to Plans to their Detriment

A. Changes to Section I(c) will make plans second-class citizens in the investment markets.

The proposed amendments in section I(c) impose restrictions on the use of the QPAM Exemption that may cause market participants and counterparties to avoid bringing market color, research and investment ideas to asset managers or even trading with plans for fear that the exemption will not be available. These service providers, who also act as dealers, use the exemption expressly, or as a backup, for nearly every trade. Because of the breadth of the language used by the Department in section I(c), the adverse effect on plans will be enormous. The provision, marked to reflect the changes from the current exemption, would, if adopted, read as follows:

> (c) The terms of the transaction ~~are negotiated~~**, commitments, and investment of fund assets, and any associated negotiations** on behalf of the ~~investment fund by, or under the authority and general direction~~ **Investment Fund are the sole responsibility** of~~,~~ the QPAM~~, and either~~**. 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~~ **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~~ **Party** in ~~interest~~ **Interest**. **The prohibited transaction relief provided under this exemption applies only in connection with an Investment Fund that is established primarily for investment purposes. No relief is provided under this exemption for any transaction that has been planned, negotiated, or initiated by a Party in Interest, in whole or in part, and presented to a QPAM for approval because the QPAM would not have sole responsibility with respect to the transaction as required by this Section I(c).**

These proposed language changes are problematic. The preamble suggests that they are designed to eliminate exemptive relief for so-called "QPAM for a day" transactions where a plan fiduciary presents an already designed and negotiated transaction to a QPAM for a type of "rubber stamp" approval. We do not have a concern with the Department's desire to make clear that those type of "QPAM for a day" transactions are not in fact covered by the QPAM Exemption. However, this proposed language goes well beyond that goal. This language, as written, could be read to exclude from the exemption's relief many transactions, including those where a counterparty:

- shares market research with an asset manager;
- provides insight into how others are addressing risks; or
- brings to a manager's attention upcoming new issues, or information on execution and new exchanges.

None of these examples give rise to what we understand to be the Department's "QPAM for a day" concerns described in the preamble. Yet, the breadth of the proposed language likely will cause dealers to limit their contact with plans and their asset managers, depriving plans and their managers of market color dealers routinely provide, among other investment ideas and opportunities.

In addition, the language could be read to preclude affiliated asset managers from working together, as managers often do when running global strategies, using expert affiliated managers in various geographic locales to source and research trades. Under the Department's proposed language, if the affiliate initiates the transaction, the QPAM Exemption can't be used, even if the QPAM is responsible for the trade. Often, asset manager affiliates of the QPAM engage in negotiations on behalf of the plan with the local counterparty, and otherwise perform some of the analysis of the transaction. Because the affiliate of the QPAM may have provided this assistance, the language in I(c) would seem to cause the transaction to be outside the relief provided by the QPAM Exemption. Insurance company separate accounts and bank collective trusts often use multiple affiliated and unaffiliated managers to manage sleeves of the fund on a more cost-effective basis. The language change in these amendments could be read to prohibit the use of the QPAM exemption by all these pooled arrangements, which are often the most efficient ways to access investment management services. We note that the Department's

economic analysis fails to assess the cost impact on plans of having these investment vehicles eliminated from the plans' array of choices.[4]

We do not understand the harm in affiliated asset managers working together and why, if they do so, they would be barred from using the exemption. There are many tax, regulatory, legal, commercial, and/or other valid reasons why asset managers might elect to operate their business through multiple affiliated entities, including reasons that ultimately benefit, directly or indirectly, the managers' plans and participants. So long as the QPAM retains ultimate responsibility for any investment activity conducted in reliance on the QPAM Exemption, there should be no reason why activities conducted through or with the assistance of affiliated entities should be prohibited.

Even more troubling is the new language at the end of section I(c) which suggests that if a dealer or other counterparty "initiates," "plans" or "negotiates" a transaction, "in whole or in part," the transaction is not covered under the exemption. If this provision remains unchanged, the exemption could be read to severely limit plan participation in the primary investment markets. First, dealers visit asset managers daily, giving them market color, telling them what is available in the market, what new issues are on the horizon, other transactions they are seeing in the market to address volatility, interest rate changes and the like. This has been true since 1974 and was the reason for PTE 75-1 and the earliest exemptions. It continues to be how asset managers access the market. If these services are deemed to be initiating a transaction in whole or in part, dealers will approach plans only on a reverse inquiry basis and will require managers to attest that the idea, purpose of outline of a transaction was not provided to the plan by the dealer, lest they have a nonexempt prohibited transaction.[5] In addition, the Department's proposal could require every party in interest engaging in a QPAM-covered transaction to prove a negative: that the QPAM did not initiate, plan or negotiate the transaction. If the dealer brings an idea to a manager for the dealer's taxable clients and the manager engages in the transaction for a plan, then it would seem to be unclear as to whether the dealer engaged in a nonexempt transaction. Given the severe penalties for engaging in a prohibited transaction, this kind of ambiguity is unworkable.[6] The Department's economic analysis ignores the cost of this provision and ignores the operationally prohibitive burden of keeping track of all "approaches" to plans from dealers.

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[4] Another example is when a QPAM licenses intellectual property and/or services from one or more of its affiliates, including intellectual property and/or services underlying the QPAM's investment-related decision-making.

[5] We note that none of the other dealing exemptions like PTE 75-1 or section 408(b)(17) contain such broad and proscriptive language. They simply say the dealer cannot be acting as a fiduciary.

[6] We urge the Department to make the operative language clear, and not simply clarify the preamble. While we understand that the Department has recently taken this approach, the economic risks for engaging in a prohibited transaction are severe enough to warrant absolute clarify in the language of the exemption itself.

We note that the proposed recordkeeping provisions appear to require that all of this information, which is not currently reduced to writing and retained, must be kept for 6 years. The requirement appears to be transaction based – "conditions of the exemption have been met with respect to a transaction" – which will reverse all of the efficiency that the QPAM exemption was designed to foster. We have found no other status based exemption which imposes any recordkeeping requirement on a transaction basis, and others, like the insurance company general account exemption (PTE 95-60) and INHAM (PTE 96-23) do not have a recordkeeping requirement at all. See PTE 75-1, PTE 86-128, PTE 77-4. This recordkeeping requirement seems unnecessary. Further, the Department provides no explanation why the records were necessary. No other commonly used exemption contains such a requirement. There is no evidence that the Department analyzed the cost of this new and extraordinary costly recordkeeping requirement. If the Department is unwilling to withdraw this condition, we suggest that the requirement be consistent with the recordkeeping requirement in PTE 2020-02.[7]

There is a potential reading of the preamble suggesting that the Department is using the term party in interest to mean the plan sponsor (*i.e.,* the party in interest who cannot be involved in initiation, planning or negotiating is the plan sponsor), where the preamble says:

> The Department has determined that adding this additional clarifying language in Section I(c) would eliminate any possible ambiguity regarding the extent to which a party in interest may be involved in a transaction with an investment fund managed by a QPAM. A party in interest should not be involved in any aspect of a transaction, aside from certain ministerial duties and oversight associated with plan transactions, such as providing general investment guidelines to the QPAM. The role of the QPAM under the terms of the exemption is not to act as a mere independent approver of transactions. Rather, the QPAM must have and exercise discretion over the commitments and investments of Plan assets and the related negotiations with respect to a fund that is established primarily for investment purposes in order for the relief provided under the exemption to apply. 87 FR 452143.

The reference to ministerial duties and guidelines suggests that the focus of the Department's attention is the fiduciary who hires the QPAM. But the breadth of the language covers any party dealing with the plan in an investment transaction. The perhaps unintended consequence of this use of party in interest is that it draws in service providers who are

[7] Moreover, the use of the term "negotiates" does not make sense in this context, since a counterparty (who is a party in interest because most dealers also act as brokers and thus are service providers to plans, making them parties in interest under ERISA section 3(14)) will always be negotiating the transaction. The party in interest is the plan's counterparty, not its manager and it will be negotiating the transaction *in its own interest.* The plan's asset manager will be negotiating in the plan's interest.

counterparties to investment transactions, such as brokers, dealers, banks and insurers, leading to an untenable result for plans.

We feel certain that the Department did not intend this result, and that it is merely a drafting error. At a minimum, the Department should agree that the term "party in interest" should be changed to employer, plan sponsor, appointing fiduciary or named fiduciary. This approach could clarify the Department's intent; however, as we noted above, plan sponsors suggest transactions, strategies and investments all the time through investment guidelines. We hope the Department will make clear that these conversations are excluded from the kinds of contacts plan sponsors have with managers that would make the manager unable to use the QPAM Exemption.

Finally, it is unclear what the Department means by the term "planning." For example, often when an investment manager is seeking to hedge a particular risk, the investment manager asks each of the dealers that it has identified to model various scenarios. Dealers provide these analytics, and in the absence of their doing so, the plan would be required to retain additional advisors to provide them.[8] We urge the Department not to make plans second class citizens in the financial markets by potentially prohibiting them from using dealer analytics if they want to use the QPAM Exemption.

The Department should clarify that routine monitoring meetings and inquires by plan fiduciaries with respect to a manager's trading strategies do not constitute "planning." In addition, some investment strategies could require coordination with plan fiduciaries; for example, assume a plan retains a manager to hedge against declining interest rates in order to better manage the plan's funding ratio and that the QPAM meets with the plan's CIO to discuss the direction of interest rates, the potential timing of the hedge and the instruments by which the hedge could best be accomplished (*e.g.,* swaptions, forwards, etc.). Assume further that the QPAM retains discretion as to the timing and the manner in which the hedge is implemented. In this case, the conversations that the CIO has with the QPAM should not be considered "planning" within the meaning of the amendment. In addition, some strategies may require margin and may introduce other risks to the Plan, and in those circumstances, it would be entirely appropriate for the QPAM to discuss these issues with the plan sponsor and even required under ERISA. In these situations, the manager should not be penalized so long as it has the appropriate discretion to implement the strategies that are contemplated under its investment management agreement with the plan.

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[8] It is worth noting that, this language, which also reflects on the first sentence in section I(c), calls into question whether, if the manager hires a third party to analyze the economics of various trades, it will fail to meet the "sole responsibility" requirement of the proposed amendment.

We are happy to meet with the Department with representatives of the dealing community to answer questions about trading practices.

B. <u>Requiring a website list of managers is unprecedented and does not benefit plans.</u>

The Department's proposed amendments would require all managers who might ever use the QPAM Exemption to register with the Department for inclusion on a public list on the Department's website. The Department gives no reason for needing the names of every entity that could ever use the exemption, despite the fact that there is no other exemption that has ever been granted by the Department that contains such a requirement. There are hundreds of exemptions, class and statutory, that are used every day and the Department has never requested the manager to alert the Department and the public about which exemptions it is using. Nor, in the last 38 years, has the Department needed to know which managers were using the QPAM Exemption, or for that matter, any other status-based exemption.

The preamble offers no explanation for why asset managers using the exemption should have to register as QPAMs with the Department or why the Department wishes to publish such a list of registered QPAMs on its website. Nevertheless, the Department asks for comment on whether the requirement should include *additional identifying information*, such as the CRD number of a registered investment adviser and whether banks, savings and loan associations, and insurance companies have similar identifying information that they should be required to provide. Since it is unclear as to why the Department should need to know the names of managers who might, for a certain trade, be relying on the QPAM Exemption, it is hard to see what additional identifying information would help the Department. This new provision does not require the inclusion of identifying information regarding the kind of trades for which it is being used, such as whether the QPAM Exemption is being expressly used for the trade, as it might be if the trade occurred under an ISDA, or whether it is being used as one of several available and applicable exemptions.[9] Therefore, simply identifying oneself as a manager who could meet the net equity and assets under management tests seems unnecessary, and unconnected with any legitimate aim the Department has expressed now or in the past.

The Department's proposal to require QPAM registration and to publish a list of QPAMs is particularly perplexing considering that the Department only a few months ago expressed in the preambles to multiple individual exemptions that the QPAM Exemption should not be used as the "Good Housekeeping Seal of Approval." The registration requirement has raised many questions among our members:

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[9] A common formulation in investment documents might read as follows: the manager agrees and acknowledges that this agreement and each transaction effected pursuant to this agreement will not result in a non-exempt prohibited transaction by reason of PTE 84-14, section 408(b)(17) or another applicable exemption.

- Does a manager have to prove that it is actually using the QPAM Exemption to keep its name on the list?
- Is there a time frame within which the names should be provided?
- In the event of corporate changes, must the listing be amended?
- How long would an institution have to make those changes?
- If the manager is late posting a new affiliate, will all trades entered into become prohibited transactions?
- Will the intent of the list be misconstrued by plan fiduciaries and consultants?
- If a manager does not routinely use the QPAM exemption but takes on a client for a short-term transition during which the manager may use the exemption, must the manager register before using the exemption, send out all the required information to plans, and then notify the Department immediately after the transaction that it is no longer using the exemption and notify the client that its contractual obligations are no longer in force?
- What if a manager ceases to rely on the exemption for a time (*e.g.,* because the commingled funds it operates fall below the 25% plan asset threshold), but it expects to resume doing so at some unspecified point in the future?

The preamble does not explain why the Department needs to know the name of every manager using the QPAM Exemption but not the name of every manager using any other exemption, even those exemptions that were the basis on which the Department granted the QPAM Exemption in 1984 and represent the same "status-based" approach to relief. This provision presents significant opportunities for unintentional foot-faults (such as an inadvertent failure to change a name on a website from Co. to LLC or similar kind of change) [10]. However, the result of any such foot-fault is that numerous (hundreds or thousands) trades may become prohibited transactions, requiring the reversal of those economics and imposition of excise taxes, among other consequences. Since the consequences are borne by counterparties, vague requirements such as these make ERISA plans very unattractive trading partners, a fact that raises opportunity and transaction costs. We note that the Department's economic analyses did not take into account these costs.

As written, the language suggests, and the position likely would be taken by the plaintiff's bar, that a counterparty and/or a plan fiduciary should verify that a manager is on the published QPAM list before doing business with the manager. Particularly in the case of counterparties, it seems that this could be needed each time a new transaction is conducted between the counterparty and the manager when acting on behalf of an ERISA plan client, even if the relationship between the parties is already documented by an evergreen agreement. Again, this

[10] It is hard to understand why such a change would make a difference to the Department, in any event.

suggests a layer of complication that counterparties would not have to deal with for non-ERISA clients and could cause counterparties to avoid trading with ERISA plans. It also raises questions about the effect of delays in the publishing of the name of a manager on the Department's website. In the interim, counterparties may choose to avoid dealing with the affected manager, which could limit the options of the manger's ERISA plan clients. We also have significant concerns if the list is intended to constitute, or is perceived as constituting a list of Department of Labor approved managers.

We urge the Department to reconsider this listing requirement and to consider carefully how it will be perceived by plan fiduciaries. We also urge the Department to provide its rationale for including the list requirement as a condition of this exemption, particularly in light of there being no comparable requirement for other exemptions. Only after the Department provides such additional information can stakeholders provide meaningful comment.

C. Requiring amendment of every investment management agreement is unduly burdensome.

The proposed amendment will require every manager that might ever use the QPAM Exemption to amend every single agreement with every client to provide for client remedies if the manager or its affiliate is convicted of a crime, or is otherwise made ineligible to use the exemption by administrative action of the Department.[11] As noted above, a QPAM representation may be requested by clients even if the manager is unlikely to need the QPAM Exemption. Just the search through all the client agreements to determine if a QPAM representation was made will take more hours than the Department has allotted for editing the affected agreements. The cost of this single requirement is hard to overstate. The amendment will have to be drafted to fit every different investment management agreement, including agreements for separately managed accounts, funds of one, and commingled investment funds (which often have a mix of plan and nonplan investors). Most managers use numerous different templates, depending on strategy, and then, at the client's election, may need to amend the client form of exemption, rather than use of the manager's templates. In addition, managers will also need to consider whether any additional amendments beyond those mandated in the rule will be necessary or desirable in light of the terms of their existing investment management agreements and, if so, they will need to draft such additional changes. In short, the Department's assumption that there is a "single standard form with identical language" for each plan investor is completely unrealistic.

The drafting exercise, and negotiations, will take significantly more time than the Department assumes. Further, once the amendments are drafted, lawyers, relationship managers,

[11] Our comments on the substance of these amendments are found later in this comment in the section relating to crimes.

and portfolio managers will need to visit with the client, explain the amendment, negotiate it, and likely explain how the exemption is used. Every plan fiduciary will need to review the amendments, talk to each one of its managers, refer the document to outside counsel and the plan's consultant, taking hundreds of hours for large plans with many managers. In addition, whether or not a manager determines to make only the required amendments, any such changes typically will require investor consent, including by non-plan investors who might be adversely affected by the changes.[12] In the event such consent cannot be obtained, managers will be forced to choose between winding down the applicable investment fund or ceasing to rely on the QPAM Exemption (*e.g.,* by involuntarily withdrawing plan investors such that the applicable investment fund no longer constitutes plan assets). The Department's estimate that these amendments will cost $135,540, in the aggregate, is unfounded and incorrect by several orders of magnitude, not only because of the time required for each plan, but also because the Department's analysis severely underestimates the number of managers to which these requirements will apply and the number of plans per manager. If one estimated that the number of managers affected is 10,000 unique managers; the number of plans affected could range from 50 for small managers to 30,000 for large managers, the only conclusion is that the Department's economic analysis is fatally flawed. [13]

As a practical matter, it is unclear what is required to meet this condition. For example, if a manager has hundreds of clients and only amends the agreement of some of them, can the manager still use the exemption in cases where it has made the amendments, or can it not use the exemption at all because it has not amended all the agreements? The proposed exemption's amendments are effective 60 days after grant. For managers with thousands or hundreds of thousands of clients, must the amendments be made in 60 days or must the manager terminate transactions dependent on the exemption prematurely? For clients who insist on bilateral amendments, if they have not signed the amendment, must their transactions be prematurely terminated, even if many of these plans have hundreds of managers whose documents will need to be amended? While we believe that this requirement is unnecessary, and puts an undue burden on plans, the lead time for such an extensive, time-consuming requirement such as this is at least 18 months.

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[12] As outlined in further detail below, and to cite just one example, the exercise of unrestricted termination or withdrawal rights following a disqualification event could have a material adverse effect on investors in the applicable investment funds or strategies, whether or not they exercise such rights or elect to remain invested, since limitations on termination and withdrawal in investment management agreements—which are disclosed to all investors in advance—are typically carefully calibrated to the underlying investment strategy and the protection of investors. Because of this potentially adverse outcome, any amendment permitting such terminations or withdrawals typically will require advance investor consent.

[13] For example, recent applications for individual exemptive relief reference thousands of plans with respect to which the QPAM exemption might be used. All of these plans would be in scope for these investment management agreement amendments, eclipsing the Department's estimate of the entire universe of plans affected.

The Department's economic analysis does not reveal that it considered any other method of achieving its goals and we are reluctant to speculate on other methods without knowing the Department's goals.[14] The Department's proposed change is expensive and disruptive, and because it is unnecessary and costly for plans, not in their best interest.

D. The inclusion of the term "Investment Fund" is unclear, and potentially harmful for pooled fund creation.

The Department has focused on the term "investment fund," but again the preamble is not clear as to why. Section I(c) provides: "The prohibited transaction relief provided under this exemption applies only in connection with an Investment Fund that is established primarily for investment purposes."[15]

The preamble suggests that this change is to deal with "QPAMs for a day," but it does not specify where the two concepts overlap. 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 newly proposed language appears to prohibit the use of the QPAM Exemption for such purposes, but the preamble does not describe the abuse to which it is addressed.

The application of the QPAM Exemption to managers of Investment Funds in Section I(a)(2) mimics the language in PTE 91-38 for bank collective funds. Bank collective funds, like other pooled investment products, are often started with only a few seed investors, possibly as few as one or two. After a collective fund grows to a sufficient size and has enough unrelated investors, the bank can use PTE 91-38. However, prior to that, the bank would have to rely on other exemptions. The QPAM Exemption has become a standard for banks that manage smaller or new collective funds. Eliminating the opportunity to use the QPAM Exemption for such funds, could stifle the creation of new collective funds thereby limiting the investment opportunities for ERISA plans.

[14] The Department could consider making such a condition a part of the exemption, as opposed to requiring the creation of new contracts.

[15] The Department should provide examples of Investment Funds that are not established primarily for investment purposes and allow the public to comment on this provision once the language and the purpose are clear.

IV. The Department's Proposed Expansion to Cover Foreign Crimes is Beyond Its Authority

A. The Department expands its authority too far with regard to foreign crimes unrelated to the management of plan assets.

Section I(g) of the exemption has been relabeled "integrity." It suggests that asset managers whose *non-asset management affiliates*, including upstream entities that own more than 5% of the manager, who have been convicted of a crime, (or even not convicted of a crime, in the case of DPAs and NPAs) lack integrity. While we are neither excusing nor minimizing any kind of misconduct, we disagree with the Department's suggestion that a manager's mere affiliation (which can occur at an ownership level of as little as 5%) with an entity that may have been convicted of a crime (or entered into a DPA or NPA) indicates a lack of integrity on the part of the manager. Except where the asset manager itself has been convicted, the Department's view that all asset management affiliates should be guilty by association is not supported in any way by the record before the Department. Indeed, the audits required by the individual exemptions tell a completely different story.

For nearly all of the asset managers associated with entities that, in the past 10 years have been convicted of crimes, virtually none of these asset managers were involved. They did not know of or participate in the crimes. They did not profit from the crimes. They most often employ a completely different set of employees, and may be physically separated from the convicted entity, with no common business purpose. They may have separate compliance, risk and legal staffs. They may have their own policies and their own training, and their records in these fiduciary activities may be largely unblemished. These facts, verified by independent auditors, are not taken into account anywhere in the Department's analysis. The Department used a very broad set of consequences in this proposal that even the Department found unwarranted when crafting in PTE 2020-02.

In this connection, we note that the Department's economic analysis suggests a variety of other approaches that the Department considered; but surprisingly, it specifically did not consider the approach it took less than 2 years ago in PTE 2020-02. We think the Department's approach in PTE 2020-02 was far more considered. It takes away the exemption when the asset manager is convicted of a state or federal crime that arises out of the manager's provision of investment advisory services. It would be hard to disagree that PTE 2020-02 is a more targeted, sensible approach in that it does not punish fiduciaries who were not involved in criminal activity, nor does it punish plans that choose to use such fiduciaries. Rather it makes clear that once a trusted fiduciary *itself* is convicted, an additional look at the financial institution is warranted.

Instead, with these proposed amendments, the Department has chosen a more punitive and restrictive path. If a manager is associated in almost any way with a convicted entity or person, nothing appears to save that manager from the Department's censure. Instead of connecting the criminal conduct to asset management, or requiring that the convicted entity be one that can actually influence the investment manager's decision-making, the Department disqualifies all affiliated managers including those with the most remote connection to the wrong-doing. In addition, the Department warns that the asset manager is unlikely to receive an exemption, regardless of a lack of proximity to the crime. Plan fiduciaries who select or retain them are strongly cautioned that they may face liability by continuing to use a fiduciary whose affiliate has been convicted.[16] It would appear that the gravamen of the proposed amendments is to make sure that clients have a year to terminate the manager (since, during that year, the manager cannot use the exemption for any new transaction involving the plan). The Department does not hide its views: the preamble indicates that a QPAM that fails to meet Section I(g) has one year to "wind down" its relationship with the plan, as if it is foreordained that every client will want to fire the manager, a presumption that is demonstrably untrue.[17] The Department presumes that plan fiduciaries *should* fire any manager whose affiliates have been convicted of a crime. And that those managers should "wind down" their entire plan business. From our perspective, it appears the Department has gone too far by taking on the plan fiduciary's role.

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[16] E.g., Proposed Exemption for Certain Prohibited Transaction Restrictions Involving Credit Suisse Group AG, 87 Fed. Reg. 1186, 1192 (Jan. 10, 2022) ("In this regard, the Department also strongly emphasizes that a fiduciary's duties of prudence and loyalty under ERISA section 404 apply in the context of hiring, monitoring, evaluating, and retaining an asset manager, regardless of whether the asset manager retains the ability to continue relying on PTE 84-14 under a supplemental individual exemption. A fiduciary's failure to abide by these duties may give rise to fiduciary liability, including co-fiduciary liability or personal liability."); see also Exemption for Certain Prohibited Transaction Restrictions Involving Credit Suisse Group AG, 87 Fed. Reg. 23249, 23258 (Apr. 19, 2022) ("The existence of malfeasance within a corporate family is an important consideration for plan fiduciaries when deciding upon a discretionary asset manager, particularly one calling itself a QPAM and relying upon PTE 84-14. Therefore, the ability of a QPAM and its client plans to continue to rely upon the exemption is directly linked to Section I(g). Regardless of the plan fiduciary's choice to select Credit Suisse as an asset manager, the relief under the exemption is tied to the integrity condition in Section I(g) as a protection not only to plan fiduciaries but to the plan participants whose benefits are ultimately at risk when it appears there may be a malfeasance and legal compliance problem within an entire corporate family."); Exemption for Certain Prohibited Transaction Restrictions Involving DWS Investment Management Americas, Inc., 86 Fed. Reg. 20410, 20412 (Apr. 19, 2021) ("The fact that a transaction is the subject of an exemption under section 408(a) of the Act or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which, among other things, require a fiduciary to discharge his or her duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries.").

[17] Few, if any managers, have been terminated because their affiliate has been convicted of a crime but the effect of losing the QPAM exemption altogether would be very different. See "DOL Proposal May Disrupt Plan Sponsors' Investment Arrangements" Mercer, September 7, 2022.

This approach differs significantly from the past, from the proven conduct of plan fiduciaries over the past 10 years, from the studied views of consultants acting as fiduciaries, and from other government agencies. If it achieves its goal of forcing out of the investment management business for plans all managers whose affiliates have been convicted, it will have gone far beyond what Congress intended – that only the convicted entity may be eliminated as a manager – and only for a United States crime. If the Department is unwilling to reconsider the inclusion of foreign crimes as an automatic disqualification, we urge the Department to take the approach Congress took in the Investment Company Act and make foreign crimes part of the ineligibility determination. There are good reasons why the Department should do so. It is challenging and time consuming for the Department to make the determination whether a foreign crime is a felony, or whether it is substantially equivalent to a felony. The finding by a foreign criminal court often provides no lead time in which this determination can be made. Plans can be harmed in substantial ways by a sudden loss of the exemption with little or no notice. There is rarely time to get advice from the Department and even in cases that seem straightforward, the Department has taken weeks or months to respond. If the foreign country gives a defendant a *de novo* trial on appeal, the Department has taken the position that the conviction in the first trial is controlling, which is at clear odds with the intent of the process in the foreign country.

The result will be to eliminate excellent managers from those available to plans. It seems unlikely that Congress intended that authority to be granted on a discretionary basis to a government agency, especially where we can see that Congress insisted that a court be involved even where an asset management firm is itself convicted of a crime.[18] Further, as we have commented in the past, there is no evidence whatsoever, that Congress wanted an automatic result where foreign convictions are involved. SIFMA strongly disagrees that this exemption should cover foreign crimes, let along foreign DPAs and NPAs. As we stated in our advisory opinion request dated December 18, 2018, there are three principal arguments that support the conclusion that section I(g) does not apply to foreign convictions. First, nothing about the regulatory proposals underlying the QPAM Exemption itself suggests that the Department intended to reach foreign convictions. Neither section 411, nor PTE 84-14, section I(g), contain any mention of foreign crimes. Section 411 of ERISA, which section I(g) incorporates by reference, expressly contemplates conviction by a federal, state, or local court only—not by a foreign court. Thus, we are confident a court would hold that section 411 has no extraterritorial effect and that foreign crimes are not therefore disabling thereunder. The nearly identical list of crimes in section I(g) similarly does not include foreign convictions and was never intended to do so. Nothing in the language of section I(g) or in any of the preambles accompanying the QPAM Exemption speaks to a conviction under foreign law. Had the Department intended section I(g) to vastly expand upon section 411's disqualifications by extending section I(g) to

[18] See ERISA section 411.

convictions in every other country in the world, one would expect a very specific reference to and explanation for such a significant departure from ERISA, and from the very provision of ERISA being incorporated by reference. The complete absence of such a statement or explanation is powerful evidence that section I(g) is limited to domestic convictions.

Second, application of the rules of statutory construction bolsters the conclusion that section I(g) of the QPAM Exemption does not encompass foreign convictions. The Supreme Court has cautioned that statutes should not be applied extraterritorially unless they plainly on their face provide for such application, *see Small v. United States*, 544 U.S. 385, 388-89 (2005), and ERISA does not so provide. The Supreme Court's decision in *Small* and other cases on the presumption against extraterritoriality provide ample authority to conclude that given the lack of clear Congressional intent to the contrary, neither section 411 nor section I(g) applies to foreign crimes.

Third, there are several public policy reasons for excluding foreign convictions. For example, section I(g)'s disqualification provision refers to felonies, but many foreign crimes are not clearly denominated as felonies or misdemeanors. Moreover, standards differ from country to country. Convictions for a felony in one country may be a misdemeanor in another (or in the United States). Other countries impose criminal penalties where there is no criminal intent required, and in others, so-called dual penalty laws render the conviction of an institution automatic if an institution's employees are convicted. Countries also differ in their substantive law, criminal procedure, and principles of due process. In addition, the Department would be forced to interpret foreign statutes with which it is unfamiliar. Finally, section I(g) already is broader than what Congress enacted in section 411 (in that section I(g)'s disqualification extends to convictions of a broadly-defined universe of "affiliates"), and provides fewer procedural protections. Applying section I(g) to foreign convictions would further deprive affected entities of the protections and limitations that Congress deemed appropriate.

Indeed, if the Department intends that every investment manager whose affiliate has been convicted of a crime will need to wind down its relationships with all of its plan clients, it would seem likely that the Department of Justice will see a very different picture of the collateral consequences of any conviction, let alone any DPA or NPA. We can think of no other exemption where the Department has suggested that the inability to use the exemption should result in the manager's termination.

B. <u>The proposed wind-down period is, in effect, an immediate cessation of trading</u>

The preamble suggests that the wind down period will help protect plans against precipitous required sales. If the Department wants to protect plans, this wind down period will be

ineffective. First, it does not permit new transactions, but only continuing transactions.[19] That means that the termination of a swap that requires the QPAM Exemption will not be permitted since it is a new transaction. Similarly, if a manager is relying on the QPAM Exemption through a swap to protect against currency fluctuations, and the swap needs to be renegotiated, it can neither terminate the swap or put on a revised trade to provide the same protection, such as a currency roll or future. Not permitting the plan to be invested in the same strategy with similar protections cannot be in the interest of plans.

Under Section I(j), the Department expects that a manager losing its ability to use the QPAM Exemption will be able to wind-down activities within a year and will not engage in new transactions after the Ineligibility Date. As written, the provision would make it impossible for a manager to "manage [] plan assets prudently and loyally during the winding-down period." If a manager cannot transact under the QPAM exemption, then it will be limited to strategies that are less advantageous to plans. For certain assets, the QPAM Exemption is the only way to effectuate certain trades on behalf of an ERISA plan client. In addition, exposure to certain derivatives, used to hedge a fund's investment exposure, can only be "closed" by initiating a new, offsetting trade. Effectively, the restriction on new transactions would require the plan fiduciaries to select a new manager immediately. Unfortunately, searches for new managers typically take months as plan fiduciaries prudently research and vet candidates in addition to the lengthy process to negotiate an agreement with the new manager. During this time, the plan could suffer since the incumbent manager is limited in its ability to manage the assets effectively.

The winding-down period becomes more problematic if the manager is managing an Investment Fund that covers the assets of multiple ERISA plans. Without being able to enter into new transactions, the manager could be forced to close down a pooled fund. However, even termination would be impeded by the inability of the manager to enter into new transactions.

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[19] It is unclear what "new transactions" means in the prohibition on using QPAM during the winddown period. In particular:

- Does it mean that you can literally enter into no new transactions in reliance on QPAM and you have to use other exemptions *(e.g.*, you can't sell an security the plan currently holds)?
- Or does it mean that you can use the exemption to sell things you already own and you just can't buy new things?
- If so, what does that mean, *e.g.*, for closing out a short position, rolling a hedge, or complying with a contractual obligation (such as a follow-on investment requirement)?
- In either case, the "new transactions" provision creates a real conflict with the obligation to "manage [] plan assets prudently and loyally" – *i.e.*, how can you manage assets prudently if you can't rely on the QPAM Exemption to buy/sell assets?

C. The proposed amendments create new contractual obligations that will interfere with existing contractual relationships.

As noted earlier, the proposed amendments require every manager who could ever use the QPAM Exemption to agree to certain contractual obligations in writing, through the amendment of every client contract. This contractual obligation, applicable to all managers and all clients if the manager might rely on the QPAM Exemption should be eliminated. As a threshold matter, we note that an analogous provision in another exemption was struck down by the Fifth Circuit Court of Appeals just a few years ago, on the ground that the Department lacks the authority to impose a contractual obligation where one does not otherwise exist, including through an administrative exemption.[20] This extraordinary investment management agreement amendment mandate is anticipatory of a crime, when one may never occur. We understand imposing that obligation once a crime has been committed, although our view of the Department's authority to do so in this circumstance appears to be the same as the now invalidated requirement in the BIC Exemption.

This contractual requirement to broadly indemnify clients who are not obligated to terminate their relationships is imposed if any of the manager's affiliates are convicted of a crime, in the United States or abroad, regardless of the due process in foreign courts, or if they enter into a DPA or NPA, or a foreign equivalent thereof and are made ineligible by the Department. We have already noted the unnecessary burden of amending every investment management agreement with every ERISA plan and every managed IRA to include these contractual obligations and the fundamental errors in the Department's economic analysis of the requirement. In addition to those fundamental points, we also believe that some of the requirements are not well considered. The requirements are as follows -- the QPAM:

> (A) agrees not to restrict the ability of a client Plan to terminate or withdraw from its arrangement with the QPAM;
> (B) will not impose any fees, penalties, or charges on client Plans in connection with the process of terminating or withdrawing from an Investment Fund managed by the QPAM except for reasonable fees, appropriately disclosed in advance, that are specifically designed to: (i) prevent generally recognized abusive investment practices or (ii) ensure equitable treatment of all investors in a pooled fund in the event such withdrawal or termination may have adverse consequences for all other investors, provided that such fees are applied consistently and in a like manner to all such investors;
> (C) agrees to indemnify, hold harmless, and promptly restore actual losses to the client Plans for any damages that directly result to them from a violation of applicable laws, a breach of contract, or any claim arising out of the conduct that is the subject of a Criminal Conviction or Written Ineligibility Notice of the QPAM or an Affiliate (as defined in

[20] See Chamber of Commerce v. U.S. Department of Labor, 885 F.3d 360, 384-385.

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;[21] and

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

First, we assume that these requirements apply only with respect to trades that rely on the QPAM Exemption. Where a plan's portfolio does not rely on the QPAM Exemption, there is no reason why the QPAM should be subject to these requirements (*i.e.,* obligated to indemnify the plan for leaving).

With respect to subsection (A), the language fails to recognize that for pooled funds, whether closed-end vehicles focused on illiquid strategies such as real estate and private equity or open-end vehicles focused on more liquid strategies, withdrawal restrictions and related provisions are carefully tailored in one or more ways to protect all investors in the fund. In the absence of such restrictions, investors in pooled funds would be subject to significant risk that a substantial number of investors could seek liquidity all at once (*i.e.,* that the fund will experience a "run on the fund"), which could require the manager to liquidate the assets of the fund at "fire sale" prices, thereby harming both investors that elect to withdraw and those that remain invested. Nevertheless, and without any apparent justification, the proposed rule requires that investors be given unfettered withdrawal rights following a disqualifying event and, in so doing, all but assures this outcome by creating powerful incentives for investors to race to the exit. In addition, certain withdrawal restrictions are required for legal, tax, and/or other similar reasons (*e.g.,* to permit an adviser to comply with applicable law if it is required to freeze the assets of one or more investors under sanctions or other similar laws or to avoid materially adverse tax consequences for investors if the investment fund's withdrawal provisions were deemed to be unduly permissive and the fund therefore were determined to be a "publicly traded partnership" for U.S. federal income tax purposes). Once again, no justification is provided for why investors should be subjected to this risk. In the individual QPAM exemptions, the Department accommodated this concern with language that acknowledged that if the liquidity and withdrawal restrictions had been disclosed in advance, these restrictions were permissible. We note that the Department did include this concept in subsection (B). In addition, we urge the Department to

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[21] This requirement ignores the contractual reality that the counterparty usually has the unilateral right to undo a transaction if it reasonably believes it will result in a prohibited transaction for which it could be liable for excise taxes, and the transaction will be terminated on the counterparty's side of the market.

amend this provision to allow the manager of such a pooled fund, where the investors are contractually bound to remain in the fund, to continue to use the QPAM Exemption for the life of the fund. Unless the Department makes this change, the wind down period for pooled funds is unhelpful to investing plans and all other investors in that pooled fund.

With respect to subsection (B), the proposed rule permits only the imposition of reasonable "fees" and then only to "prevent generally recognized abusive investment practices or [] 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." We note however that pooled investment funds often include provisions permitting the applicable manager or general partner to withhold certain items in connection with investor withdrawals, including an investor's *pro rata* share of current or expected fund expenses as well as investor-specific items such as an investor's tax or indemnification obligations. We are concerned that the current language of the rule would prohibit this practice, which would unfairly shift those expenses and other items from the withdrawing investors to whom they should be allocated to the remaining investors in the fund. We do not believe the Department intended such a result.

With respect to subsection (C), we believe this obligation goes too far and should be deleted from the proposed rule. If the convicted entity is the asset manager, and it is no longer allowed to manage plan assets at all, we understand the notion that it perhaps should be liable for the transaction costs involved in selling securities, hiring a new manager and reinvesting proceeds. However, where the asset manager was not involved in the criminal conduct, the choice to leave an entirely innocent manager is the plan fiduciary's choice and is not compelled by law. For many managers who use the QPAM Exemption only occasionally or not at all for a particular account or strategy, there is no reason for a plan fiduciary to terminate the arrangement so there should be no indemnification for the costs of termination.[22]

In the event subsection (C) is not removed from the final rule, we request confirmation that the phrase "arising out of the conduct that is the subject of a Criminal Conviction or Written Ineligibility Notice of the QPAM or an Affiliate (as defined in Section VI(d)) or an owner, direct or indirect, of a five (5) percent or more interest in the QPAM" applies not only to the words "any claim" but also to "a violation of applicable laws" and "a breach of contract." In the absence of such confirmation, this new language could be read to create, without any justification or nexus to the QPAM Exemption, a generalized indemnification obligation on the part of asset managers for any and all violations of law and any and all breaches of contract, whether or not they have anything to do with the applicable disqualifying conduct.

[22] We note that a plan relying on other exemptions is not entitled to such indemnification.

Subsection (C) also has an odd reference to Code section 4975 excise taxes. The indemnification runs to the plan and plans are not liable for excise taxes. We assume the reference is in error and should be deleted.[23]

Subsection (D) appears to require each QPAM to do its own investigation to determine whether any potential new hire, regardless of the position that the individual applies for, may have participated in any criminal conduct of any of their prior employers. This is not a practical approach and it is beyond the capability of asset managers. Moreover, it violates ordinary notions of due process that an individual charged, and found innocent, or not charged at all, should be eliminated as a candidate for any job with an asset manager. We suggest that the language make clear that the QPAM cannot hire any individual charged and convicted in connection with a financial services crime. This provision should not cover DPAs, NPAs or any other disqualifications based on notices of ineligibility.

D. The Department goes too far in proposing to disqualify managers from acting as QPAMs for non-criminal activity

The proposed amendments include an entirely new idea: that the Department, on its own motion, can take away a manager's ability to use the QPAM Exemption for conduct that is not criminal. That provision allows the Department to be investigator, prosecutor, judge and jury, and to extend its authority to put a manager out of business for civil violations, settlements that do not involve a criminal conviction, substantially equivalent foreign resolutions -- which are fatally vague and undefined – and for repeated violations of the exemption or misstatements. Unlike the current language of section I(g) where a ***court*** must actually *convict* an entity of a felony, or Section 411 of ERISA which also requires court review, the proposed ineligibility determination lacks due process and the final determination of a neutral third-party judge. The "due process" that the Department attempts to add is little more than a nod to process, with no real review of the Department's unilateral discretion.

We agree with the Investment Company Institute's suggestion that if the Department does not eliminate the Notice of Ineligibility provisions it needs to propose and follow rules for establishing a factual record, examine the fact finders, review, rebut and supplement the investigative record, obtain on the record the views of law enforcement agencies, the selection and appointment of an independent decision maker such as an administrative law judge, and a

[23] If the Department is suggesting that the manager should be liable for the excise taxes potentially payable by all counterparties, regardless of whether their transaction was intended to be covered by the QPAM Exemption, we strongly object to such a punitive and far-reaching consequence. This provision, if read as indicated here, would provide a strong disincentive to a manager agreeing to manage plan assets in any strategy that relies on the QPAM exemption. We note that the Department's economic analysis does not consider the cost to plans of being unable to choose a strategy, such as loans, real estate, or cleared swaps, that must rely on the QPAM exemption. We believe that consideration of this cost is critical and would far eclipse any benefit to plans at all.

stay of the disqualification until a court has had the opportunity to adjudicate a challenge to the administrative action. Without such safeguards, there is no due process provided.

The Department's authority would stem from its definition of Prohibited Misconduct.

> (s) "Prohibited Misconduct" means:
> (1) any conduct that forms the basis for a non-prosecution or deferred prosecution agreement that, if successfully prosecuted, would have constituted a crime described in Section VI(r);
> (2) any conduct that forms the basis for an agreement, however denominated by the laws of the relevant foreign government, that is substantially equivalent to a non-prosecution agreement or deferred prosecution agreement described in (1);
> (3) engaging in a systematic pattern or practice of violating the conditions of this exemption in connection with otherwise non-exempt prohibited transactions;
> (4) intentionally violating the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; or
> (5) providing materially misleading information to the Department in connection with the conditions of the exemption.

We already have noted the inappropriateness of including (s)(1) and (s)(2) as a basis for the Department forcing an un-convicted asset manager to "wind down" its relationship with plans. These two bases give the Department nearly unfettered discretion and are an invitation to inconsistent results. It is unclear as to whether the NPA or DPA would have to involve the manager's parent or whether it could be even the most remote affiliate or an entity with only a 5% interest in the manager. [24]

We question the conduct covered in (s)(3) and (s)(4) and whether there is a definition of intentional violation that will govern the Department's determinations. We are unsure whether foot-faults and honest errors would be excused. What about an oversight failure or systems failure? What constitutes a pattern or practice? SIFMA asked similar questions when language like this was added to PTE 2020-02. QPAM already has a mechanism for dealing with failure to meet the terms of the exemption. The exemption simply does not apply and the trade is

[24] If a broker is accused of market manipulation but the prosecutor settles for a civil violation, it is unclear whether that would be considered substantially equivalent to an NPA. It is unclear how one would discern the difference between a civil violation and an NPA. The Department says "if successfully prosecuted"; that seems to be a very subjective "if" that is entirely within the Department's judgment. Not only will we be struggling with whether a particular crime is a felony or substantially equivalent to a U.S. felony, but we will need to look at every civil resolution and discern whether there was a companion criminal case that could have been brought, giving every such case the benefit of the doubt on whether it would have been successfully prosecuted. We note that the Department's economic analysis fails to consider the costs on the Justice Department if entities previously prepared to enter into DPAs and NPAs no longer view these outcomes as acceptable based on their collateral consequences under the QPAM Exemption.

prohibited. The counterparty is subject to excise taxes under the Code *and* the fiduciary has caused a prohibited transaction to occur and needs to reverse it while making the plan whole. In our view, that is consequence enough; there is no need to make the QPAM exemption wholly unavailable in this context, removing plans' access to managers it wants to engage. We do not think compliance with the exemption will be improved by granting this vast power to put managers out of business to a federal agency. If the Department is determined to retain these provisions, we suggest that it clarify (s)(3) and (s)(4) by adding at the end of each: "(*i.e.*, including transactions for which no other prohibited transaction exemption is available)."

Subsection (s)(5) covers providing misleading information to the Department. While we certainly do not defend such behavior, the Department mentions no abuses that it has encountered that would justify this exercise of authority. The Department should have to demonstrate that such a result is the appropriate consequence for a misstatement, especially where the misstatement is isolated and unintentional.

Concerning the six-year record keeping requirement, we suggest that the Department clarify that this requirement does not create any new obligation to document the basis for satisfaction of the conditions. The language "The QPAM maintains the records necessary to enable the persons described in subsection (t)(2) below to determine whether the conditions of this exemption have been met with respect to a transaction" suggests that it might. Frequently, the parties make representations to each other about satisfaction of different parts of the conditions. Often that is the only record that enables the parties to determine whether the conditions of the exemption have been met. Retaining those representations is one thing; creating new evidence to support the conclusion that the conditions have been met, so that the persons described in (t)(2) can refer to that evidence, is something else. Also, any records subject to this condition should not be required to be made available to plan sponsors, plan fiduciaries, or plan participants and beneficiaries, but only to the DOL and the IRS. A manager's trading records can be highly sensitive, and their disclosure could have a material adverse effect on plans and other investors. The 30-day window should be expanded to at least 90 days for making records available to permitted requestors and a manager should have 90 days to provide notice of grounds for non-production. In addition, this provision should make clear a ground for non-production is availability of another exemption for the transactions at issue. Also, in those cases in which a QPAM may rely on more than one exemption pursuant to its IMA with the Plan, it is unclear what the Department expects of managers: does the QPAM have to tag each transaction to a specific exemption or potentially available exemptions? That kind of recordkeeping is not done now, and the paperwork burden would be crushing, slowing down every trade with every counterparty, getting lawyers involved in every trade reconciliation, and spiraling the costs of asset management for plans, as well as disadvantaging their pricing, as counterparties would be forced to create the same records.

It is unclear what types of records the exemption would require a QPAM to keep. [25] In addition, the economic analysis and the regulatory flexibility analysis must consider the cost and burden of these requirements as well as alternatives the Department considered.

V. The Department's Economic Analysis Is Flawed

The Department's economic analysis is flawed and must be reconsidered. These amendments, if adopted as proposed, will increase the upfront and ongoing costs of asset managers and dealers complying with the QPAM Exemption and these increased costs likely will be passed on to plans, an economic result that the Department does not consider or analyze at all. Nor does the Department recognize the need for asset managers and their counterparties to review and potentially renegotiate all prime brokerage, trading, and other counterparty agreements, which often include QPAM Exemption-related provisions, or the costs of complying with the record-keeping requirements, particularly for investment strategies that involve a very large number of transactions—which costs likely will be passed through to plans. Further, the Department's economic analysis fails to consider that every trading agreement, lease, and loan agreement that relies on the QPAM Exemption will need to be renegotiated. Since each counterparty may have a separate agreement for each of a manager's plans, that could amount to tens of thousands of agreements.

Among the flawed assumptions the Department relies on in its economic analysis are:

- The number of investment managers using the QPAM Exemption likely is off by a factor of 10-20 times. The analysis assumes 616 managers based on the inexplicable assumption that a QPAM will be both an investment manager and a named fiduciary. In our experience, virtually no QPAM also is a named fiduciary. Without this dual role assumption, we suggest that the Department would find more than 10,000 managers that are able to use the QPAM Exemption. We note that the analysis appears to ignore the fact that virtually every bank, trust company and insurance company managing plan assets also can act as a QPAM.
- The number of affected clients is vastly understated. The 10 largest investment managers have between 2,000 and 4,000 plan clients, rather than the 30 or so that the Department's economic analysis assumes.
- The time it takes to amend all client agreements, including the time to meet, explain, negotiate and obtain required clients' consents is vastly understated. It is unreasonable to

[25] To the extent that a counterparty makes a representation to the manager regarding a QPAM condition (e.g., regarding its power to appoint the manager), the Department must clarify that the representation is a sufficient "record" for this purpose.

believe that a manager can use a single form to amend every client agreement and that it can amend every agreement without any conversations or negotiations with any clients.

- The time it takes to amend all trading agreements for all plans, including real estate and lease documentation, loans, other credit agreements, derivatives clearing arrangements, ISDAs and other industry agreements is not adequately considered. The economic analysis does not even mention these agreements, all of which would need to be renegotiated, and in light of the kinds of additional conditions proposed by the Department, risk allocation on each of conditions based on the questions raised in this comment would have to be separately negotiated.
- The potential elimination of multi-sleeve pooled funds, such as bank collective funds and insurance company separate accounts is not considered at all.
- The costs to plans (e.g., additional risk, volatility, cost of strategy, etc.) of not being able to use the strategy of their choice because of the difficulties in complying with the QPAM exemption or counterparties being unwilling to accept it has not been qualified.
- The cost of defending a notice of ineligibility has not been considered. As noted throughout, a notice of ineligibility is intended by the Department essentially to put an asset manager out of business (at least the business of managing plan assets). When a manager's business is at stake, we believe it is far more likely that the manager will spend upwards of $1 million to defend against the notice and apply for an individual exemption.
- The economic analysis suggests there is no cost to the changes in Section I(c), which simply is incorrect; As the body of this comment letter indicates, we believe that the costs would be substantial and would affect virtually every plan, manager and counterparty.
- The economic analysis significantly understates the recordkeeping required by all counterparties and the additional recordkeeping required by asset managers, particularly the new aspects of this recordkeeping requirement.
- The Department's assumed cost of filing for an individual exemption is unrealistically low. While the Department estimates the cost of an individual exemption to be $25,000, Our members' experience is that it will cost between $250,000 to $500,000 for such applications.
- The Department does not consider the additional enforcement cost to the Justice Department if DPAs and NPAs have the same collateral consequences as criminal convictions.

VI. Other Issues of Concern

A. Technical issues with respect to indexing

While SIFMA understands that the dollar amounts in the definition of QPAM are outdated, we are concerned that they have been indexed based on 1984 values and not 2010 values, when the exemption last was changed.[26] In addition, we believe that the automatic indexing will create situations where an entity is a QPAM on one day, and not thereafter, leaving its plan clients in a precarious position if the plans are invested in continuing transactions dependent on QPAM, and suddenly need to find alternative managers. We do not believe that the Department intends this result, and we would like to work with the Department to create a prospective indexing date, perhaps once every 5 years, with a one-year effective date lag.

B. Effective Date

SIFMA hopes that the comments received by the Department will convince it to withdraw these amendments and reconsider them after an appropriate and robust economic analysis has been completed. Nonetheless, any final rule should be effective only after a period long enough to renegotiate all client and trading agreements, and only with respect to new transactions entered into after that date.

VII. Conclusion

The goal of the QPAM Exemption was to provide plans whose assets are managed by seasoned investment managers with broad-based market relief to engage in a wide range of financial transactions with parties in interest to those plans, notwithstanding the limitations of Section 406(a) of ERISA. The Department's goal when it adopted the QPAM exemption in 1984 was to provide these plans with access to the investment markets that is comparable to the access available to other investors, and by all accounts the QPAM Exemption has been overwhelmingly successful at doing just that. We urge the Department not to abandon that goal and not to leave plans, participants and beneficiaries, with investment opportunities and strategies that are less effective and less efficient and more costly than those they currently enjoy and those that all other investors enjoy. These opportunities and strategies, some of which can be accessed only in reliance on the QPAM Exemption, allow plans to access superior risk adjusted returns, hedge risk, diversify portfolios, and reduce volatility.

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[26] We recognize; however, that limits were adjusted in 2005.

Ultimately, we believe the proposed amendments will adversely affect plans by limiting their counterparties and their access to the investment markets, while increasing their costs, without any corresponding benefit. We urge the Department to withdraw this proposal, to reconsider what, if any, changes to the QPAM exemption will improve it, and if there are any such changes, to repropose them in a much more tailored set of amendments.

Sincerely,

Lisa J. Bleier

Lisa J. Bleier
Managing Director and Assoc. General Counsel