(e) *Internal Revenue Code.* Section 4975(e)(3) of the Code contains provisions parallel to section 3(21)(A) of the Act which define the term "fiduciary" for purposes of the prohibited transaction provisions in Code section 4975. Effective December 31, 1978, section 102 of the Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 237 transferred the authority of the Secretary of the Treasury to promulgate regulations of the type published herein to the Secretary of Labor. All references herein to section 3(21)(A) of the Act should be read to include reference to the parallel provisions of section 4975(e)(3) of the Code. Furthermore, the provisions of this section shall apply for purposes of the application of Code section 4975 with respect to any plan described in Code section 4975(e)(1).

(f) *Definitions.* For purposes of this section—

(1) "Recommendation" means a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action.

(2)(i) "Plan" means any employee benefit plan described in section 3(3) of the Act and any plan described in section 4975(e)(1)(A) of the Code, and

(ii) "IRA" means any trust, account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code.

(3) "Plan participant" means for a plan described in section 3(3) of the Act, a person described in section 3(7) of the Act.

(4) "IRA owner" means with respect to an IRA either the person who is the owner of the IRA or the person for whose benefit the IRA was established.

(5) "Plan fiduciary" means a person described in section (3)(21) of the Act and 4975(e)(3) of the Code.

(6) "Fee or other compensation, direct or indirect" for purposes of this section and section 3(21)(A)(ii) of the Act, means any fee or compensation for the advice received by the person (or by an affiliate) from any source and any fee or compensation incident to the transaction in which the investment advice has been rendered or will be rendered. The term fee or other compensation includes, for example, brokerage fees, mutual fund and insurance sales commissions.

(7) "Affiliate" includes: Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such person; any officer, director, partner, employee or relative (as defined in section 3(15) of the Act) of such person; and any corporation or partnership of which such person is an officer, director or partner.

(8) "Control" for purposes of paragraph (f)(7) of this section means the power to exercise a controlling influence over the management or policies of a person other than an individual.

Signed at Washington, DC, this 14th day of April, 2015.

Phyllis C. Borzi,

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

[FR Doc. 2015–08831 Filed 4–15–15; 11:15 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

[Application No. D–11712]

ZRIN 1210–ZA25

Proposed Best Interest Contract Exemption

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

ACTION: Notice of Proposed Class Exemption.

SUMMARY: This document contains a notice of pendency before the U.S. Department of Labor of a proposed exemption from certain prohibited transactions provisions of the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (the Code). The provisions at issue generally prohibit fiduciaries with respect to employee benefit plans and individual retirement accounts (IRAs) from engaging in self-dealing and receiving compensation from third parties in connection with transactions involving the plans and IRAs. The exemption proposed in this notice would allow entities such as broker-dealers and insurance agents that are fiduciaries by reason of the provision of investment advice to receive such compensation when plan participants and beneficiaries, IRA owners, and certain small plans purchase, hold or sell certain investment products in accordance with the fiduciaries' advice, under protective conditions to safeguard the interests of the plans, participants and beneficiaries, and IRA owners. The proposed exemption would affect participants and beneficiaries of plans, IRA owners and fiduciaries with respect to such plans and IRAs.

DATES: *Comments:* Written comments concerning the proposed class exemption must be received by the Department on or before July 6, 2015.

Applicability: The Department proposes to make this exemption available eight months after publication of the final exemption in the **Federal Register**. We request comment below on whether the applicability date of certain conditions should be delayed.

ADDRESSES: All written comments concerning the proposed class exemption should be sent to the Office of Exemption Determinations by any of the following methods, identified by ZRIN: 1210–ZA25:

Federal eRulemaking Portal: http://www.regulations.gov at Docket ID number: EBSA–2014–0016. Follow the instructions for submitting comments.

Email to: e-OED@dol.gov.

Fax to: (202) 693–8474.

Mail: Office of Exemption Determinations, Employee Benefits Security Administration, (Attention: D–11712), U.S. Department of Labor, 200 Constitution Avenue NW., Suite 400, Washington DC 20210.

Hand Delivery/Courier: Office of Exemption Determinations, Employee Benefits Security Administration, (Attention: D–11712), U.S. Department of Labor, 122 C St. NW., Suite 400, Washington DC 20001.

Instructions. All comments must be received by the end of the comment period. The comments received will be available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N–1513, 200 Constitution Avenue NW., Washington, DC 20210. Comments will also be available online at *www.regulations.gov,* at Docket ID number: EBSA–2014–0016 and *www.dol.gov/ebsa,* at no charge.

Warning: All comments will be made available to the public. Do not include any personally identifiable information (such as Social Security number, name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

FOR FURTHER INFORMATION CONTACT: Karen E. Lloyd or Brian L. Shiker, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor (202) 693–8824 (this is not a toll-free number).

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

Public Hearing: The Department plans to hold an administrative hearing within 30 days of the close of the comment period. The Department will ensure ample opportunity for public comment by reopening the record following the hearing and publication of the hearing transcript. Specific information regarding the date, location and submission of requests to testify will be published in a notice in the **Federal Register**.

Executive Summary

Purpose of Regulatory Action

The Department is proposing this exemption in connection with its proposed regulation under ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) (Proposed Regulation), published elsewhere in this issue of the **Federal Register**. The Proposed Regulation would amend the definition of a ''fiduciary'' under ERISA and the Code to specify when a person is a fiduciary by reason of the provision of investment advice for a fee or other compensation regarding assets of a plan or IRA. If adopted, the Proposed Regulation would replace an existing regulation dating to 1975. The Proposed Regulation is intended to take into account the advent of 401(k) plans and IRAs, the dramatic increase in rollovers, and other developments that have transformed the retirement plan landscape and the associated investment market over the four decades since the existing regulation was issued. In light of the extensive changes in retirement investment practices and relationships, the Proposed Regulation would update existing rules to distinguish more appropriately between the sorts of advice relationships that should be treated as fiduciary in nature and those that should not.

The exemption proposed in this notice (''the Best Interest Contract Exemption'') was developed to promote the provision of investment advice that is in the best interest of retail investors such as plan participants and beneficiaries, IRA owners, and small plans. ERISA and the Code generally prohibit fiduciaries from receiving payments from third parties and from acting on conflicts of interest, including using their authority to affect or increase their own compensation, in connection with transactions involving a plan or IRA. Certain types of fees and compensation common in the retail market, such as brokerage or insurance commissions, 12b-1 fees and revenue sharing payments, fall within these prohibitions when received by fiduciaries as a result of transactions involving advice to the plan participants and beneficiaries, IRA owners and small plan sponsors. To facilitate continued provision of advice to such retail investors and under conditions designed to safeguard the interests of these investors, the exemption would allow certain investment advice fiduciaries, including broker-dealers and insurance agents, to receive these various forms of compensation that, in the absence of an exemption, would not be permitted under ERISA and the Code.

Rather than create a set of highly prescriptive transaction-specific exemptions, which has generally been the regulatory approach to date, the proposed exemption would flexibly accommodate a wide range of current business practices, while minimizing the harmful impact of conflicts of interest on the quality of advice. The Department has sought to preserve beneficial business models by taking a standards-based approach that will broadly permit firms to continue to rely on common fee practices, as long as they are willing to adhere to basic standards aimed at ensuring that their advice is in the best interest of their customers.

ERISA section 408(a) specifically authorizes the Secretary of Labor to grant administrative exemptions from ERISA's prohibited transaction provisions.[1] Regulations at 29 CFR 2570.30 to 2570.52 describe the procedures for applying for an administrative exemption. Before granting an exemption, the Department must find that the exemption is administratively feasible, in the interests of plans and their participants and beneficiaries and IRA owners, and protective of the rights of participants and beneficiaries of plans and IRA owners. Interested parties are permitted to submit comments to the Department through July 6, 2015. The Department plans to hold an administrative hearing within 30 days of the close of the comment period.

Summary of the Major Provisions

The proposed exemption would apply to compensation received by investment advice fiduciaries—both individual ''advisers''[2] and the ''financial institutions'' that employ or otherwise contract with them—and their affiliates and related entities that is provided in connection with the purchase, sale or holding of certain assets by plans and IRAs. In particular, the exemption would apply when prohibited compensation is received as a result of advice to retail ''retirement investors'' including plan participants and beneficiaries, IRA owners, and plan sponsors (or their employees, officers or directors) of plans with fewer than 100 participants making investment decisions on behalf of the plans and IRAs.

In order to protect the interests of the plan participants and beneficiaries, IRA owners, and small plan sponsors, the exemption would require the adviser and financial institution to contractually acknowledge fiduciary status, commit to adhere to basic standards of impartial conduct, warrant that they have adopted policies and procedures reasonably designed to mitigate any harmful impact of conflicts of interest, and disclose basic information on their conflicts of interest and on the cost of their advice. The adviser and firm must commit to fundamental obligations of fair dealing and fiduciary conduct—to give advice that is in the customer's best interest; avoid misleading statements; receive no more than reasonable compensation; and comply with applicable federal and state laws governing advice. This standards-based approach aligns the adviser's interests with those of the plan or IRA customer, while leaving the adviser and employing firm the flexibility and discretion necessary to determine how best to satisfy these basic standards in light of the unique attributes of their business. All financial institutions relying on the exemption would be required to notify the Department in advance of doing so. Finally, all financial institutions making use of the exemption would have to maintain certain data, and make it available to the Department, to help

[1] Code section 4975(c)(2) authorizes the Secretary of the Treasury to grant exemptions from the parallel prohibited transaction provisions of the Code. Reorganization Plan No. 4 of 1978 (5 U.S.C. app. at 214 (2000)) generally transferred the authority of the Secretary of the Treasury to grant administrative exemptions under Code section 4975 to the Secretary of Labor. This proposed exemption would provide relief from the indicated prohibited transaction provisions of both ERISA and the Code.

[2] By using the term ''adviser,'' the Department does not intend to limit the exemption to investment advisers registered under the Investment Advisers Act of 1940 or under state law. As explained herein, an adviser is an individual who can be a representative of a registered investment adviser, a bank or similar financial institution, an insurance company, or a broker-dealer.

evaluate the effectiveness of the exemption in safeguarding the interests of the plan participants and beneficiaries, IRA owners, and small plans.

Executive Order 12866 and 13563 Statement

Under Executive Orders 12866 and 13563, the Department must determine whether a regulatory action is ''significant'' and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing and streamlining rules, and of promoting flexibility. It also requires federal agencies to develop a plan under which they will periodically review their existing significant regulations to make regulatory programs more effective or less burdensome in achieving their regulatory objectives.

Under Executive Order 12866, ''significant'' regulatory actions are subject to the requirements of the Executive Order and review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866, defines a ''significant regulatory action'' as an action that is likely to result in a rule (1) having an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as an ''economically significant'' regulatory action); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. Pursuant to the terms of the Executive Order, OMB has determined that this action is ''significant'' within the meaning of Section 3(f)(4) of the Executive Order. Accordingly, the Department has undertaken an assessment of the costs and benefits of the proposed exemption, and OMB has reviewed this regulatory action.

Background

Proposed Regulation Defining a Fiduciary

As explained more fully in the preamble to the Department's Proposed Regulation under ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B), also published in this issue of the **Federal Register**, ERISA is a comprehensive statute designed to protect the interests of plan participants and beneficiaries, the integrity of employee benefit plans, and the security of retirement, health, and other critical benefits. The broad public interest in ERISA-covered plans is reflected in its imposition of fiduciary responsibilities on parties engaging in important plan activities, as well as in the tax-favored status of plan assets and investments. One of the chief ways in which ERISA protects employee benefit plans is by requiring that plan fiduciaries comply with fundamental obligations rooted in the law of trusts. In particular, plan fiduciaries must manage plan assets prudently and with undivided loyalty to the plans and their participants and beneficiaries.[3] In addition, they must refrain from engaging in ''prohibited transactions,'' which ERISA does not permit because of the dangers posed by the fiduciaries' conflicts of interest with respect to the transactions.[4] When fiduciaries violate ERISA's fiduciary duties or the prohibited transaction rules, they may be held personally liable for the breach.[5] In addition, violations of the prohibited transaction rules are subject to excise taxes under the Code.

The Code also has rules regarding fiduciary conduct with respect to tax-favored accounts that are not generally covered by ERISA, such as IRAs. Although ERISA's general fiduciary obligations of prudence and loyalty do not govern the fiduciaries of IRAs, these fiduciaries are subject to the prohibited transaction rules. In this context, fiduciaries engaging in the prohibited transactions are subject to an excise tax enforced by the Internal Revenue Service. Unlike participants in plans covered by Title I of ERISA, IRA owners do not have a statutory right to bring suit against fiduciaries for violation of the prohibited transaction rules and fiduciaries are not personally liable to IRA owners for the losses caused by their misconduct. Nor can the Secretary of Labor bring suit to enforce the prohibited transactions rules on behalf of IRA owners. The exemption proposed herein, as well as the Proposed Class Exemption for Principal Transactions in Certain Debt Securities between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs, published elsewhere in this issue of the **Federal Register**, would create contractual obligations for fiduciaries to adhere to certain standards (the Impartial Conduct Standards) if they want to take advantage of the exemption. IRA owners would have a right to enforce these new contractual rights.

Under the statutory framework, the determination of who is a ''fiduciary'' is of central importance. Many of ERISA's and the Code's protections, duties, and liabilities hinge on fiduciary status. In relevant part, ERISA section 3(21)(A) and Code section 4975(e)(3) provide that a person is a fiduciary with respect to a plan or IRA to the extent he or she (i) exercises any discretionary authority or discretionary control with respect to management of such plan or IRA, or exercises any authority or control with respect to management or disposition of its assets; (ii) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan or IRA, or has any authority or responsibility to do so; or, (iii) has any discretionary authority or discretionary responsibility in the administration of such plan or IRA.

The statutory definition deliberately casts a wide net in assigning fiduciary responsibility with respect to plan and IRA assets. Thus, ''any authority or control'' over plan or IRA assets is sufficient to confer fiduciary status, and any persons who render ''investment advice for a fee or other compensation, direct or indirect'' are fiduciaries, regardless of whether they have direct control over the plan's or IRA's assets and regardless of their status as an investment adviser or broker under the federal securities laws. The statutory definition and associated responsibilities were enacted to ensure that plans, plan participants, and IRA owners can depend on persons who provide investment advice for a fee to provide recommendations that are untainted by conflicts of interest. In the absence of fiduciary status, the providers of investment advice are neither subject to ERISA's fundamental fiduciary standards, nor accountable for imprudent, disloyal, or tainted advice under ERISA or the Code, no matter

[3] ERISA section 404(a).

[4] ERISA section 406. ERISA also prohibits certain transactions between a plan and a ''party in interest.''

[5] ERISA section 409; *see also* ERISA section 405.

how egregious the misconduct or how substantial the losses. Retirement investors typically are not financial experts and consequently must rely on professional advice to make critical investment decisions. In the years since then, the significance of financial advice has become still greater with increased reliance on participant directed plans and IRAs for the provision of retirement benefits.

In 1975, the Department issued a regulation, at 29 CFR 2510.3–21(c)(1975), defining the circumstances under which a person is treated as providing ''investment advice'' to an employee benefit plan within the meaning of ERISA section 3(21)(A)(ii) (the ''1975 regulation'').[6] The 1975 regulation narrowed the scope of the statutory definition of fiduciary investment advice by creating a five-part test that must be satisfied before a person can be treated as rendering investment advice for a fee. Under the 1975 regulation, for advice to constitute ''investment advice,'' an adviser who does not have discretionary authority or control with respect to the purchase or sale of securities or other property of the plan must (1) render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing or selling securities or other property (2) on a regular basis (3) pursuant to a mutual agreement, arrangement or understanding, with the plan or a plan fiduciary that (4) the advice will serve as a primary basis for investment decisions with respect to plan assets, and that (5) the advice will be individualized based on the particular needs of the plan. The regulation provides that an adviser is a fiduciary with respect to any particular instance of advice only if he or she meets each and every element of the five-part test with respect to the particular advice recipient or plan at issue. A 1976 Department of Labor Advisory Opinion further limited the application of the statutory definition of ''investment advice'' by stating that valuations of employer securities in connection with employee stock ownership plan (ESOP) purchases would not be considered fiduciary advice.[7]

As the marketplace for financial services has developed in the years since 1975, the five-part test may now undermine, rather than promote, the statutes' text and purposes. The narrowness of the 1975 regulation allows advisers, brokers, consultants and valuation firms to play a central role in shaping plan investments, without ensuring the accountability that Congress intended for persons having such influence and responsibility. Even when plan sponsors, participants, beneficiaries and IRA owners clearly rely on paid consultants for impartial guidance, the regulation allows many advisers to avoid fiduciary status and the accompanying fiduciary obligations of care and prohibitions on disloyal and conflicted transactions. As a consequence, under ERISA and the Code, these advisers can steer customers to investments based on their own self-interest, give imprudent advice, and engage in transactions that would otherwise be prohibited by ERISA and the Code.

In the Department's Proposed Regulation defining a fiduciary under ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B), the Department seeks to replace the existing regulation with one that more appropriately distinguishes between the sorts of advice relationships that should be treated as fiduciary in nature and those that should not, in light of the legal framework and financial marketplace in which IRAs and plans currently operate.[8] Under the Proposed Regulation, plans include IRAs.

The Proposed Regulation describes the types of advice that constitute ''investment advice'' with respect to plan or IRA assets for purposes of the definition of a fiduciary at ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B). The proposal provides, subject to certain carve-outs, that a person renders investment advice with respect to assets of a plan or IRA if, among other things, the person provides, directly to a plan, a plan fiduciary, a plan participant or beneficiary, IRA or IRA owner, one of the following types of advice:

(1) A recommendation as to the advisability of acquiring, holding, disposing or exchanging securities or other property, including a recommendation to take a distribution of benefits or a recommendation as to the investment of securities or other property to be rolled over or otherwise distributed from a plan or IRA;

(2) A recommendation as to the management of securities or other property, including recommendations as to the management of securities or other property to be rolled over or otherwise distributed from the plan or IRA;

(3) An appraisal, fairness opinion or similar statement, whether verbal or written, concerning the value of securities or other property, if provided in connection with a specific transaction or transactions involving the acquisition, disposition or exchange of such securities or other property by the plan or IRA; and

(4) a recommendation of a person who is also going to receive a fee or other compensation in providing any of the types of advice described in paragraphs (1) through (3), above.

In addition, to be a fiduciary, such person must either (i) represent or acknowledge that it is acting as a fiduciary within the meaning of ERISA (or the Code) with respect to the advice, or (ii) render the advice pursuant to a written or verbal agreement, arrangement or understanding that the advice is individualized to, or that such advice is specifically directed to, the advice recipient for consideration in making investment or management decisions with respect to securities or other property of the plan or IRA.

In the Proposed Regulation, the Department refers to FINRA guidance on whether particular communications should be viewed as ''recommendations''[9] within the meaning of the fiduciary definition, and requests comment on whether the Proposed Regulation should adhere to or adopt some or all of the standards developed by FINRA in defining communications which rise to the level of a recommendation. For more detailed information regarding the Proposed Regulation, see the Notice of the Proposed Regulation published in this issue of the **Federal Register**.

For advisers who do not represent that they are acting as ERISA or Code fiduciaries, the Proposed Regulation provides that advice rendered in conformance with certain carve-outs will not cause the adviser to be treated as a fiduciary under ERISA or the Code. For example, under the seller's carve-out, counterparties in arm's length transactions with plans may make investment recommendations without acting as fiduciaries if certain conditions are met.[10] The proposal also

[6] The Department of Treasury issued a virtually identical regulation, at 26 CFR 54.4975–9(c), which interprets Code section 4975(e)(3).

[7] Advisory Opinion 76–65A (June 7, 1976).

[8] The Department initially proposed an amendment to its regulation defining a fiduciary under ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) on October 22, 2010, at 75 FR 65263. It subsequently announced its intention to withdraw the proposal and propose a new rule, consistent with the President's Executive Orders 12866 and 13563, in order to give the public a full opportunity to evaluate and comment on the new proposal and updated economic analysis.

[9] *See* NASD Notice to Members 01–23 and FINRA Regulatory Notices 11–02, 12–25 and 12–55.

[10] Although the preamble adopts the phrase ''seller's carve-out'' as a shorthand way of referring

Continued

contains a carve-out from fiduciary status for providers of appraisals, fairness opinions, or statements of value in specified contexts (*e.g.,* with respect to ESOP transactions). The proposal additionally includes a carve-out from fiduciary status for the marketing of investment alternative platforms to plans, certain assistance in selecting investment alternatives and other activities. Finally, the Proposed Regulation carves out the provision of investment education from the definition of an investment advice fiduciary.

Prohibited Transactions

The Department anticipates that the Proposed Regulation will cover many investment professionals who do not currently consider themselves to be fiduciaries under ERISA or the Code. If the Proposed Regulation is adopted, these entities will become subject to the prohibited transaction restrictions in ERISA and the Code that apply specifically to fiduciaries. ERISA section 406(b)(1) and Code section 4975(c)(1)(E) prohibit a fiduciary from dealing with the income or assets of a plan or IRA in his own interest or his own account. ERISA section 406(b)(2) provides that a fiduciary shall not ''in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries.'' As this provision is not in the Code, it does not apply to transactions involving IRAs. ERISA section 406(b)(3) and Code section 4975(c)(1)(F) prohibit a fiduciary from receiving any consideration for his own personal account from any party dealing with the plan or IRA in connection with a transaction involving assets of the plan or IRA.

Parallel regulations issued by the Departments of Labor and the Treasury explain that these provisions impose on fiduciaries of plans and IRAs a duty not to act on conflicts of interest that may affect the fiduciary's best judgment on behalf of the plan or IRA.[11] The prohibitions extend to a fiduciary causing a plan or IRA to pay an additional fee to such fiduciary, or to a person in which such fiduciary has an interest that may affect the exercise of the fiduciary's best judgment as a fiduciary. Likewise, a fiduciary is prohibited from receiving compensation from third parties in connection with a transaction involving the plan or IRA, or from causing a person in which the fiduciary has an interest which may affect its best judgment as a fiduciary to receive such compensation.[12] Given these prohibitions, conferring fiduciary status on particular investment advice activities can have important implications for many investment professionals.

In particular, investment professionals typically receive compensation for services to retirement investors in the retail market through a variety of arrangements. These include commissions paid by the plan, participant or beneficiary, or IRA, or commissions, sales loads, 12b–1 fees, revenue sharing and other payments from third parties that provide investment products. The investment professional or its affiliate may receive such fees upon the purchase or sale by a plan, participant or beneficiary account, or IRA of the product, or while the plan, participant or beneficiary account, or IRA, holds the product. In the Department's view, receipt by a fiduciary of such payments would violate the prohibited transaction provisions of ERISA section 406(b) and Code section 4975(c)(1)(E) and (F) because the amount of the fiduciary's compensation is affected by the use of its authority in providing investment advice, unless such payments meet the requirements of an exemption.

Prohibited Transaction Exemptions

ERISA and the Code counterbalance the broad proscriptive effect of the prohibited transaction provisions with numerous statutory exemptions. For example, ERISA section 408(b)(14) and Code section 4975(d)(17) specifically exempt transactions in connection with the provision of fiduciary investment advice to a participant or beneficiary of an individual account plan or IRA owner where the advice, resulting transaction, and the adviser's fees meet certain conditions. The Secretary of Labor may grant administrative exemptions under ERISA and the Code on an individual or class basis if the Secretary finds that the exemption is (1) administratively feasible, (2) in the interests of plans and their participants and beneficiaries and IRA owners, and (3) protective of the rights of the participants and beneficiaries of such plans and IRA owners.

Over the years, the Department has granted several conditional administrative class exemptions from the prohibited transactions provisions of ERISA and the Code. The exemptions focus on specific types of compensation arrangements. Fiduciaries relying on these exemptions must comply with certain conditions designed to protect the interests of plans and IRAs. In connection with the development of the Proposed Regulation, the Department has considered comments suggesting the need for additional prohibited transaction exemptions for the wide variety of compensation structures that exist today in the marketplace for investments. Some commentators have suggested that the lack of such relief may cause financial professionals to cut back on the provision of investment advice and the availability of products to plan participants and beneficiaries, IRAs, and smaller plans.

After consideration of the issue, the Department has determined to propose the new class exemption described below, which applies to investment advice fiduciaries providing advice to plan participants and beneficiaries, IRAs, and certain employee benefit plans with fewer than 100 participants (referred to as ''retirement investors''). The exemption would apply broadly to many common types of otherwise prohibited compensation that such investment advice fiduciaries may receive, provided the protective conditions of the exemption are satisfied. The Department is also seeking public comment on whether it should issue a separate streamlined exemption that would allow advisers to receive otherwise prohibited compensation in connection with advice to invest in certain high-quality low-fee investments, subject to fewer conditions.

Elsewhere in this issue of the **Federal Register**, the Department is also proposing a new class exemption for ''principal transactions'' for investment advice fiduciaries selling certain debt securities out of their own inventories to plans and IRAs.

Lastly, the Department is also proposing, elsewhere in this issue of the **Federal Register**, amendments to the following existing class prohibited exemptions, which are particularly relevant to broker-dealers and other investment advice fiduciaries.

to the carve-out and its terms, the regulatory carve-out is not limited to sellers but rather applies more broadly to counterparties in arm's length transactions with plan investors with financial expertise.

[11] Subsequent to the issuance of these regulations, Reorganization Plan No. 4 of 1978, 5 U.S.C. App. (2010), divided rulemaking and interpretive authority between the Secretaries of Labor and the Treasury. The Secretary of Labor was provided interpretive and rulemaking authority regarding the definition of fiduciary in both Title I of ERISA and the Internal Revenue Code.

[12] 29 CFR 2550.408b–2(e); 26 CFR 54.4975–6(a)(5).

Prohibited Transaction Exemption (PTE) 86–128 [13] currently allows an investment advice fiduciary to cause a plan or IRA to pay the investment advice fiduciary or its affiliate a fee for effecting or executing securities transactions as agent. To prevent churning, the exemption does not apply if such transactions are excessive in either amount or frequency. The exemption also allows the investment advice fiduciary to act as the agent for both the plan and the other party to the transaction (*i.e.,* the buyer and the seller of securities), and receive a reasonable fee. To use the exemption, the fiduciary cannot be a plan administrator or employer, unless all profits earned by these parties are returned to the plan. The conditions of the exemption require that a plan fiduciary independent of the investment advice fiduciary receive certain disclosures and authorize the transaction. In addition, the independent fiduciary must receive confirmations and an annual ''portfolio turnover ratio'' demonstrating the amount of turnover in the account during that year. These conditions are not presently applicable to transactions involving IRAs.

The Department is proposing to amend PTE 86–128 to require all fiduciaries relying on the exemption to adhere to the same impartial conduct standards required in the Best Interest Contract Exemption. At the same time, the proposed amendment would eliminate relief for investment advice fiduciaries to IRA owners; instead they would be required to rely on the Best Interest Contract Exemption for an exemption for such compensation. In the Department's view, the provisions in the Best Interest Contract Exemption better address the interests of IRAs with respect to transactions otherwise covered by PTE 86–128 and, unlike plan participants and beneficiaries, there is no separate plan fiduciary in the IRA market to review and authorize the transaction. Investment advice fiduciaries to plans would remain eligible for relief under the exemption, as would investment managers with full investment discretion over the investments of plans and IRA owners, but they would be required to comply with all the protective conditions, described above. Finally, the Department is proposing that PTE 86–128 extend to a new covered transaction, for fiduciaries to sell mutual fund shares out of their own inventory (*i.e.* acting as principals, rather than agents) to plans and IRAs and to receive commissions for doing so. This transaction is currently the subject of another exemption, PTE 75–1, Part II(2) (discussed below) that the Department is proposing to revoke.

Several changes are proposed with respect to PTE 75–1, a multi-part exemption for securities transactions involving broker-dealers and banks, and plans and IRAs.[14] Part I(b) and (c) currently provide relief for certain non-fiduciary services to plans and IRAs. The Department is proposing to revoke these provisions, and require persons seeking to engage in such transactions to rely instead on the existing statutory exemptions provided in ERISA section 408(b)(2) and Code section 4975(d)(2), and the Department's implementing regulations at 29 CFR 2550.408b–2. In the Department's view, the conditions of the statutory exemption are more appropriate for the provision of services.

PTE 75–1, Part II(2), currently provides relief for fiduciaries to receive commissions for selling mutual fund shares to plans and IRAs in a principal transaction. As described above, the Department is proposing to provide relief for these types of transactions in PTE 86–128, and so is proposing to revoke PTE 75–1, Part II(2), in its entirety. As discussed in more detail in the notice of proposed amendment/revocation, the Department believes the conditions of PTE 86–128 are more appropriate for these transactions.

PTE 75–1, Part V, currently permits broker-dealers to extend credit to a plan or IRA in connection with the purchase or sale of securities. The exemption does not permit broker-dealers that are fiduciaries to receive compensation when doing so. The Department is proposing to amend PTE 75–1, Part V, to permit investment advice fiduciaries to receive compensation for lending money or otherwise extending credit to plans and IRAs, but only for the limited purpose of avoiding a failed securities transaction.

PTE 84–24 [15] covers transactions involving mutual fund shares, or insurance or annuity contracts, sold to plans or IRAs by pension consultants, insurance agents, brokers, and mutual fund principal underwriters who are fiduciaries as a result of advice they give in connection with these transactions. The exemption allows these investment advice fiduciaries to receive a sales commission with respect to products purchased by plans or IRAs. The exemption is limited to sales commissions that are reasonable under the circumstances. The investment advice fiduciary must provide disclosure of the amount of the commission and other terms of the transaction to an independent fiduciary of the plan or IRA, and obtain approval for the transaction. To use this exemption, the investment advice fiduciary may not have certain roles with respect to the plan or IRA such as trustee, plan administrator, or fiduciary with written authorization to manage the plan's assets and employers. However it is available to investment advice fiduciaries regardless of whether they expressly acknowledge their fiduciary status or are simply functional or ''inadvertent'' fiduciaries that have not expressly agreed to act as fiduciary advisers, provided there is no written authorization granting them discretion to acquire or dispose of the assets of the plan or IRA.

The Department is proposing to amend PTE 84–24 to require all fiduciaries relying on the exemption to adhere to the same impartial conduct standards required in the Best Interest Contract Exemption. At the same time, the proposed amendment would revoke PTE 84–24 in part so that investment advice fiduciaries to IRA owners would not be able to rely on PTE 84–24 with respect to (1) transactions involving variable annuity contracts and other annuity contracts that constitute securities under federal securities laws, and (2) transactions involving the purchase of mutual fund shares. Investment advice fiduciaries would instead be required to rely on the Best Interest Contract Exemption for compensation received in connection with these transactions. The Department believes that investment advice transactions involving annuity contracts that are treated as securities and transactions involving the purchase of mutual fund shares should occur under the conditions of the Best Interest Contract Exemption due to the similarity of these investments, including their distribution channels and disclosure obligations, to other investments covered in the Best Interest Contract Exemption. Investment advice fiduciaries to ERISA plans would remain eligible for relief under the exemption with respect to transactions involving all insurance and annuity

[13] Class Exemption for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers, 51 FR 41686 (Nov. 18, 1986), amended at 67 FR 64137 (Oct. 17, 2002).

[14] Exemptions from Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers and Banks, 40 FR 50845 (Oct. 31, 1975), as amended at 71 FR 5883 (Feb. 3, 2006).

[15] Class Exemption for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, Investment Companies and Investment Company Principal Underwriters, 49 FR 13208 (Apr. 3, 1984), amended at 71 FR 5887 (Feb. 3, 2006).

contracts and mutual fund shares and the receipt of commissions allowable under that exemption. Investment advice fiduciaries to IRAs could still receive commissions for transactions involving non-securities insurance and annuity contracts, but they would be required to comply with all the protective conditions, described above.

Finally, the Department is proposing amendments to certain other existing class exemptions to require adherence to the impartial conduct standards required in the Best Interest Contract Exemption. Specifically, PTEs 75–1, Part III, 75–1, Part IV, 77–4, 80–83, and 83–1, would be amended. Other than the amendments described above, however, the existing class exemptions will remain in place, affording additional flexibility to fiduciaries who currently use the exemptions or who wish to use the exemptions in the future. The Department seeks comment on whether additional exemptions are needed in light of the Proposed Regulation.

Proposed Best Interest Contract Exemption

As noted above, the exemption proposed in this notice provides relief for some of the same compensation payments as the existing exemptions described above. It is intended, however, to flexibly accommodate a wide range of current business practices, while minimizing the harmful impact of conflicts of interest on the quality of advice. The exemption permits fiduciaries to continue to receive a wide variety of types of compensation that would otherwise be prohibited. It seeks to preserve beneficial business models by taking a standards-based approach that will broadly permit firms to continue to rely on common fee practices, as long as they are willing to adhere to basic standards aimed at ensuring that their advice is in the best interest of their customers. This standards-based approach stands in marked contrast to existing class exemptions that generally focus on very specific types of investments or compensation and take a highly prescriptive approach to specifying conditions. The proposed exemption would provide relief for common investments [16] of retirement investors under the umbrella of one exemption. It is intended that this updated approach will ease compliance costs and reduce complexity while promoting the provision of investment advice that is in the best interest of retirement investors.

Section I of the proposed exemption would provide relief for the receipt of prohibited compensation by ''Advisers,'' ''Financial Institutions,'' ''Affiliates'' and ''Related Entities'' for services provided in connection with a purchase, sale or holding of an ''Asset'' [17] by a plan or IRA as a result of the Adviser's advice. The exemption also uses the term ''Retirement Investor'' to describe the types of persons who can be advice recipients under the exemption.[18] These terms are defined in Section VIII of this proposed exemption. The following sections discuss these key definitional terms of the exemption as well as the scope and conditions of the proposed exemption.

Entities Defined

1. Adviser

The proposed exemption contemplates that an individual person, an Adviser, will provide advice to the Retirement Investor. An Adviser must be an investment advice fiduciary of a plan or IRA who is an employee, independent contractor, agent, or registered representative of a ''Financial Institution'' (discussed in the next section), and the Adviser must satisfy the applicable federal and state regulatory and licensing requirements of insurance, banking, and securities laws with respect to the receipt of the compensation.[19] Advisers may be, for example, registered representatives of broker-dealers registered under the Securities Exchange Act of 1934, or insurance agents or brokers.

2. Financial Institutions

For purposes of the proposed exemption, a Financial Institution is the entity that employs an Adviser or otherwise retains the Adviser as an independent contractor, agent or registered representative.[20] Financial Institutions must be registered investment advisers, banks, insurance companies, or registered broker-dealers.

3. Affiliates and Related Entities

Relief is also proposed for the receipt of otherwise prohibited compensation by ''Affiliates'' and ''Related Entities'' with respect to the Adviser or Financial Institution.[21] Affiliates are (i) any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the Adviser or Financial Institution; (ii) any officer, director, employee, agent, registered representative, relative, member of family, or partner in, the Adviser or Financial Institution; and (iii) any corporation or partnership of which the Adviser or Financial Institution is an officer, director or employee or in which the Adviser or Financial Institution is a partner. For this purpose, ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual. Related Entities are entities other than Affiliates in which an Adviser or Financial Institution has an interest that may affect their exercise of their best judgment as fiduciaries.

4. Retirement Investor

The proposed exemption uses the term ''Retirement Investor'' to describe the types of persons who can be investment advice recipients under the exemption. The Retirement Investor may be a plan participant or beneficiary with authority to direct the investment of assets in his or her plan account or to take a distribution; in the case of an IRA, the beneficial owner of the IRA (*i.e.,* the IRA owner); or a plan sponsor (or an employee, officer or director thereof) of a non-participant-directed ERISA plan that has fewer than 100 participants.[22]

Scope of Relief in the Best Interest Contract Exemption

The Best Interest Contract Exemption set forth in Section I would provide prohibited transaction relief for the receipt by Advisers, Financial Institutions, Affiliates and Related Entities of a wide variety of compensation forms as a result of investment advice provided to the Retirement Investors, if the conditions of the exemption are satisfied. Specifically, Section I(b) of the proposed exemption provides that the exemption would permit an Adviser, Financial Institution and their Affiliates and Related Entities to receive compensation for services provided in connection with the purchase, sale or holding of an Asset by a plan, participant or beneficiary account, or IRA, as a result of an Adviser's or

[16] See Section VIII(c) of the proposed exemption, defining the term ''Asset,'' and the preamble discussion in the ''*Scope of Relief in the Best Interest Contract Exemption''* section below.

[17] See Section VIII(c) of the proposed exemption.

[18] While the Department uses the term ''*Retirement* Investor'' throughout this document, the proposed exemption is not limited only to investment advice fiduciaries of employee pension benefit plans and IRAs. Relief would be available for investment advice fiduciaries of employee welfare benefit plans as well.

[19] See Section VIII(a) of the proposed exemption.

[20] See Section VIII(e) of the proposed exemption.

[21] See Section VIII(b) and (k) of the proposed exemption.

[22] See Section VIII(l) of the proposed exemption.

Financial Institution's investment advice to a Retirement Investor.

The proposed exemption would apply to the restrictions of ERISA section 406(b) and the sanctions imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(E) and (F). These provisions prohibit conflict of interest transactions and receipt of third-party payments by investment advice fiduciaries.[23] For relief to be available under the exemption, the Adviser and Financial Institution must comply with the applicable conditions, including entering into a contract that acknowledges fiduciary status and requires adherence to certain Impartial Conduct Standards.

The types of compensation payments contemplated by this proposed exemption include commissions paid directly by the plan or IRA, as well as commissions, trailing commissions, sales loads, 12b–1 fees, and revenue sharing payments paid by the investment providers or other third parties to Advisers and Financial Institutions. The exemption also would cover other compensation received by the Adviser, Financial Institution or their Affiliates and Related Entities as a result of an investment by a plan, participant or beneficiary account, or IRA, such as investment management fees or administrative services fees from an investment vehicle in which the plan, participant or beneficiary account, or IRA invests.

As proposed, the exemption is limited to otherwise prohibited compensation generated by investments that are commonly purchased by plans, participant and beneficiary accounts, and IRAs. Accordingly, the exemption defines the ''Assets'' that can be sold under the exemption as bank deposits, CDs, shares or interests in registered investment companies, bank collective funds, insurance company separate accounts, exchange-traded REITs, exchange-traded funds, corporate bonds offered pursuant to a registration statement under the Securities Act of 1933, agency debt securities as defined in FINRA Rule 6710(l) or its successor, U.S. Treasury securities as defined in FINRA Rule 6710(p) or its successor, insurance and annuity contracts (both securities and non-securities), guaranteed investment contracts, and equity securities within the meaning of 17 CFR 230.405 that are exchange-traded securities within the meaning of 17 CFR 242.600. However, the definition does not encompass any equity security that is a security future or a put, call, straddle, or any other option or privilege of buying an equity security from or selling an equity security to another without being bound to do so.[24]

Prohibited compensation received for investments that fall outside the definition of Asset would not be covered by the exemption. Limiting the exemption in this manner ensures that the investments needed to build a basic diversified portfolio are available to plans, participant and beneficiary accounts, and IRAs, while limiting the exemption to those investments that are relatively transparent and liquid, many of which have a ready market price. The Department also notes that many investment types and strategies that would not be covered by the exemption can be obtained through pooled investment funds, such as mutual funds, that are covered by the exemption.

Request for Comment. The Department requests comment on the proposed definition of Assets, in particular:

- Do commenters agree we have identified all common investments of retail investors?
- Have we defined individual investment products with enough precision that parties will know if they are complying with this aspect of the exemption?
- Should additional investments be included in the scope of the exemption? Commenters urging addition of other investment products should fully describe the characteristics and fee structures associated with the products, as well as data supporting their position that the product is a common investment for retail investors.

The Department encourages parties to apply to the Department for individual or class exemptions for types of investments not covered by the exemption to the extent that they believe the proposed package of exemptions does not adequately cover beneficial investment practices for which appropriate protections could be crafted in an exemption.

Limitation to Prohibited Compensation Received As a Result of Advice to Retirement Investors

The Department proposed this exemption to promote the provision of investment advice to retail investors that is in their best interest and untainted by conflicts of interest. The exemption would permit receipt by Advisers and Financial Institutions of otherwise prohibited compensation commonly received in the retail market, such as commissions, 12b–1 fees, and revenue sharing payments, subject to conditions designed specifically to protect the interests of the investors. For consistency with these objectives, the exemption would apply to the receipt of such compensation by Advisers, Financial Institutions and their Affiliates and Related Entities only when advice is provided to retail Retirement Investors, including plan participants and beneficiaries, IRA owners, and plan sponsors (including the sponsor's employees, officers, and directors) acting on behalf of non-participant-directed plans that have fewer than 100 participants. As discussed in the preamble to the Proposed Regulation and in the associated Regulatory Impact Analysis, these investors are particularly vulnerable to abuse. The proposed exemption is designed to protect these investors from the harmful impact of conflicts of interest, while minimizing the potential disruption to a retail market that relies upon many forms of compensation that ERISA would otherwise prohibit.

The Department believes that investment advice in the institutional market is best addressed through other approaches. Accordingly, the proposed exemption does not extend to transactions involving certain larger ERISA plans—those with more than 100 participants. Advice providers to these plans are already accustomed to operating in a fiduciary environment and within the framework of existing prohibited transaction exemptions, which tightly constrain the operation of conflicts of interest. As a result, including large plans within the definition of Retirement Investor could have the undesirable consequence of reducing protections provided under existing law to these investors, without offsetting benefits. In particular, it could have the undesirable effect of increasing the number and impact of conflicts of interest, rather than reducing or mitigating them.

While the Department believes that the Best Interest Contract Exemption is not the appropriate way to address any potential concerns about the impact of the expanded fiduciary definition on large plans, the Department agrees that an adjustment is necessary to accommodate arm's length transactions with plan investors with financial expertise. Accordingly, as part of this regulatory project, the Department has separately proposed a seller's carve-out in the Proposed Conflict of Interest Regulation. Under the terms of that

[23] Relief is also proposed from ERISA section 406(a)(1)(D) and Code section 4975(c)(1)(D), which prohibit transfer of plan assets to, or use of plan assets for the benefit of, a party in interest (including a fiduciary).

[24] See Section VIII(c) of the proposed exemption.

carve-out, persons who provide recommendations to certain ERISA plan investors with financial expertise (but not to plan participants or beneficiaries, or IRA owners) can avoid fiduciary status altogether. The seller's carve-out was developed to avoid the application of fiduciary status to a plan's counterparty in an arm's length commercial transaction in which the plan's representative has no reasonable expectation of impartial advice. When the carve-out's terms are satisfied, it is available for transactions with plans that have more than 100 participants.

The Department recognizes, however, that there are smaller non-participant-directed plans for which the plan sponsor (or an employee, officer or director thereof) is responsible for choosing the specific investments and allocations for their participating employees. The Department believes that these small plan fiduciaries are appropriately categorized with plan participants and beneficiaries and IRA owners, as retail investors. For this reason, the proposed exemption's definition of Retirement Investor includes plan sponsors (or employees, officers and directors thereof) of plans with fewer than 100 participants.[25] As a result, the exemption would extend to advice providers to such smaller plans.

The proposed threshold of fewer than 100 participants is intended to reasonably identify plans that will most benefit from both the flexibility provided by this exemption and the protections embodied in its conditions. The threshold also mirrors the Proposed Regulations' 100-or-more participant threshold for the seller's carve-out. That threshold recognizes the generally greater sophistication possessed by larger plans' discretionary fiduciaries, as well as the greater vulnerability of retail investors, such as small plans. As explained in more detail in the preamble to the Proposed Regulation, investment recommendations to small plans, IRA owners and plan participants and beneficiaries do not fit the ''arms length'' characteristics that the seller's carve-out is designed to preserve. Recommendations to retail investors are routinely presented as advice, consulting, or financial planning services. In the securities markets, brokers' suitability obligations generally require a significant degree of individualization, and research has shown that disclaimers are ineffective in alerting typically unsophisticated investors to the dangers posed by conflicts of interest, and may even exacerbate the dangers. Most retail investors lack financial expertise, are unaware of the magnitude and impact of conflicts of interest, and are unable effectively to assess the quality of the advice they receive.

The 100 or more threshold is also consistent with that applicable for similar purposes under existing rules and practices. The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and which are likely to have a significant economic impact on a substantial number of small entities. For purposes of the RFA, the Department considers a small entity to be an employee benefit plan with fewer than 100 participants. The basis of this definition is found in section 104(a)(2) of ERISA that permits the Secretary of Labor to prescribe simplified annual reports for pension plans that cover fewer than 100 participants. Under current Department rules, such small plans generally are eligible for streamlined reporting and relieved of related audit requirements.

The Department invites comment on the proposed exemption's limitation to prohibited compensation received as a result of advice to Retirement Investors. In particular, we ask whether commenters support the limitation as currently formulated, whether the definitions should be revised, or whether there should not be an exclusion with respect to such larger plans at all. Commenters on this subject are also encouraged to address the interaction of the exemption's limitation with the scope of the seller's carve-out in the Proposed Regulation. Finally, we request comment on whether the exemption should be expanded to cover advice to plan sponsors (including the sponsor's employees, officers, and directors) of participant-directed plans with fewer than 100 participants on the composition of the menu of investment options available under such plans, and if so, whether additional or different conditions should apply.

Exclusions in Section I(c) of the Proposed Exemption

Section I(c) of the proposal sets forth additional exclusions from the exemption. Section I(c)(1) provides that the exemption would not apply to the receipt of prohibited compensation from a transaction involving an ERISA plan if the Adviser, Financial Institution or Affiliate is the employer of employees covered by the ERISA plan. The Department believes that due to the special nature of the employer/employee relationship, an exemption permitting an Adviser and Financial Institution to profit from investments by employees in their employer-sponsored plan would not be in the interest of, or protective of, the plans and their participants and beneficiaries. This restriction does not apply, however, in the case of an IRA or other similar plan that is not covered by Title I of ERISA. Accordingly, an Adviser or Financial Institution may provide advice to the beneficial owner of an IRA who is employed by the Adviser, its Financial Institution or an Affiliate, and receive prohibited compensation as a result, provided the IRA is not covered by Title I of ERISA.

Section I(c)(1) further provides that the exemption does not apply if the Adviser or Financial Institution is a named fiduciary or plan administrator, as defined in ERISA section 3(16)(A)) with respect to an ERISA plan, or an affiliate thereof, that was selected to provide advice to the plan by a fiduciary who is not independent of them.[26] This provision is intended to disallow selection of Advisers and Financial Institutions by named fiduciaries or plan administrators that have an interest in them.

Section I(c)(2) provides that the exemption does not extend to prohibited compensation received when the Adviser engages in a principal transaction with the plan, participant or beneficiary account, or IRA.[27] A principal transaction is a transaction in which the Adviser engages in a transaction with the plan, participant or beneficiary account, or IRA, on behalf of the account of the Financial Institution or another person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the Financial Institution. Principal transactions involve conflicts of interest not addressed by the safeguards of this proposed exemption. Elsewhere in today's **Federal Register**, the Department is proposing an exemption for investment advice fiduciaries to engage in principal transactions involving certain debt securities. The proposed exemption for principal transactions contains conditions

[25] The Department notes that plan participants and beneficiaries in ERISA plans can be Retirement Investors regardless of the number of participants in such plan. Therefore, the 100-participant limitation does not apply when advice is provided directly to the participants and beneficiaries.

[26] See Section VIII(f), defining the term ''Independent.''

[27] For purposes of this proposed exemption, however, the Department does not view a riskless principal transaction involving mutual fund shares as an excluded principal transaction.

specific to those transactions but is designed to align with this proposed exemption so as to ease parties' ability to comply with both exemptions with respect to the same investor.

Section I(c)(3) provides that the exemption would not cover prohibited compensation that is received by an Adviser or Financial Institution as a result of investment advice that is generated solely by an interactive Web site in which computer software-based models or applications provide investment advice to Retirement Investors based on personal information each investor supplies through the Web site without any personal interaction or advice from an individual Adviser. Such computer derived advice is often referred to as "robo-advice." While the Department believes that computer generated advice that is delivered in this manner may be very useful to Retirement Investors, relief will not be included in the proposal. As the marketplace for such advice is still evolving in ways that both appear to avoid conflicts of interest that would violate the prohibited transaction rules, and minimize cost, the Department believes that inclusion of such advice in this exemption could adversely modify the incentives currently shaping the market for robo-advice. Furthermore, a statutory prohibited transaction exemption at ERISA section 408(g) covers computer-generated investment advice and is available for robo-advice involving prohibited transactions if its conditions are satisfied. *See* 29 CFR 2550.408g–1.

Finally, Section I(c)(4) provides that the exemption is limited to Advisers who are fiduciaries by reason of providing investment advice.[28] Advisers who have full investment discretion with respect to plan or IRA assets or who have discretionary authority over the administration of the plan or IRA, for example, are not affected by the Proposed Regulation and are therefore not the subject of this exemption.

Conditions of the Proposed Exemption

Sections II–V of the proposal list the conditions applicable to the Best Interest Contract Exemption described in Section I. All applicable conditions must be satisfied in order to avoid application of the specified prohibited transaction provisions of ERISA and the Code. The Department believes that these conditions are necessary for the Secretary to find that the exemption is administratively feasible, in the interests of plans and of their participants and beneficiaries, and IRA owners and protective of the rights of the participants and beneficiaries of such plans and IRA owners. Under ERISA section 408(a)(2), and Code section 4975(c)(2), the Secretary may not grant an exemption without making such findings. The proposed conditions of the exemption are described below.

Contractual Obligations Applicable to the Best Interest Contract Exemption (Section II)

Section II(a) of the proposal requires that an Adviser and Financial Institution enter into a written contract with the Retirement Investor prior to recommending that the plan, participant or beneficiary account, or IRA, purchase, sell or hold an Asset. The contract must be executed by both the Adviser and the Financial Institution as well as the Retirement Investor. In the case of advice provided to a plan participant or beneficiary in a participant-directed individual account plan, the participant or beneficiary should be the Retirement Investor that is the party to the contract, on behalf of his or her individual account.

The contract may be part of a master agreement with the Retirement Investor and does not require execution prior to each additional recommendation to purchase, sell or hold an Asset. The exemption, in particular the requirement to adhere to a best interest standard, does not mandate an ongoing or long-term advisory relationship, but rather leaves that to the parties. The terms of the contract, along with other representations, agreements, or understandings between the Adviser, Financial Institution and Retirement Investor, will govern whether the nature of the relationship between the parties is ongoing or not.

The contract is the cornerstone of the proposed exemption, and the Department believes that by requiring a contract as a condition of the proposed exemption, it creates a mechanism by which a Retirement Investor can be alerted to the Adviser's and Financial Institution's obligations and be provided with a basis upon which its rights can be enforced. In order to comply with the exemption, the contract must contain every required element set forth in Section II(b)–(e) and also must not include any of the prohibited provisions described in Section II(f). It is intended that the contract creates actionable obligations with respect to both the Impartial Conduct Standards and the warranties, described below. In addition, failure to satisfy the Impartial Conduct Standards will result in loss of the exemption.

It should be noted, however, that compliance with the exemption's conditions is necessary only with respect to transactions that otherwise would constitute prohibited transactions under ERISA and the Code. The exemption does not purport to impose conditions on the management of investments held outside of ERISA-covered plans and IRAs. Accordingly, the contract and its conditions are mandatory only with respect to investments held by plans and IRAs.

1. Fiduciary Status

The proposal sets forth multiple contractual requirements. The first and most fundamental contractual requirement, which is set out in Section II(b) of proposal, is that that both the Adviser and Financial Institution must acknowledge fiduciary status under ERISA or the Code, or both, with respect to any recommendations to the Retirement Investor to purchase, sell or hold an Asset. If this acknowledgment of fiduciary status does not appear in a contract with a Retirement Investor, the exemption is not satisfied with respect to transactions involving that Retirement Investor. This fiduciary acknowledgment is critical to ensuring that there is no uncertainty—before or after investment advice is given with regard to the Asset—that both the Adviser and Financial Institution are acting as fiduciaries under ERISA and the Code with respect to that advice.

The acknowledgment of fiduciary status in the contract is nonetheless limited to the advice to the Retirement Investor to purchase, sell or hold the Asset. The Adviser and Financial Institution do not become fiduciaries with respect to any other conduct by virtue of this contractual requirement.

2. *Standards of Impartial Conduct*

Building upon the required acknowledgment of fiduciary status, the proposal additionally requires that both the Adviser and the Financial Institution contractually commit to adhering to certain specifically delineated Impartial Conduct Standards when providing investment advice to the Retirement Investor regarding Assets, and that they in fact do adhere to such standards. Therefore, if an Adviser and/or Financial Institution fail to comply with the Impartial Conduct Standards, relief under the exemption is no longer available and the contract is violated.

Specifically, Section II(c)(1) of the proposal requires that under the contract the Adviser and Financial Institution provide advice regarding Assets that is in the "best interest" of

[28] See also Section VIII(a), defining the term "Adviser."

the Retirement Investor. Best interest is defined to mean that the Adviser and Financial Institution act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and the needs of the Retirement Investor, when providing investment advice to them. Further, under the best interest standard, the Adviser and Financial Institution must act without regard to the financial or other interests of the Adviser, Financial Institution or their Affiliates or any other party. Under this standard, the Adviser and Financial Institution must put the interests of the Retirement Investor ahead of the financial interests of the Adviser, Financial Institution or their Affiliates, Related Entities or any other party.

The best interest standard set forth in this exemption is based on longstanding concepts derived from ERISA and the law of trusts. For example, ERISA section 404 requires a fiduciary to act "solely in the interest of the participants . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." Similarly, both ERISA section 404(a)(1)(A) and the trust-law duty of loyalty require fiduciaries to put the interests of trust beneficiaries first, without regard to the fiduciaries' own self-interest. Accordingly, the Department would expect the standard to be interpreted in light of forty years of judicial experience with ERISA's fiduciary standards and hundreds more with the duties imposed on trustees under the common law of trusts. In general, courts focus on the process the fiduciary used to reach its determination or recommendation—whether the fiduciaries, "at the time they engaged in the challenged transactions, employed the proper procedures to investigate the merits of the investment and to structure the investment." *Donovan* v. *Mazzola,* 716 F.2d 1226, 1232 (9th Cir. 1983). Moreover, a fiduciary's investment recommendation is measured based on the circumstances prevailing at the time of the transaction, not on how the investment turned out with the benefit of hindsight.

In this regard, the Department notes that while fiduciaries of plans covered by ERISA are subject to the ERISA section 404 standards of prudence and loyalty, the Code contains no provisions that hold IRA fiduciaries to these standards. However, as a condition of relief under the proposed exemption, both IRA and plan fiduciaries would have to agree to, and uphold, the best interest and Impartial Conduct Standards, as set forth in Section II(c). The best interest standard is defined to effectively mirror the ERISA section 404 duties of prudence and loyalty, as applied in the context of fiduciary investment advice.

In addition to the best interest standard, the exemption imposes other important standards of impartial conduct in Section II(c) of the proposal. Section II(c)(2) requires that the Adviser and Financial Institution agree that they will not recommend an Asset if the total amount of compensation anticipated to be received by the Adviser, Financial Institution, and their Affiliates and Related Entities in connection with the purchase, sale or holding of the Asset by the plan, participant or beneficiary account, or IRA, will exceed reasonable compensation in relation to the total services they provide to the applicable Retirement Investor. The obligation to pay no more than reasonable compensation to service providers is long recognized under ERISA. *See* ERISA section 408(b)(2), 29 CFR 2550.408b–2(a)(3), and 29 CFR 2550.408c–2. The reasonableness of the fees depends on the particular facts and circumstances. Finally, Section II(c)(3) requires that the Adviser's and Financial Institution's statements about Assets, fees, material conflicts of interest, and any other matters relevant to a Retirement Investor's investment decisions, not be misleading.

Under ERISA section 408(a) and Code section 4975(c), the Department cannot grant an exemption unless it first finds that the exemption is administratively feasible, in the interests of plans and their participants and beneficiaries and IRA owners, and protective of the rights of participants and beneficiaries of plans and IRA owners. An exemption permitting transactions that violate the requirements of Section II(c) would be unlikely to meet these standards.

3. Warranty—Compliance With Applicable Law

Section II(d) of the proposal requires that the contract include certain warranties intended to be protective of the rights of Retirement Investors. In particular, to satisfy the exemption, the Adviser, and Financial Institution must warrant that they and their Affiliates will comply with all applicable federal and state laws regarding the rendering of the investment advice, the purchase, sale or holding of the Asset and the payment of compensation related to the purchase, sale and holding. Although this warranty must be included in the contract, the exemption is not conditioned on compliance with the warranty. Accordingly, the failure to comply with applicable federal or state law could result in contractual liability for breach of warranty, but it would not result in loss of the exemption, as long as the breach did not involve a violation of one of the exemption's other conditions (*e.g.,* the best interest standard). De minimis violations of state or federal law would be unlikely to violate the exemption's other conditions, such as the best interest standard, and would not typically result in the loss of the exemption.

4. Warranty—Policies and Procedures

The Financial Institution must also contractually warrant that it has adopted written policies and procedures that are reasonably designed to mitigate the impact of material conflicts of interest that exist with respect to the provision of investment advice to Retirement Investors and ensure that individual Advisers adhere to the Impartial Conduct Standards described above. For purposes of the exemption, a material conflict of interest is deemed to exist when an Adviser or Financial Institution has a financial interest that could affect the exercise of its best judgment as a fiduciary in rendering advice to a Retirement Investor regarding an Asset.[29] Like the warranty on compliance with applicable law, discussed above, this warranty must be in the contract but the exemption is not conditioned on compliance with the warranty. Failure to comply with the warranty could result in contractual liability for breach of warranty.

As part of the contractual warranty on policies and procedures, the Financial Institution must state that in formulating its policies and procedures, it specifically identified material conflicts of interest and adopted measures to prevent those material conflicts of interest from causing violations of the Impartial Conduct Standards. Further, the Financial Institution must state that neither it nor (to the best of its knowledge) its Affiliates or Related Entities will use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differentiated compensation or other actions or incentives to the extent they would tend to encourage individual Advisers to make recommendations that are not in the best interest of Retirement Investors.

While these warranties must be part of the contract between the Adviser and

[29] See Section VIII(h) of the proposed exemption.

Financial Institution and the Retirement Investor, the proposal does not mandate the specific content of the policies and procedures. This flexibility is intended to allow Financial Institutions to develop policies and procedures that are effective for their particular business models, within the constraints of their fiduciary obligations and the Impartial Conduct Standards.

Under the proposal, a Financial Institution's policies and procedures must not authorize compensation or incentive systems that would tend to encourage individual Advisers to make recommendations that are not in the best interest of Retirement Investors. Consistent with the general approach in the proposal to the Financial Institution's policies and procedures, however, there are no particular required compensation or employment structures. Certainly, one way for a Financial Institution to comply is to adopt a ''level-fee'' structure, in which compensation for Advisers does not vary based on the particular investment product recommended. But the exemption does not mandate such a structure. The Department believes that the specific implementation of this requirement is best determined by the Financial Institution in light of its particular circumstances and business models.

For further clarification, the Department sets forth the following examples of broad approaches to compensation structures that could help satisfy the contractual warranty regarding the policies and procedures. In connection with all these examples, it is important that the Financial Institution carefully monitor whether the policies and procedures are, in fact, working to prevent the provision of biased advice. The Financial Institution must correct isolated or systemic violations of the Impartial Conduct Standards and reasonably revise policies and procedures when failures are identified.

Example 1: Independently certified computer models.[30] The Adviser provides investment advice that is in accordance with an unbiased computer model created by an independent third party. Under this example, the Adviser can receive any form or amount of compensation so long as the advice is rendered in strict accordance with the model.[31]

Example 2: Asset-based compensation. The Financial Institution pays the Adviser a percentage, which does not vary based on the types of investments, of the dollar amount of assets invested by the plans, participant and beneficiary accounts, and IRAs with the Adviser. Under this example, assume the Financial Institution established the percentage as 0.1% on a quarterly basis. If a plan, participant or beneficiary account, or IRA, invested a total of $10,000 with the Adviser, divided 25% in equity securities, 50% in proprietary mutual funds, and 25% in bonds underwritten by non-Related Entities, and did not withdraw any of the money within the quarter, the Adviser would receive 0.1% of the $10,000.

Example 3: Fee offset. The Financial Institution establishes a fee schedule for its services. It accepts transaction-based payments directly from the plan, participant or beneficiary account, or IRA, and/or from third party investment providers. To the extent the payments from third party investment providers exceed the established fee for a particular service, such amounts are rebated to the plan, participant or beneficiary account, or IRA. To the extent third party payments do not satisfy the established fee, the plan, participant or beneficiary account, or IRA is charged directly for the remaining amount due.[32]

Example 4: Differential Payments Based on Neutral Factors. The Financial Institution establishes payment structures under which transactions involving different investment products result in differential compensation to the Adviser based on a reasonable assessment of the time and expertise necessary to provide prudent advice on the product or other reasonable and objective neutral factors. For example, a Financial Institution could compensate an Adviser differently for advisory work relating to annuities, as opposed to shares in a mutual fund, if it reasonably determined that the time to research and explain the products differed. However, the payment structure must be reasonably designed to avoid incentives to Advisers to recommend investment transactions that are not in Retirement Investors' best interest.

Example 5: Alignment of Interests. The Financial Institution's policies and procedures establish a compensation structure that is reasonably designed to align the interests of the Adviser with the interests of the Retirement Investor. For example, this might include compensation that is primarily asset-based, as discussed in Example 2, with the addition of bonuses and other incentives paid to promote advice that is in the Best Interest of the Retirement Investor. While the compensation would be variable, it would align with the customer's best interest.

These examples are not exhaustive, and many other compensation and employment arrangements may satisfy the contractual warranties. The exemption imposes a broad standard for the warranty and policies and procedures requirement, not an inflexible and highly-prescriptive set of rules. The Financial Institution retains the latitude necessary to design its compensation and employment arrangements, provided that those arrangements promote, rather than undermine, the best interest and Impartial Conduct Standards.

Whether a Financial Institution adopts one of the specific approaches taken in the examples above or a different approach, the Department expects that it will engage in a good faith process to prudently establish and oversee policies and procedures that will effectively mitigate conflicts of interest and ensure adherence to the Impartial Conduct Standards. To this end, Financial Institutions may also want to consider designating an individual or group responsible for addressing material conflicts of interest issues. An internal compliance officer or a committee could monitor adherence to the Impartial Conduct Standards and consider ways to ensure compliance. The individual or group could also develop procedures for reporting material conflicts of interest and for handling external and internal complaints within the Financial Institution, and disciplinary measures for non-compliance with the Impartial Conduct Standards. Additionally, Financial Institutions should consider how best to inform and train individual Advisers on the Impartial Conduct Standards and other requirements of the exemption.

Additionally, Financial Institutions could consider the following components of effective policies and procedures relating to an Adviser's compensation: (i) Avoiding creating compensation thresholds that enable an Adviser to increase his or her

[30] These examples should not be read as retracting views the Department expressed in prior Advisory Opinions regarding how an investment advice fiduciary could avoid prohibited transactions that might result from differential compensation arrangements. Specifically, in Advisory Opinion 2001–09A, the Department concluded that the provision of fiduciary investment advice would not result in prohibited transactions under circumstances where the advice provided by the fiduciary with respect to investment funds that pay additional fees to the fiduciary is the result of the application of methodologies developed, maintained and overseen by a party independent of the fiduciary in accordance with the conditions set forth in the Advisory Opinion. A computer model also can be used as part of an advice arrangement that satisfies the conditions under the prohibited transaction exemption in ERISA section 408(b)(14) and (g), described above.

[31] As previously noted, this exemption is not available for advice generated solely by a computer model and provided to the Retirement Investor electronically without live advice. Nevertheless, this exemption remains available in the hypothetical because the advice is delivered by a live Adviser.

[32] *See* footnote 31 *supra.* Certain types of fee-offset arrangements may result in avoidance of prohibited transactions altogether. In Advisory Opinion Nos. 97–15A and 2005–10A, the Department explained that a fiduciary investment adviser could provide investment advice to a plan with respect to investment funds that pay it or an affiliate additional fees without engaging in a prohibited transaction if those fees are offset against fees that the plan otherwise is obligated to pay to the fiduciary.

compensation disproportionately through an incremental increase in sales; (ii) monitoring activity of Advisers approaching compensation thresholds such as higher payout percentages, back-end bonuses, or participation in a recognition club, such as a President's Club; (iii) maintaining neutral compensation grids that pay the Adviser a flat payout percentage regardless of product type sold (so long as they do not merely transmit the Financial Institution's conflicts to the Adviser); (iv) refraining from providing higher compensation or other rewards for the sale of proprietary products or products for which the firm has entered into revenue sharing arrangements; (v) stringently monitoring recommendations around key liquidity events in the investor's lifecycle where the recommendation is particularly significant (*e.g.* when an investor rolls over his pension or 401(k) account); and (vi) developing metrics for good and bad behavior (red flag processes) and using clawbacks of deferred compensation to adjust compensation for employees who do not properly manage conflicts of interest.[33]

The Department seeks comments on all aspects of its discussion of the sorts of policies and procedures that will satisfy the required contractual warranties of Section II(d)(2)–(4). In particular, the Department requests comments on whether the exemption should be more prescriptive about the terms of policies and procedures, or provide more detailed examples of acceptable policies and procedures. In addition, the Department requests comments on whether commenters believe the examples describe policies and procedures that would achieve the investor-protective objectives of the exemption.

5. Contractual Disclosures

Finally, Section II(e) of the proposal requires certain disclosures in the written contract. If the disclosures do not appear in a contract with a Retirement Investor, the exemption is not satisfied with respect to transactions involving that Retirement Investor. First, Section II(e)(1) provides that the Financial Institution and the Adviser must identify in the written contract any material conflicts of interest. This disclosure may be a general description of the types of material conflicts of interest applicable to the Financial Institution and Adviser, provided the disclosure also informs the Retirement Investor that a more specific description that is kept current is available on the Financial Institution's Web site (web address provided) and by mail, upon request of the Retirement Investor.

Second, Section II(e)(2) requires that the written contract must inform the Retirement Investor of the right to obtain complete information about all of the fees currently associated with the Assets in which it is invested, including all of the fees payable to the Adviser, Financial Institution, and any Affiliates and Related Entities in connection with such investments. The fee information must be complete, and it must include both the direct and the indirect fees paid by the plan or IRA.[34] Section II(e)(3) provides that the written contract also must disclose to the Retirement Investor whether the Financial Institution offers proprietary products or receives third party payments with respect to the purchase, sale or holding of any Asset. Third party payments, for purposes of this exemption, are defined as sales charges (when not paid directly by the plan, participant or beneficiary account, or IRA), 12b–1 fees, and other payments paid to the Adviser, Financial Institution or any Affiliate or Related Entity by a third party as a result of the purchase, sale or holding of an Asset by a plan, participant or beneficiary account, or IRA. A proprietary product is defined for purposes of this exemption as a product that is managed by the Financial Institution or any of its Affiliates. In conjunction with this disclosure, the contract must provide the address of a Web page that discloses the compensation arrangements entered into by the Adviser and the Financial Institution, as required by Section III(c) of the proposal and discussed below.

Enforcement of the Contractual Obligations

The contractual requirements set forth in Section II of the proposal are enforceable. Plans, plan participants and beneficiaries, IRA owners, and the Department may use the contract as a tool to ensure compliance with the exemption. The Department notes, however, that this contractual tool creates different rights with respect to plans, participants and beneficiaries, IRA owners and the Department.

1. IRA Owners

The contract between the IRA owner and the Adviser and Financial Institution forms the basis of the IRA owner's enforcement rights. As outlined above, the contract embodies obligations on the part of the Adviser and Financial Institution. The Department intends that all the contractual obligations (the Impartial Conduct Standards and the warranties) will be actionable by IRA owners. The most important of these contractual obligations for enforcement purposes is the obligation imposed on both the Adviser and the Financial Institution to comply with the Impartial Conduct Standards. Because these standards are contractually imposed, the IRA owner has a contract claim if, for example, the Adviser recommends an investment product that is not in the best interest of the IRA owner.

2. Plans, Plan Participants and Beneficiaries

The protections of the exemption and contractual terms will also be enforceable by plans, plan participants and beneficiaries. Specifically, if an Adviser or Financial Institution received compensation in a prohibited transaction but failed to satisfy any of the Impartial Conduct Standards or any other condition of the exemption, the Adviser and Financial Institution would be unable to qualify for relief under the exemption, and, as a result, could be liable under ERISA section 502(a)(2) and (3). An Adviser's failure to comply with the exemption or the Impartial Conduct Standards would result in a non-exempt prohibited transaction and would likely constitute a fiduciary breach. As a result, a plan, plan participant or beneficiary would be able to sue under ERISA section 502(a)(2) or (3) to recover any loss in value to the plan (including the loss in value to an individual account), or to obtain disgorgement of any wrongful profits or unjust enrichment. Additionally, plans, participants and beneficiaries could enforce their obligations in an action based on breach of the agreement.

3. The Department

In addition, the Department would be able to enforce ERISA's prohibited transaction and fiduciary duty provisions with respect to employee benefit plans, but not IRAs, in the event that the Adviser or Financial Institution received compensation in a prohibited transaction but failed to comply with the exemption or the Impartial Conduct Standards. If, for example, any of the

[33] *See* FINRA Report on Conflicts of Interest, October 2013.

[34] To the extent compliance with this information request requires Advisers and Financial Institutions to obtain such information from entities that are not closely affiliated with them, the Adviser or Financial Institution may supply such information to the Retirement Investor in compliance with the exemption provided the Adviser and Financial Institution act in good faith and do not know that the materials are incomplete or inaccurate. For purposes of the proposed exemption, Affiliates within the meaning of Section VIII(b)(1) and (2) are considered closely affiliated such that the good faith reliance would not apply.

specific conditions of the exemption are not met, the Adviser and Financial Institution will have engaged in a non-exempt prohibited transaction, and the Department will be entitled to seek relief under ERISA section 502(a)(2) and (5).

4. Excise Taxes Under the Code

In addition to the claims described above that may be brought by IRA owners, plans, plan participants and beneficiaries, and the Department, to enforce the contract and ERISA, Advisers and Financial Institutions that engage in prohibited transactions under the Code are subject to an excise tax. The excise tax is generally equal to 15% of the amount involved. Parties who have participated in a prohibited transaction for which an exemption is not available must pay the excise tax and file Form 5330 with the Internal Revenue Service.

Prohibited Provisions

Finally, in order to preserve these various enforcement rights, Section II(f) of the proposal provides that certain provisions may not be part of the contract. If these provisions appear in a contract with a Retirement Investor, the exemption is not satisfied with respect to transactions involving that Retirement Investor. First, the proposal requires that the contract may not contain exculpatory provisions that disclaim or otherwise limit liability for an Adviser's or Financial Institution's violations of the contract's terms. Second, the contract may not require the Retirement Investor to agree to waive or qualify its right to bring or participate in a class action or other representative action in court in a contract dispute with the Adviser or Financial Institution. The right of a Retirement Investor to bring a class-action claim in court (and the corresponding limitation on fiduciaries' ability to mandate class-action arbitration) is consistent with FINRA's position that its arbitral forum is not the correct venue for class-action claims. As proposed, this section would not affect the ability of a Financial Institution or Adviser, and a Retirement Investor, to enter into a pre-dispute binding arbitration agreement with respect to individual contract claims. The Department expects that most individual arbitration claims under this exemption will be subject to FINRA's arbitration procedures and consumer protections. The Department seeks comments on whether there are certain procedures and/or consumer protections that it should adopt or mandate for those disputes not covered by FINRA.

Disclosure Requirements for Best Interest Contract Exemption (Section III)

In order to facilitate access to information on Financial Institution and Adviser compensation, the proposal requires both public disclosure and disclosure to Retirement Investors.

1. Web Page

Section III(c) of the proposal requires that the Financial Institution maintain a public Web page that provides several different types of information. The Web page must show the direct and indirect material compensation payable to the Adviser, Financial Institution and any Affiliate for services provided in connection with each Asset (or, if uniform across a class of Assets, the class of Assets) that a plan, participant or beneficiary account, or an IRA, is able to purchase, hold, or sell through the Adviser or Financial Institution, and that a plan, participant or beneficiary account, or an IRA has purchased, held, or sold within the last 365 days, the source of the compensation, and how the compensation varies within and among Asset classes. The Web page must be updated at reasonable intervals, not less than quarterly. The compensation may be expressed as a monetary amount, formula or percentage of the assets involved in the purchase, sale or holding.

The information provided by the Web page will provide a broad base of information about the various pricing and compensation structures adopted by Financial Institutions and Advisers. The Department believes that the data provided on the Web page will provide information that can be used by financial information companies to analyze and provide information comparing the practices of different Advisers and Financial Institutions. Such information will allow a Retirement Investor to evaluate costs and Advisers' and Financial Institutions' compensation practices.

The Web page information must be provided in a manner that is easily accessible to a Retirement Investor and the general public. Appendix I to this notice is an exemplar of a possible web disclosure. In addition, the Web page must also contain a version of the same information that is formatted in a machine-readable manner. The Department recognizes that machine readable data can be formatted in many ways. Therefore, the Department requests comment on the format and data fields that should be required under such a condition.

2. Individual Transactional Disclosure

In Section III(a), the exemption requires point of sale disclosure to the Retirement Investor, prior to the execution of the investment transaction, regarding the all-in cost and anticipated future costs of recommended Assets. The disclosure is designed to make as clear and salient as possible the total cost that the plan, participant or beneficiary account, or IRA will incur when following the Adviser's recommendation, and to provide cost information that can be compared across different Assets that are recommended for investment. In addition, the projection of the costs over various holding periods would inform the Retirement Investor of the cumulative impact of the costs over time and of potential costs when the investment is sold.

As proposed, the disclosure requirement of Section III(a) would be provided in a summary chart designed to direct the Retirement Investor's attention to a few important data points regarding fees, in a time frame that would enable the Retirement Investor to discuss other (possibly less costly) alternatives with the Adviser prior to executing the transaction. The disclosure chart does not have to be provided again with respect to a subsequent recommendation to purchase the same investment product, so long as the chart was previously provided to the Retirement Investor within the past 12 months and the total cost has not materially changed.

To the extent compliance with the point of sale disclosure requires Advisers and Financial Institutions to obtain cost information from entities that are not closely affiliated with them, they may rely in good faith on information and assurances from the other entities, as long as they do not know that the materials are incomplete or inaccurate. This good faith reliance applies unless the entity providing the information to the Adviser and Financial Institution is (1) a person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the Adviser or Financial Institution; or (2) any officer, director, employee, agent, registered representative, relative (as defined in ERISA section 3(15)), member of family (as defined in Code section 4975(e)(6)) of, or partner in, the Adviser or Financial Institution.[35]

The required chart would disclose with respect to each Asset

[35] See proposed definition of Affiliate, Section VIII(b)(1) and (b)(2).

recommended, the ''total cost'' to the plan, participant or beneficiary account, or IRA, of the investment for 1-, 5- and 10-year periods expressed as a dollar amount, assuming an investment of the dollar amount recommended by the Adviser, and reasonable assumptions about investment performance, which must be disclosed.

As defined in the proposal, the ''total cost'' of investing in an asset means the sum of the following, as applicable: Acquisition costs, ongoing costs, disposition costs, and any other costs that reduce the asset's rate of return, are paid by direct charge to the plan, participant or beneficiary account, or IRA, or reduce the amounts received by the plan, participant or beneficiary account, or IRA (*e.g.,* contingent fees, such as back-end loads, including those that phase out over time, with such terms explained beneath the table). The terms ''acquisition costs,'' ''ongoing costs,'' and ''disposition costs,'' are defined in the proposal. Appendix II to this proposal contains a model chart that may be used to provide the information required under this section. Use of the model chart is not mandatory. However, use of an appropriately completed model chart will be deemed to satisfy the requirement of Section III(a).

Request for comment. The Department requests comment on the design of this proposed point of sale disclosure, as well as issues related to the ability of the Adviser to provide the disclosure and whether it will provide information that is meaningful to Retirement Investors. In general, commenters are asked to address the anticipated cost of compliance with the point of sale disclosure and whether the disclosure as we have described it will provide information that is more useful to Retirement Investors than other similar disclosures that are required under existing law. As discussed below in more detail, the Department requests comment on whether the disclosure can be designed to provide information that would result in a useful comparison among Assets; whether it is feasible for Advisers and Financial Institutions to obtain reliable information to complete the chart at the time it would be required to be provided to the Retirement Investor; and whether the disclosure, without information on other characteristics of the investment, would improve Retirement Investors' ability to make informed investment decisions.

Design. As explained above, the proposal contemplates a chart with the following information: All-in cost of the Asset, and the cost if held for 1-, 5-, and 10 years. The all-in cost would be calculated with the following components: ''acquisition costs,'' ''ongoing costs,'' ''disposition costs,'' and ''other.'' The Department seeks comment on all aspects of this approach. In particular, we ask:

- Are the all-in costs of the investments permitted under the proposal capable of being reflected accurately in the chart?
- Are all-in costs already reflected in the summary prospectuses for certain investments?
- Have we correctly identified the possible various costs associated with the permitted investments?
- Should the point of sale disclosure requirement be limited to certain events, such as opening a new account or rolling over existing investments? If so, what changes would be needed to the model chart?
- Are our proposed definitions of the various costs clear enough to result in information that is reasonably comparable across different Financial Institutions?
- Is it possible to attribute all the costs to the account of a particular plan, participant or beneficiary, or IRA?
- How should long-term costs be measured?

Feasibility. The point of sale disclosure is proposed to be an individualized disclosure provided prior to the execution of the transaction. The Department seeks comment on whether there are practical impediments to the creation and disclosure of the chart in the time frame proposed. Therefore, we ask:

- Will Advisers and Financial Institutions have access to the information required to be disclosed in the chart?
- Are there existing systems at Financial Institutions that could produce the disclosure required in this proposal? If not, what is the cost of developing a system to comply?
- What are the costs associated with providing the disclosure?
- Would the costs be reduced if the Adviser and Financial Institution could provide the disclosure for full portfolios of investments, rather than for each investment recommendation separately?
- Would the costs be reduced if the timing of the disclosure was more closely aligned with the SEC's disclosure requirements applicable to broker-dealers (*i.e.* at or before the completion of the transaction), rather than point of sale?
- Are there particular asset classes for which this kind of point of sale disclosure is more feasible or less feasible? What share of assets held by Retirement Investors or share of transactions executed by Advisers and Financial Institutions fall within the asset classes for which the point of sale disclosure is more feasible and less feasible?
- Are there particular asset classes for which all the information that would be required to be disclosed in the chart is currently required in a similar format under existing law?
- Would the required disclosure be more feasible or less costly if a narrative statement were required instead of a summary chart?

Impact. The point of sale disclosure would be intended to inform the Retirement Investor of the costs associated with the investment. Would such a disclosure in this simple format provide information that is meaningful and likely to improve a Retirement Investor's decision making? We ask for input on the following:

- Would the simplified format result in the communication of information that is accurate, and contribute to informed investment decisions?
- Do commenters recommend an alternative format or alternative disclosures?
- Would the relative fees associated with different types of investment products, without a required disclosure of the relative risks of the product (*i.e.,* mutual fund ongoing fees versus a one-time brokerage commission for a stock transaction) contribute to informed investment decisions?
- In the absence of a required benchmark, is the disclosure of the all-in fees of a particular investment helpful to the Retirement Investor? If not, how could a benchmark be crafted for the various Assets permitted to be sold under the proposal?

Alternative. Instead of the point of sale disclosure as proposed, would a ''cigarette warning''-style disclosure be as effective and less costly? For example, the disclosure could read:

Investors are urged to check loads, management fees, revenue-sharing, commissions, and other charges before investing in any financial product. These fees may significantly reduce the amount you are able to invest over time and may also determine your adviser's take-home pay. If these fees are not reported in marketing materials or made apparent by your investment adviser, do not forget to ask about them.

3. Individual Annual Disclosure

Section III(b) of the proposal requires individual disclosure in the form of an annual disclosure. Specifically, the proposal requires the Adviser or Financial Institution to provide each

Retirement Investor with an annual written disclosure within 45 days of the end of the applicable year. The annual disclosure must include: (i) A list identifying each Asset purchased or sold during the applicable period and the price at which the Asset was purchased or sold; (ii) a statement of the total dollar amount of all fees and expenses paid by the plan, participant or beneficiary account, or IRA, both directly and indirectly, with respect to each Asset purchased, held or sold during the applicable period; and (iii) a statement of the total dollar amount of all compensation received by the Adviser and Financial Institution, directly or indirectly, from any party, as a result of each Asset sold, purchased or held by the plan, participant or beneficiary account, or IRA, during the applicable period. This disclosure is intended to show the Retirement Investor the impact of the cost of the Adviser's advice on the investments by the plan, participant or beneficiary account, or IRA.

The Department requests comment on this disclosure, in light of the potential point of sale disclosure. We are particularly interested in comments discussing whether both disclosures would be helpful and, if not, which would be more useful to Retirement Investors?

4. Non-Security Insurance and Annuity Contracts.

Section III(a) and (b) will apply to all Assets as defined in the proposal. This includes insurance and annuity contracts that are securities under federal securities law, such as variable annuities, and insurance and annuity contracts that are not, such as fixed annuities. The Department requests comment on whether the types of information required in the Section III(a) and (b) disclosures are applicable and available with respect to insurance and annuity contracts that are not securities.

In this regard, we note that PTE 84–24 [36] is an existing exemption under which certain investment advice fiduciaries can receive commissions on insurance and annuity contracts and mutual fund shares that are purchased by plans and IRAs. Elsewhere in this issue of the **Federal Register**, the Department has proposed to revoke relief under PTE 84–24 as it applies to IRA transactions involving annuity contracts that are securities (including variable annuity contracts) and mutual fund shares. The fact that IRA owners generally do not benefit from the protections afforded by the fiduciary duties owed by plan sponsors to their employee benefit plans makes it critical that their interests are protected by appropriate conditions in the Department exemptions. In our view, this proposed Best Interest Contract Exemption contains conditions that are uniquely protective of IRA owners.

The Department has determined however that PTE 84–24 should remain available for investment advice fiduciaries to receive commissions for IRA (and plan) purchases of insurance and annuity contracts that are not securities. This distinction is due in part to uncertainty as to whether the disclosure requirements proposed herein are readily applicable to insurance and annuity contracts that are not securities, and whether the distribution methods and channels of insurance products that are not securities fit within this exemption's framework.

The Department requests comment on this approach. In particular, we ask whether we have drawn the correct lines between insurance and annuity products that are securities and those that are not, in terms of our decision to continue to allow IRA transactions involving non-security insurance and annuity contracts to occur under the conditions of PTE 84–24 while requiring IRA transactions involving securities to occur under the conditions of this proposed Best Interest Contract Exemption.

In order for us to evaluate our approach, we request public comment the current disclosure requirements applicable to insurance and annuity contracts that are not securities. Can Section III(a) and (b) can be revised with respect to such non-securities insurance and annuity contracts to provide meaningful information to investors as to the costs of such investments and the overall compensation received by Advisers and Financial Institutions in connection with the transactions? In addition, the Department requests information on the distribution methods and channels applicable to insurance and annuity products that are not securities. What are common structures of insurance agencies?

Finally, we request public input as to whether any conditions of this proposed Best Interest Contract Exemption, other than the disclosure conditions discussed above, would be inapplicable to non-security insurance and annuity products? Are any aspects of this exemption particularly difficult for insurance companies to comply with?

Range of Investment Options (Section IV)

Section IV(a) of the proposal requires a Financial Institution to offer for purchase, sale, or holding and the Adviser to make available to the plan, participant or beneficiary account, or IRA, for purchase, sale or holding a broad range of investment options. These investment options should enable an Adviser to make recommendations to the Retirement Investor with respect to all of the asset classes reasonably necessary to serve the best interests of the Retirement Investor in light of the Retirement Investor's objectives, risk tolerance and specific financial circumstances. The Department believes that ensuring that an Adviser has a wide range of investment options at his or her disposal is the most likely method by which a Retirement Investor can be assured of developing a balanced investment portfolio.

The Department recognizes, however, that some Financial Institutions limit the investment products that a Retirement Investor may purchase, sell or hold based on whether the products generate third-party payments or are proprietary products, or for other reasons (*e.g.,* the firms specialize in particular asset classes or product types). Both Financial Institutions and Advisers often rely on the ability to sell proprietary products or the ability to generate additional revenue through third-party payments to support their business models. The proposal permits Financial Institutions with such business models to rely on the exemption provided additional conditions are satisfied.

The additional conditions are set forth in Section IV(b) of the proposal. First, before limiting the investment products a Retirement Investor may purchase, sell or hold, the Financial Institution must make a specific written finding that the limitations do not prevent the Adviser from providing advice that is in the best interest of the Retirement Investors (*i.e.,* advice that reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party) or from otherwise adhering to the Impartial Conduct Standards.

[36] Class Exemption for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, Investment Companies and Investment Company Principal Underwriters, 49 FR 13208 (Apr. 3, 1984), amended at 71 FR 5887 (Feb. 3, 2006).

Second, the proposal provides that the payments received in connection with these limited menus be reasonable in relation to the value of specific services provided to Retirement Investors in exchange for the payments and not in excess of the services' fair market value. This is more specific than the reasonable compensation requirement set forth in the contract under Section II because of the limitation placed by the Financial Institution on the investments available for Adviser recommendation. The Department intends to ensure that such additional payments received in connection with the advice are for specific services to Retirement Investors.

The proposal additionally provides that the Financial Institution or Adviser, before giving any recommendations to a Retirement Investor, must give clear written notice to the Retirement Investor of any limitations placed by the Financial Institution on the investment products offered by the Adviser. In this regard, it is insufficient for the notice merely to state that the Financial Institution "may" limit investment recommendations, without specifically disclosing the extent to which the Financial Institution in fact does so.

Finally, the proposal would require an Adviser or Financial Institution to notify the Retirement Investor if the Adviser does not recommend a sufficiently broad range of investment options to meet the Retirement Investor's needs. For example, the Department envisions the provision of such a notice when the Adviser and Financial Institution provide advice with respect to a limited class of investment products, but those products do not meet a particular investor's needs. The Department requests comment on whether it is possible to state this standard with more specificity, or whether more detailed guidance is needed for parties to determine when compliance with the condition would be necessary. The Department also requests comment on whether any specific disclosure is necessary to inform the Retirement Investor about the particular conflicts of interest associated with Advisers that recommend only proprietary products, and, if so, what the disclosure should say.

The conditions of Section IV do not apply to an Adviser or Financial Institution with respect to the provision of investment advice to a participant or beneficiary of a participant directed individual account plan concerning the participant's or beneficiary's selection of designated investment options available under the plan, provided the Adviser and Financial Institution did not provide advice to the responsible plan fiduciary regarding the menu of designated investment options. In such circumstances, the Adviser and Financial Institution are not responsible for the limitations on the investment options.

EBSA Disclosure and Recordkeeping (Section V)

1. Notification to the Department of Reliance on the Exemption

Before receiving prohibited compensation in reliance on Section I of this exemption, Section V(a) of the proposal requires that the Financial Institution notify the Employee Benefits Security Administration of the intention to rely on this exemption. The notice need not identify any specific plan or IRA. The notice will remain in effect until it is revoked in writing. The Department envisions accepting the notice via email and regular mail.

This is a notice provision only and does not require any approval or finding by the Department that the Financial Institution is eligible for the exemption. Once a Financial Institution has sent the notice, it can immediately begin to rely on the exemption provided the conditions are satisfied.

2. Data Request

Section V(b) of the proposed exemption also would require Financial Institutions to maintain certain data, which is specified in Section IX, for six years from the date of the applicable transaction. The data request would require Financial Institutions to maintain and disclose to the Department upon request specific information regarding purchases, sales, and holdings by Retirement Investors made pursuant to advice provided by Advisers and Financial Institutions relying on the proposed exemption. Financial Institutions may maintain this information in any form that may be readily analyzed by the Department or simply as raw data. Receipt of this additional data will assist the Department in assessing the effectiveness of the exemption.

No party, other than the Financial Institution responsible for compliance, will be subject to the taxes imposed by Code section 4975(a) and (b), if applicable, if the Financial Institution fails to maintain the data or the data are not available for examination.

Request for Comment. The proposed data request covers certain information with respect to investment inflows, outflows and holdings, and returns, by plans, participant and beneficiary accounts, and IRAs and is intended to assist the Department in evaluating the effectiveness of the exemption. We request comment on whether these are the appropriate data points for the covered Assets. Are the terms used clear enough to result in information that is reasonably comparable across different Financial Institutions? Or should we include precise definitions of inflows, outflows, holdings, returns, etc.? If so, please suggest specifically how these terms should be defined. Are different terms needed to request comparable information regarding insurance and annuity contracts that are not securities?

3. General Recordkeeping

Finally, Section V(c) and (d) of the proposal contains a general recordkeeping requirement applicable to the Financial Institution. The general recordkeeping requirement relates to the records necessary for the Department and certain other entities to determine whether the conditions of this exemption have been satisfied.

Effect of Failure To Comply With Conditions

If the exemption is granted, relief under the Best Interest Contract Exemption will be available only if all applicable conditions described above are satisfied. Satisfaction of the conditions is determined on a transaction by transaction basis, however. Thus, the effect of noncompliance with a condition depends on whether the condition applies to a single transaction or multiple transactions. For example, if an Adviser fails to provide a transaction disclosure in accordance with Section III(a) with respect to an Asset purchased by a plan, participant or beneficiary account, or an IRA, the relief provided by the Best Interest Contract Exemption would be unavailable to the Adviser and Financial Institution only for the otherwise prohibited compensation received in connection with the investment in that specific Asset by the plan, participant or beneficiary account, or IRA. More broadly, if an Adviser and Financial Institution fail to enter into a contract with a Retirement Investor in accordance with Section II, relief under the Best Interest Contract Exemption would be unavailable solely with respect to the investments by that Retirement Investor, not all Retirement Investors to which the Adviser and Financial Institution provide advice. However, if a Financial Institution fails to comply with a condition that is necessary for all transactions involving investment advice to Retirement

Investors, such as the maintenance of the Web page required by Section III(c), the Financial Institution will not be eligible for the relief under the Best Interest Contract Exemption for all prohibited transactions entered into during the period in which the failure to comply existed.

Supplemental Exemptions

1. Proposed Insurance and Annuity Exemption (Section VI)

The Best Interest Contract Exemption, as set forth above, permits Advisers and Financial Institutions to receive compensation that would otherwise be prohibited by the self-dealing and conflicts of interest provisions of ERISA and the Code. ERISA and the Code contain additional prohibitions on certain specific transactions between plans and IRAs and ''parties in interest'' and ''disqualified persons,'' including service providers. These additional prohibited transactions include: (i) The purchase or sale of an asset between a plan/IRA and a party in interest/disqualified person, and (ii) the transfer of plan/IRA assets to a party in interest/disqualified person. These prohibited transactions are subject to excise tax and personal liability for the fiduciary.

A plan's or IRA's purchase of an insurance or annuity product would be a prohibited transaction if the insurance company has a pre-existing relationship with the plan/IRA as a service provider, or is otherwise a party in interest/disqualified person. In the Department's view, this circumstance is common enough in connection with recommendations by Advisers and Financial Institutions to warrant proposal of an exemption for these types of transactions in conjunction with the Best Interest Contract Exemption. The Department anticipates that the fiduciary that causes a plan's or IRA's purchase of an insurance or annuity product would not be the Adviser or Financial Institution but would instead be another fiduciary, such as a plan sponsor or IRA owner, acting on the Adviser's or Financial Institution's advice. Because the party requiring relief for this prohibited transaction is separate and independent of the Adviser and Financial Institution, the Department is proposing this exemption subject to discrete conditions described below.

Although there is an existing exemption which would often cover these transactions, PTE 84–24, the Department is proposing elsewhere in this issue of the **Federal Register** to revoke that exemption to the extent it provides relief for transactions involving IRAs' purchase of variable annuity contracts and other annuity contracts that are securities under federal securities law. We have therefore decided to provide an exemption for these transactions as part of this document, both to ensure that relief is available for transactions involving IRAs but also for ease of compliance for transactions involving other Retirement Investors (*i.e.,* plan participants, beneficiaries and small plan sponsors).

As with the Best Interest Contract Exemption, relief under the proposed insurance and annuity exemption in Section VI would not extend to a plan covered by Title I of ERISA where (i) the Adviser, Financial Institution or any Affiliate is the employer of employees covered by the plan, or (ii) the Adviser or Financial Institution is a named fiduciary or plan administrator (as defined in ERISA section 3(16)(A)) with respect to the plan, or an affiliate thereof, that has not been selected by a fiduciary that is Independent. The conditions proposed for the insurance and annuity exemption are that the transaction must be effected by the insurance company in the ordinary course of its business as an insurance company, the combined total of all fees and compensation received by the insurance company is not in excess of reasonable compensation under the circumstances, the purchase is for cash only, and that the terms of the purchase are at least as favorable to the plan as the terms generally available in an arm's length transaction with an unrelated party.[37]

2. Exemption for Pre-Existing Transactions (Section VII)

Section VII of the proposal would provide an exemption for Advisers, Financial Institutions, and their Affiliates and Related Entities in connection with transactions that occurred prior to the applicability date of the Proposed Regulation, if adopted. Specifically, the exemption would provide relief from ERISA sections 406(a)(1)(D) and 406(b) for the receipt of prohibited compensation, after the applicability date of the regulation, by an Adviser, Financial Institution and any Affiliate or Related Entity for services provided in connection with the purchase, sale or holding of an Asset before the applicability date. The Department is proposing this exemption to provide relief for investment professionals that may have provided advice prior to the applicability date of the regulation but did not consider themselves fiduciaries. Their receipt after the applicability date of ongoing periodic payments of compensation attributable to a purchase, sale or holding of an Asset by a plan, participant or beneficiary account, or IRA, prior to the applicability date of the regulation might otherwise raise prohibited transaction concerns.

The Department is also proposing this exemption for Advisers and Financial Institutions who were considered fiduciaries before the applicability date, but who entered into transactions involving plans and IRAs before the applicability date in accordance with the terms of a prohibited transaction exemption that has since been amended. Section VII would permit Advisers, Financial Institutions, and their Affiliates and Related Entities, to receive compensation such as 12b–1 fees, after the applicability date, that is attributable to a purchase, sale or holding of an Asset by a plan, participant or beneficiary account, or an IRA, that occurred prior to the applicability date.

In order to take advantage of this relief, the exemption would require that the compensation must be received pursuant to an agreement, arrangement or understanding that was entered into prior to the applicability date of the regulation, and that the Adviser and Financial Institution not provide additional advice to the plan or IRA, regarding the purchase, sale or holding of the Asset after the applicability date of the regulation. Relief would not be extended to compensation that is excluded pursuant to Section I(c) of the proposal or to compensation received in connection with a purchase or sale transaction that, at the time it was entered into, was a non-exempt prohibited transaction. The Department requests comment on whether there are other areas in which exemptions would be desirable to avoid unforeseen consequences in connection with the timing of the finalization of the Proposed Regulation.

3. Low Fee Streamlined Exemption

While the flexibility of the Best Interest Contract Exemption is designed to accommodate a wide range of current business practices and avoid the need for highly prescriptive regulation, the Department acknowledges that there may be actors in the industry that would

[37] The condition requiring the purchase to be made for cash only is not intended to preclude purchases with plan or IRA contributions, but rather to preclude transactions effected in-kind through an exchange of securities or other assets. In-kind exchanges would not be permitted as part of this class exemption due to the potential need for conditions relating to valuation of the assets to be exchanged.

prefer a more prescriptive approach. The Department believes that both approaches could be desirable and could, if designed properly, minimize the harmful impact of conflicts of interest on the quality of advice. Accordingly, in addition to the Best Interest Contract Exemption, the Department is also considering issuing a separate streamlined exemption that would allow Advisers and Financial Institutions (and their Affiliates and Related Entities) to receive otherwise prohibited compensation in connection with plan, participant and beneficiary accounts, and IRA investments in certain high-quality low-fee investments, subject to fewer conditions. However, at this point, the Department has been unable to operationalize this concept and therefore has not proposed text for such a streamlined exemption. Instead, we seek public input to assist our consideration and design of the exemption.

A low-fee streamlined exemption is an attractive idea that, if properly crafted, could achieve important goals. It could minimize the compliance burdens for Advisers offering high-quality low-fee investment products with minimal potential for material conflicts of interest, as discussed further below. Products that met the conditions of the streamlined exemption could be recommended to plans, participants and beneficiaries, and IRA owners, and the Adviser could receive variable and third-party compensation as a result of those recommendations, without satisfying some or all of the conditions of the Best Interest Contract Exemption. The streamlined exemption could reward and encourage best practices with respect to optimizing the quality, amount, and combined, all-in cost of recommended financial products, financial advice, and other related services. In particular, a streamlined exemption could be useful in enhancing access to quality, affordable financial products and advice by savers with smaller account balances. Additionally, because it would be premised on a fee comparison, it would apply only to investments with relatively simple and transparent fee structures.

In this regard, the Department believes that certain high-quality investments are provided pursuant to fee structures in which the payments are sufficiently low that they do not present serious potential material conflicts of interest. In theory, a streamlined exemption with relatively few conditions could be constructed around such investments. Facilitating investments in such high-quality low-fee products would be consistent with the prevailing (though by no means universal) view in the academic literature that posits that the optimal investment strategy is often to buy and hold a diversified portfolio of assets calibrated to track the overall performance of financial markets. Under this view, for example, a long-term recommendation to buy and hold a low-priced (often passively managed) target date fund that is consistent with the investor's future risk appetite trajectory is likely to be sound. As another example, under this view, a medium-term recommendation to buy and hold (for 5 or perhaps 10 years) an inexpensive, risk-matched balanced fund or combination of funds, and afterward to review the investor's circumstances and formulate a new recommendation also is likely to be sound.

If it could be constructed appropriately, a streamlined exemption for high-quality low-fee investments could be subject to relatively few conditions, because the investments present minimal risk of abuse to plans, participants and beneficiaries, and IRA owners. The aim would be to design conditions with sufficient objectivity that Advisers and Financial Institutions could proceed with certainty in their business operations when recommending the investments. The Department does not anticipate that such a streamlined exemption would require Advisers and Financial Institutions to undertake the contractual commitments to adhere to the Impartial Conduct Standards or adopt anti-conflict policies and procedures with respect to advice given on such products, as is proposed in the Best Interest Contract Exemption. However, some of the required disclosures proposed in the Best Interest Contract Exemption would likely be imposed in the streamlined exemption.

The Department has initially focused on mutual funds as the only type of investment widely held by Retirement Investors that would be readily susceptible to the type of expense calculations necessary to implement the low-fee streamlined exemption. This is due to the transparency associated with mutual fund investments and, in particular, the requirement that the mutual fund disclose its fees and operating expenses in its prospectus. Accordingly, data on mutual fund fees and expenses is widely available.

Within the category of mutual fund investments, the Department is considering whether the streamlined exemption would be available to funds with all-in fees below a certain amount. However, the Department lacks data regarding the characteristics of mutual funds with low all-in fees. Consequently, we are exploring whether the streamlined exemption should contain additional conditions to safeguard the interests of plans, participants and beneficiaries, and IRA owners. For example, the streamlined exemption could require that the investment product be ''broadly diversified to minimize risk for targeted return,'' or ''calibrated to provide a balance of risk and return appropriate to the investor's circumstances and preferences for the duration of the recommended holding period.'' However, we recognize that adding conditions might undercut the usefulness of the streamlined exemption.

Request for Comment. The Department requests comment on these possible initial terms of a streamlined exemption and other questions relating to the technical design of such an exemption and its likely utility to Advisers and Financial Institutions. Additionally, the Department requests public input on the likely consequences of the establishment of a low-fee streamlined exemption.

Design. The Department requests public input on the technical design challenges in defining high-quality low-fee investment products that would satisfy the policy goals of the streamlined exemption. We are concerned that there may be no single, objective way to evaluate fees and expenses associated with mutual funds (or other investments) and no single cut-off to determine when fees are sufficiently low. One cut-off could be too low for some investors' needs and too high for others'. A very low cut-off would strongly favor passively managed funds. A high cut-off would permit recommendations that may not be sound and free from bias. Multiple cut-offs for different product categories would be complex and would risk introducing bias between the categories. In addition, it is unclear whether mutual funds with the lowest fees necessarily represent the highest quality investments for Retirement Investors. As noted above, the streamlined exemption would not expressly contain a ''best interest'' standard.

To further aid in the design of the streamlined exemption, the Department requests comments on the questions below. The Regulatory Impact Analysis for the Proposed Regulation, published elsewhere in this issue of the **Federal Register**, describes additional questions the Department is considering regarding the development of a low-fee streamlined exemption.

• *Should the streamlined exemption cover investment products other than mutual funds?* The streamlined exemption would be based on the premise that low-cost investment products distributed pursuant to relatively unconflicted fee structures present minimal risk of abuse to plans, participants and beneficiaries, and IRA owners. In order to design a streamlined exemption for the sale of such products, the products must have fee structures that are transparent, publicly available, and capable of being compared reliably. Are there other investments commonly held by Retirement Investors that meet these criteria?

• *How should the fee calculation be performed?* How should fees be defined for the fee calculation to ensure a useful metric? Should the fee calculation include both ongoing management/administrative fees and one-time distribution/transactional costs? What time period should the fee calculation cover? Should it cover fees as projected over future time periods (*e.g.,* one, five and ten year periods) to lower the impact of one-time transactional costs such as sales loads? If so, what discount rate should be used to determine the present value of future fees?

• *How should the Department determine the fee cut-off?* If the Department established a streamlined exemption for low-fee mutual funds and other products, how would the precise fee cut-off be determined? How often should it be updated? What are characteristics of mutual funds with very low fees? Should the cut-off be based on a percentage of the assets invested (*i.e.,* a specified number of basis points) or as a percentile of the market? If a percentile, how should reliable data be obtained to determine fund percentiles? Are there available and appropriate sources of industry benchmarking data? Should the Department collect data for this purpose? Is the range of fees in the market known? Are there data that would suggest that mutual funds with relatively low fees are (or are not) high quality investments for a wide variety of Retirement Investors?

• *Should the low-fee cutoff be applied differently to different types of funds?* Should a single fee cut-off apply broadly to all mutual funds, or would that exclude entire categories of funds with certain investment strategies? Would it be appropriate to develop sub-categories of funds for the fee cut-offs? If so, how should the sub-categories be defined?

• *Should ETFs be covered?* Within the category of mutual funds, should exchange-traded funds (ETFs) be covered under the streamlined exemption? If so, how would the commission associated with an ETF transaction be incorporated into the low-fee calculation?

• *What, if any, conditions other than low fees should be required as part of the streamlined exemption?* If the streamlined exemption covers only mutual funds, are conditions relating to their availability and transparent pricing unnecessary? Are conditions relating to liquidity necessary? Should funds covered by the streamlined exemption be required to be broadly diversified to minimize risk for targeted return? Should the streamlined exemption contain a requirement that the investment be calibrated to provide a balance of risk and return appropriate to the investor's circumstances and preferences for the duration of the recommended holding period? Should the funds be required to meet the requirements of a ''qualified default investment alternative,'' as described in 29 CFR 2550.404c–5?

• *How should the low-fee cut-off be communicated to Advisers and Financial Institutions?* Should the initial cut-off and subsequent updates be written as a condition of the exemption, or publicized through other formats? How would Advisers and Financial Institutions be sure that certain funds meet the low-fee cut-off? By what means and how frequently should Advisers and Financial Institutions be required to confirm that mutual funds that they recommend (or recommended in the past) continue to meet the low-fee cut-off?

• *How could consumers police the low-fee cut-off?* What enforcement mechanism could be used to assure that the Advisers taking advantage of such a safe harbor are correctly analyzing whether their products meet the cut-off?

Utility. In addition to seeking comment on the technical design of the streamlined exemption, the Department asks for information on whether the low-fee streamlined exemption would effectively reduce the compliance burden for a significant number of Advisers and Financial Institutions. Because of its design, the low-fee streamlined exemption would generally apply on a product-by-product basis rather than at the Financial Institution level, unless the Financial Institution and its Advisers exclusively advise retail customers to invest in the low-fee products. Therefore, the Department asks:

• *Would Advisers and Financial Institutions restrict their business models to offer only the low-fee mutual funds that the Department envisions covering in the streamlined exemption?* Or, would Advisers that offer products outside the streamlined exemption (higher-fee mutual funds as well as other investment products such as stocks and bonds) rely on the streamlined exemption for the low-fee mutual fund investments and the Best Interest Contract Exemption for the other investments? If Advisers and Financial Institutions had to implement the safeguards required by the Best Interest Contract Exemption for many of their Retirement Investor customers, would the availability of the streamlined exemption result in material cost savings to them?

• *How do low-fee investment products compensate Advisers for distribution?* Do low-fee funds tend to pay sales loads, revenue sharing and 12b–1 fees? If not, how would Advisers and Financial Institutions be compensated within the low-fee confines of the streamlined exemption?

• *What design features would be most likely to enhance the utility of the low-fee streamlined exemption?*

Consequences. The Department seeks the public's views on the potential consequences of granting a streamlined exemption for certain types of investments.

• *Would a streamlined exemption limited to low-fee mutual fund investments or other categories of investments be in the interests of plans and their participants and beneficiaries?* Would the availability of the streamlined exemption discourage Advisers and Financial Institutions from offering other types of investments, including higher-cost mutual funds, even if the offering of such other investments would be in the best interest of the plan, participant or beneficiary, or IRA owner? Would the streamlined exemption have the beneficial effect of reducing investment costs? On the other hand, could the streamlined exemption result in some of the lowest-cost investment products increasing their fees to the cut-off threshold? Would it expand the number of Financial Institutions that developed low-fee options, making them more widely available?

• *How would the streamlined exemption affect the marketplace for investment products?* Would a low-fee streamlined exemption have the unintended effect of unduly promoting certain investment styles? Which types of Advisers and Financial Institutions would be most affected and would they be likely to revise their business models in response? Would there be increased competition among Advisers and Financial Institutions to offer investment products with lower fees? Would Retirement Investors have more choices to diversify while paying less in fees? Would Financial Institutions and Advisers offer other incentives to Retirement Investors in order to sell specific products?

Availability of Other Prohibited Transaction Exemptions

Certain existing exemptions, including amendments thereto and superseding exemptions, provide relief for specific types of transactions that are outside of the scope of this proposed exemption. A person seeking relief for a transaction covered by one of those existing exemptions would need to comply with its requirements and conditions. Those exemptions are as follows:

(1) PTE 75–1 (Part III),[38] which provides relief for a plan's acquisition of securities during an underwriting or selling syndicate from any person other than a fiduciary who is a member of the syndicate.

(2) PTE 75–1 (Part V),[39] which exempts an extension of credit to a plan from a party in interest.

(3) PTE 83–1,[40] which provides relief for certain transactions involving mortgage pool investment trusts and pass-through certificates evidencing interests therein.

(4) PTE 2004–16,[41] which provides relief for a fiduciary of the plan who is the employer of employees covered under the plan to establish individual retirement plans for certain mandatory distributions on behalf of separated employees at a financial institution that is itself or an affiliate, and also select a proprietary investment product as the initial investment for the plan.

(5) PTE 2006–16,[42] which exempts certain loans of securities by plans to broker-dealers and banks and provides relief for the receipt of compensation by a fiduciary for services rendered in connection with the securities loans.

Applicability Date

The Department is proposing that compliance with the final regulation defining a fiduciary under ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) will begin eight months after publication of the final regulation in the **Federal Register** (Applicability Date). The Department proposes to make this exemption, if granted, available on the Applicability Date. Further, the Department is proposing to revoke relief for transactions involving IRAs from two existing exemptions, PTEs 86–128 and 84–24, as of the Applicability Date.[43] As a result, Advisers and Financial Institutions, including those newly defined as fiduciaries, will generally have to comply with this exemption to receive many common forms of compensation in transactions involving IRAs.

The Department recognizes that complying with the requirements of the exemption may represent a significant adjustment for many Advisers and Financial Institutions, particularly in their dealings with IRA owners. At the same time, in the Department's view, it is essential that Advisers and Financial Institutions wishing to receive compensation under the exemption institute certain conditions for the protection of IRA customers as of the Applicability Date. These safeguards include: Acknowledging fiduciary status,[44] complying with the Impartial Conduct Standards,[45] adopting anti-conflict policies and procedures,[46] notifying EBSA of the use of the exemption,[47] and recordkeeping.[48] The Department requests comment on whether Financial Institutions anticipate that there will be existing contractual obligations or other barriers that would prevent them from implementing the exemption's policies and procedures requirement in this time frame.

The Department also specifically requests comment on whether it should delay certain other conditions of the exemption as applicable to IRA transactions for an additional period (*e.g.,* three months) following the Applicability Date. For example, one possibility would be to delay the requirement that Advisers and Financial Institutions execute a contract with their IRA customers for an additional three-month period, as well as the disclosure requirements in Sections III and the data collection requirements described in Section IX. This phased approach would give Financial Institutions additional time to review and refine their policies and procedures and to put new compliance systems in place, without exposure to contractual liability to the IRA owners.

The Department does not believe that such additional delay would be warranted for Advisers and Financial Institutions with respect to transactions involving ERISA plan sponsors and ERISA plan participants and beneficiaries. Advisers and Financial Institutions to ERISA plans and their participants and beneficiaries are accustomed to working within the existing exemptions, such as PTEs 86–128 and 84–24, and such exemptions would remain available to them while they develop systems for complying with this exemption.[49] Nevertheless, the Department also requests comments on the appropriate period for phasing in some or all of the exemption's conditions with respect to ERISA plans as well as IRAs.

The Department additionally notes that, elsewhere in this issue of the **Federal Register**, it has proposed to revoke another existing exemption, PTE 75–1, Part II(2), in its entirety in connection with a proposed amendment to PTE 86–128. The Department requests comment on whether this exemption is widely used and whether it should delay revocation for some period after the Applicability Date while Advisers and Financial Institutions develop systems for complying with PTE 86–128.

No Relief Proposed From ERISA Section 406(a)(1)(C) or Code Section 4975(c)(1)(C) for the Provision of Services

If granted, this proposed exemption will not provide relief from a transaction prohibited by ERISA section 406(a)(1)(C), or from the taxes imposed by Code section 4975(a) and (b) by reason of Code section 4975(c)(1)(C), regarding the furnishing of goods, services or facilities between a plan and a party in interest. The provision of investment advice to a plan under a contract with a plan fiduciary is a service to the plan and compliance with this exemption will not relieve an Adviser or Financial Institution of the need to comply with ERISA section 408(b)(2), Code section 4975(d)(2), and applicable regulations thereunder.

Paperwork Reduction Act Statement

As part of its continuing effort to reduce paperwork and respondent burden, the Department conducts a preclearance consultation program to provide the general public and Federal

[38] 40 FR 50845 (Oct. 31, 1975).

[39] Id., as amended at 71 FR 5883 (Feb. 3, 2006).

[40] 48 FR 895 (Jan. 7, 1983).

[41] 69 FR 57964 (Sept. 28, 2004).

[42] 71 FR 63786 (Oct. 31, 2006).

[43] See the notices with respect to these proposals, published elsewhere in this issue of the **Federal Register**.

[44] *See* Section II(b).

[45] *See* Section II(c).

[46] *See* Section II(d)(2)–(4).

[47] *See* Section V(a).

[48] *See* Section V(c).

[49] In this regard, the Department anticipates making the Impartial Conduct Standards amendments to PTEs 86–128 and 84–24 effective as of the Applicability Date.

agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that the public understands the Department's collection instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

Currently, the Department is soliciting comments concerning the proposed information collection request (ICR) included in the Best Interest Contract Exemption (PTE) as part of its proposal to amend its 1975 rule that defines when a person who provides investment advice to an employee benefit plan or IRA becomes a fiduciary. A copy of the ICR may be obtained by contacting the PRA addressee shown below or at *http://www.RegInfo.gov.*

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

- Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Comments should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for the Employee Benefits Security Administration. OMB requests that comments be received within 30 days of publication of the proposed PTE to ensure their consideration.

PRA Addressee: Address requests for copies of the ICR to G. Christopher Cosby, Office of Policy and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue NW., Room N–5718, Washington, DC 20210. Telephone (202) 693–8410; Fax: (202) 219–5333. These are not toll-free numbers. ICRs submitted to OMB also are available at *http://www.RegInfo.gov.*

As discussed in detail below, the PTE would require financial institutions and their advisers to enter into a contractual arrangement with retirement investors making investment decisions on behalf of the plan or IRA (*i.e.,* plan participants or beneficiaries, IRA owners, or small plan sponsors (or employees, officers or directors thereof)), and make certain disclosures to the retirement investors and the Department in order to receive relief from ERISA's prohibited transaction rules for the receipt of compensation as a result of a financial institution's and its adviser's advice (*i.e.,* prohibited compensation). Financial institutions would be required to maintain records necessary to prove that the conditions of the exemption have been met. These requirements are ICRs subject to the Paperwork Reduction Act.

The Department has made the following assumptions in order to establish a reasonable estimate of the paperwork burden associated with these ICRs:

- Disclosures distributed electronically will be distributed via means already used by respondents in the normal course of business and the costs arising from electronic distribution will be negligible;
- Financial institutions will use existing in-house resources to prepare the contracts and disclosures, adjust their IT systems, and maintain the recordkeeping systems necessary to meet the requirements of the exemption;
- A combination of personnel will perform the tasks associated with the ICRs at an hourly wage rate of $125.95 for a financial manager, $30.42 for clerical personnel, $79.67 for an IT professional, and $129.94 for a legal professional; [50]
- Approximately 2,800 financial institutions [51] will take advantage of this exemption and they will use this exemption in conjunction with transactions involving nearly all of their clients that are small defined benefit and defined plans, participant directed defined contribution plans, and IRA holders.[52] [53] Eight percent of financial institutions (approximately 224) will be new firms beginning use of this exemption each year.

Contract, Disclosures, and Notices

In order to receive prohibited compensation under this PTE, Section II requires financial institutions and advisers to enter into a written contract with retirement investors affirmatively stating that they are fiduciaries under ERISA or the Code with respect to any recommendations to the retirement investor to purchase, sell or hold specified assets, and that the financial institution and adviser will give advice that is in the best interest of the retirement investor.

Section III(a) requires the adviser to furnish the retirement investor with a disclosure prior to the execution of the purchase of the asset stating the total cost of investing in the asset. Section III(b) requires the adviser or financial institution to furnish the retirement investor with an annual statement listing all assets purchased or sold during the year, as well as the associated fees and expenses paid by the plan, participant or beneficiary account, or IRA, and the compensation received by the financial institution and the adviser. Section III(c) requires the financial institution to maintain a publicly available Web page displaying the compensation (including its source and how it varies within asset classes) that would be received by the adviser, the financial institution and any affiliate

[50] The Department's estimated 2015 hourly labor rates include wages, other benefits, and overhead, and are calculated as follows: mean wage from the 2013 National Occupational Employment Survey (April 2014, Bureau of Labor Statistics *http://www.bls.gov/news.release/pdf/ocwage.pdf*); wages as a percent of total compensation from the Employer Cost for Employee Compensation (June 2014, Bureau of Labor Statistics *http://www.bls.gov/news.release/ecec.t02.htm*); overhead as a multiple of compensation is assumed to be 25 percent of total compensation for paraprofessionals, 20 percent of compensation for clerical, and 35 percent of compensation for professional; annual inflation assumed to be 2.3 percent annual growth of total labor cost since 2013 (Employment Costs Index data for private industry, September 2014 *http://www.bls.gov/news.release/eci.nr0.htm*).

[51] As described in the regulatory impact analysis for the accompanying rule, the Department estimates that approximately 2,619 broker dealers service the retirement market. The Department anticipates that the exemption will be used primarily, but not exclusively, by broker-dealers. Further, the Department assumes that all broker-dealers servicing the retirement market will use the exemption. Beyond the 2,619 broker-dealers, the Department estimates that almost 200 other financial institutions will use the exemption.

[52] The Department welcomes comment on this estimate.

[53] For purposes of this analysis, "IRA holders" include rollovers from ERISA plans.

[54] The Department assumes that nearly all financial institutions already maintain Web sites and that updates to the disclosure required by Section III(c) could be automated. Therefore, the IT costs required by Section III(c) would be almost exclusively start-up costs. The Department invites comment on these assumptions.

with respect to any asset that a plan, participant or beneficiary account, or IRA could purchase through the adviser.

If the financial institution limits the assets available for sale, Section IV requires the financial institution to furnish the retirement investor with a written description of the limitations placed on the menu. The adviser must also notify the retirement investor if it does not recommend a sufficiently broad range of assets to meet the retirement investor's needs.

Finally, before the financial institution begins engaging in transactions covered under this PTE, Section V(a) requires the financial institution to provide notice to the Department of its intent to rely on this proposed PTE.

Legal Costs

The Department estimates that drafting the PTE's contractual provisions, the notice to the Department, and the limited menu disclosure will require 60 hours of legal time for financial institutions during the first year that the financial institution uses the PTE. This legal work results in approximately 168,000 hours of burden during the first year and approximately 13,000 hours of burden during subsequent years at an equivalent cost of $21.8 million and $1.7 million respectively.

IT Costs

The Department estimates that updating computer systems to create the required disclosures, insert the contract provisions into existing contracts, maintain the required records, and publish information on the Web site will require 100 hours of IT staff time for financial institutions during the first year that the financial institution uses the PTE.[54] This IT work results in approximately 280,000 hours of burden during the first year and approximately 22,000 hours of burden during subsequent years at an equivalent cost of $22.3 million and $1.8 million respectively.

Production and Distribution of Required Contract, Disclosures, and Notices

The Department estimates that approximately 21.3 million plans and IRAs have relationships with financial institutions and are likely to engage in transactions covered under this PTE.

The Department assumes that financial institutions already maintain contracts with their clients. Therefore, the required contractual provisions will be inserted into existing contracts with no additional cost for production or distribution.

The Department assumes that financial institutions will send approximately 24 point-of-sale transaction disclosures each year to 37,000 small defined benefit plans and small defined contribution plans that do not allow participants to direct investments. All of these disclosures will be sent electronically at de minimis cost. Financial institutions will send two point-of-sale transaction disclosures each year to 1.1 million defined contribution plans participants and 20.2 million IRA holders. These disclosures will be distributed electronically to 75 percent of defined contribution plan participants and IRA holders. Paper copies of the disclosure will be given to 25 percent of defined contribution plan participants and IRA holders. Further, 15 percent of the paper copies will be mailed, while the other 85 percent will be hand-delivered during in-person meetings. The Department estimates that electronic distribution will result in de minimis cost, while paper distribution will cost approximately $1.3 million. Paper distribution will also require one minute of clerical time to print the disclosure and one minute of clerical time to mail the disclosure, resulting in 204,000 hours at an equivalent cost of $6.2 million annually.

The Department estimates that 21.3 million plans and IRAs will receive an annual statement. Small defined benefit and defined contribution plans that do not allow participants to direct investments will receive a ten page statement electronically at de minimis cost. Defined contribution plan participants and IRA holders will receive a two page statement. This statement will be distributed electronically to 38 percent of defined contribution plan participants and 50 percent of IRA holders. Paper statements will be mailed to 62 percent of defined contribution plan participants and 50 percent of IRA holders. The Department estimates that electronic distribution will result in de minimis cost, while paper distribution will cost approximately $6.3 million. Paper distribution will also require two minutes of clerical time to print and mail the disclosure, resulting in 359,000 hours at an equivalent cost of $10.9 million annually.

For purposes of this estimate, the Department assumes that nearly all financial institutions using the PTE will limit their investment menus in some way and provide the limited menu disclosure. Accordingly, during the first year of the exemption the Department estimates that all of the 21.3 million plans and IRAs would receive the one-page limited menu disclosure. In subsequent years, approximately 1.7 million plans and IRAs would receive the one-page limited menu disclosure. Small defined benefit and defined contribution plans that do not allow participants to direct investments would receive the disclosure electronically at de minimis cost. The disclosure would be distributed electronically to 75 percent of defined contribution plan participants and IRA holders. Paper copies of the disclosure would be given to 25 percent of defined contribution plan participants and IRA holders. Further, 15 percent of the paper copies would be mailed, while the other 85 percent would be hand-delivered during in-person meetings. The Department estimates that electronic distribution would result in de minimis cost, while paper distribution would cost approximately $922,000 during the first year and approximately $74,000 in subsequent years. Paper distribution would also require one minute of clerical time to print the disclosure and one minute of clerical time to mail the disclosure, resulting in 244,000 hours in the first year and 20,000 hours in subsequent years at an equivalent cost of $7.4 million and $595,000 respectively. If, as seems likely, many financial institutions choose not to limit the universe of investment recommendations, we would expect the actual costs to be substantially smaller.

Finally, the Department estimates that all of the 2,800 financial institutions would mail the required one-page notice to the Department during the first year and approximately 224 new financial institutions would mail the required one-page notice to the Department in subsequent years. Producing and distributing this notice would cost approximately $1,500 during the first year and approximately $100 in subsequent years. Producing and distributing this notice would also require 2 minutes of clerical time resulting in a burden of approximately 93 hours during the first year and approximately 7 hours in subsequent years at an equivalent cost of $2,800 and $200 respectively.

Recordkeeping Requirement

Section V(b) requires financial institutions to maintain investment return data in a manner accessible for examination by the Department for six years. Section V(c) and (d) requires

[54] The Department assumes that nearly all financial institutions already maintain Web sites and that updates to the disclosure required by Section III(c) could be automated. Therefore, the IT costs required by Section III(c) would be almost exclusively start-up costs. The Department invites comment on these assumptions.

financial institutions to maintain or cause to be maintained for six years and disclosed upon request the records necessary for the Department, Internal Revenue Service, plan fiduciary, contributing employer or employee organization whose members are covered by the plan, and participants, beneficiaries and IRA owners to determine whether the conditions of this exemption have been met in a manner that is accessible for audit and examination.

Most of the data retention requirements in Section V(b) are consistent with data retention requirements made by the SEC and FINRA. In addition, the data retention requirements correspond to the six year statute of limitations in Section 413 of ERISA. Insofar as the data retention time requirements in Section V(b) are lengthier than those required by the SEC and FINRA, the Department assumes that retaining data for an additional time period is a de minimis additional burden.

The records required in Section V(c) and Section V(d) are generally kept as regular and customary business practices. Therefore, the Department has estimated that the additional time needed to maintain records consistent with the exemption will only require about one-half hour, on average, annually for a financial manager to organize and collate the documents or else draft a notice explaining that the information is exempt from disclosure, and an additional 15 minutes of clerical time to make the documents available for inspection during normal business hours or prepare the paper notice explaining that the information is exempt from disclosure. Thus, the Department estimates that a total of 45 minutes of professional time per Financial Institution would be required for a total hour burden of 2,100 hours at an equivalent cost of $198,000.

In connection with this recordkeeping and disclosure requirements discussed above, Section V(d)(2) and (3) provide that financial institutions relying on the exemption do not have to disclose trade secrets or other confidential information to members of the public (*i.e.,* plan fiduciaries, contributing employers or employee organizations whose members are covered by the plan, participants and beneficiaries and IRA owners), but that in the event a financial institution refuses to disclose information on this basis, it must provide a written notice to the requester advising of the reasons for the refusal and advising that the Department may request such information. The Department's experience indicates that this provision is not commonly invoked, and therefore, the written notice is rarely, if ever, generated. Therefore, the Department believes the cost burden associated with this clause is de minimis. No other cost burden exists with respect to recordkeeping.

Overall Summary

Overall, the Department estimates that in order to meet the conditions of this PTE, 2,800 financial institutions will produce 86 million disclosures and notices during the first year of this PTE and 66.4 million disclosures and notices during subsequent years. These disclosures and notices will result in 1.3 million burden hours during the first year and 620,000 burden hours in subsequent years, at an equivalent cost of $68.9 million and $21.4 million respectively. The disclosures and notices in this exemption will also result in a total cost burden for materials and postage of $8.6 million during the first year and $7.7 million during subsequent years.

These paperwork burden estimates are summarized as follows:

Type of Review: New collection (Request for new OMB Control Number).

Agency: Employee Benefits Security Administration, Department of Labor.

Titles: (1) Proposed Best Interest Contract Exemption.

OMB Control Number: 1210–NEW.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 2,800.

Estimated Number of Annual Responses: 85,985,156 in the first year and 66,394,985 in subsequent years.

Frequency of Response: Initially, Annually, and When engaging in exempted transaction.

Estimated Total Annual Burden Hours: 1,256,862 during the first year and 619,766 in subsequent years.

Estimated Total Annual Burden Cost: $8,582,764 during the first year and $7,733,247 in subsequent years.

General Information

The attention of interested persons is directed to the following:

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

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

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

(4) The proposed exemption, if granted, will be 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.

Written Comments

The Department invites all interested persons to submit written comments on the proposed exemption to the address and within the time period set forth above. All comments received will be made a part of the record. Comments should state the reasons for the writer's interest in the proposed exemption. Comments received will be available for public inspection at the above address.

Proposed Exemption

Section I—Best Interest Contract Exemption

(a) *In general.* ERISA and the Internal Revenue Code prohibit fiduciary advisers to employee benefit plans (Plans) and individual retirement plans (IRAs) from receiving compensation that varies based on their investment recommendations. Similarly, fiduciary advisers are prohibited from receiving compensation from third parties in connection with their advice. This exemption permits certain persons who provide investment advice to Retirement Investors, and their associated financial institutions, affiliates and other related entities, to receive such otherwise prohibited compensation as described below.

(b) *Covered transactions.* This exemption permits Advisers, Financial Institutions, and their Affiliates and Related Entities to receive compensation for services provided in connection with a purchase, sale or holding of an Asset by a Plan, participant or beneficiary account, or IRA, as a result of the Adviser's and Financial Institution's advice to any of the following "Retirement Investors:"

(1) A participant or beneficiary of a Plan subject to Title I of ERISA with authority to direct the investment of assets in his or her Plan account or to take a distribution;

(2) The beneficial owner of an IRA acting on behalf of the IRA; or

(3) A plan sponsor as described in ERISA section 3(16)(B) (or any employee, officer or director thereof) of a non-participant-directed Plan subject to Title I of ERISA with fewer than 100 participants, to the extent it acts as a fiduciary who has authority to make investment decisions for the Plan.

As detailed below, parties seeking to rely on the exemption must contractually agree to adhere to Impartial Conduct Standards in rendering advice regarding Assets; warrant that they have adopted policies and procedures designed to mitigate the dangers posed by Material Conflicts of Interest; disclose important information relating to fees, compensation, and Material Conflicts of Interest; and retain documents and data relating to investment recommendations regarding Assets. The exemption provides relief from the restrictions of ERISA section 406(a)(1)(D) and 406(b) and the sanctions imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(D), (E) and (F). The Adviser and Financial Institution must comply with the conditions of Sections II–V to rely on this exemption.

(c) *Exclusions.* This exemption does not apply if:

(1) The Plan is covered by Title I of ERISA, and (i) the Adviser, Financial Institution or any Affiliate is the employer of employees covered by the Plan, or (ii) the Adviser or Financial Institution is a named fiduciary or plan administrator (as defined in ERISA section 3(16)(A)) with respect to the Plan, or an affiliate thereof, that was selected to provide advice to the Plan by a fiduciary who is not Independent;

(2) The compensation is received as a result of a transaction in which the Adviser is acting on behalf of its own account or the account of the Financial Institution, or the account of a person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the Financial Institution (*i.e.,* a principal transaction);

(3) The compensation is received as a result of investment advice to a Retirement Investor generated solely by an interactive Web site in which computer software-based models or applications provide investment advice based on personal information each investor supplies through the Web site without any personal interaction or advice from an individual Adviser (*i.e.,* "robo advice"); or

(4) The Adviser (i) exercises any discretionary authority or discretionary control respecting management of the Plan or IRA assets involved in the transaction or exercises any authority or control respecting management or disposition of the assets, or (ii) has any discretionary authority or discretionary responsibility in the administration of the Plan or IRA.

Section II—Contract, Impartial Conduct, and Other Requirements

(a) *Contract.* Prior to recommending that the Plan, participant or beneficiary account, or IRA purchase, sell or hold the Asset, the Adviser and Financial Institution enter into a written contract with the Retirement Investor that incorporates the terms required by Section II(b)–(e).

(b) *Fiduciary.* The written contract affirmatively states that the Adviser and Financial Institution are fiduciaries under ERISA or the Code, or both, with respect to any investment recommendations to the Retirement Investor.

(c) *Impartial Conduct Standards.* The Adviser and the Financial Institution affirmatively agree to, and comply with, the following:

(1) When providing investment advice to the Retirement Investor regarding the Asset, the Adviser and Financial Institution will provide investment advice that is in the Best Interest of the Retirement Investor (*i.e.,* advice that reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party);

(2) When providing investment advice to the Retirement Investor regarding the Asset, the Adviser and Financial Institution will not recommend an Asset if the total amount of compensation anticipated to be received by the Adviser, Financial Institution, Affiliates and Related Entities in connection with the purchase, sale or holding of the Asset by the Plan, participant or beneficiary account, or IRA, will exceed reasonable compensation in relation to the total services they provide to the Retirement Investor; and

(3) The Adviser's and Financial Institution's statements about the Asset, fees, Material Conflicts of Interest, and any other matters relevant to a Retirement Investor's investment decisions, will not be misleading.

(d) *Warranties.* The Adviser and Financial Institution affirmatively warrant the following:

(1) The Adviser, Financial Institution, and Affiliates will comply with all applicable federal and state laws regarding the rendering of the investment advice, the purchase, sale and holding of the Asset, and the payment of compensation related to the purchase, sale and holding of the Asset;

(2) The Financial Institution has adopted written policies and procedures reasonably designed to mitigate the impact of Material Conflicts of Interest and ensure that its individual Advisers adhere to the Impartial Conduct Standards set forth in Section II(c);

(3) In formulating its policies and procedures, the Financial Institution has specifically identified Material Conflicts of Interest and adopted measures to prevent the Material Conflicts of Interest from causing violations of the Impartial Conduct Standards set forth in Section II(c); and

(4) Neither the Financial Institution nor (to the best of its knowledge) any Affiliate or Related Entity uses quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation or other actions or incentives to the extent they would tend to encourage individual Advisers to make recommendations that are not in the Best Interest of the Retirement Investor. Notwithstanding the foregoing, the contractual warranty set forth in this Section II(d)(4) does not prevent the Financial Institution or its Affiliates and Related Entities from providing Advisers with differential compensation based on investments by Plans, participant or beneficiary accounts, or IRAs, to the extent such compensation would not encourage advice that runs counter to the Best Interest of the Retirement Investor (*e.g.,* differential compensation based on such neutral factors as the difference in time and analysis necessary to provide prudent advice with respect to different types of investments would be permissible).

(e) *Disclosures.* The written contract must specifically:

(1) Identify and disclose any Material Conflicts of Interest;

(2) Inform the Retirement Investor that the Retirement Investor has the right to obtain complete information about all the fees currently associated with the Assets in which it is invested, including all of the direct and indirect fees paid payable to the Adviser, Financial Institution, and any Affiliates; and

(3) Disclose to the Retirement Investor whether the Financial Institution offers Proprietary Products or receives Third Party Payments with respect to the purchase, sale or holding of any Asset, and of the address of the Web site required by Section III(c) that discloses the compensation arrangements entered into by Advisers and the Financial Institution.

(f) *Prohibited Contractual Provisions.* The written contract shall not contain the following:

(1) Exculpatory provisions disclaiming or otherwise limiting liability of the Adviser or Financial Institution for a violation of the contract's terms; and

(2) A provision under which the Plan, IRA or Retirement Investor waives or qualifies its right to bring or participate in a class action or other representative action in court in a dispute with the Adviser or Financial Institution.

Section III—Disclosure Requirements

(a) *Transaction Disclosure.*

(1) *Disclosure.* Prior to the execution of the purchase of the Asset by the Plan, participant or beneficiary account, or IRA, the Adviser furnishes to the Retirement Investor a chart that provides, with respect to each Asset recommended, the Total Cost to the Plan, participant or beneficiary account, or IRA, of investing in the Asset for 1-, 5- and 10-year periods expressed as a dollar amount, assuming an investment of the dollar amount recommended by the Adviser and reasonable assumptions about investment performance that are disclosed.

The disclosure chart required by this section need not be provided with respect to a subsequent recommendation to purchase the same investment product if the chart was previously provided to the Retirement Investor within the past twelve months and the Total Cost has not materially changed.

(2) *Total Cost.* The ''Total Cost'' of investing in an Asset means the sum of the following, as applicable:

(A) *Acquisition costs.* Any costs of acquiring the Asset that are paid by direct charge to the Plan, participant or beneficiary account, or IRA, or that reduce the amount invested in the Asset (*e.g.,* any loads, commissions, or mark-ups on Assets bought from dealers, and account opening fees, if applicable).

(B) *Ongoing costs.* Any ongoing (*e.g.,* annual) costs attributable to fees and expenses charged for the operation of an Asset that is a pooled investment fund (*e.g.,* mutual fund, bank collective investment fund, insurance company pooled separate account) that reduces the Asset's rate of return (*e.g.,* amounts attributable to a mutual fund expense ratio and account fees). This includes amounts paid by the pooled investment fund to intermediaries, such as sub-TA fees, sub-accounting fees, etc.

(C) *Disposition costs.* Any costs of disposing of or redeeming an interest in the Asset that are paid by direct charge to the Plan, participant or beneficiary account, or IRA, or that reduce the amounts received by the Plan, participant or beneficiary account, or IRA (*e.g.,* surrender fees, back-end loads, etc., that are always applicable (*i.e.,* do not sunset), mark-downs on assets sold to dealers, and account closing fees, if applicable).

(D) *Others.* Any costs not described in (A)–(C) that reduce the Asset's rate of return, are paid by direct charge to the Plan, participant or beneficiary account, or IRA, or reduce the amounts received by the Plan, participant or beneficiary account, or IRA (*e.g.,* contingent fees, such as back-end loads that phase out over time (with such terms explained beneath the table)).

(3) *Model Chart.* Appendix II to this exemption contains a model chart that may be used to provide the information required under this Section III(a). Use of the model chart is not mandatory. However, use of an appropriately completed model chart will be deemed to satisfy the requirements of this Section III(a).

(b) *Annual Disclosure.* The Adviser or Financial Institution provides the following written information to the Retirement Investor, annually, within 45 days of the end of the applicable year, in a succinct single disclosure:

(1) A list identifying each Asset purchased or sold during the applicable period and the price at which the Asset was purchased or sold;

(2) A statement of the total dollar amount of all fees and expenses paid by the Plan, participant or beneficiary account, or IRA (directly and indirectly) with respect to each Asset purchased, held or sold during the applicable period; and

(3) A statement of the total dollar amount of all compensation received by the Adviser and Financial Institution, directly or indirectly, from any party, as a result of each Asset sold, purchased or held by the Plan, participant or beneficiary account, or IRA during the applicable period.

(c) *Web page.*

(1) The Financial Institution maintains a Web page, freely accessible to the public, which shows the following information:

(A) The direct and indirect material compensation payable to the Adviser, Financial Institution and any Affiliate for services provided in connection with each Asset (or, if uniform across a class of Assets, the class of Assets) that a Plan, participant or beneficiary account, or an IRA is able to purchase, hold, or sell through the Adviser or Financial Institution, and that a Plan, participant or beneficiary account, or an IRA has purchased, held, or sold within the last 365 days. The compensation may be expressed as a monetary amount, formula or percentage of the assets involved in the purchase, sale or holding; and

(B) The source of the compensation, and how the compensation varies within and among Assets.

(2) The Financial Institution's Web page provides access to the information in (1)(A) and (B) in a machine readable format.

Section IV—Range of Investment Options

(a) *General.* The Financial Institution offers for purchase, sale or holding, and the Adviser makes available to the Plan, participant or beneficiary account, or IRA for purchase, sale or holding, a range of Assets that is broad enough to enable the Adviser to make recommendations with respect to all of the asset classes reasonably necessary to serve the Best Interests of the Retirement Investor in light of its investment objectives, risk tolerance, and specific financial circumstances.

(b) *Limited Range of Investment Options.* Section (a) notwithstanding, a Financial Institution may limit the Assets available for purchase, sale or holding based on whether the Assets are Proprietary Products, generate Third Party Payments, or for other reasons, and still rely on the exemption, provided that:

(1) The Financial Institution makes a specific written finding that the limitations it has placed on the Assets made available to an Adviser for purchase, sale or holding by Plans, participant and beneficiary accounts, and IRAs do not prevent the Adviser

from providing advice that is in the Best Interest of the Retirement Investor (*i.e.,* advice that reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party) or otherwise adhering to the Impartial Conduct Standards;

(2) Any compensation received in connection with a purchase, sale or holding of the Asset by a Plan, participant or beneficiary account, or an IRA, is reasonable in relation to the value of the specific services provided to the Retirement Investor in exchange for the payments and not in excess of the services' fair market value;

(3) Before giving investment recommendations to Retirement Investors, the Adviser or Financial Institution gives the Retirement Investor clear written notice of the limitations placed on the Assets that the Adviser may offer for purchase, sale or holding by a Plan, participant or beneficiary account, or an IRA. Notice is insufficient if it merely states that the Financial Institution or Adviser "may" limit investment recommendations based on whether the Assets are Proprietary Products or generate Third Party Payments, or for other reasons, without specific disclosure of the extent to which recommendations are, in fact, limited on that basis; and

(4) The Adviser notifies the Retirement Investor if the Adviser does not recommend a sufficiently broad range of Assets to meet the Retirement Investor's needs.

(c) *ERISA plan participants and beneficiaries.* Some Advisers and Financial Institutions provide advice to participants in ERISA-covered participant directed individual account Plans in which the menu of investment options is selected by an Independent Plan fiduciary. In such cases, provided the Adviser and Financial Institution did not provide investment advice to the Plan fiduciary regarding the composition of the menu, the Adviser and Financial Institution do not have to comply with Section IV(a)–(c) in connection with their advice to individual participants and beneficiaries on the selection of Assets from the menu provided. This exception is not available for advice with respect to investments within open brokerage windows or otherwise outside the Plan's designated investment options.

Section V—Disclosure to the Department and Recordkeeping

(a) *EBSA Disclosure.* Before receiving compensation in reliance on the exemption in Section I, the Financial Institution notifies the Department of Labor of the intention to rely on this class exemption. The notice will remain in effect until revoked in writing by the Financial Institution. The notice need not identify any Plan or IRA.

(b) *Data Request.* The Financial Institution maintains the data that is subject to request pursuant to Section IX in a manner that is accessible for examination by the Department for six (6) years from the date of the transaction subject to relief hereunder. No party, other than the Financial Institution responsible for complying with this paragraph (b), will be subject to the taxes imposed by Code section 4975(a) and (b), if applicable, if the data is not maintained or not available for examination as required by paragraph (b).

(c) *Recordkeeping.* The Financial Institution maintains for a period of six (6) years, in a manner that is accessible for examination, the records necessary to enable the persons described in paragraph (d) of this Section to determine whether the conditions of this exemption have been met, except that:

(1) If such records are lost or destroyed, due to circumstances beyond the control of the Financial Institution, then no prohibited transaction will be considered to have occurred solely on the basis of the unavailability of those records; and

(2) No party, other than the Financial Institution responsible for complying with this paragraph (c), will be subject to the civil penalty that may be assessed under ERISA section 502(i) or the taxes imposed by Code section 4975(a) and (b), if applicable, if the records are not maintained or are not available for examination as required by paragraph (d), below.

(d) (1) Except as provided in paragraph (d)(2) of this Section, and notwithstanding any provisions of ERISA section 504(a)(2) and (b), the records referred to in paragraph (c) of this Section are unconditionally available at their customary location for examination during normal business hours by:

(A) Any authorized employee or representative of the Department or the Internal Revenue Service;

(B) Any fiduciary of a Plan that engaged in a purchase, sale or holding of an Asset described in this exemption, or any authorized employee or representative of such fiduciary;

(C) Any contributing employer and any employee organization whose members are covered by a Plan described in paragraph (d)(1)(B), or any authorized employee or representative of these entities; or

(D) Any participant or beneficiary of a Plan described in paragraph (B), IRA owner, or the authorized representative of such participant, beneficiary or owner; and

(2) None of the persons described in paragraph (d)(1)(B)–(D) of this Section are authorized to examine privileged trade secrets or privileged commercial or financial information, of the Financial Institution, or information identifying other individuals.

(3) Should the Financial Institution refuse to disclose information on the basis that the information is exempt from disclosure, the Financial Institution must, by the close of the thirtieth (30th) day following the request, provide a written notice advising the requestor of the reasons for the refusal and that the Department may request such information.

Section VI—Insurance and Annuity Contract Exemption

(a) *In general.* In addition to prohibiting fiduciaries from receiving compensation from third parties and compensation that varies on the basis of the fiduciaries' investment advice, ERISA and the Internal Revenue Code prohibit the purchase by a Plan, participant or beneficiary account, or IRA of an insurance or annuity product from an insurance company that is a service provider to the Plan or IRA. This exemption permits a Plan, participant or beneficiary account, or IRA to purchase an Asset that is an insurance or annuity contract in accordance with an Adviser's advice, from a Financial Institution that is an insurance company and that is a service provider to the Plan or IRA. This exemption is provided because purchases of insurance and annuity products are often prohibited purchases and sales involving insurance companies that have a pre-existing party in interest relationship to the Plan or IRA.

(b) *Covered transaction.* The restrictions of ERISA section 406(a)(1)(A) and (D), and the sanctions imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(A) and (D), shall not apply to a fiduciary's causing the purchase of an Asset that is an insurance or annuity contract by a non-participant-directed Plan subject to Title I of ERISA that has fewer than 100 participants, participant or beneficiary account, or IRA, from a Financial Institution that is an insurance company and that is a party in interest or disqualified person, if:

(1) The transaction is effected by the insurance company in the ordinary course of its business as an insurance company;

(2) The combined total of all fees and compensation received by the insurance company and any Affiliate is not in excess of reasonable compensation under the circumstances;

(3) The purchase is for cash only; and

(4) The terms of the purchase are at least as favorable to the Plan, participant or beneficiary account, or IRA as the terms generally available in an arm's length transaction with an unrelated party.

(c) *Exclusion:* The exemption in this Section VI does not apply if the Plan is covered by Title I of ERISA, and (i) the Adviser, Financial Institution or any Affiliate is the employer of employees covered by the Plan, or (ii) the Adviser and Financial Institution is a named fiduciary or plan administrator (as defined in ERISA section 3(16)(A)) with respect to the Plan, or an affiliate thereof, that was selected to provide advice to the plan by a fiduciary who is not Independent.

Section VII—Exemption for Pre-Existing Transactions

(a) *In general.* ERISA and the Internal Revenue Code prohibit Advisers, Financial Institutions and their Affiliates and Related Entities from receiving variable or third-party compensation as a result of the Adviser's and Financial Institution's advice to a Plan, participant or beneficiary, or IRA owner. Some Advisers and Financial Institutions did not consider themselves fiduciaries within the meaning of 29 CFR 2510–3.21 before the applicability date of the amendment to 29 CFR 2510–3.21 (the Applicability Date). Other Advisers and Financial Institutions entered into transactions involving Plans, participant or beneficiary accounts, or IRAs before the Applicability Date, in accordance with the terms of a prohibited transaction exemption that has since been amended. This exemption permits Advisers, Financial Institutions, and their Affiliates and Related Entities, to receive compensation, such as 12b–1 fees, in connection with the purchase, sale or holding of an Asset by a Plan, participant or beneficiary account, or an IRA, as a result of the Adviser's and Financial Institution's advice, that occurred prior to the Applicability Date, as described and limited below.

(b) *Covered transaction.* Subject to the applicable conditions described below, the restrictions of ERISA section 406(a)(1)(D) and 406(b) and the sanctions imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(D), (E) and (F), shall not apply to the receipt of compensation by an Adviser, Financial Institution, and any Affiliate and Related Entity, for services provided in connection with the purchase, holding or sale of an Asset, as a result of the Adviser's and Financial Institution's advice, that was purchased, sold, or held by a Plan, participant or beneficiary account, or an IRA before the Applicability Date if:

(1) The compensation is not excluded pursuant to Section I(c) of the Best Interest Contract Exemption;

(2) The compensation is received pursuant to an agreement, arrangement or understanding that was entered into prior to the Applicability Date;

(3) The Adviser and Financial Institution do not provide additional advice to the Plan regarding the purchase, sale or holding of the Asset after the Applicability Date; and

(4) The purchase or sale of the Asset was not a non-exempt prohibited transaction pursuant to ERISA section 406 and Code section 4975 on the date it occurred.

Section VIII—Definitions

For purposes of these exemptions:

(a) ''Adviser'' means an individual who:

(1) Is a fiduciary of a Plan or IRA solely by reason of the provision of investment advice described in ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B), or both, and the applicable regulations, with respect to the Assets involved in the transaction;

(2) Is an employee, independent contractor, agent, or registered representative of a Financial Institution; and

(3) Satisfies the applicable federal and state regulatory and licensing requirements of insurance, banking, and securities laws with respect to the covered transaction.

(b) ''Affiliate'' of an Adviser or Financial Institution means—

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the Adviser or Financial Institution. For this purpose, ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual;

(2) Any officer, director, employee, agent, registered representative, relative (as defined in ERISA section 3(15)), member of family (as defined in Code section 4975(e)(6)) of, or partner in, the Adviser or Financial Institution; and

(3) Any corporation or partnership of which the Adviser or Financial Institution is an officer, director or employee or in which the Adviser or Financial Institution is a partner.

(c) An ''Asset,'' for purposes of this exemption, includes only the following investment products: Bank deposits, certificates of deposit (CDs), shares or interests in registered investment companies, bank collective funds, insurance company separate accounts, exchange-traded REITs, exchange-traded funds, corporate bonds offered pursuant to a registration statement under the Securities Act of 1933, agency debt securities as defined in FINRA Rule 6710(l) or its successor, U.S. Treasury securities as defined in FINRA Rule 6710(p) or its successor, insurance and annuity contracts, guaranteed investment contracts, and equity securities within the meaning of 17 CFR 230.405 that are exchange-traded securities within the meaning of 17 CFR 242.600. Excluded from this definition is any equity security that is a security future or a put, call, straddle, or other option or privilege of buying an equity security from or selling an equity security to another without being bound to do so.

(d) Investment advice is in the ''Best Interest'' of the Retirement Investor when the Adviser and Financial Institution providing the advice act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, without regard to the financial or other interests of the Adviser, Financial Institution or any Affiliate, Related Entity, or other party.

(e) ''Financial Institution'' means the entity that employs the Adviser or otherwise retains such individual as an independent contractor, agent or registered representative and that is:

(1) Registered as an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 *et seq.*) or under the laws of the state in which the adviser maintains its principal office and place of business;

(2) A bank or similar financial institution supervised by the United States or state, or a savings association (as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1)), but only if the advice resulting in the compensation is provided through a trust department of the bank or similar financial institution or savings association which is subject to periodic examination and review by federal or state banking authorities;

(3) An insurance company qualified to do business under the laws of a state, provided that such insurance company:

(A) Has obtained a Certificate of Authority from the insurance commissioner of its domiciliary state which has neither been revoked nor suspended,

(B) Has undergone and shall continue to undergo an examination by an Independent certified public accountant for its last completed taxable year or has undergone a financial examination (within the meaning of the law of its domiciliary state) by the state's insurance commissioner within the preceding 5 years, and

(C) Is domiciled in a state whose law requires that actuarial review of reserves be conducted annually by an Independent firm of actuaries and reported to the appropriate regulatory authority; or

(4) A broker or dealer registered under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

(f) "Independent" means a person that:

(1) Is not the Adviser, the Financial Institution or any Affiliate relying on the exemption,

(2) Does not receive compensation or other consideration for his or her own account from the Adviser, the Financial Institution or Affiliate; and

(3) Does not have a relationship to or an interest in the Adviser, the Financial Institution or Affiliate that might affect the exercise of the person's best judgment in connection with transactions described in this exemption.

(g) "Individual Retirement Account" or "IRA" means any trust, account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code.

(h) A "Material Conflict of Interest" exists when an Adviser or Financial Institution has a financial interest that could affect the exercise of its best judgment as a fiduciary in rendering advice to a Retirement Investor regarding an Asset.

(i) "Plan" means any employee benefit plan described in section 3(3) of the Act and any plan described in section 4975(e)(1)(A) of the Code.

(j) "Proprietary Product" means a product that is managed by the Financial Institution or any of its Affiliates.

(k) "Related Entity" means any entity other than an Affiliate in which the Adviser or Financial Institution has an interest which may affect the exercise of its best judgment as a fiduciary.

(l) "Retirement Investor" means—

(1) A participant or beneficiary of a Plan subject to Title I of ERISA with authority to direct the investment of assets in his or her Plan account or to take a distribution,

(2) The beneficial owner of an IRA acting on behalf of the IRA, or

(3) A plan sponsor as described in ERISA section 3(16)(B) (or any employee, officer or director thereof), of a non-participant-directed Plan subject to Title I of ERISA that has fewer than 100 participants, to the extent it acts as a fiduciary with authority to make investment decisions for the Plan.

(m) "Third-Party Payments" mean sales charges when not paid directly by the Plan, participant or beneficiary account, or IRA, 12b–1 fees and other payments paid to the Financial Institution or an Affiliate or Related Entity by a third party as a result of the purchase, sale or holding of an Asset by a Plan, participant or beneficiary account, or IRA.

Section IX—Data Request

Upon request by the Department, a Financial Institution that relies on the exemption in Section I shall provide, within a reasonable time, but in no event longer than six (6) months, after receipt of the request, the following information for the preceding six (6) year period:

(a) *Inflows.* At the Financial Institution level, for each Asset purchased, for each quarter:

(1) The aggregate number and identity of shares/units bought;

(2) The aggregate dollar amount invested and the cost to the Plan, participant or beneficiary account, or IRA associated with the purchase;

(3) The revenue received by the Financial Institution and any Affiliate in connection with the purchase of each Asset disaggregated by source; and

(4) The identity of each revenue source (*e.g.,* mutual fund, mutual fund adviser) and the reason the compensation was paid.

(b) *Outflows.* At the Financial Institution level for each Asset sold, for each quarter:

(1) The aggregate number of and identity of shares/units sold;

(2) The aggregate dollar amount received and the cost to the Plan, participant or beneficiary account, or IRA, associated with the sale;

(3) The revenue received by the Financial Institution and any Affiliate in connection with the sale of each Asset disaggregated by source; and

(4) The identity of each revenue source (*e.g.,* mutual fund, mutual fund adviser) and the reason the compensation was paid.

(c) *Holdings.* At the Financial Institution level for each Asset held at any time during each quarter:

(1) The aggregate number and identity of shares/units held at the end of such quarter;

(2) The aggregate cost incurred by the Plan, participant or beneficiary account, or IRA, during such quarter in connection with the holdings;

(3) The revenue received by the Financial Institution and any Affiliate in connection with the holding of each Asset during such quarter for each Asset disaggregated by source; and

(4) The identity of each revenue source (*e.g.,* mutual fund, mutual fund adviser) and the reason the compensation was paid.

(d) *Returns.* At the Retirement Investor level:

(1) The identity of the Adviser;

(2) The beginning-of-quarter value of the Retirement Investor's Portfolio;

(3) The end-of-quarter value of the Retirement Investor's Portfolio; and

(4) Each external cash flow to or from the Retirement Investor's Portfolio during the quarter and the date on which it occurred.

For purposes of this subparagraph (d), "Portfolio" means the Retirement Investor's combined holding of assets held in a Plan account or IRA advised by the Adviser.

(e) *Public Disclosure.* The Department reserves the right to publicly disclose information provided by the Financial Institution pursuant to subparagraph (d). If publicly disclosed, such information would be aggregated at the Adviser level, and the Department would not disclose any individually identifiable financial information regarding Retirement Investor accounts.

Signed at Washington, DC, this 14th day of April, 2015.

Phyllis C. Borzi,

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

APPENDIX I FINANCIAL INSTITUTION ABC—WEB SITE DISCLOSURE MODEL FORM

Type of investment	Provider, name, sub-type	Transactional			Ongoing			Affiliate	Special rules
		Charges to investor	Compensation to firm	Compensation to adviser	Charges to investor	Compensation to firm	Compensation to adviser		
Non-Proprietary Mutual Fund (Load Fund).	XYZ MF Large Cap Fund, Class A Class B Class C.	[•]% sales load as applicable.	[•]% dealer concession.	[•]% of transactional fee Extent considered in annual bonus.	[•]% expense ratio.	[•]% 12b–1 fee, revenue sharing (paid by fund/affiliate).	[•]% of ongoing fees. Extent considered in annual bonus.	N/A	Breakpoints (as applicable) Contingent deferred shares charge (as applicable)
Proprietary Mutual Fund (No load).	ABC MF Large Cap Fund.	No upfront charge.	N/A	N/A	[•]% expense ratio.	[•]% asset-based annual fee for shareholder servicing (paid by fund/affiliate).	[•]% of ongoing fees Extent considered in annual bonus.	[•]% asset-based investment advisory fee paid by fund to affiliate of Financial Institution.	N/A
Equities, ETFs, Fixed Income.	....	$[•] commission per transaction.	$[•] commission per transaction.	[•]% of commission Extent considered in annual bonus.	N/A	N/A	N/A Extent considered in annual bonus.	N/A	N/A
Annuities (Fixed and Variable).	Insurance Company A.	No upfront charge on amount invested.	$[•] commission (paid by insurer).	[•]% of commission Extent considered in annual bonus.	[•]% M&E fee [•]% underlying expense ratio.	$[•] Ongoing trailing commission (paid by underlying investment providers).	[•]% of ongoing fees Extent considered in annual bonus.	N/A	Surrender charge

APPENDIX II FINANCIAL INSTITUTION XZY—TRANSACTION DISCLOSURE MODEL CHART

	Your investment	Total cost of your investment if held for:		
		1 year	5 years	10 years
Asset 1				
Asset 2				
Asset 3				
Account fees				
Total				

[FR Doc. 2015–08832 Filed 4–15–15; 11:15 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

[Application Number D–11713]

ZRIN 1210–ZA25

Proposed Class Exemption for Principal Transactions in Certain Debt Securities between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs

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

ACTION: Notice of Proposed Class Exemption.

SUMMARY: This document contains a notice of pendency before the U.S. Department of Labor of a proposed exemption from certain prohibited transactions provisions of the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (the Code). The provisions at issue generally prohibit fiduciaries with respect to employee benefit plans and individual retirement accounts (IRAs) from purchasing and selling securities when the fiduciaries are acting on behalf of their own accounts (principal transactions). The exemption proposed in this notice would permit principal transactions in certain debt securities between a plan, plan participant or beneficiary account, or an IRA, and a fiduciary that provides investment advice to the plan or IRA, under conditions to safeguard the interests of these investors. The proposed exemption would affect participants and beneficiaries of plans, IRA owners, and fiduciaries with respect to such plans and IRAs.

DATES: *Comments:* Written comments concerning the proposed class exemption must be received by the Department on or before July 6, 2015.

Applicability: The Department proposes to make this exemption available eight months after publication of the final exemption in the **Federal Register**.

ADDRESSES: All written comments concerning the proposed class exemption should be sent to the Office of Exemption Determinations by any of the following methods, identified by ZRIN: 1210–ZA25:

Federal eRulemaking Portal: http://www.regulations.gov at Docket ID number: EBSA–EBSA–2014–0016. Follow the instructions for submitting comments.

Email to: e-OED@dol.gov.

Fax to: (202) 693–8474.

Mail: Office of Exemption Determinations, Employee Benefits Security Administration, (Attention: D–11713), U.S. Department of Labor, 200 Constitution Avenue NW., Suite 400, Washington, DC 20210.

Hand Delivery/Courier: Office of Exemption Determinations, Employee Benefits Security Administration, (Attention: D–11713), U.S. Department of Labor, 122 C St. NW., Suite 400, Washington, DC 20001.

Instructions. All comments must be received by the end of the comment period. The comments received will be available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N–1513, 200 Constitution Avenue NW., Washington, DC 20210. Comments will also be available online at *www.regulations.gov,* at Docket ID number: EBSA–2014–0016 and *www.dol.gov/ebsa,* at no charge.

ERISA section 408(a) and Code section 4975(c)(2), the Department must find that the class exemption as amended is administratively feasible, in the interests of the plan and of its participants and beneficiaries and IRA owners, and protective of the rights of the plan's participants and beneficiaries and IRA owners;

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

(4) If granted, this amended class exemption will be 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.

Proposed Amendment

Under the authority of ERISA section 408(a) and Code section 4975(c)(2), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, October 27, 2011),[15] the Department proposes to amend PTE 75–1, Part V, to read as follows:

The restrictions of section 406 of the Employee Retirement Income Security Act of 1974 (the Act) and the taxes imposed by section 4975(a) and (b) of the Internal Revenue Code of 1986 (the Code), by reason of section 4975(c)(1) of the Code, shall not apply to any extension of credit to an employee benefit plan or an individual retirement account (IRA) by a party in interest or a disqualified person with respect to the plan or IRA, provided that the following conditions are met:

(a) The party in interest or disqualified person:

(1) Is a broker or dealer registered under the Securities Exchange Act of 1934; and

(2) Does not have or exercise any discretionary authority or control (except as a directed trustee) with respect to the investment of the plan or IRA assets involved in the transaction, nor does it render investment advice (within the meaning of 29 CFR 2510.3–21) with respect to those assets, unless no interest or other consideration is received by the party in interest or disqualified person or any affiliate thereof in connection with such extension of credit.

[15] For purposes of this proposed amendment, references to ERISA should be read to refer as well to the corresponding provisions of the Code.

(b) Such extension of credit:

(1) Is in connection with the purchase or sale of securities;

(2) Is lawful under the Securities Exchange Act of 1934 and any rules and regulations promulgated thereunder; and

(3) Is not a prohibited transaction within the meaning of section 503(b) of the Code.

(c) Notwithstanding section (a)(2), a fiduciary within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) may receive reasonable compensation for extending credit to a plan or IRA to avoid a failed purchase or sale of securities involving the plan or IRA if:

(1) The potential failure of the purchase or sale of the securities is not the result of action or inaction by such fiduciary or an affiliate;

(2) The terms of the extension of credit are at least as favorable to the plan or IRA as the terms available in an arm's length transaction between unaffiliated parties;

(3) Prior to the extension of credit, the plan or IRA receives written disclosure of (i) the rate of interest (or other fees) that will apply and (ii) the method of determining the balance upon which interest will be charged, in the event that the fiduciary extends credit to avoid a failed purchase or sale of securities, as well as prior written disclosure of any changes to these terms. This Section (c)(3) will be considered satisfied if the plan or IRA receives the disclosure described in the Securities and Exchange Act Rule 10b–16;[16] and

(d) The broker-dealer engaging in the covered transaction maintains or causes to be maintained for a period of six years from the date of such transaction such records as are necessary to enable the persons described in paragraph (e) of this exemption to determine whether the conditions of this exemption have been met, except that:

(1) No party other than the broker-dealer engaging in the covered transaction shall be subject to the civil penalty which may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, if such records are not maintained, or are not available for examination as required by paragraph (e) below; and

(2) A prohibited transaction will not be deemed to have occurred if, due to circumstances beyond the control of the broker-dealer, such records are lost or destroyed prior to the end of such six-year period.

[16] 17 CFR 240.10b–16.

(e) Notwithstanding anything to the contrary in subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (d) are unconditionally available for examination during normal business hours by duly authorized employees of (1) the Department of Labor, (2) the Internal Revenue Service, (3) plan participants and beneficiaries and IRA owners, (4) any employer of plan participants and beneficiaries, and (5) any employee organization any of whose members are covered by such plan.

For purposes of this exemption, the terms "party in interest," "disqualified person" and "fiduciary" shall include such party in interest, disqualified person, or fiduciary, and any affiliates thereof, and the term "affiliate" shall be defined in the same manner as that term is defined in 29 CFR 2510.3–21(e) and 26 CFR 54.4975–9(e). Also for the purposes of this exemption, the term "IRA" means any trust, account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code.

Signed at Washington, DC, this 14th day of April, 2015.

Phyllis C. Borzi,

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

[FR Doc. 2015–08836 Filed 4–15–15; 11:15 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

[Application Number D–11850]

ZRIN: 1210–ZA25

Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption (PTE) 84–24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies and Investment Company Principal Underwriters

AGENCY: Employee Benefits Security Administration (EBSA), Department of Labor.

ACTION: Notice of Proposed Amendment to and Proposed Partial Revocation of PTE 84–24.

SUMMARY: This document contains a notice of pendency before the Department of Labor of a proposed amendment to Prohibited Transaction Exemption (PTE) 84–24, an exemption from certain prohibited transaction provisions of the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code of 1986 (the Code). The ERISA and Code provisions at issue generally prohibit fiduciaries with respect to employee benefit plans and individual retirement accounts (IRAs) from engaging in self-dealing in connection with transactions involving these plans and IRAs. The exemption allows fiduciaries to receive compensation when plans and IRAs enter into certain insurance and mutual fund transactions recommended by the fiduciaries as well as certain related transactions. The proposed amendments would increase the safeguards of the exemption. This document also contains a notice of pendency before the Department of the proposed revocation of the exemption as it applies to IRA purchases of mutual fund shares and certain annuity contracts. The amendments and revocations would affect participants and beneficiaries of plans, IRA owners and certain fiduciaries of plans and IRAs.

DATES: *Comments:* Written comments must be received by the Department on or before July 6, 2015.

Applicability: The Department proposes to make this amendment and partial revocation applicable eight months after the publication of the final amendment and partial revocation in the **Federal Register**.

ADDRESSES: All written comments concerning the proposed amendment and proposed revocation to the class exemption should be sent to the Office of Exemption Determinations by any of the following methods, identified by ZRIN: 1210–ZA25:

Federal eRulemaking Portal: *http://www.regulations.gov* at Docket ID number: EBSA–2014–0016. Follow the instructions for submitting comments.

Email to: e-OED@dol.gov.

Fax to: (202) 693–8474.

Mail: Office of Exemption Determinations, Employee Benefits Security Administration, (Attention: D–11850), U.S. Department of Labor, 200 Constitution Avenue NW., Suite 400, Washington, DC 20210.

Hand Delivery/Courier: Office of Exemption Determinations, Employee Benefits Security Administration, (Attention: D–11850), U.S. Department of Labor, 122 C St. NW., Suite 400, Washington, DC 20001.

Instructions. All comments must be received by the end of the comment period. The comments received will be available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N–1513, 200 Constitution Avenue NW., Washington, DC 20210. Comments will also be available online at *www.regulations.gov*, at Docket ID number: EBSA–2014–0016 and *www.dol.gov/ebsa*, at no charge.

Warning: All comments will be made available to the public. Do not include any personally identifiable information (such as Social Security number, name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

FOR FURTHER INFORMATION CONTACT: Brian Shiker, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Suite 400, Washington, DC 20210, (202) 693–8824 (not a toll-free number).

SUPPLEMENTARY INFORMATION: The Department is proposing the amendment to PTE 84–24 [1] on its own motion, pursuant to ERISA section 408(a) and Code section 4975(c)(2), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637 (October 27, 2011)).

Public Hearing: The Department plans to hold an administrative hearing within 30 days of the close of the comment period. The Department will ensure ample opportunity for public comment by reopening the record following the hearing and publication of the hearing transcript. Specific information regarding the date, location and submission of requests to testify will be published in a notice in the **Federal Register**.

Executive Summary

Purpose of Regulatory Action

This proposal is being published in the same issue of the **Federal Register** as the Department's proposed regulation that would amend the definition of a "fiduciary" of an employee benefit plan or an IRA under ERISA and the Internal Revenue Code (Proposed Regulation). The Proposed Regulation specifies when an entity is a fiduciary by reason of the provision of investment advice for a fee or other compensation regarding assets of a plan or IRA. If adopted, the Proposed Regulation would replace an existing regulation that was adopted in 1975. The Proposed Regulation is intended to take into account the advent of 401(k) plans and IRAs, the dramatic increase in rollovers, and other developments that have transformed the retirement plan landscape and the associated investment market over the four decades since the existing regulation was issued. In light of the extensive changes in retirement investment practices and relationships, the Proposed Regulation would update existing rules to distinguish more appropriately between the sorts of advice relationships that should be treated as fiduciary in nature and those that should not.

PTE 84–24 permits certain investment advice fiduciaries to receive commissions in connection with the purchase and sale of recommended insurance and annuity products and mutual fund shares by the plans and IRAs, and certain related transactions. In the absence of an exemption, ERISA and the Code generally prohibit fiduciaries from using their authority to affect or increase their own compensation. This proposal would revoke the exemption for certain transactions and amend the conditions under which fiduciaries may receive such compensation.

The Secretary of Labor may grant and amend administrative exemptions from the prohibited transaction provisions of ERISA and the Code.[2] Before granting an amendment to an exemption, the Department must find that the amended 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 such plans and IRA owners. Interested parties are permitted to submit comments to the Department through July 6, 2015. The Department plans to hold an administrative hearing within 30 days of the close of the comment period.

Summary of the Major Provisions

PTE 84–24 currently provides an exemption for certain prohibited transactions that occur when plans or IRAs purchase insurance and annuity contracts and shares in an investment

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[1] PTE 84–24, 49 FR 13208 (Apr. 3, 1984), as corrected, 49 FR 24819 (June 15, 1984), as amended, 71 FR 5887 (Feb. 3, 2006).

[2] Regulations at 29 CFR 2570.30 to 2570.52 describe the procedures for applying for an administrative exemption under ERISA. Code section 4975(c)(2) authorizes the Secretary of the Treasury to grant exemptions from the parallel prohibited transaction provisions of the Code. Reorganization Plan No. 4 of 1978 (5 U.S.C. app. at 214 (2000)) generally transferred the authority of the Secretary of the Treasury to issue administrative exemptions under Code section 4975 to the Secretary of Labor.

company registered under the Investment Company Act of 1940 (a mutual fund). The exemption permits insurance agents, insurance brokers and pension consultants that are parties in interest or fiduciaries with respect to plans and IRAs to effect the purchase of the insurance or annuity contracts for the plans or IRAs and receive a commission on the sale. The exemption is also available for the prohibited transaction that occurs when the insurance company selling the insurance or annuity contract is a party in interest or disqualified person with respect to the plan or IRA. Likewise, with respect to mutual fund transactions, PTE 84–24 permits mutual fund principal underwriters that are parties in interest or fiduciaries to effect the sale of mutual fund shares to plans or IRAs, and receive a commission on the transaction.

This proposal would make several changes to PTE 84–24. First, it would increase the safeguards of the exemption by requiring fiduciaries that rely on the exemption to adhere to certain ''Impartial Conduct Standards,'' including acting in the best interest of the plans and IRAs when providing advice, and by more precisely defining the types of payments that are permitted under the exemption.

Second, on a going forward basis, the amendment would revoke relief for insurance agents, insurance brokers and pension consultants to receive a commission in connection with the purchase by IRAs of variable annuity contracts and other annuity contracts that are securities under federal securities laws and for mutual fund principal underwriters to receive a commission in connection with the purchase by IRAs of mutual fund shares.[3] A new exemption for the receipt of compensation by fiduciaries that provide investment advice to IRA owners is proposed elsewhere in this issue of the **Federal Register** in the ''Best Interest Contract Exemption.'' The Department believes that the provisions in the Best Interest Contract Exemption better protect the interests of IRAs with respect to investment advice regarding securities products.

[3] For purposes of this amendment, the terms ''Individual Retirement Account'' or ''IRA'' mean any trust, account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code.

Executive Order 12866 and 13563 Statement

Under Executive Orders 12866 and 13563, the Department must determine whether a regulatory action is ''significant'' and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing and streamlining rules, and of promoting flexibility. It also requires federal agencies to develop a plan under which the agencies will periodically review their existing significant regulations to make the agencies' regulatory programs more effective or less burdensome in achieving their regulatory objectives.

Under Executive Order 12866, ''significant'' regulatory actions are subject to the requirements of the Executive Order and review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866, defines a ''significant regulatory action'' as an action that is likely to result in a rule (1) having an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as ''economically significant'' regulatory actions); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. Pursuant to the terms of the Executive Order, OMB has determined that this action is ''significant'' within the meaning of Section 3(f)(4) of the Executive Order. Accordingly, the Department has undertaken an assessment of the costs and benefits of the proposal, and OMB has reviewed this regulatory action.

Background

As explained more fully in the preamble to the Department's Proposed Regulation on the definition of fiduciary under ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B), also published in this issue of the **Federal Register**, ERISA is a comprehensive statute designed to protect the interests of plan participants and beneficiaries, the integrity of employee benefit plans, and the security of retirement, health, and other critical benefits. The broad public interest in ERISA-covered plans is reflected in its imposition of fiduciary responsibilities on parties engaging in important plan activities, as well as in the tax-favored status of plan assets and investments. One of the chief ways in which ERISA protects employee benefit plans is by requiring that plan fiduciaries comply with fundamental obligations rooted in the law of trusts. In particular, plan fiduciaries must manage plan assets prudently and with undivided loyalty to the plans and their participants and beneficiaries.[4] In addition, they must refrain from engaging in ''prohibited transactions,'' which ERISA does not permit because of the dangers posed by the fiduciaries' conflicts of interest with respect to the transactions.[5] When fiduciaries violate ERISA's fiduciary duties or the prohibited transaction rules, they may be held personally liable for the breach.[6] In addition, violations of the prohibited transaction rules are subject to excise taxes under the Code.

The Code also has rules regarding fiduciary conduct with respect to tax-favored accounts that are not generally covered by ERISA, such as IRAs. Although ERISA's general fiduciary obligations of prudence and loyalty do not govern the fiduciaries of IRAs, these fiduciaries are subject to the prohibited transaction rules. In this context fiduciaries engaging in the prohibited transactions are subject to an excise tax enforced by the Internal Revenue Service. Unlike participants in plans covered by Title I of ERISA, under the Code, IRA owners cannot bring suit against fiduciaries under ERISA for violation of the prohibited transaction rules and fiduciaries are not personally liable to IRA owners for the losses caused by their misconduct. Elsewhere in this issue of the **Federal Register**, however, the Department is proposing two new class exemptions that would create contractual obligations for the

[4] ERISA section 404(a).

[5] ERISA section 406. ERISA also prohibits certain transactions between a plan and a ''party in interest.''

[6] ERISA section 409; *see also* ERISA section 405.

adviser to adhere to certain standards (the Impartial Conduct Standards). IRA owners would have a right to enforce these new contractual obligations.

Under this statutory framework, the determination of who is a "fiduciary" is of central importance. Many of ERISA's and the Code's protections, duties, and liabilities hinge on fiduciary status. In relevant part, section 3(21)(A) of ERISA and section 4975(e)(3) of the Code provide that a person is a fiduciary with respect to a plan or IRA to the extent he or she (1) exercises any discretionary authority or discretionary control with respect to management of such plan or IRA, or exercises any authority or control with respect to management or disposition of its assets; (2) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan or IRA, or has any authority or responsibility to do so; or, (3) has any discretionary authority or discretionary responsibility in the administration of such plan or IRA.

ERISA section 406(a)(1)(A)–(D) and Code section 4975(c)(1)(A)–(D) prohibit certain transactions between plans or IRAs and "parties in interest," as defined in ERISA section 3(14), or "disqualified persons," as defined in Code section 4975(e)(2). Fiduciaries and other service providers are parties in interest and disqualified persons under ERISA and the Code. As a result, they are prohibited from engaging in (1) the sale, exchange or leasing of property with a plan or IRA, (2) the lending of money or other extension of credit to a plan or IRA, (3) the furnishing of goods, services or facilities to a plan or IRA and (4) the transfer to or use by or for the benefit of a party in interest of plan assets.

ERISA section 406(b) and Code section 4975(c)(1)(E) and (F) are aimed at fiduciaries only. These provisions generally prohibit a fiduciary from dealing with the income or assets of a plan or IRA in his or her own interest or his or her own account and from receiving payments from third parties in connection with transactions involving the plan or IRA. Parallel regulations issued by the Departments of Labor and the Treasury explain that these provisions impose on fiduciaries of plans and IRAs a duty not to act on conflicts of interest that may affect the fiduciary's best judgment on behalf of the plan or IRA. Under these provisions, a fiduciary may not cause a plan or IRA to pay an additional fee to such fiduciary, or to a person in which such fiduciary has an interest that may affect the exercise of the fiduciary's best judgment.

In the Department's view, the receipt of a commission on the sale of an insurance or annuity contract or mutual fund shares by a fiduciary that recommended the investment violates the prohibited transaction provisions of ERISA section 406(b) and Code section 4975(c)(1)(E) and (F). The effecting of the sale by a fiduciary or service provider is a service, potentially in violation of ERISA section 406(a)(1)(C) and Code section 4975(c)(1)(C). Finally, the purchase of an insurance or annuity contract by a plan or IRA from an insurance company that is a fiduciary, service provider or other party in interest or disqualified person, violates ERISA section 406(a)(1)(A) and (D) and Code section 4975(c)(1)(A) and (D).

PTE 84–24 provides an exemption for these transactions for the following parties: insurance agents, insurance brokers, pension consultants, insurance companies and mutual fund principal underwriters. Currently, PTE 84–24 provides relief to these parties in connection with transactions involving both employee benefit plans, as defined in ERISA section 3(3), as well as IRAs and other plans described in Code section 4975, such as Archer MSAs described in Code section 220(d), health savings accounts described in Code section 223(d) and Coverdell education savings accounts described in Code section 530.[7]

Specifically, PTE 84–24 permits insurance agents, insurance brokers and pension consultants to receive, directly or indirectly, a commission for selling insurance or annuity contracts to plans and IRAs. The exemption also permits the purchase by plans and IRAs of insurance and annuity contracts from insurance companies that are parties in interest or disqualified persons. The term "insurance and annuity contract" includes variable annuities.[8]

In the area of mutual fund transactions, PTE 84–24 permits the mutual fund's principal underwriter to receive commissions in connection with a plan's or IRA's purchase of mutual fund shares. The term "principal underwriter" is defined in the same manner as it is defined in section 2(a)(29) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(29)).[9]

PTE 84–24 contains conditions under which the transactions must occur in order for the exemption to apply. Generally, the exemption requires that the transaction involving the insurance or annuity contract or mutual fund shares be effected by the insurance agent, insurance broker, insurance company, pension consultant or mutual fund principal underwriter in the ordinary course of its business. The terms of the transaction must be at least as favorable to the plan or IRA as an arm's length transaction, and the party relying on the exemption must receive no more than reasonable compensation.

Additionally, the exemption restricts the parties that may use the exemption. Accordingly, the insurance agent, insurance broker, pension consultant, insurance company or investment company principal underwriter, and their affiliates, may not be a plan administrator (within the meaning of ERISA section 3(16) and Code section 414(g)), or an employer of employees covered by the plan.

Further, the insurance agent, insurance broker, pension consultant, insurance company or investment company principal underwriter may not be a trustee of the plan (other than a nondiscretionary trustee who does not render investment advice with respect to any assets of the plan) or a fiduciary who is expressly authorized in writing to manage, acquire or dispose of the assets of the plan on a discretionary basis (*i.e.*, an investment manager). However, these entities may be affiliated with discretionary trustees or investment managers if the trustee or investment manager affiliate has no discretionary authority or control over the plan assets involved in the transaction other than as a nondiscretionary trustee.

The exemption requires that certain disclosures be made to an independent fiduciary of the plan or IRA, following which the independent fiduciary must approve the transaction. In the case of the purchase of an insurance or annuity contract, the insurance agent, insurance broker or pension consultant must disclose its relationship with the insurance company, the sales commission it will receive (including for renewal years), and a description of any charges, fees, discounts, penalties or

[7] *See* PTE 2002–13, 67 FR 9483 (March 1, 2002) (preamble discussion of certain exemptions, including PTE 84–24, that apply to plans described in Code section 4975).

[8] *See* PTE 77–9, 42 FR 32395 (June 24, 1977) (predecessor to PTE 84–24).

[9] The exemption also provides relief for: (1) The purchase, with plan assets, of an insurance or annuity contract from an insurance company which is a fiduciary or a service provider (or both) with respect to the plan solely by reason of the sponsorship of a master or prototype plan, and (2) The purchase, with plan assets, of mutual fund shares from, or the sale of such securities to, a mutual fund or mutual fund principal underwriter, when such mutual fund or its principal underwriter or investment adviser is a fiduciary or a service provider (or both) with respect to the plan solely by reason of: the sponsorship of a master or prototype plan or the provision of nondiscretionary trust services to the plan; or both.

adjustments which may be imposed under the recommended contract in connection with the purchase, holding, exchange, termination or sale of such contract.

In the case of mutual fund shares, the principal underwriter similarly must disclose its relationship with the mutual fund, the sales commission it will receive, a description of any charges, fees, discounts, penalties, or adjustments which may be imposed under the recommended mutual fund shares in connection with the purchase, holding, exchange, termination or sale of such shares.

If granted, this proposal would make changes, discussed below, to PTE 84–24, as well as a re-ordering of the sections of the exemption and the definitions set forth in the exemption.

Description of the Proposal

I. Impartial Conduct Standards

This proposal would amend PTE 84–24 to require insurance agents, insurance brokers, pension consultants, insurance companies and mutual fund principal underwriters that are fiduciaries engaging in the exempted transactions to adhere to certain Impartial Conduct Standards. The Impartial Conduct Standards are set forth in a new proposed Section II.

Under the first conduct standard, the insurance agent, insurance broker, pension consultant, insurance company or mutual fund principal underwriter would be required to act in the plan's or IRA's best interest when providing investment advice regarding the purchase of the insurance or annuity contract or mutual fund shares. Best interest is defined as acting with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and the needs of the plan or IRA. Further, under the best interest standard, the insurance agent, insurance broker, pension consultant, insurance company or mutual fund principal underwriter must act without regard to its own financial or other interests or those of any affiliate or other party. Under this standard, the fiduciary must put the interests of the plan or IRA ahead of the fiduciary's own financial interests or those of its affiliates or any other party.

In this regard, the Department notes that while fiduciaries of plans covered by ERISA are subject to the ERISA section 404 standards of prudence and loyalty, the Code contains no provisions that hold IRA fiduciaries to these standards. However, as a condition of relief under the proposed amendment, both IRA and plan fiduciaries would have to uphold the best interest and other Impartial Conduct Standards set forth in Section II. The best interest standard is defined to effectively mirror the ERISA section 404 duties of prudence and loyalty, as applied in the context of fiduciary investment advice.

The second conduct standard requires that the statements by the insurance agent, insurance broker, pension consultant, insurance company or mutual fund principal underwriter about recommended investments, fees, material conflicts of interest, and any other matters relevant to a plan's or IRA owner's investment decisions, are not misleading. For this purpose, the failure to disclose a material conflict of interest relevant to the services the entity is providing or other actions it is taking in relation to a plan's or IRA owner's investment decisions is deemed to be a misleading statement. Transactions that violate the requirements are not likely to be in the interests of or protective of plans and their participants and beneficiaries and IRA owners.

Unlike the new exemption proposals published elsewhere in the **Federal Register**, the Impartial Conduct Standards proposed herein do not include a requirement that the compensation received by the fiduciary and affiliates be reasonable. Such a requirement already exists under Section IV(c) of the exemption, and is therefore unnecessary in Section II.

Additionally, unlike the new exemption proposals, this proposed amendment does not require fiduciaries to contractually warrant compliance with applicable federal and state laws. However, the Department notes that significant violations of applicable federal or state law could also amount to violations of the Impartial Conduct Standards, such as the best interest standard, in which case, this exemption, as amended, would be deemed unavailable for transactions occurring in connection with such violations.

II. IRAs

Since PTE 84–24 was initially granted,[10] the amount of assets held in IRAs has grown dramatically. The financial services marketplace has become more complex, and compensation structures and the types of products offered have changed significantly beyond what the Department contemplated at the time. The fact that IRA owners generally do not benefit from the protections afforded by the fiduciary duties owed by plan sponsors to their employee benefit plans makes it all the more critical that their interests are protected by appropriate conditions in the Department's exemptions.

In connection with the Department's Proposed Regulation on the definition of fiduciary the Department has also proposed, elsewhere in this issue of the **Federal Register**, new class exemptions applicable to investment advice fiduciaries. The proposed "Best Interest Contract Exemption" would permit investment advice fiduciaries to receive compensation in a broad range of transactions commonly entered into by retail retirement investors (plan participants and beneficiaries, IRA owners and small plan sponsors) including investment in stocks, bonds, mutual funds and insurance and annuity contracts, and it contains safeguards specifically crafted for these investors.

The Best Interest Contract Exemption would require investment advice fiduciaries—including both the individual adviser and the firm that the adviser is employed by or otherwise the agent of—to contractually acknowledge fiduciary status, commit to adhere to basic standards of impartial conduct, adopt policies and procedures reasonably designed to minimize the harmful impact of conflicts of interest, and disclose basic information on their conflicts of interest. As a result, the exemption ensures that IRA owners have a contract-based claim to hold their fiduciary investment advisers accountable if they violate basic obligations of prudence and loyalty. Additionally, the Best Interest Contract Exemption would require detailed disclosure of fees associated with investments and the compensation received by investment advice fiduciaries in connection with the transactions.

As the Best Interest Contract Exemption was designed for IRA owners and other investors that rely on fiduciary investment advisers in the retail marketplace, the Department believes that some of the transactions involving IRAs that are currently permitted under PTE 84–24 should instead occur under the conditions of the Best Interest Contract Exemption, specifically, transactions involving variable annuity contracts and other annuity contracts that are securities under federal securities laws, and mutual fund shares. Therefore, this proposal would revoke relief in PTE 84–24 for such transactions. This change is

[10] PTE 84–24 was preceded by PTE 77–9, 42 FR 32395 (June 24, 1977), as corrected, 42 FR 33817 (July 1, 1977), and as amended, 44 FR 1479 (Jan. 5, 1979) and 44 FR 52365 (Sept. 7, 1979).

reflected in a proposed new Section I(b), setting forth the scope of the exemption. On the other hand, the Department has determined that transactions involving insurance and annuity contracts that are not securities can continue to occur under this exemption, with the added protections of the Impartial Conduct Standards.

In this proposal, therefore, the Department has distinguished between transactions that involve securities and those that involve insurance products that are not securities. The Department believes that annuity contracts that are securities and mutual fund shares are distributed through the same channels as many other investments covered by the Best Interest Contract Exemption, and such investment products all have similar disclosure requirements under existing regulations. In that respect, the conditions of the proposed Best Interest Contract Exemption are appropriately tailored for such transactions.

The Department is not certain that the conditions of the Best Interest Contract Exemption, including some of the disclosure requirements, would be readily applicable to insurance and annuity contracts that are not securities, or that the distribution methods and channels of insurance products that are not securities would fit within the exemption's framework. While the Best Interest Contract Exemption will be available for such products, the Department is seeking comment in that proposal on a number of issues related to use of that exemption for such insurance and annuity products.

The Department requests comment on this approach. In particular, the Department requests comment on whether the proposal to revoke relief for securities transactions involving IRAs (*i.e.*, annuities that are securities and mutual funds) but leave in place relief for IRA transactions involving insurance and annuity contracts that are not securities strikes the appropriate balance and is protective of the interests of the IRAs.

III. Commissions

While PTE 84–24 provides an exemption for the specified parties to receive commissions in connection with the purchase of the insurance or annuity contracts and mutual fund shares, it does not currently contain a definition of commission. To provide certainty with respect to the payments permitted by the exemption, specific definitions for both (1) insurance commissions and (2) mutual fund commissions are now proposed in Section VI.

Section VI(f) would define an insurance commission to mean a sales commission paid by the insurance company or an affiliate to the insurance agent, insurance broker or pension consultant for the service of effecting the purchase or sale of an insurance or annuity contract, including renewal fees and trailers that are paid in connection with the purchase or sale of the insurance or annuity contract. As proposed, insurance commissions would not include revenue sharing payments, administrative fees or marketing fees. Additionally, the term does not include payments from parties other than the insurance company or its affiliates, and it does not include payments that result from the underlying investments that are held pursuant to the insurance contract, such as payments derived from a variable annuity's investments.

Section VI(i) would define a mutual fund commission to mean a commission or sales load paid either by the plan or the mutual fund for the service of effecting or executing the purchase or sale of mutual fund shares, but not a 12b–1 fee, revenue sharing payment, administrative fee or marketing fee.

IV. Recordkeeping Requirements

A new proposed Section V to PTE 84–24 would require the fiduciary engaging in a transaction covered by the exemption to maintain records necessary to enable certain persons (described in proposed Section V(b)) to determine whether the conditions of this exemption have been met. This requirement would replace the more limited existing recordkeeping requirement in Section V(e). The proposed recordkeeping requirement is consistent with other existing class exemptions as well as the recordkeeping provisions of the other notices of proposed exemption published in this issue of the **Federal Register**, and is intended to be protective of rights of plan participants and beneficiaries and IRA owners by ensuring they and the Department can confirm the exemption has been satisfied.

V. Other

Finally, the proposed amendment makes several minor changes in order to update PTE 84–24. The definitions have been reordered in alphabetical order for ease of use. Section I has been deleted because retroactive relief is no longer necessary, and Section II and III have been combined in order to increase readability and clarity. Finally, the term ''Act'' has been replaced with ''ERISA'' to reflect modern usage.

Applicability Date

The Department is proposing that compliance with the final regulation defining a fiduciary under ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) will begin eight months after publication of the final regulation in the **Federal Register** (Applicability Date). The Department proposes to make the amendments to and partial revocation of this exemption, if granted, applicable on the Applicability Date.

Paperwork Reduction Act Statement

As part of its continuing effort to reduce paperwork and respondent burden, the Department of Labor conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that the public understands the Department's collection instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

Currently, the Department is soliciting comments concerning the proposed information collection request (ICR) included in the Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption (PTE) 84–24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters as part of its proposal to amend its 1975 rule that defines when a person who provides investment advice to an employee benefit plan or IRA becomes a fiduciary. A copy of the ICR may be obtained by contacting the PRA addressee shown below or at *http://www.RegInfo.gov.*

The Department has submitted a copy of the proposed amendment to and proposed partial revocation of PTE 84–24 to the Office of Management and Budget (OMB) in accordance with 44 U.S.C. 3507(d) for review of its information collections. The Department and OMB are particularly interested in comments that:

- Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the

collection of information, including the validity of the methodology and assumptions used;

• Enhance the quality, utility, and clarity of the information to be collected; and

• Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Comments should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for the Employee Benefits Security Administration. OMB requests that comments be received within 30 days of publication of the Proposed Amendments to ensure their consideration.

PRA Addressee: Address requests for copies of the ICR to G. Christopher Cosby, Office of Policy and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue NW., Room N–5718, Washington, DC 20210. Telephone (202) 693–8410; Fax: (202) 219–5333. These are not toll-free numbers. ICRs submitted to OMB also are available at *http://www.RegInfo.gov.*

As discussed in detail below, PTE 84–24, as amended, would require insurance agents and brokers, pension consultants, insurance companies, and investment company Principal Underwriters to make certain disclosures to and receive an advance written authorization from plan fiduciaries in order to receive relief from ERISA's and the Code's prohibited transaction rules for the receipt of compensation when plans enter into certain insurance and mutual fund transactions recommended by the fiduciaries. The proposed amendment would require insurance agents and brokers, pension consultants, insurance companies, and investment company Principal Underwriters relying on PTE 84–24 to maintain records necessary to prove that the conditions of the exemption have been met. These requirements are information collection requests (ICRs) subject to the Paperwork Reduction Act.

The Department has made the following assumptions in order to establish a reasonable estimate of the paperwork burden associated with these ICRs:

• 38% of disclosures to and advance authorizations from plans, as well as 50% of disclosures to and advance authorizations from IRAs will be distributed electronically via means already used by respondents in the normal course of business and the costs arising from electronic distribution will be negligible;

• Insurance agents and brokers, pension consultants, insurance companies, investment company Principal Underwriters, and plans will use existing in-house resources to prepare the legal authorizations and disclosures, and maintain the recordkeeping systems necessary to meet the requirements of the exemption;

• A combination of personnel will perform the tasks associated with the ICRs at an hourly wage rate of $125.95 for a financial manager, $30.42 for clerical personnel, and $129.94 for a legal professional; and [11]

• Eight percent of plans and nine percent of IRAs have relationships with insurance agents and brokers, pension consultants, and insurance companies.

• Approximately 1,300 insurance agents and brokers, pension consultants, and insurance companies will take advantage of this exemption with all of their client plans and IRAs.[12]

• Ten investment company Principal Underwriters will take advantage of this exemption and each will do so once with one client plan annually.[13]

Disclosures and Consent Forms

In order to receive commissions in conjunction with the purchase of insurance or annuity contracts, section IV(b) of PTE 84–24 as amended requires the insurance agent or broker or pension consultant to obtain advance written authorization from a plan fiduciary or IRA holder independent of the insurance company (the independent fiduciary) following certain disclosures, including: if the agent, broker, or consultant is an Affiliate of the insurance company whose contract is being recommended, or if the ability of the agent, broker, or consultant to recommend insurance or annuity contracts is limited by any agreement with the insurance company, the nature of the affiliation, limitation, or relationship; the insurance commission; and a description of any charges, fees, discounts, penalties, or adjustments which may be imposed under the recommended contract.

In order to receive commissions in conjunction with the purchase of securities issued by an investment company, section IV(c) of PTE 84–24 as amended requires the investment company Principal Underwriter to obtain approval from an independent plan fiduciary following certain disclosures: if the person recommending securities issued by an investment company is the Principal Underwriter of the investment company whose securities are being recommended, the nature of the relationship and of any limitation it places upon the Principal Underwriter's ability to recommend investment company securities; the commission; and a description of any charges, fees, discounts, penalties, or adjustments which may be imposed under the recommended securities in connection with the purchase, holding, exchange, termination, or sale of the securities. Unless facts or circumstances would indicate the contrary, the approval required under section IV(c) may be presumed if the independent plan fiduciary permits the transaction to proceed after receipt of the written disclosure.

Legal Costs

According to 2012 Annual Return/Report of Employee Benefit (Form 5500) data and Internal Revenue Service Statistics of Income data, the Department estimates that there are approximately 677,000 ERISA covered pension plans and approximately 54.5 million individual retirement accounts (IRAs). Of these plans and IRAs, the Department assumes that 6.5 percent are new plans/IRAs or plans/IRAs entering into relationships with new financial institutions and, as stated previously, eight percent of these new plans and nine percent of these new IRAs will engage in transactions covered under PTE 84–24 with insurance agents or brokers and pension consultants. In the

[11] The Department's estimated 2015 hourly labor rates include wages, other benefits, and overhead, and are calculated as follows: mean wage from the 2013 National Occupational Employment Survey (April 2014, Bureau of Labor Statistics *http://www.bls.gov/news.release/pdf/ocwage.pdf*); wages as a percent of total compensation from the Employer Cost for Employee Compensation (June 2014, Bureau of Labor Statistics *http://www.bls.gov/news.release/ecec.t02.htm*); overhead as a multiple of compensation is assumed to be 25 percent of total compensation for paraprofessionals, 20 percent of compensation for clerical, and 35 percent of compensation for professional; annual inflation assumed to be 2.3 percent annual growth of total labor cost since 2013 (Employment Costs Index data for private industry, September 2014 *http://www.bls.gov/news.release/eci.nr0.htm*).

[12] As described in the regulatory impact analysis for the accompanying rule, the Department estimates that approximately 1,300 insurance agents and pension consultants service the retirement market.

[13] In the Department's experience, investment company Principal Underwriters almost never use PTE 84–24. Therefore, the Department assumes that ten investment company Principal Underwriters will engage in one transaction annually under PTE 84–24.

plan universe, the Department assumes that a legal professional will spend one hour per plan reviewing the disclosures and preparing an authorization form for each of the approximately 3,500 plans entering into new relationships each year. In the IRA universe, the Department assumes that a legal professional working on behalf of each of the 1,300 insurance agents or pension consultants will spend one hour drafting an authorization form for IRA holders to sign. The Department also estimates that it will take two hours of legal time for each of the approximately 1,300 insurance companies and pension consultants, and one hour of legal time for each of the ten investment company Principal Underwriters, to produce the disclosures.[14] This legal work results in a total of approximately 7,000 hours annually at an equivalent cost of $965,000.

Production and Distribution of Required Disclosures

The Department estimates that approximately 54,000 plans and 4.9 million IRAs have relationships with insurance agents or brokers and pension consultants and are likely to engage in transactions covered under this exemption. Of these 54,000 plans and 4.9 million IRAs, approximately 3,500 plans and 319,000 IRAs are new clients to the insurance agents or brokers and pension consultants each year. The Department assumes that ten plans have relationships with investment company Principal Underwriters that are new each year.

The Department estimates that 3,500 plans will send insurance agents or brokers and pension consultants a two page authorization letter and 319,000 IRAs will receive a two page authorization letter from insurance agents or brokers and pension consultants each year. Prior to obtaining authorization, insurance companies and pension consultants will send the same 3,500 plans and 319,000 IRAs a seven page pre-authorization disclosure. Paper copies of the authorization letter and the pre-authorization disclosure will be mailed for 62 percent of the plans and distributed electronically for the remaining 38 percent. Paper copies of the authorization letter and the pre-authorization disclosure will be mailed to 50 percent of the IRAs and distributed electronically to the remaining 50 percent. The Department estimates that electronic distribution will result in a de minimis cost, while paper distribution will cost approximately $231,000. Paper distribution of the letter and disclosure will also require two minutes of clerical preparation time resulting in a total of 11,000 hours at an equivalent cost of approximately $328,000.

The Department estimates that ten plans will receive the seven page pre-transaction disclosure from investment company Principal Underwriters; 38 percent will be distributed electronically and 62 percent will be mailed. The Department estimates that electronic distribution will result in a de minimis cost, while the paper distribution will cost $5. Paper distribution will also require two minutes of clerical preparation time resulting in a total of 12 minutes at an equivalent cost of $6. Approval to investment company Principal Underwriters will be granted orally at de minimis cost.

Recordkeeping Requirement

Section V of PTE 84–24, as amended, would require insurance agents and brokers, insurance companies, pension consultants, and investment company Principal Underwriters to maintain or cause to be maintained for six years and disclosed upon request the records necessary for the Department, Internal Revenue Service, plan fiduciary, contributing employer or employee organization whose members are covered by the plan, plan participant, beneficiary or IRA owner, to determine whether the conditions of this exemption have been met.

The Department assumes that each institution will maintain these records on behalf of their client plans in their normal course of business. Therefore, the Department has estimated that the additional time needed to maintain records consistent with the exemption will only require about one-half hour, on average, annually for a financial manager to organize and collate the documents or else draft a notice explaining that the information is exempt from disclosure, and an additional 15 minutes of clerical time to make the documents available for inspection during normal business hours or prepare the paper notice explaining that the information is exempt from disclosure. Thus, the Department estimates that a total of 45 minutes of professional time per financial institution per year would be required for a total hour burden of 1,000 hours at an equivalent cost of $92,000.

In connection with the recordkeeping and disclosure requirements discussed above, Section V(b) (2) and (3) of PTE 84–24 provides that parties relying on the exemption do not have to disclose trade secrets or other confidential information to members of the public (*i.e.,* plan fiduciaries, contributing employers or employee organizations whose members are covered by the plan, participants and beneficiaries and IRA owners), but that in the event a party refuses to disclose information on this basis, it must provide a written notice to the requester advising of the reasons for the refusal and advising that the Department may request such information. The Department's experience indicates that this provision is not commonly invoked, and therefore, the written notice is rarely, if ever, generated. Therefore, the Department believes the cost burden associated with this clause is de minimis. No other cost burden exists with respect to recordkeeping.

Overall Summary

Overall, the Department estimates that in order to meet the conditions of this amended class exemption, almost 5,000 financial institutions and plans will produce 645,000 disclosures and notices annually. These disclosures and notices will result in over 19,000 burden hours annually, at an equivalent cost of $1.4 million. This exemption will also result in a total annual cost burden of over $231,000.

These paperwork burden estimates are summarized as follows:

Type of Review: New collection (Request for new OMB Control Number).

Agency: Employee Benefits Security Administration, Department of Labor.

Titles: (1) Proposed Amendment to and Partial Revocation of Prohibited Transaction Exemption (PTE) 84–24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies and Investment Company Principal Underwriters.

OMB Control Number: 1210–NEW.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 4,828.

Estimated Number of Annual Responses: 644,669.

Frequency of Response: Initially, Annually, When engaging in exempted transaction.

Estimated Total Annual Burden Hours: 19,184 hours.

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[14] The Department assumes that it will require one hour of legal time per financial institution to prepare plan-oriented disclosures and one hour of legal time per financial institution to prepare IRA-oriented disclosures. Because insurance agents and pension consultants are permitted to use PTE 84–24 in their transactions with both plans and IRAs, this totals two hours of legal burden each. Because investment company principal underwriters are only permitted to use PTE 84–24 in their transactions with plans, this totals one hour of legal burden each.

Estimated Total Annual Burden Cost: $231,074.

General Information

The attention of interested persons is directed to the following:

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

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

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

(4) This amended exemption, if granted, will be 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.

Written Comments

The Department invites all interested persons to submit written comments on the proposed amendment and proposed partial revocation to the address and within the time period set forth above. All comments received will be made a part of the public record for this proceeding and will be available for examination on the Department's Internet Web site. Comments should state the reasons for the writer's interest in the proposal. Comments received will be available for public inspection at the above address.

Proposed Amendment to PTE 84–24

Under section 408(a) of the Employee Retirement Income Security Act of 1974, as amended (ERISA) and section 4975(c)(2) of the Internal Revenue Code of 1986, as amended (the Code), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644 (October 27, 2011)), the Department proposes to amend and restate PTE 84–24 as set forth below:

Section I. Covered Transactions

(a) *Exemptions.* The restrictions of ERISA section 406(a)(1)(A) through (D) and 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code section 4975(c)(1)(A) through (F), do not apply to any of the following transactions if the conditions set forth in Sections II, III, IV and V, as applicable, are met:

(1) The receipt, directly or indirectly, by an insurance agent or broker or a pension consultant of an Insurance Commission from an insurance company in connection with the purchase, with plan assets, of an insurance or annuity contract.

(2) The receipt of a Mutual Fund Commission by a Principal Underwriter for an investment company registered under the Investment Company Act of 1940 (an investment company) in connection with the purchase, with plan assets, of securities issued by an investment company.

(3) The effecting by an insurance agent or broker, pension consultant or investment company principal underwriter of a transaction for the purchase, with plan assets, of an insurance or annuity contract or securities issued by an investment company.

(4) The purchase, with plan assets, of an insurance or annuity contract from an insurance company.

(5) The purchase, with plan assets, of an insurance or annuity contract from an insurance company which is a fiduciary or a service provider (or both) with respect to the plan solely by reason of the sponsorship of a Master or Prototype Plan.

(6) The purchase, with plan assets, of securities issued by an investment company from, or the sale of such securities to, an investment company or an investment company Principal Underwriter, when the investment company, Principal Underwriter, or the investment company investment adviser is a fiduciary or a service provider (or both) with respect to the plan solely by reason of: (A) The sponsorship of a Master or Prototype Plan; or (B) the provision of Nondiscretionary Trust Services to the plan; or (C) both (A) and (B).

(b) *Scope of these Exemptions.* The exemptions set forth in Section I(a) do not apply to the purchase by an Individual Retirement Account as defined in Section VI, of (1) a variable annuity contract or other annuity contract that is a security under federal securities laws, or (2) mutual fund shares.

Section II. Impartial Conduct Standards

If the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter is a fiduciary within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) with respect to the assets involved in the transaction, the following conditions must be satisfied with respect to the transaction to the extent they are applicable to the fiduciary's actions:

(a) When exercising fiduciary authority described in ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) with respect to the assets involved in the transaction, the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter acts in the Best Interest of the plan or IRA; and

(b) The statements by the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter about recommended investments, fees, Material Conflicts of Interest, and any other matters relevant to a plan's or IRA owner's investment decisions, are not misleading. For this purpose, the insurance agent's or broker's, pension consultant's, insurance company's or investment company Principal Underwriter's failure to disclose a Material Conflict of Interest relevant to the services it is providing or other actions it is taking in relation to a plan's or IRA owner's investment decisions is deemed to be a misleading statement.

Section III. General Conditions

(a) The transaction is effected by the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter in the ordinary course of its business as such a person.

(b) The transaction is on terms at least as favorable to the plan or IRA as an arm's length transaction with an unrelated party would be.

(c) The combined total of all fees, Insurance Commissions, Mutual Fund Commissions and other consideration received by the insurance agent or broker, pension consultant, insurance company, or investment company Principal Underwriter:

(1) For the provision of services to the plan or IRA; and

(2) In connection with the purchase of insurance or annuity contracts or securities issued by an investment company is not in excess of ''reasonable compensation'' within the contemplation of ERISA section 408(b)(2) and 408(c)(2) and Code section 4975(d)(2) and 4975(d)(10). If the total is in excess of ''reasonable compensation,'' the ''amount involved'' for purposes of the civil penalties of ERISA section 502(i) and the excise taxes imposed by Code section 4975 (a) and (b) is the amount of compensation in excess of ''reasonable compensation.''

Section IV. Conditions for Transactions Described in Section I(a)(1) Through (4)

The following conditions apply solely to a transaction described in paragraphs (a)(1), (2), (3) or (4) of Section I:

(a) The insurance agent or broker, pension consultant, insurance company, or investment company Principal Underwriter is not (1) a trustee of the plan or IRA (other than a Nondiscretionary Trustee who does not render investment advice with respect to any assets of the plan), (2) a plan administrator (within the meaning of ERISA section 3(16)(A) and Code section 414(g)), (3) a fiduciary who is expressly authorized in writing to manage, acquire or dispose of the assets of the plan or IRA on a discretionary basis, or (4) an employer any of whose employees are covered by the plan. Notwithstanding the above, an insurance agent or broker, pension consultant, insurance company, or investment company Principal Underwriter that is Affiliated with a trustee or an investment manager (within the meaning of Section VI(e)) with respect to a plan or IRA may engage in a transaction described in Section I(a)(1)–(4) of this exemption (if permitted under Section I(b)) on behalf of the plan or IRA if the trustee or investment manager has no discretionary authority or control over the assets of the plan or IRA involved in the transaction other than as a Nondiscretionary Trustee.

(b)(1) With respect to a transaction involving the purchase with plan or IRA assets of an insurance or annuity contract or the receipt of an Insurance Commission thereon, the insurance agent or broker or pension consultant provides to an independent fiduciary with respect to the plan or IRA prior to the execution of the transaction the following information in writing and in a form calculated to be understood by a plan fiduciary who has no special expertise in insurance or investment matters:

(A) If the agent, broker, or consultant is an Affiliate of the insurance company whose contract is being recommended, or if the ability of the agent, broker or consultant to recommend insurance or annuity contracts is limited by any agreement with the insurance company, the nature of the affiliation, limitation, or relationship;

(B) The Insurance Commission, expressed as a percentage of gross annual premium payments for the first year and for each of the succeeding renewal years, that will be paid by the insurance company to the agent, broker or consultant in connection with the purchase of the recommended contract; and

(C) A description of any charges, fees, discounts, penalties or adjustments which may be imposed under the recommended contract in connection with the purchase, holding, exchange, termination or sale of the contract.

(2) Following the receipt of the information required to be disclosed in paragraph (b)(1), and prior to the execution of the transaction, the independent fiduciary acknowledges in writing receipt of the information and approves the transaction on behalf of the plan. The fiduciary may be an employer of employees covered by the plan, but may not be an insurance agent or broker, pension consultant or insurance company involved in the transaction. The fiduciary may not receive, directly or indirectly (*e.g.,* through an Affiliate), any compensation or other consideration for his or her own personal account from any party dealing with the plan in connection with the transaction.

(c)(1) With respect to a transaction involving the purchase with plan assets of securities issued by an investment company or the receipt of a Mutual Fund Commission thereon by an investment company Principal Underwriter, the investment company Principal Underwriter provides to an independent fiduciary with respect to the plan, prior to the execution of the transaction, the following information in writing and in a form calculated to be understood by a plan fiduciary who has no special expertise in insurance or investment matters:

(A) If the person recommending securities issued by an investment company is the Principal Underwriter of the investment company whose securities are being recommended, the nature of the relationship and of any limitation it places upon the Principal Underwriter's ability to recommend investment company securities;

(B) The Mutual Fund commission, expressed as a percentage of the dollar amount of the plan's gross payment and of the amount actually invested, that will be received by the Principal Underwriter in connection with the purchase of the recommended securities issued by the investment company; and

(C) A description of any charges, fees, discounts, penalties, or adjustments which may be imposed under the recommended securities in connection with the purchase, holding, exchange, termination or sale of the securities.

(2) Following the receipt of the information required to be disclosed in paragraph (c)(1), and prior to the execution of the transaction, the independent fiduciary approves the transaction on behalf of the plan. Unless facts or circumstances would indicate the contrary, the approval may be presumed if the fiduciary permits the transaction to proceed after receipt of the written disclosure. The fiduciary may be an employer of employees covered by the plan, but may not be a Principal Underwriter involved in the transaction. The fiduciary may not receive, directly or indirectly (*e.g.,* through an Affiliate), any compensation or other consideration for his or her own personal account from any party dealing with the plan in connection with the transaction.

(d) With respect to additional purchases of insurance or annuity contracts or securities issued by an investment company, the written disclosure required under paragraphs (b) and (c) of this Section IV need not be repeated, unless:

(1) More than three years have passed since the disclosure was made with respect to the same kind of contract or security, or

(2) The contract or security being recommended for purchase or the Insurance Commission or Mutual Fund Commission with respect thereto is materially different from that for which the approval described in paragraphs (b) and (c) of this Section was obtained.

Section V. Recordkeeping Requirements

(a) The insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter engaging in the covered transactions maintains or causes to be maintained for a period of six years, in a manner that is accessible for audit and examination, the records necessary to enable the persons described in Section V(b) to determine whether the conditions of this exemption have been met, except that:

(1) If the records necessary to enable the persons described in Section V(b) below to determine whether the conditions of the exemption have been met are lost or destroyed, due to circumstances beyond the control of the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter, then no prohibited transaction will be considered to have occurred solely on the basis of the unavailability of those records; and

(2) No party in interest, other than the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter shall be subject to the civil penalty that may be assessed under ERISA section 502(i) or the taxes imposed by Code section 4975(a) and (b) if the records are not maintained or are not available for examination as required by paragraph (b) below; and

(b)(1) Except as provided below in subparagraph (2) and notwithstanding any provisions of ERISA section 504(a)(2) and (b), the records referred to in the above paragraph are unconditionally available at their customary location for examination during normal business hours by—

(A) Any duly authorized employee or representative of the Department or the Internal Revenue Service;

(B) Any fiduciary of the plan or any duly authorized employee or representative of the fiduciary;

(C) Any contributing employer and any employee organization whose members are covered by the plan, or any authorized employee or representative of these entities; or

(D) Any participant or beneficiary of the plan or the duly authorized representative of the participant or beneficiary or IRA owner; and

(2) None of the persons described in subparagraph (1)(B)–(D) above shall be authorized to examine trade secrets or commercial or financial information of the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter which is privileged or confidential.

(3) Should the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter refuse to disclose information on the basis that the information is exempt from disclosure, the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter shall, by the close of the thirtieth (30th) day following the request, provide a written notice advising that person of the reasons for the refusal and that the Department may request the information.

Section VI. Definitions

For purposes of this exemption:

(a) The term ''Affiliate'' of a person means:

(1) Any person directly or indirectly controlling, controlled by, or under common control with the person;

(2) Any officer, director, employee (including, in the case of Principal Underwriter, any registered representative thereof, whether or not the person is a common law employee of the Principal Underwriter), or relative of any such person, or any partner in such person; or

(3) Any corporation or partnership of which the person is an officer, director, or employee, or in which the person is a partner.

(b) The insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter that is a fiduciary acts in the ''Best Interest'' of the plan or IRA is when the fiduciary acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances and needs of the plan or IRA, without regard to the financial or other interests of the fiduciary, any affiliate or other party.

(c) The term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(d) The terms ''Individual Retirement Account'' means any trust, account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code.

(e) The terms ''insurance agent or broker,'' ''pension consultant,'' ''insurance company,'' ''investment company,'' and ''Principal Underwriter'' mean such persons and any Affiliates thereof.

(f) The term ''Insurance Commission'' mean a sales commission paid by the insurance company or an Affiliate to the insurance agent or broker or pension consultant for the service of effecting the purchase or sale of an insurance or annuity contract, including renewal fees and trailers, but not revenue sharing payments, administrative fees or marketing payments, or payments from parties other than the insurance company or its Affiliates.

(g) The term ''Master or Prototype Plan'' means a plan which is approved by the Service under Rev. Proc. 2011–49, 2011–44 I.R.B. 608 (10/31/2011), as modified, or its successors.

(h) A ''Material Conflict of Interest'' exists when a person has a financial interest that could affect the exercise of its best judgment as a fiduciary in rendering advice to a plan or IRA.

(i) The term ''Mutual Fund Commission'' means a commission or sales load paid either by the plan or the investment company for the service of effecting or executing the purchase or sale of investment company shares, but does not include a 12b-1 fee, revenue sharing payment, administrative fee or marketing fee.

(j) The term ''Nondiscretionary Trust Services'' means custodial services, services ancillary to custodial services, none of which services are discretionary, duties imposed by any provisions of the Code, and services performed pursuant to directions in accordance with ERISA section 403(a)(1). The term ''Nondiscretionary Trustee'' of a plan or IRA means a trustee whose powers and duties with respect to the plan are limited to the provision of Nondiscretionary Trust Services. For purposes of this exemption, a person who is otherwise a Nondiscretionary Trustee will not fail to be a Nondiscretionary Trustee solely by reason of his having been delegated, by the sponsor of a Master or Prototype Plan, the power to amend the plan.

(k) The term ''Principal Underwriter'' is defined in the same manner as that term is defined in section 2(a)(29) of the Investment Company Act of 1940 (15 U.S. C. 80a-2(a)(29)).

(l) The term ''relative'' means a ''relative'' as that term is defined in ERISA section 3(15) (or a ''member of the family'' as that term is defined in Code section 4975(e)(6)), or a brother, a sister, or a spouse of a brother or a sister.

Signed at Washington, DC, this 14th day of April, 2015.

Phyllis C. Borzi,

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

[FR Doc. 2015–08837 Filed 4–15–15; 11:15 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

[Application Number D–11327]

ZRIN 1210–ZA25

Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption (PTE) 86–128 for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers; Proposed Amendment to and Proposed Partial Revocation of PTE 75–1, Exemptions From Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefits Plans and Certain Broker-Dealers, Reporting Dealers and Banks

AGENCY: Employee Benefits Security Administration (EBSA), Department of Labor.

ACTION: Notice of proposed amendments to and proposed partial revocation of PTEs 86–128 and 75–1.

SUMMARY: This document contains a notice of pendency before the Department of Labor of proposed amendments to Prohibited Transaction Exemptions (PTEs) 86–128 and 75–1, exemptions from certain prohibited transaction provisions of the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code of 1986 (the Code). The ERISA and Code provisions at issue generally prohibit fiduciaries with respect to employee benefit plans and individual retirement accounts (IRAs) from engaging in self-dealing in connection with transactions involving plans and IRAs. The exemptions allow fiduciaries to receive compensation in connection with certain securities transactions entered into by plans and IRAs. The proposed amendments would increase the safeguards of the exemptions. This document also contains a notice of pendency before the Department of the proposed revocation of PTE 86–128 with respect to transactions involving investment advice fiduciaries and IRAs, and of PTE 75–1, Part II(2), and PTE 75–1, Parts I(b) and I(c), as duplicative in light of existing or newly proposed relief. The amendments and revocations would affect participants and beneficiaries of plans, IRA owners and certain fiduciaries of plans and IRAs.

DATES:

Comments: Written comments must be received by the Department on or before July 6, 2015.

Applicability: The Department proposes to make this amendment and partial revocation applicable eight months after the publication of the final amendment and partial revocation in the **Federal Register**.

ADDRESSES: All written comments concerning the proposed amendments to the class exemptions should be sent to the Office of Exemption Determinations by any of the following methods, identified by ZRIN: 1210–ZA25.

Federal eRulemaking Portal: http://www.regulations.gov at Docket ID number: EBSA–2014–0016. Follow the instructions for submitting comments.

Email to: e-OED@dol.gov.

Fax to: (202) 693–8474.

Mail: Office of Exemption Determinations, Employee Benefits Security Administration, (Attention: D–11327), U.S. Department of Labor, 200 Constitution Avenue NW., Suite 400, Washington, DC 20210.

Hand Delivery/Courier: Office of Exemption Determinations, Employee Benefits Security Administration, (Attention: D–11327), U.S. Department of Labor, 122 C St. NW., Suite 400, Washington, DC 20001.

Instructions. All comments must be received by the end of the comment period. The comments received will be available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N–1513, 200 Constitution Avenue NW., Washington, DC 20210. Comments will also be available online at *www.regulations.gov,* at Docket ID number: EBSA–2014–0016 and *www.dol.gov/ebsa,* at no charge.

Warning: All comments will be made available to the public. Do not include any personally identifiable information (such as Social Security number, name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

FOR FURTHER INFORMATION CONTACT: Brian Shiker, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Suite 400, Washington, DC 20210, (202) 693–8824 (not a toll-free number).

SUPPLEMENTARY INFORMATION: The Department is proposing the amendments to and partial revocation of PTEs 86–128 and 75–1 on its own motion, pursuant to ERISA section 408(a) and Code section 4975(c)(2), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637 (October 27, 2011)).

Public Hearing: The Department plans to hold an administrative hearing within 30 days of the close of the comment period. The Department will ensure ample opportunity for public comment by reopening the record following the hearing and publication of the hearing transcript. Specific information regarding the date, location and submission of requests to testify will be published in a notice in the **Federal Register**.

Executive Summary

Purpose of Regulatory Action

These proposed amendments and revocations are being published in the same issue of the **Federal Register** as the Department's proposed regulation that would amend the definition of a "fiduciary" of an employee benefit plan or an IRA under ERISA and the Internal Revenue Code (Proposed Regulation). The Proposed Regulation specifies when an entity is a fiduciary by reason of the provision of investment advice for a fee or other compensation regarding assets of a plan or IRA. If adopted, the Proposed Regulation would replace an existing regulation that was adopted in 1975. The Proposed Regulation is intended to take into account the advent of 401(k) plans and IRAs, the dramatic increase in rollovers, and other developments that have transformed the retirement plan landscape and the associated investment market over the four decades since the existing regulation was issued. In light of the extensive changes in retirement investment practices and relationships, the Proposed Regulation would update existing rules to distinguish more appropriately between the sorts of advice relationships that should be treated as fiduciary in nature and those that should not.

PTEs 86–128 and 75–1, Part II(2), permit fiduciaries to receive fees in connection with certain securities transactions entered into by plans and IRAs in accordance with the fiduciaries' advice. In the absence of an exemption, ERISA and the Code generally prohibit fiduciaries from using their authority to affect or increase their own compensation. These proposed amendments would affect the scope of the exemptions and conditions under which fiduciaries may receive such compensation.

The Secretary of Labor may grant and amend administrative exemptions from the prohibited transaction provisions of

ERISA and the Code.[1] Before granting an amendment to an exemption, the Department must find that the amended 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 such plans and IRA owners. Interested parties are permitted to submit comments to the Department through July 6, 2015. The Department plans to hold an administrative hearing within 30 days of the close of the comment period.

Summary of the Major Provisions

PTE 86–128 currently provides an exemption for certain fiduciaries and their affiliates to receive a fee from a plan or IRA for effecting or executing securities transactions as an agent on behalf of the plan or IRA. It also allows a fiduciary to act in an ''agency cross transaction''—as an agent both for the plan or IRA and for another party—and receive reasonable compensation from the other party. The exemption generally requires compliance with certain conditions such as advance disclosures to and approval by an independent fiduciary, although such conditions are not currently applicable to transactions involving IRAs.

This proposed amendment to PTE 86–128 would increase the safeguards of the exemption in a number of ways. The amendment would require fiduciaries relying on the exemption to adhere to certain ''Impartial Conduct Standards,'' including acting in the best interest of the plans and IRAs when providing advice, and would define the types of payments that are permitted under the exemption. The amendment would restrict relief under this exemption to IRA fiduciaries that have discretionary authority or control over the management of the IRA's assets (*i.e.,* investment managers) and would take the additional step of imposing the exemption's conditions on investment management fiduciaries when they engage in transactions with IRAs. The proposal would revoke relief for fiduciaries who provide investment advice to IRAs. A new exemption for receipt of compensation by fiduciaries who provide investment advice to IRAs, plan participants, and certain small plans is proposed elsewhere in this issue of the **Federal Register** in the ''Best Interest Contract Exemption.'' In the Department's view, the provisions of the Best Interest Contract Exemption better protect the interests of IRAs with respect to investment advice regarding securities transactions.

This proposed amendment also would add a new transaction to the exemption for certain fiduciaries to act as principals (as opposed to agents for third parties) in selling mutual fund shares to plans and IRAs and to receive commissions for doing so. An exemption for this transaction is currently available in PTE 75–1, Part II(2), with few applicable safeguards.

Several changes are proposed with respect to PTE 75–1. The Department is proposing to revoke PTE 75–1, Part II(2), as that exemption would be incorporated within PTE 86–128 subject to additional safeguards. Part I(b) and (c) of PTE 75–1 also would be revoked. These provisions of PTE 75–1 provide relief for certain non-fiduciary services to plans and IRAs. If these provisions are revoked, persons seeking to engage in such transactions should look to the existing statutory exemptions provided in ERISA section 408(b)(2) and Code section 4975(d)(2), and the Department's implementing regulations at 29 CFR 2550.408b-2, for relief.

Finally, this document proposes to amend the remaining exemption of PTE 75–1, Part II, to revise the recordkeeping requirement of that exemption.

Executive Order 12866 and 13563 Statement

Under Executive Orders 12866 and 13563, the Department must determine whether a regulatory action is ''significant'' and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing and streamlining rules, and of promoting flexibility. It also requires federal agencies to develop a plan under which the agencies will periodically review their existing significant regulations to make the agencies' regulatory programs more effective or less burdensome in achieving their regulatory objectives.

Under Executive Order 12866, ''significant'' regulatory actions are subject to the requirements of the Executive Order and review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866, defines a ''significant regulatory action'' as an action that is likely to result in a rule (1) having an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as ''economically significant'' regulatory actions); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. Pursuant to the terms of the Executive Order, OMB has determined that this action is ''significant'' within the meaning of Section 3(f)(4) of the Executive Order. Accordingly, the Department has undertaken an assessment of the costs and benefits of the proposed amendment, and OMB has reviewed this regulatory action.

Background

As explained more fully in the preamble to the Department's proposed regulation on the definition of fiduciary under ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B), also published in this issue of the **Federal Register**, ERISA is a comprehensive statute designed to protect the interests of plan participants and beneficiaries, the integrity of employee benefit plans, and the security of retirement, health, and other critical benefits. The broad public interest in ERISA-covered plans is reflected in its imposition of stringent fiduciary responsibilities on parties engaging in important plan activities, as well as in the tax-favored status of plan assets and investments. One of the chief ways in which ERISA protects employee benefit plans is by requiring that plan fiduciaries comply with fundamental obligations rooted in the law of trusts. In particular, plan fiduciaries must manage plan assets prudently and with undivided loyalty to the plans and their participants and beneficiaries.[2] In

[1] Regulations at 29 CFR 2570.30 to 2570.52 describe the procedures for applying for an administrative exemption under ERISA. Code section 4975(c)(2) authorizes the Secretary of the Treasury to grant exemptions from the parallel prohibited transaction provisions of the Code. Reorganization Plan No. 4 of 1978 (5 U.S.C. app. at 214 (2000)) generally transferred the authority of the Secretary of the Treasury to issue administrative exemptions under Code section 4975 to the Secretary of Labor.

[2] ERISA section 404(a).

addition, they must refrain from engaging in ''prohibited transactions,'' which ERISA forbids because of the dangers posed by the fiduciaries' conflicts of interest with respect to the transactions.[3] When fiduciaries violate ERISA's fiduciary duties or the prohibited transaction rules, they may be held personally liable for the breach.[4] In addition, violations of the prohibited transaction rules are subject to excise taxes under the Code.

The Code also has rules regarding fiduciary conduct with respect to tax-favored accounts that are not generally covered by ERISA, such as IRAs. Although ERISA's general fiduciary obligations of prudence and loyalty do not govern the fiduciaries of IRAs, these fiduciaries are subject to the prohibited transaction rules. In this context fiduciaries engaging in the illegal transactions are subject to an excise tax enforced by the Internal Revenue Service. Unlike participants in plans covered by Title I of ERISA, under the Code, IRA owners cannot bring suit against fiduciaries under ERISA for violation of the prohibited transaction rules and fiduciaries are not personally liable to IRA owners for the losses caused by their misconduct. Elsewhere in this issue of the **Federal Register**, however, the Department is proposing two new class exemptions that would create contractual obligations for the adviser to adhere to certain standards (the Impartial Conduct Standards). IRA owners would have a right to enforce these new contractual rights.

Under this statutory framework, the determination of who is a ''fiduciary'' is of central importance. Many of ERISA's protections, duties, and liabilities hinge on fiduciary status. In relevant part, section 3(21)(A) of ERISA and section 4975(e)(3) of the Code provide that a person is a fiduciary with respect to a plan or IRA to the extent he or she (1) exercises any discretionary authority or discretionary control with respect to management of such plan or IRA, or exercises any authority or control with respect to management or disposition of its assets; (2) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan or IRA, or has any authority or responsibility to do so; or, (3) has any discretionary authority or discretionary responsibility in the administration of such plan or IRA.

ERISA section 406(b)(1) and Code section 4975(c)(1)(E) prohibit a fiduciary from dealing with the income or assets of a plan or IRA in his or her own interest or his or her own account. Parallel regulations issued by the Departments of Labor and the Treasury explain that these provisions impose on fiduciaries of plans and IRAs a duty not to act on conflicts of interest that may affect the fiduciary's best judgment on behalf of the plan or IRA. Accordingly, a fiduciary may not cause a plan or IRA to pay an additional fee to such fiduciary, or to a person in which such fiduciary has an interest that may affect the exercise of the fiduciary's best judgment as a fiduciary.

The Department understands that investment professionals are often compensated on a commission basis for effecting or executing securities transactions for plans, plan participants, and IRA owners. Because such payments vary based on the advice provided, the Department views a fiduciary that recommends to a plan or IRA a securities transaction and then receives a commission for itself or a related party as violating the prohibited transaction provisions of ERISA section 406(b) and Code section 4975(c)(1)(E).

PTE 86–128 [5] provides an exemption from these prohibited transactions provisions for certain types of fiduciaries to use their authority to cause a plan or IRA to pay a fee to the fiduciary, or its affiliate, for effecting or executing securities transactions as agent for the plan. The exemption further provides relief for these types of fiduciaries to act as agent in an ''agency cross transaction'' for both a plan or IRA and one or more other parties to the transaction, and for such fiduciaries or their affiliates to receive fees from the other party(ies) in connection with the agency cross transaction. An agency cross transaction is defined in the exemption as a securities transaction in which the same person acts as agent for both any seller and any buyer for the purchase or sale of a security.

As originally granted, the exemption in PTE 86–128 could be used only by fiduciaries who were not discretionary trustees, plan administrators, or employers of any employees covered by the plan.[6] PTE 86–128 was amended in 2002 to permit use of the exemption by discretionary trustees, and their affiliates, without meeting the ''recapture of profits'' provisions, subject to certain additional requirements.[7] Additionally, in 2011 the Department clarified that PTE 86–128 provides relief for covered transactions engaged in by fiduciaries who provide investment advice.[8]

If granted, this proposed amendment would make additional changes, discussed below, to PTE 86–128, as well as a re-ordering of the sections of the exemption.[9] The Department notes that the relief provided under PTE 86–128 is limited to ERISA section 406(b) and Code section 4975(c)(1)(E) and (F), for self-dealing and other conflict of interest transactions involving fiduciaries. Relief from the prohibitions of ERISA section 406(a)(1)(C) or Code section 4975(c)(1)(C), for the provision of services to a plan, would be available only by meeting the requirements of the statutory exemptions of ERISA section 408(b)(2) and Code section 4975(d)(2) and the Department's regulations in 29 CFR 2550.408b–2.[10]

Description of the Proposed Amendments

I. Impartial Conduct Standards

This proposal would amend PTE 86–128 to require fiduciaries engaging in the exempted transactions to adhere to certain Impartial Conduct Standards. The Impartial Conduct Standards are set forth in a new proposed Section II. The standards would only be applicable to the extent they are applicable to the fiduciary's actions.

Under the first conduct standard, fiduciaries would be required to act in the plan's or IRA's best interest when providing investment advice to the plan or IRA, or managing the plan's or IRA's assets. Best interest is defined as acting with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial

[3] ERISA section 406. ERISA also prohibits certain transactions between a plan and a ''party in interest.''

[4] ERISA section 409; *see also* ERISA section 405.

[5] PTE 86–128, 51 FR 41686 (November 18, 1986), replaced PTE 79–1, 44 FR 5963 (January 30, 1979) and PTE 84–46, 49 FR 22157 (May 25, 1984).

[6] Plan trustees, plan administrators and employers were permitted to rely on the exemption if they returned or credited to the plan all profits (recapture of profits) earned in connection with the transactions covered by the exemption.

[7] 67 FR 64137 (October 17, 2002).

[8] *See* Advisory Opinion 2011–08A (June 21, 2011).

[9] This proposal would move the definitions from Section I to Section VII. The other sections are re-ordered accordingly. Additionally, within the definitions section, the following definitions are new or revised: Independent (Section VII(f)), plan (Section VII(j)), individual retirement account (Section VII(k)), Related Entity (Section VII(l)), Best Interest (Section VII(m)), and Commission (VII(n)).

[10] These statutory exemptions provide relief for making reasonable arrangements between a plan and a party in interest (disqualified person) for, among other things, services necessary for operation of the plan, if no more than reasonable compensation is paid therefore. ERISA section 408(b)(2) and Code section 4975(d)(2) do not provide relief from ERISA section 406(b) or Code section 4975(c)(1)(E) and (F).

circumstances, and the needs of the plan or IRA. Further, under the best interest standard, fiduciaries must act without regard to their own financial or other interests or those of any affiliates or other party. Under this standard, fiduciaries must put the plan's or IRA's interests ahead of the fiduciaries' own financial interests or those of any other party.

In this regard, the Department notes that while fiduciaries of plans covered by ERISA are subject to the ERISA section 404 standards of prudence and loyalty, the Code contains no provisions that hold IRA fiduciaries to those standards. However, as a condition of relief under the proposed exemption, both IRA and plan fiduciaries would have to agree to, and uphold, the best interest requirement that is set forth in Section II(a). The best interest standard is defined to effectively mirror the ERISA section 404 duties of prudence and loyalty, as applied in the context of fiduciary investment advice. Failure to satisfy the best interest standard would render the exemption unavailable to the fiduciary with respect to compensation received in connection with the transaction.

The second conduct standard requires that all compensation received by the fiduciary and its affiliates in connection with the applicable transaction be reasonable in relation to the total services provided to the plan or IRA. The third conduct standard requires that statements about recommended investments, fees, material conflicts of interest, and any other matters relevant to a plan's or IRA's investment decisions, are not misleading. The Department notes in this regard that a fiduciary's *failure* to disclose a material conflict of interest may be considered a misleading statement. Transactions that violate the requirements are not likely to be in the interests of or protective of plans, their participants and beneficiaries, and IRA owners.

Unlike the new exemption proposals published elsewhere in the **Federal Register**, these proposed amendments do not require fiduciaries to contractually warrant compliance with applicable federal and state laws. However, the Department notes that significant violations of applicable federal or state law could also amount to violations of the Impartial Conduct Standards, such as the best interest standard, in which case, these exemptions, as amended, would be deemed unavailable for transactions occurring in connection with such violations.

II. IRAs

Currently, Section IV(a) of PTE 86–128 contains an exception from the conditions of the exemption for covered transactions engaged in on behalf of individual retirement accounts described in 29 CFR 2510.3–2(d) (IRAs), and plans, other than training programs, that cover no employees within the meaning of 29 CFR 2510.3–3. The exception was included in response to comments received on the original proposal of PTE 86–128's predecessor, PTE 79–1, suggesting that such plans and IRAs did not need the protection provided by the conditions of the exemption because the participants of such plans and IRAs directly exercise control over their accounts. Additionally, the comments suggested that imposing the conditions on these plans and IRAs would result in unnecessary costs.[11]

Upon reconsideration of the issue, however, the Department has determined that these policy reasons do not support a continued exception from the conditions of PTE 86–128 for IRAs. Since PTE 86–128 was granted, the amount of assets held in IRAs has grown dramatically. The financial services marketplace has become more complex, and compensation structures and the types of products offered have changed significantly beyond what the Department contemplated at the time. The fact that IRA owners generally do not benefit from the protections afforded by the fiduciary duties owed by plan sponsors to their employee benefit plans makes it all the more critical that appropriate safeguards in an exemption apply to IRAs.

The Department therefore is proposing to revise the exemption in several ways with respect to transactions involving IRAs. First, if the amendment is adopted, fiduciaries that exercise discretionary authority or control with respect to IRAs as described in Code section 4975(e)(3)(A) (*i.e.,* investment managers) will be required, among other things, to make the disclosures and receive approvals that are currently required by the exemption with respect to other types of plans. The Department believes that compliance with these conditions will enhance the ability of the authorizing fiduciary, which, in the case of an IRA would be the IRA owner, to monitor fees and compensation paid in connection with their accounts.

Further, if the amendment is adopted, the exemption will no longer provide relief to IRA fiduciaries engaging in the covered transactions if they are fiduciaries due to the provision of investment advice for a fee as described in Code section 4975(e)(3)(B). This change is reflected in a proposed new Section I(c), setting forth the scope of the exemption, which will apply on a prospective basis. Elsewhere in this issue of the **Federal Register**, the Department has proposed a new exemption that specifically provides relief for the receipt by such fiduciaries of a broad range of types of compensation (Best Interest Contract Exemption). The Best Interest Contract Exemption was crafted to protect the interests of retail retirement investors—plan participants and beneficiaries, IRA owners and small plan sponsors—that rely on fiduciary investment advisers to engage in securities transactions, and it contains safeguards specifically crafted for these investors. The exemption requires the investment advice fiduciary to contractually acknowledge fiduciary status, commit to adhere to basic standards of impartial conduct, adopt policies and procedures reasonably designed to minimize the harmful impact of conflicts of interest, and disclose basic information on their conflicts of interest and on the cost of their advice. As a result, the exemption ensures that IRA owners have a contract-based claim to hold their fiduciary investment advisers accountable if they violate basic obligations of prudence and loyalty.

The proposed definition of IRA in Section I(c) is "any trust, account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code." The Department notes that this is not identical to the definition currently in Section IV(a), the exception for IRAs, which is "individual retirement accounts meeting the conditions of 29 CFR 2510.3–2(d), or plans, other than training programs, that cover no employees within the meaning of 29 CFR 2510.3–3." However, this new definition is identical to the definition of IRA used in the proposed Best Interest Contract Exemption. Accordingly, the Best Interest Contract Exemption will be available for transactions involving IRAs that are excluded from this exemption.

III. The Mutual Fund Exemption of PTE 75–1, Part II

PTE 75–1, granted October 31, 1975,[12] provides an exemption for broker-

[11] *See* preamble to PTE 79–1, 44 FR 5963, 5964 (Jan. 30, 1979).

[12] 40 FR 50845 (Oct. 31, 1975).

dealers, reporting dealers and banks to engage in certain classes of transactions with employee benefit plans and IRAs. The exemption has five parts, two of which (Part II and Part V) were amended in 2006.[13]

Part II of PTE 75–1 is captioned ''Principal transactions.'' Part II(1) of the exemption permits the purchase or sale of a security between an employee benefit plan or IRA and a broker-dealer registered under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et. seq.*), a reporting dealer who makes primary markets in securities of the United States Government or of any agency of the United States Government and reports daily to the Federal Reserve Bank of New York its positions with respect to Government securities and borrowings thereon, or a bank supervised by the United States or a State. The exemption provided in Part II(1) does not extend to the fiduciary self-dealing and conflicts of interest prohibitions of ERISA and the Code.

PTE 75–1, Part II(2), contains a special exemption for mutual fund purchases (the mutual fund exemption) between fiduciaries and plans or IRAs. Although it does provide relief for fiduciary self-dealing and conflicts of interest, the exemption is only available if the fiduciary who decides on behalf of the plan or IRA to enter into the transaction is not a principal underwriter for, or affiliated with, the mutual fund.

In 2004, when proposing to amend Part II of PTE 75–1,[14] the Department sought public comments on the current utility of the mutual fund exemption. The Department was uncertain if the mutual fund exemption continued to provide meaningful relief to fiduciaries, insofar as many sales of mutual fund shares are made to and from the mutual fund itself. It was the Department's understanding that any broker-dealer involvement in these mutual fund transactions was as agent on behalf of a plan or IRA. Under such circumstances, the transactions would not appear to be properly characterized as ''principal'' transactions.

The Department received three comments on the continuing utility of the mutual fund exemption. The commenters stated that the mutual fund exemption continued to be widely used by the public. As background, the commenters noted that mutual fund transactions had some characteristics of principal transactions as well as agency transactions. In 1975, when the mutual fund exemption was originally granted, mutual funds typically entered into distribution agreements with principal underwriters, and the underwriters in turn entered into selling agreements designated as ''dealer'' agreements, with retail broker-dealers. However, sales of mutual funds under these dealer agreements exhibited many of the economic characteristics of agency transactions. For example, commenters stated that the selling broker-dealer was not at risk because it could not inventory mutual fund shares. Additionally, as mutual funds were required to be sold at net asset value (NAV), the broker-dealer usually received a fixed sales commission for effecting the transaction, rather than a negotiable dealer mark-up.

These commenters indicated that these features were still commonplace in mutual fund transactions. Additionally, the commenters indicated that this exemption was commonly understood to provide relief for the receipt of commissions by such broker-dealer fiduciaries in connection with the transactions.[15] In issuing the final amendment to PTE 75–1, Part II, the Department acknowledged these comments and stated that additional time was needed to fully consider the issues raised in these comments. Pending further action by the Department, the mutual fund exemption has remained in effect.[16]

After further consideration of these comments, the Department concurs that the relief provided by the mutual fund exemption remains relevant to broker-dealer fiduciaries that use their authority to cause plans and IRAs to purchase mutual fund shares. The Department believes that the transaction described in PTE 75–1, Part II(2), is most accurately described as a ''riskless principal'' transaction, in which the fiduciary that is providing investment advice purchases shares on its own account for the purpose of covering a purchase order previously received from a plan or IRA, and then sells the shares to the plan or IRA to satisfy the order.

However, the existing mutual fund exemption needs to be revised in a manner that would make it consistent with more recent exemptions that similarly provide broad relief from fiduciary self-dealing and conflicts of interest. PTE 86–128 covers transactions that are the most similar to those covered in the mutual fund exemption in that the relief it provides permits a fiduciary to use its authority to receive a commission for effecting or executing a plan's or IRA's securities transactions as agent for the plan or IRA, subject to a number of specific requirements designed to protect the interests of plan participants and beneficiaries and IRA owners.

The Department is therefore proposing a new Section I(b) of PTE 86–128 that would provide relief for the transaction currently covered in PTE 75–1, Part II(2). New Section I(b) would permit a broker-dealer fiduciary to use its authority to cause a plan (or IRA, as applicable) to purchase shares of a mutual fund from the broker-dealer fiduciary, acting as principal, where the shares were acquired solely to cover the plan's prior order, and for the receipt of a commission by such fiduciary in connection with the transaction.[17] Consistent with the exemption originally provided for this transaction in PTE 75–1, Part II(2), relief is not available if such fiduciary is a principal underwriter for, or affiliated with, such investment company. The Department intends that, with respect to this new proposed transaction, the compensation to the broker-dealer will be limited to the commission (*i.e.,* sales load) disclosed by the mutual fund, but may be paid either by the plan or the mutual fund.

To provide certainty with respect to the payments permitted by the exemption in both Section I(a) and newly proposed Section I(b), the Department is proposing a new defined term ''Commission.'' This term, used in Section I(b), will also replace the language currently in the exemption that permits a fiduciary to cause a plan or IRA to pay a ''fee for effecting or executing securities transactions.'' The term ''Commission'' is defined to mean a brokerage commission or sales load paid for the service of effecting or executing the transaction, but not a 12b–1 fee, revenue sharing payment,

[13] 71 FR 5883 (Feb. 3, 2006).

[14] 69 FR 23216 (April 28, 2004).

[15] Although PTE 75–1, Part II, is silent on the payment of commissions, the commenters point to the preamble to the proposal of PTE 77–9 (41 FR 56760, December 29, 1976)(final exemption superseded by PTE 84–24, 49 FR 13208, April 3, 1984, as amended, 71 FR 5887, February 3, 2006) which states that PTE 75–1, Part II, covers ''the purchase and sale of mutual fund shares by a plan from or to a broker-dealer which is a plan fiduciary, provided that such broker-dealer is not a principal underwriter for, or affiliated with, such mutual fund, and the receipt of commissions by such fiduciary/broker-dealer in connection with the purchase of mutual fund shares by plans.''

[16] 71 FR 5883, 5885 (Feb. 3, 2006).

[17] Section I(b) would provide relief from the restrictions of ERISA section 406(a)(1)(A) and (D) and 406(b) and the taxes imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(A), (D), (E) and (F). The proposed new covered transaction, as a principal transaction, involves the purchase and sale of shares between a plan and a party in interest, and the transfer of a plan asset to a party in interest, which would violate the cited provisions of ERISA section 406(a) and Code section 4975(c)(1)(A) and (D) in the absence of an exemption.

marketing fee, administrative fee, sub-TA fee, or sub-accounting fee. Further, based on the language of Section I(a)(1), the term ''Commission'' as used in that section is limited to payments directly from the plan or IRA.[18] On the other hand, the Commission payment described in Section I(b) is not limited to payments directly from the plan or IRA and includes payments from the mutual fund. The Department understands that sales load payments in connection with mutual fund transactions are commonly made by the mutual fund.

The proposed new covered transaction in Section I(b) would be subject to the general prohibition in PTE 86–128 on churning, and the new proposed Impartial Conduct Standards in Section II. In addition, the Department is also proposing a new Section IV to PTE 86–128 which sets forth conditions applicable solely to the proposed new covered transaction. The proposed new Section IV incorporates conditions currently applicable to PTE 75–1, Part II(2).

Specifically, the conditions applicable to the proposed new covered transaction in Section I(b), as set forth in proposed Section IV, are: (1) The fiduciary customarily sells securities for its own account in the ordinary course of its business as a broker-dealer; (2) the transaction is at least as favorable to the plan or IRA as an arm's length transaction with an unrelated party would be; and (3) unless rendered inapplicable by Section V of the exemption, the requirements of Sections III(a) through III(f), III(h) and III(i) (if applicable), and III(j) are satisfied with respect to the transaction. The Department seeks comments as to whether any of the conditions described in Section IV(c) should be revised as applied to the proposed new covered transaction. The exceptions contained in Section V would be applicable to this proposed new covered transaction as well.[19]

Relief is not proposed in the new Section I(b) for sales by a plan or IRA to a fiduciary due to the Department's belief that it is not necessary for a plan or IRA to sell a mutual fund share to a fiduciary that is acting as a principal. The Department requests comment on this limitation, as well as on its understanding of this transaction and the related fee payments.

Additionally, in connection with the proposed new covered transaction, the Department is proposing to revoke the mutual fund exemption provisions from PTE 75–1, Part II(2). The Department is further proposing to revise the recordkeeping provisions of Section (e) of PTE 75–1, Part II. Section (e) currently provides that records demonstrating compliance with the exemption must be maintained by the plan or IRA involved in the transaction. The proposed amendment would place the responsibility for maintaining such records on the broker-dealer, reporting dealer, or bank engaging in the transaction with such plan or IRA.

IV. Relief for Related Entities

Currently, PTE 86–128 provides relief for a fiduciary to use its authority to cause a plan or IRA to pay a fee to *that person* for effecting or executing securities transactions. The term ''person'' is defined to include the person's affiliates, which are: (1) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with, the person; (2) any officer, director, partner, employee, relative (as defined in ERISA section 3(15)), brother, sister, or spouse of a brother or sister, of the person; and (3) any corporation or partnership of which the person is an officer, director or employee or in which such person is a partner.

The Department understands that in some cases, fiduciaries are concerned that the relief provided by the exemption to persons (including their affiliates) is too narrow. In this regard, it is a prohibited transaction for a fiduciary to use the ''authority, control, or responsibility which makes such a person a fiduciary to cause a plan to pay an additional fee to such fiduciary (or to a person in which such fiduciary has an interest which may affect the exercise of such fiduciary's best judgment as a fiduciary) to provide a service.'' [20] The concern expressed to the Department is that the definition of affiliate is not broad enough to cover all persons in whom a fiduciary has an interest that may affect its best judgment. Specifically, it is not necessary for a fiduciary to have control over or be under control by an entity in order for the fiduciary to have an interest in the entity that may affect the exercise of the fiduciary's best judgment as a fiduciary.

To address this concern, the amendment would add relief for covered transactions when fees are paid to a ''related entity.'' [21] The term ''related entity'' is defined as an entity, other than an affiliate, in which a fiduciary has an interest that may affect the exercise of its best judgment as a fiduciary. Additionally, Section II(b) of the exemption would reflect this additional relief to related entities. Section II(b) would require that all compensation received by the person (*i.e.,* the fiduciary and its affiliates) and any related entity in connection with the transaction is reasonable in relation to the total services the person provides to the plan or IRA.

The Department requests comment on the necessity of incorporating relief for related entities in PTE 86–128, and the approach taken in this proposal to do so.

V. The 2002 Amendment and Clarification of Recapture of Profits Exception of PTE 86–128

As explained above, discretionary trustees were first permitted to rely on PTE 86–128 without meeting the ''recapture of profits'' provision pursuant to an amendment in 2002 (2002 Amendment). To effect this change, the 2002 Amendment revised Section III(a), which had provided that ''[t]he person engaging in the covered transaction [may not be] a trustee (other than a nondiscretionary trustee), or an administrator of the plan, or an employer any of whose employees are covered by the plan.'' Under the amendment, the reference to ''trustee (other than a nondiscretionary trustee)'' was deleted from Section III(a). Further, under the amendment, discretionary trustees had to satisfy certain additional conditions, set forth in Section III(h) and (i), in order to rely on the exemption. Section III(h) provides that discretionary trustees may engage in the covered transactions only with plans or IRAs with total net assets of at least $50 million.[22] Section III(i) requires discretionary trustees to provide additional disclosures.

The Department understands that subsequent to the 2002 Amendment, questions were raised as to whether discretionary trustees were permitted to rely on the ''recapture of profits''

[18] Section I(a)(2) of the proposed amended exemption clarifies that relief for plan fiduciaries acting as agents in agency cross transactions is limited to compensation paid in the form of Commissions, although the Commission may be paid by the other party to the transaction.

[19] The condition set forth in Section V(c)(1)(B) of the exemption requires the disclosure of information that the person seeking authorization ''reasonably believes to be necessary'' for the authorizing fiduciary to determine whether the authorization should be made. This condition is followed by a list of required items. To improve objectivity of the exemption, the Department is proposing to delete the language ''reasonably believes to be necessary'' from Section V(c)(1)(B) but leave the list of specified items in place.

[20] ERISA section 406(b); Code section 4975(c)(1)(E).

[21] See re-ordered Section VII(m).

[22] Special rules apply under Section III(h) for pooled funds and groups of plans maintained by a single employer or controlled group of employers.

provision of the exemption (redesignated in this proposal as Section V(b)) as an alternative to complying with Sections III(h) and (i). This provision allows persons identified in Section III(a) to engage the covered transactions if they return or credit to the plan or IRA all profits. By deleting the reference to discretionary trustees from Section III(a), the Department believes that the 2002 Amendment inadvertently may have prevented trustees of plans or IRAs from using the recapture of profits approach, and instead, has limited the exemption to trustees that satisfy Section III(h) and (i). As this result was not intended, the Department proposes to modify the exemption to permit all trustees, regardless of associated plan or IRA size, to utilize the exception as originally permitted in PTE 86–128 for the recapture of profits.

In order to achieve this result, the Department has proposed amendments to several different conditions of PTE 86–128. Section V(c), which is re-designated as Section V(b) in this proposal, provides that Sections III(a) and III(i) do not apply in any case where the person engaging in the covered transaction returns or credits to the plan or IRA all profits earned by that person in connection with the securities transaction associated with the covered transaction. In addition, the Department proposes to reinsert a reference to trustees (other than nondiscretionary trustees) in Section III(a) along with the existing references to plan administrators and employers. Finally, a sentence has been added to the end of Section III(a) stating: "Notwithstanding the foregoing, this condition does not apply to a trustee that satisfies Section III(h) and (i)." The purpose of these proposed amendments is to clarify that trustees may engage in covered transactions subject to the recapture of profits limitations in Section V(b) of the exemption.

VI. Recordkeeping Requirements

A proposed new Section VI to PTE 86–128 would require the fiduciary engaging in a transaction covered by the exemption to maintain records necessary to enable certain persons (described in proposed Section VI(b)) to determine whether the conditions of this exemption have been met. The proposed recordkeeping requirement is consistent with other existing class exemptions as well as the recordkeeping provisions of the other notices of proposed exemption published in this issue of the **Federal Register**.

Description of the Proposed Revocation of PTE 75–1, Part I(b) and (c), and II(2), and Proposed Amendment to and Restatement of PTE 75–1, Part II

Lastly, the Department proposes to revoke Part I(b) and I(c) of PTE 75–1, and Part II(2) of PTE 75–1. Part I(b) of PTE 75–1 provides relief from ERISA section 406 and the taxes imposed by Code section 4975(a) and (b), for the effecting of securities transactions, including clearance, settlement or custodial functions incidental to effecting the transactions, by parties in interest or disqualified persons other than fiduciaries. Part I(c) of PTE 75–1 provides relief from ERISA section 406 and Code section 4975(a) and (b) for the furnishing of advice regarding securities or other property to a plan or IRA by a party in interest or disqualified person under circumstances which do not make the party in interest or disqualified person a fiduciary with respect to the plan or IRA.

PTE 75–1 was granted shortly after ERISA's passage in order to provide certainty to the securities industry over the nature and extent to which ordinary and customary transactions between broker-dealers and plans or IRAs would be subject to the ERISA prohibited transaction rules. Paragraphs (b) and (c) in Part I of PTE 75–1, specifically, served to provide exemptive relief for certain non-fiduciary services provided by broker-dealers in securities transactions. Code section 4975(d)(2), ERISA section 408(b)(2) and regulations thereunder, have clarified the scope of relief for service providers to plans and IRAs.[23] The Department believes that the relief provided in Parts I(b) and I(c) of PTE 75–1 duplicates the relief available under the statutory exemptions. Therefore, the Department is proposing the revocation of these parts.

As noted earlier, the exemption in PTE 75–1, Part II(2), would, under this proposal, be incorporated into PTE 86–128. Accordingly, the Department is proposing herein the revocation of PTE 75–1, Part II(2). In connection with the proposed revocation of PTE 75–1, Part II(2), the Department is proposing to amend Section (e) of the remaining exemption in PTE 75–1, Part II, the recordkeeping provisions of the exemption, to place the recordkeeping responsibility on the broker-dealer, reporting dealer, or bank engaging in transactions with the plan or IRA, as opposed to the plan or IRA itself.

[23] See 29 CFR 2550.408b-2, 42 FR 32390 (June 24, 1977) and Reasonable Contract or Arrangement under Section 408(b)(2)—Fee Disclosure, Final Rule, 77 FR 5632 (Feb. 3, 2012).

Applicability Date

The Department is proposing that compliance with the final regulation defining a fiduciary under ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) will begin eight months after the final regulation is published in the **Federal Register** (Applicability Date). The Department proposes to make the amendments to and partial revocation of this exemption, if granted, applicable on the Applicability Date as well.

Paperwork Reduction Act Statement

As part of its continuing effort to reduce paperwork and respondent burden, the Department of Labor conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that the public understands the Department's collection instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

Currently, the Department is soliciting comments concerning the proposed information collection request (ICR) included in the Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption (PTE) 86–128 for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers; Proposed Amendment to and Partial Revocation of PTE 75–1, Exemptions From Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefits Plans and Certain Broker-Dealers, Reporting Dealers and Banks as part of its proposal to amend its 1975 rule that defines when a person who provides investment advice to an employee benefit plan or IRA becomes a fiduciary. A copy of the ICR may be obtained by contacting the PRA addressee shown below or at *http://www.RegInfo.gov.*

The Department has submitted a copy of the proposed amendments to and partial revocation of PTEs 86–128 and 75–1 to the Office of Management and Budget (OMB) in accordance with 44 U.S.C. 3507(d) for review of its information collections. The Department and OMB are particularly interested in comments that:

• Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
• Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
• Enhance the quality, utility, and clarity of the information to be collected; and
• Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Comments should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for the Employee Benefits Security Administration. OMB requests that comments be received within 30 days of publication of the Proposed Amendments to ensure their consideration.

PRA Addressee: Address requests for copies of the ICR to G. Christopher Cosby, Office of Policy and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue NW., Room N–5718, Washington, DC 20210. Telephone (202) 693–8410; Fax: (202) 219–5333. These are not toll-free numbers. ICRs submitted to OMB also are available at *http://www.RegInfo.gov.*

As discussed in detail below, as amended, PTE 86–128 would require financial firms to make certain disclosures to plan fiduciaries in order to receive relief from ERISA's and the Code's prohibited transaction rules for the receipt of commissions and to engage in riskless principal transactions involving mutual fund shares. Financial firms relying on either PTE 86–128 or PTE 75–1, as amended, would be required to maintain records necessary to prove that the conditions of these exemptions have been met. These requirements are information collection requests (ICRs) subject to the Paperwork Reduction Act.

The Department has made the following assumptions in order to establish a reasonable estimate of the paperwork burden associated with these ICRs:

• 38% of disclosures will be distributed electronically via means already used by respondents in the normal course of business and the costs arising from electronic distribution will be negligible;
• Financial institutions will use existing in-house resources to prepare the legal authorizations and disclosures, and maintain the recordkeeping systems necessary to meet the requirements of the exemption;
• A combination of personnel will perform the tasks associated with the ICRs at an hourly wage rate of $125.95 for a financial manager, $30.42 for clerical personnel, and $129.94 for a legal professional; and [24]
• Approximately 2,800 financial institutions [25] will take advantage of this exemption and they will use this exemption in conjunction with transactions involving 25.6 percent of their client plans.[26]

Disclosures and Consent Forms

In order to receive commissions in conjunction with the purchase of mutual fund shares or securities products, sections III(b) and III(d) of PTE 86–128 as amended require financial institutions to obtain advance written authorization from a plan fiduciary independent of the financial institutions (the authorizing fiduciary) and furnish the authorizing fiduciary with information necessary to determine whether an authorization should be made, including a copy of the exemption, a form for termination, a description of the financial institution's brokerage placement practices, and any other reasonably available information regarding the matter that the authorizing fiduciary requests.

Section III(c) requires financial institutions to obtain annual written reauthorization or provide the authorizing fiduciary with an annual termination form explaining that the authorization is terminable at will, without penalty to the plan, and that failure to return the form will result in continued authorization for the financial institution to engage in covered transactions on behalf of the plan. Furthermore, Section III(e) requires the financial institution to provide the authorizing fiduciary with either (a) a confirmation slip for each individual securities transaction within 10 days of the transaction containing the information described in Rule 10b–10(a)(1–7) under the Securities Exchange Act of 1934, 17 CFR 240.10b–10 or (b) a quarterly report containing certain financial information including the total of all transaction-related charges incurred by the plan. The Department assumes that financial institutions will meet this requirement for 40 percent of plans through the provision of a confirmation slip, which already is provided to their clients in the normal course of business, while financial institutions will meet this requirement for 60 percent of plans through provision of the quarterly report.

Finally, Section III(f) requires the financial institution to provide the authorizing fiduciary with an annual summary of the confirmation slips or quarterly reports. The summary must contain the following information: The total of all securities transaction-related charges incurred by the plan during the period in connection with the covered securities transactions, the amount of the securities transaction-related charges retained by the authorized person and the amount of these charges paid to other persons for execution or other services; a description of the financial institution's brokerage placement practices if such practices have materially changed during the period covered by the summary; and a portfolio turnover ratio calculated in a manner reasonable designed to provide the authorizing fiduciary the information needed to assist in discharging its duty of prudence. Section III(i) states that a financial institution that is a discretionary plan trustee who qualifies to use the exemption must provide the authorizing fiduciary with an annual report showing separately the commissions paid to affiliated brokers and non-affiliated brokers, on both a total dollar basis and a cents-per-share basis.

[24] The Department's estimated 2015 hourly labor rates include wages, other benefits, and overhead, and are calculated as follows: Mean wage from the 2013 National Occupational Employment Survey (April 2014, Bureau of Labor Statistics *http://www.bls.gov/news.release/pdf/ocwage.pdf*); wages as a percent of total compensation from the Employer Cost for Employee Compensation (June 2014, Bureau of Labor Statistics *http://www.bls.gov/news.release/ecec.t02.htm*); overhead as a multiple of compensation is assumed to be 25 percent of total compensation for paraprofessionals, 20 percent of compensation for clerical, and 35 percent of compensation for professional; annual inflation assumed to be 2.3 percent annual growth of total labor cost since 2013 (Employment Costs Index data for private industry, September 2014 *http://www.bls.gov/news.release/eci.nr0.htm*).

[25] As described in the regulatory impact analysis for the accompanying rule, the Department estimates that approximately 2,619 broker dealers service the retirement market. The Department anticipates that the exemption will be used primarily, but not exclusively, by broker-dealers. Further, the Department assumes that all broker-dealers servicing the retirement market will use the exemption. Beyond the 2,619 broker-dealers, the Department estimates that almost 200 other financial institutions will use the exemption.

[26] This is a weighted average of the Department's estimates of the share of DB plans and DC plans with broker-dealer relationships. The Department welcomes comment on this estimate.

Legal Costs

According to the 2012 Form 5500, approximately 677,000 plans exist in the United States that could enter into relationships with financial institutions. Of these plans, the Department assumes that 6.5 percent are new plans or plans entering into relationships with new financial institutions and, as stated previously, 25.6 percent of these plans will engage in transactions covered under this PTE. The Department estimates that granting written authorization to the financial institutions will require one hour of legal time for each of the approximately 11,000 plans entering into new relationships with financial institutions each year. The Department also estimates that it will take one hour of legal time for each of the approximately 2,800 financial institutions to produce the annual termination form. This legal work results in a total of approximately 14,000 hours annually at an equivalent cost of $1.8 million.

Production and Distribution of Required Disclosures

The Department estimates that approximately 173,000 plans have relationships with financial institutions and are likely to engage in transactions covered under this exemption. Of these 173,000 plans, approximately 11,000 are new clients to the financial institutions each year.

The Department estimates that 11,000 plans will send financial institutions a two page authorization letter each year. Prior to obtaining authorization, financial institutions will send the same 11,000 plans a seven page pre-authorization disclosure. Paper copies of the authorization letter and the pre-authorization disclosure will be mailed for 62 percent of the plans and distributed electronically for the remaining 38 percent. The Department estimates that electronic distribution will result in a de minimis cost, while paper distribution will cost approximately $10,000. Paper distribution of the letter and disclosure will also require two minutes of clerical preparation time resulting in a total of 500 hours at an equivalent cost of approximately $14,000.

The Department estimates that all of the 173,000 plans will receive a two-page annual termination form from financial institutions; 38 percent will be distributed electronically and 62 percent will be mailed. The Department estimates that electronic distribution will result in a de minimis cost, while the paper distribution will cost $63,000. Paper distribution will also require two minutes of clerical preparation time resulting in a total of 4,000 hours at an equivalent cost of $109,000.

The Department estimates that 60 percent of plans (approximately 104,000) will receive quarterly two-page transaction reports from financial institutions four times per year; 38 percent will be distributed electronically and 62 percent will be mailed. The Department estimates that electronic distribution will result in a de minimis cost, while paper distribution will cost $152,000. Paper distribution will also require two minutes of clerical preparation time resulting in a total of 9,000 hours at an equivalent cost of $261,000.

The Department estimates that all of the 173,000 plans will receive a five-page annual statement with a two-page summary of commissions paid from financial institutions; 38 percent will be distributed electronically and 62 percent will be mailed. The Department assumes that these disclosures will be distributed with the annual termination form, resulting in no further hour burden or postage cost. Electronic distribution will result in a de minimis cost, while the paper distribution will cost $38,000 in materials costs.

Finally, the Department estimates that it will cost financial institutions $3 per plan, for each of the 173,000 plans, to track all the transactions data necessary to populate the quarterly transaction reports, the annual statements, and the report of commissions paid. This results in an IT tracking cost of $520,000.

Recordkeeping Requirement

Section VI of PTE 86–128, as amended, and condition (e) of PTE 75–1, Part II, as amended, would require financial institutions to maintain or cause to be maintained for six years and disclosed upon request the records necessary for the Department, Internal Revenue Service, plan fiduciary, contributing employer or employee organization whose members are covered by the plan, participants and beneficiaries and IRA owners to determine whether the conditions of this exemption have been met.

The Department assumes that each financial institution will maintain these records on behalf of their client plans in their normal course of business. Therefore, the Department has estimated that the additional time needed to maintain records consistent with the exemption will only require about one-half hour, on average, annually for a financial manager to organize and collate the documents or else draft a notice explaining that the information is exempt from disclosure, and an additional 15 minutes of clerical time to make the documents available for inspection during normal business hours or prepare the paper notice explaining that the information is exempt from disclosure. Thus, the Department estimates that a total of 45 minutes of professional time per financial institution per year would be required for a total hour burden of 2,100 hours at an equivalent cost of $198,000.

In connection with this recordkeeping and disclosure requirements discussed above, Section VI(b) of PTE 86–128 and Section (f) of PTE 75–1, Part II, provide that parties relying on the exemption do not have to disclose trade secrets or other confidential information to members of the public (*i.e.,* plan fiduciaries, contributing employers or employee organizations whose members are covered by the plan, participants and beneficiaries and IRA owners), but that in the event a party refuses to disclose information on this basis, it must provide a written notice to the requester advising of the reasons for the refusal and advising that the Department may request such information. The Department's experience indicates that this provision is not commonly invoked, and therefore, the written notice is rarely, if ever, generated. Therefore, the Department believes the cost burden associated with this clause is de minimis. No other cost burden exists with respect to recordkeeping.

Overall Summary

Overall, the Department estimates that in order to meet the conditions of this amended class exemption, over 14,000 financial institutions and plans will produce 958,000 disclosures and notices annually. These disclosures and notices will result in almost 29,000 burden hours annually, at an equivalent cost of $2.4 million. This exemption will also result in a total annual cost burden of almost $783,000.

These paperwork burden estimates are summarized as follows:

Type of Review: Revision of a Currently Approved Information Collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Titles: (1) Proposed Amendment to and Partial Revocation of Prohibited Transaction Exemption (PTE) 86–128 for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers; Proposed Amendment to and Partial Revocation of PTE 75–1, and (2) Proposed Investment Advice Regulation.

OMB Control Number: 1210–0059.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 14.059.

Estimated Number of Annual Responses: 957,880.

Frequency of Response: Initially, Annually, When engaging in exempted transaction.

Estimated Total Annual Burden Hours: 28,795 hours.

Estimated Total Annual Burden Cost: $782,647.

General Information

The attention of interested persons is directed to the following:

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

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

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

(4) These amended exemptions, if granted, will be 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.

Written Comments

The Department invites all interested persons to submit written comments on the proposed amendments and proposed revocations to the address and within the time period set forth above. All comments received will be made a part of the public record for this proceeding and will be available for examination on the Department's Internet Web site. Comments should state the reasons for the writer's interest in the proposed amendment and revocation. Comments received will be available for public inspection at the above address.

Proposed Amendment to PTE 86–128

Under section 408(a) of the Employee Retirement Income Security Act of 1974, as amended (ERISA) and section 4975(c)(2) of the Internal Revenue Code of 1986, as amended (the Code), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, 66644 (October 27, 2011)), the Department proposes to amend and restate PTE 86–128 as set forth below:

Section I. Covered Transactions

(a) *Securities Transactions Exemptions.* If each of the conditions of Sections II and III of this exemption is either satisfied or not applicable under Section V, the restrictions of ERISA section 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code section 4975(c)(1)(E) or (F) shall not apply to—(1) A plan fiduciary's using its authority to cause a plan to pay a Commission to that person or a Related Entity as agent for the plan, but only to the extent that such transactions are not excessive, under the circumstances, in either amount or frequency; and (2) A plan fiduciary's acting as the agent in an agency cross transaction for both the plan and one or more other parties to the transaction and the receipt by such person of a Commission from one or more other parties to the transaction.

(b) *Mutual Fund Transactions Exemption.* If each condition of Sections II and IV is either satisfied or not applicable under Section V, the restrictions of ERISA sections 406(a)(1)(A), 406(a)(1)(D) and 406(b) and the taxes imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(A), (D), (E) and (F), shall not apply to a plan fiduciary's using its authority to cause the plan to purchase shares of an open end investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) (Mutual Fund) from such fiduciary, acting as principal, and to the receipt of a Commission by such person in connection with such transaction, but only to the extent that such transactions are not excessive, under the circumstances, in either amount or frequency; provided that, the fiduciary (1) is a broker-dealer registered under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), and (2) is not a principal underwriter for, or affiliated with, such Mutual Fund, within the meaning of sections 2(a)(29) and 2(a)(3) of the Investment Company Act of 1940.

(c) *Scope of these Exemptions.* The exemptions set forth in Section I(a) and (b) do not apply to a transaction if (1) the plan is an Individual Retirement Account and (2) the fiduciary engaging in the transaction is a fiduciary by reason of the provision of investment advice for a fee, described in Code section 4975(e)(3)(B) and the applicable regulations.

Section II. Impartial Conduct Standards

If the fiduciary engaging in the covered transaction is a fiduciary within the meaning of ERISA section 3(21)(A)(i) or (ii), or Code section 4975(e)(3)(A) or (B), with respect to the assets involved in the transaction, the following conditions must be satisfied with respect to such transaction to the extent they are applicable to the fiduciary's actions:

(a) When exercising fiduciary authority described in ERISA section 3(21)(A)(i) or (ii), or Code section 4975(e)(3)(A) or (B), with respect to the assets involved in the transaction, the fiduciary acts in the Best Interest of the plan.

(b) All compensation received by the person and any Related Entity in connection with the transaction is reasonable in relation to the total services the person and any Related Entity provide to the plan.

(c) The fiduciary's statements about recommended investments, fees, material conflicts of interest, and any other matters relevant to a plan's investment decisions, are not misleading. For this purpose, a fiduciary's failure to disclose a Material Conflict of Interest relevant to the services the fiduciary is providing or other actions it is taking in relation to a plan's investment decisions is deemed to be a misleading statement

III. Conditions Applicable to Transactions Described in Section I(a)

Except to the extent otherwise provided in Section V of this exemption, Section I of this exemption applies only if the following conditions are satisfied:

(a) The person engaging in the covered transaction is not a trustee (other than a nondiscretionary trustee), an administrator of the plan, or an employer any of whose employees are covered by the plan. Notwithstanding the foregoing, this condition does not apply to a trustee that satisfies Section III(h) and (i).

(b) The covered transaction is performed under a written authorization executed in advance by a fiduciary of each plan whose assets are involved in the transaction, which plan fiduciary is independent of the person engaging in the covered transaction. The authorization is terminable at will by the plan, without penalty to the plan, upon receipt by the authorized person of written notice of termination.

(c) The authorized person obtains annual reauthorization to engage in transactions pursuant to the exemption in the method set forth in Section III(b). Alternatively, the authorized person may supply a form expressly providing an election to terminate the authorization described in Section III(b) with instructions on the use of the form to the authorizing fiduciary no less than annually. The instructions for such form must include the following information:

(1) The authorization is terminable at will by the plan, without penalty to the plan, when the authorized person receives (via first class mail, personal delivery, or email) from the authorizing fiduciary or other plan official having authority to terminate the authorization, a written notice of the intent of the plan to terminate authorization; and

(2) Failure to return the form or some other written notification of the plan's intent to terminate the authorization within thirty (30) days from the date the termination form is sent to the authorizing fiduciary will result in the continued authorization of the authorized person to engage in the covered transactions on behalf of the plan.

(d) Within three months before an initial authorization is made pursuant to Section III(b), the authorizing fiduciary is furnished with a copy of this exemption, the form for termination of authorization described in Section III(c), a description of the person's brokerage placement practices, and any other reasonably available information regarding the matter that the authorizing fiduciary requests.

(e) The person engaging in a covered transaction furnishes the authorizing fiduciary with either:

(1) A confirmation slip for each securities transaction underlying a covered transaction within ten business days of the securities transaction containing the information described in Rule 10b–10(a)(1–7) under the Securities Exchange Act of 1934; or

(2) at least once every three months and not later than 45 days following the period to which it relates, a report disclosing:

(A) A compilation of the information that would be provided to the plan pursuant to Section III(e)(1) during the three-month period covered by the report;

(B) the total of all securities transaction-related charges incurred by the plan during such period in connection with such covered transactions; and

(C) the amount of the securities transaction-related charges retained by such person, and the amount of such charges paid to other persons for execution or other services. For purposes of this paragraph (e), the words ''incurred by the plan'' shall be construed to mean ''incurred by the pooled fund'' when such person engages in covered transactions on behalf of a pooled fund in which the plan participates.

(f) The authorizing fiduciary is furnished with a summary of the information required under Section III(e)(1) at least once per year. The summary must be furnished within 45 days after the end of the period to which it relates, and must contain the following:

(1) The total of all securities transaction-related charges incurred by the plan during the period in connection with covered securities transactions.

(2) The amount of the securities transaction-related charges retained by the authorized person and the amount of these charges paid to other persons for execution or other services.

(3) A description of the brokerage placement practices of the person that is engaging in the covered transaction, if such practices have materially changed during the period covered by the summary.

(4)(A) A portfolio turnover ratio, calculated in a manner which is reasonably designed to provide the authorizing fiduciary with the information needed to assist in making a prudent determination regarding the amount of turnover in the portfolio. The requirements of this paragraph (f)(4)(A) will be met if the ''annualized portfolio turnover ratio,'' calculated in the manner described in paragraph (f)(4)(B), is contained in the summary.

(B) The ''annualized portfolio turnover ratio'' shall be calculated as a percentage of the plan assets consisting of securities or cash over which the authorized person had discretionary investment authority, or with respect to which such person rendered, or had any responsibility to render, investment advice within the meaning of ERISA section 3(21)(A)(ii), (the portfolio) at any time or times (management period(s)) during the period covered by the report. First, the ''portfolio turnover ratio'' (not annualized) is obtained by dividing (i) the lesser of the aggregate dollar amounts of purchases or sales of portfolio securities during the management period(s) by (ii) the monthly average of the market value of the portfolio securities during all management period(s). Such monthly average is calculated by totaling the market values of the portfolio securities as of the beginning and end of each management period and as of the end of each month that ends within such period(s), and dividing the sum by the number of valuation dates so used. For purposes of this calculation, all debt securities whose maturities at the time of acquisition were one year or less are excluded from both the numerator and the denominator. The ''annualized portfolio turnover ratio'' is then derived by multiplying the ''portfolio turnover ratio'' by an annualizing factor. The annualizing factor is obtained by dividing (iii) the number twelve by (iv) the aggregate duration of the management period(s) expressed in months (and fractions thereof). Examples of the use of this formula are provided in Section VII.

(C) The information described in this paragraph (f)(4) is not required to be furnished in any case where the authorized person has not exercised discretionary authority over trading in the plan's account, nor provided investment advice within the meaning of ERISA section 3(21)(A)(ii), during the period covered by the report.

For purposes of this paragraph (f), the words ''incurred by the plan'' shall be construed to mean ''incurred by the pooled fund'' when such person engages in covered transactions on behalf of a pooled fund in which the plan participates.

(g) If an agency cross transaction to which Section V(a) does not apply is involved, the following conditions must also be satisfied:

(1) The information required under Section III(d) or Section V(c)(1)(B) of this exemption includes a statement to the effect that with respect to agency cross transactions, the person effecting or executing the transactions will have a potentially conflicting division of

loyalties and responsibilities regarding the parties to the transactions;

(2) The summary required under Section III(f) of this exemption includes a statement identifying the total number of agency cross transactions during the period covered by the summary and the total amount of all commissions or other remuneration received or to be received from all sources by the person engaging in the transactions in connection with the transactions during the period;

(3) The person effecting or executing the agency cross transaction has the discretionary authority to act on behalf of, and/or provide investment advice to, either (A) one or more sellers or (B) one or more buyers with respect to the transaction, but not both.

(4) The agency cross transaction is a purchase or sale, for no consideration other than cash payment against prompt delivery of a security for which market quotations are readily available; and

(5) The agency cross transaction is executed or effected at a price that is at or between the independent bid and independent ask prices for the security prevailing at the time of the transaction.

(h) Except pursuant to Section V(b), a trustee (other than a non-discretionary trustee) may engage in a covered transaction only with a plan that has total net assets with a value of at least $50 million and in the case of a pooled fund, the $50 million requirement will be met if 50 percent or more of the units of beneficial interest in such pooled fund are held by plans having total net assets with a value of at least $50 million.

For purposes of the net asset tests described above, where a group of plans is maintained by a single employer or controlled group of employers, as defined in ERISA section 407(d)(7), the $50 million net asset requirement may be met by aggregating the assets of such plans, if the assets are pooled for investment purposes in a single master trust.

(i) The trustee described in Section III(h) engaging in a covered transaction furnishes, at least annually, to the authorizing fiduciary of each plan the following:

(1) The aggregate brokerage commissions, expressed in dollars, paid by the plan to brokerage firms affiliated with the trustee;

(2) the aggregate brokerage commissions, expressed in dollars, paid by the plan to brokerage firms unaffiliated with the trustee;

(3) the average brokerage commissions, expressed as cents per share, paid by the plan to brokerage firms affiliated with the trustee; and

(4) the average brokerage commissions, expressed as cents per share, paid by the plan (to brokerage firms unaffiliated with the trustee.

For purposes of this paragraph (i), the words "paid by the plan" shall be construed to mean "paid by the pooled fund" when the trustee engages in covered transactions on behalf of a pooled fund in which the plan participates.

(j) In the case of securities transactions involving shares of Mutual Funds, other than exchange traded funds, at the time of the transaction, the shares are purchased or sold at net asset value (NAV) plus a commission, in accordance with applicable securities laws and regulations.

Section IV. Conditions Applicable to Transactions Described in Section I(b)

Section I(b) of this exemption applies only if the following conditions are satisfied:

(a) The fiduciary engaging in the covered transaction customarily purchases and sells securities for its own account in the ordinary course of its business as a broker-dealer.

(b) At the time the transaction is entered into, the terms are at least as favorable to the plan as the terms generally available in an arm's length transaction with an unrelated party.

(c) Except to the extent otherwise provided in Section V, the requirements of Section III(a) through III(f), III(h) and III(i) (if applicable), and III(j) are satisfied with respect to the transaction.

Section V. Exceptions From Conditions

(a) Certain agency cross transactions. Section III of this exemption does not apply in the case of an agency cross transaction, provided that the person effecting or executing the transaction:

(1) Does not render investment advice to any plan for a fee within the meaning of ERISA section 3(21)(A)(ii) with respect to the transaction;

(2) is not otherwise a fiduciary who has investment discretion with respect to any plan assets involved in the transaction, *see* 29 CFR 2510.3–21(d); and

(3) does not have the authority to engage, retain or discharge any person who is or is proposed to be a fiduciary regarding any such plan assets.

(b) Recapture of profits. Sections III(a) and III(i) do not apply in any case where the person who is engaging in a covered transaction returns or credits to the plan all profits earned by that person and any Related Entity in connection with the securities transactions associated with the covered transaction.

(c) Special rules for pooled funds. In the case of a person engaging in a covered transaction on behalf of an account or fund for the collective investment of the assets of more than one plan (a pooled fund):

(1) Sections III(b), (c) and (d) of this exemption do not apply if—

(A) the arrangement under which the covered transaction is performed is subject to the prior and continuing authorization, in the manner described in this paragraph (c)(1), of a plan fiduciary with respect to each plan whose assets are invested in the pooled fund who is independent of the person. The requirement that the authorizing fiduciary be independent of the person shall not apply in the case of a plan covering only employees of the person, if the requirements of Section V(c)(2)(A) and (B) are met.

(B) The authorizing fiduciary is furnished with any information that is reasonably necessary to determine whether the authorization should be given or continued, not less than 30 days prior to implementation of the arrangement or material change thereto, including (but not limited to) a description of the person's brokerage placement practices, and, where requested any other reasonably available information regarding the matter upon the reasonable request of the authorizing fiduciary at any time.

(C) In the event an authorizing fiduciary submits a notice in writing to the person engaging in or proposing to engage in the covered transaction objecting to the implementation of, material change in, or continuation of, the arrangement, the plan on whose behalf the objection was tendered is given the opportunity to terminate its investment in the pooled fund, without penalty to the plan, within such time as may be necessary to effect the withdrawal in an orderly manner that is equitable to all withdrawing plans and to the nonwithdrawing plans. In the case of a plan that elects to withdraw under this subparagraph (c)(1)(C), the withdrawal shall be effected prior to the implementation of, or material change in, the arrangement; but an existing arrangement need not be discontinued by reason of a plan electing to withdraw.

(D) In the case of a plan whose assets are proposed to be invested in the pooled fund subsequent to the implementation of the arrangement and that has not authorized the arrangement in the manner described in Section V(c)(1)(B) and (C), the plan's investment in the pooled fund is subject to the prior written authorization of an authorizing fiduciary who satisfies the requirements of subparagraph (c)(1)(A).

(2) Section III(a) of this exemption, to the extent that it prohibits the person from being the employer of employees covered by a plan investing in a pool managed by the person, does not apply if—

(A) The person is an ''investment manager'' as defined in section 3(38) of ERISA, and

(B) Either (i) the person returns or credits to the pooled fund all profits earned by the person and any Related Entity in connection with all covered transactions engaged in by the fund, or (ii) the pooled fund satisfies the requirements of paragraph V(c)(3).

(3) A pooled fund satisfies the requirements of this paragraph for a fiscal year of the fund if—

(A) On the first day of such fiscal year, and immediately following each acquisition of an interest in the pooled fund during the fiscal year by any plan covering employees of the person, the aggregate fair market value of the interests in such fund of all plans covering employees of the person does not exceed twenty percent of the fair market value of the total assets of the fund; and

(B) The aggregate brokerage commissions received by the person and any Related Entity, in connection with covered transactions engaged in by the person on behalf of all pooled funds in which a plan covering employees of the person participates, do not exceed five percent of the total brokerage commissions received by the person and any Related Entity from all sources in such fiscal year.

Section VI. Recordkeeping Requirements

(a) The plan fiduciary engaging in the covered transactions maintains or causes to be maintained for a period of six years, in a manner that is accessible for audit and examination, the records necessary to enable the persons described in Section VI(b) to determine whether the conditions of this exemption have been met, except that:

(1) If the records necessary to enable the persons described in Section VI(b) below to determine whether the conditions of the exemption have been met are lost or destroyed, due to circumstances beyond the control of the such plan fiduciary, then no prohibited transaction will be considered to have occurred solely on the basis of the unavailability of those records; and

(2) No party in interest, other than such plan fiduciary who is responsible for record-keeping, shall be subject to the civil penalty that may be assessed under ERISA section 502(i) or the taxes imposed by Code section 4975(a) and (b) if the records are not maintained or are not available for examination as required by paragraph (b) below; and

(b)(1) Except as provided below in subparagraph (2) and notwithstanding any provisions of ERISA section 504(a)(2) and (b), the records referred to in the above paragraph are unconditionally available at their customary location for examination during normal business hours by—

(A) Any duly authorized employee or representative of the Department or the Internal Revenue Service;

(B) Any fiduciary of the plan or any duly authorized employee or representative of such fiduciary;

(C) Any contributing employer and any employee organization whose members are covered by the plan, or any authorized employee or representative of these entities; or

(D) Any participant or beneficiary of the plan or the duly authorized representative of such participant or beneficiary; and

(2) None of the persons described in subparagraph (1)(B)–(D) above shall be authorized to examine trade secrets or commercial or financial information of such fiduciary which is privileged or confidential.

(3) Should such plan fiduciary refuse to disclose information on the basis that such information is exempt from disclosure, such plan fiduciary shall, by the close of the thirtieth (30th) day following the request, provide a written notice advising that person of the reasons for the refusal and that the Department may request such information.

Section VII. Definitions

The following definitions apply to this exemption:

(a) The term ''person'' includes the person and affiliates of the person.

(b) An ''affiliate'' of a person includes the following:

(1) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with, the person;

(2) Any officer, director, partner, employee, relative (as defined in ERISA section 3(15)), brother, sister, or spouse of a brother or sister, of the person; and

(3) Any corporation or partnership of which the person is an officer, director or employee or in which such person is a partner.

A person is not an affiliate of another person solely because one of them has investment discretion over the other's assets. The term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(c) An ''agency cross transaction'' is a securities transaction in which the same person acts as agent for both any seller and any buyer for the purchase or sale of a security.

(d) The term ''covered transaction'' means an action described in Section I of this exemption.

(e) The term ''effecting or executing a securities transaction'' means the execution of a securities transaction as agent for another person and/or the performance of clearance, settlement, custodial or other functions ancillary thereto.

(f) A plan fiduciary is ''independent'' of a person if it (1) is not the person, (2) does not receive compensation or other consideration for his or her own account from the person, and (3) does not have a relationship to or an interest in the person that might affect the exercise of the person's best judgment in connection with transactions described in this exemption. Notwithstanding the foregoing, if the plan is an individual retirement account not subject to title I of ERISA, and is beneficially owned by an employee, officer, director or partner of the person engaging in covered transactions with the IRA pursuant to this exemption, such beneficial owner is deemed ''independent'' for purposes of this definition.

(g) The term ''profit'' includes all charges relating to effecting or executing securities transactions, less reasonable and necessary expenses including reasonable indirect expenses (such as overhead costs) properly allocated to the performance of these transactions under generally accepted accounting principles.

(h) The term ''securities transaction'' means the purchase or sale of securities.

(i) The term ''nondiscretionary trustee'' of a plan means a trustee or custodian whose powers and duties with respect to any assets of the plan are limited to (1) the provision of nondiscretionary trust services to the plan, and (2) duties imposed on the trustee by any provision or provisions of ERISA or the Code. The term ''nondiscretionary trust services'' means custodial services and services ancillary to custodial services, none of which services are discretionary. For purposes of this exemption, a person does not fail to be a nondiscretionary trustee solely by reason of having been delegated, by the sponsor of a master or prototype plan, the power to amend such plan.

(j) The term ''plan'' means an employee benefit plan described in ERISA section 3(3) and any plan described in Code section 4975(e)(1) (including an Individual Retirement Account as defined in VII(k)).

(k) The terms ''Individual Retirement Account'' or ''IRA'' mean any trust, account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code.

(l) The term ''Related Entity'' means an entity, other than an affiliate, in which a person has an interest which may affect the person's exercise of its best judgment as a fiduciary.

(m) A fiduciary acts in the ''Best Interest'' of the plan when the fiduciary acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the plan, without regard to the financial or other interests of the fiduciary, its affiliate, a Related Entity or any other party.

(n) The term ''Commission'' means a brokerage commission or sales load paid for the service of effecting or executing the transaction, but not a 12b–1 fee, revenue sharing payment, marketing fee, administrative fee, sub-TA fee or sub-accounting fee.

(o) A ''Material Conflict of Interest'' exists when person has a financial interest that could affect the exercise of its best judgment as a fiduciary in rendering advice to a Plan or IRA.

Section VIII. Examples Illustrating the Use of the Annualized Portfolio Turnover Ratio Described in Section III(f)(4)(B)

(a) M, an investment manager affiliated with a broker dealer that M uses to effect securities transactions for the accounts that it manages, exercises investment discretion over the account of plan P for the period January 1, 2014, though June 30, 2014, after which the relationship between M and P ceases. The market values of P's account with A at the relevant times (excluding debt securities having a maturity of one year or less at the time of acquisition) are:

Date	Market value ($ millions)
January 1, 2014	10.4
January 31, 2014	10.2
February 28, 2014	9.9
March 31, 2014	10.0
April 30, 2014	10.6
May 31, 2014	11.5
June 30, 2014	12.0
Sum of market value	74.6

Aggregate purchases during the 6-month period were $850,000; aggregate sales were $1,000,000, excluding in each case debt securities having a maturity of one year or less at the time of acquisition.

For purposes of Section III(f)(4) of this exemption, M computes the annualized portfolio turnover as follows:

A = $850,000 (lesser of purchases or sales)

B = $10,657,143 ($74.6 million divided by 7, *i.e.,* number of valuation dates)

Annualizing factor = C/D = 12/6 = 2

Annualized portfolio turnover ratio = 2 × (850,000/10,657,143) = 0.160 = 16.0 percent

(b) Same facts as (a), except that M manages the portfolio through July 15, 2014, and, in addition, resumes management of the portfolio on November 10, 2014, through the end of the year. The additional relevant valuation dates and portfolio values are:

Dates	Market value ($ millions)
July 15, 2014	12.2
November 10, 2014	9.4
November 30, 2014	9.6
December 31, 2014	9.8
Sum of market values	41.0

During the periods July 1, 2014, through July 15, 2014, and November 10, 2014, through December 31, 2014, there were an additional $650,000 of purchases and $400,000 of sales. Thus, total purchases were $1,500,000 (*i.e.,* $850,000 + $650,000) and total sales were $1,400,000 (*i.e.,* $1,000,000 + $400,000) for the management periods.

M now computes the annualized portfolio turnover as follows:

A = $1,400,000 (lesser of aggregate purchases or sales)

B = $10,509,091 ($10,509,091 ($115.6 million divided by 11)

Annualizing factor = C/D = 12/ (6.5 + 1.67) = 1.47

Annualized portfolio turnover ratio = 1.47 × (1,400,000/10,509,091) = 0.196 = 19.6 percent.

Proposed Revocation of Parts I(b), I(c) and II(2) of PTE 75–1 and Restatement of PTE 75–1

The Department is proposing to revoke Parts I(b), I(c) and II(2) of PTE 75–1. In connection with the proposed revocation of Part II(2), the Department is republishing Part II of PTE 75–1. Part II of PTE 75–1 shall read as follows:

The restrictions of section 406(a) of the Employee Retirement Income Security Act of 1974 (the Act) and the taxes imposed by section 4975(a) and (b) of the Internal Revenue Code of 1986 (the Code), by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply to any purchase or sale of a security between an employee benefit plan and a broker-dealer registered under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), a reporting dealer who makes primary markets in securities of the United States Government or of any agency of the United States Government (Government securities) and reports daily to the Federal Reserve Bank of New York its positions with respect to Government securities and borrowings thereon, or a bank supervised by the United States or a State if the following conditions are met:

(a) In the case of such broker-dealer, it customarily purchases and sells securities for its own account in the ordinary course of its business as a broker-dealer.

(b) In the case of such reporting dealer or bank, it customarily purchases and sells Government securities for its own account in the ordinary course of its business and such purchase or sale between the plan and such reporting dealer or bank is a purchase or sale of Government securities.

(c) Such transaction is at least as favorable to the plan as an arm's length transaction with an unrelated party would be, and it was not, at the time of such transaction, a prohibited transaction within the meaning of section 503(b) of the Code.

(d) Neither the broker-dealer, reporting dealer, bank, nor any affiliate thereof has or exercises any discretionary authority or control (except as a directed trustee) with respect to the investment of the plan assets involved in the transaction, or renders investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to those assets.

(e) The broker-dealer, reporting dealer, or bank engaging in the covered transaction maintains or causes to be maintained for a period of six years from the date of such transaction such records as are necessary to enable the persons described in paragraph (f) of this exemption to determine whether the conditions of this exemption have been met, except that:

(1) No party in interest other than the broker-dealer, reporting dealer, or bank engaging in the covered transaction, shall be subject to the civil penalty, which may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, if such records are not maintained, or are not available for examination as required by paragraph (f) below; and

(2) A prohibited transaction will not be deemed to have occurred if, due to circumstances beyond the control of the broker-dealer, reporting dealer, or bank, such records are lost or destroyed prior to the end of such six year period.

(f)(1) Notwithstanding anything to the contrary in subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (e) are unconditionally available for examination during normal business hours by:

A. Any duly authorized employee or representative of the Department or the Internal Revenue Service;

B. Any fiduciary of the plan or any duly authorized employee or representative of such fiduciary;

C. Any contributing employer and any employee organization whose members are covered by the plan, or any authorized employee or representative of these entities; or

D. Any participant or beneficiary of the plan or the duly authorized representative of such participant or beneficiary; and

(2) None of the persons described in subparagraph (1)(B)–(D) above shall be authorized to examine trade secrets or commercial or financial information of the broker-dealer, reporting dealer, or bank which is privileged or confidential.

(3) Should such broker-dealer, reporting dealer, or bank refuse to disclose information on the basis that such information is exempt from disclosure, the broker-dealer, reporting dealer, or bank shall, by the close of the thirtieth (30th) day following the request, provide a written notice advising that person of the reasons for the refusal and that the Department may request such information.

For purposes of this exemption, the terms "broker-dealer," "reporting dealer" and "bank" shall include such persons and any affiliates thereof, and the term "affiliate" shall be defined in the same manner as that term is defined in 29 CFR 2510.3–21(e) and 26 CFR 54.4975–9(e).

Signed at Washington, DC, this 14th day of April, 2015.

Phyllis C. Borzi,

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

[FR Doc. 2015–08838 Filed 4–15–15; 11:15 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

[Application Number D–11820]

ZRIN 1210–ZA25

Proposed Amendments to Class Exemptions 75–1, 77–4, 80–83 and 83–1

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

ACTION: Notice of proposed amendments to class exemptions.

SUMMARY: This document contains a notice of pendency before the Department of Labor of proposed amendments to prohibited transaction exemptions (PTEs) 75–1, 77–4, 80–83 and 83–1. Generally, the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (the Code) prohibit fiduciaries with respect to employee benefit plans and individual retirement accounts (IRAs) from engaging in self-dealing, including using their authority, control or responsibility to affect or increase their own compensation. These existing exemptions generally permit fiduciaries to receive compensation or other benefits as a result of the use of their fiduciary authority, control or responsibility in connection with investment transactions involving plans or IRAs. The proposed amendments would require the fiduciaries to satisfy uniform Impartial Conduct Standards in order to obtain the relief available under each exemption. The proposed amendments would affect participants and beneficiaries of plans, IRA owners, and fiduciaries with respect to such plans and IRAs.

DATES: *Comments:* Written comments must be received by the Department on or before July 6, 2015.

Applicability: The Department proposes to make these amendments applicable eight months after publication of the final exemption in the **Federal Register**.

ADDRESSES: All written comments concerning the proposed amendments to the class exemptions should be sent to the Office of Exemption Determinations by any of the following methods, identified by ZRIN: 1210–ZA25:

Federal eRulemaking Portal: http://www.regulations.gov at Docket ID number: EBSA–2014–0016. Follow the instructions for submitting comments.

Email to: e-OED@ dol.gov.

Fax to: (202) 693–8474.

Mail: Office of Exemption Determinations, Employee Benefits Security Administration, (Attention: D–11820), U.S. Department of Labor, 200 Constitution Avenue NW., Suite 400, Washington, DC 20210.

Hand Delivery/Courier: Office of Exemption Determinations, Employee Benefits Security Administration, (Attention: D–11820), U.S. Department of Labor, 122 C St. NW., Suite 400, Washington, DC 20001. *Instructions.* All comments must be received by the end of the comment period. The comments received will be available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N–1513, 200 Constitution Avenue NW., Washington, DC 20210. Comments will also be available online at *www.regulations.gov,* at Docket ID number: EBSA–2014–0016 and *www.dol.gov/ebsa,* at no charge.

Warning: All comments will be made available to the public. Do not include any personally identifiable information (such as Social Security number, name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

FOR FURTHER INFORMATION CONTACT: Brian Shiker, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, (202) 693–8854 (this is not a toll-free number).

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

Executive Summary

Purpose of Regulatory Action

The Department is proposing these amendments to existing class exemptions in connection with its proposed regulation defining a fiduciary under ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) (Proposed Regulation), published elsewhere in this issue of the **Federal Register**. The Proposed Regulation specifies when an entity is a fiduciary by reason of the provision of investment advice for a fee or other compensation regarding assets of a plan or IRA. If adopted, the Proposed Regulation would replace an

in the Adviser or Financial Institution; and

(3) Any corporation or partnership of which the Adviser or Financial Institution is an officer, director, or employee, or in which the Adviser or Financial Institution is a partner.

(c) Investment advice is in the ''Best Interest'' of the Retirement Investor when the Adviser and Financial Institution providing the advice act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, without regard to the financial or other interests of the Adviser, Financial Institution, any Affiliate or other party.

(d) ''Debt Security'' means a ''debt security'' as defined in Rule 10b–10(d)(4) of the Exchange Act that is:

(1) U.S. dollar denominated, issued by a U.S. corporation and offered pursuant to a registration statement under the Securities Act of 1933;

(2) An ''Agency Debt Security'' as defined in FINRA Rule 6710(l) or its successor; or

(3) A ''U.S. Treasury Security'' as defined in FINRA Rule 6710(p) or its successor.

(e) ''Financial Institution'' means the entity that (i) employs the Adviser or otherwise retains such individual as an independent contractor, agent or registered representative, and (ii) customarily purchases or sells Debt Securities for its own account in the ordinary course of its business, and that is:

(1) Registered as an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 *et seq.*) or under the laws of the state in which the adviser maintains its principal office and place of business;

(2) A bank or similar financial institution supervised by the United States or state, or a savings association (as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1))), but only if the advice resulting in the compensation is provided through a trust department of the bank or similar financial institution or savings association which is subject to periodic examination and review by federal or state banking authorities; and

(3) A broker or dealer registered under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

(f) ''Independent'' means a person that:

(1) Is not the Adviser or Financial Institution or an Affiliate;

(2) Does not receive compensation or other consideration for his or her own account from the Adviser, Financial Institution or an Affiliate; and

(3) Does not have a relationship to or an interest in the Adviser, Financial Institution or an Affiliate that might affect the exercise of the person's best judgment in connection with transactions described in this exemption.

(g) ''Individual Retirement Account'' or ''IRA'' means any trust, account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in Code section 408(a) and a health savings account described in Code section 223(d).

(h) A ''Material Conflict of Interest'' exists when an Adviser or Financial Institution has a financial interest that could affect the exercise of its best judgment as a fiduciary in rendering advice to a Retirement Investor regarding Principal Transactions.

(i) ''Plan'' means an employee benefit plan described in ERISA section 3(3) and any plan described in Code section 4975(e)(1)(A).

(j) ''Principal Transaction'' means a purchase or sale of a Debt Security where an Adviser or Financial Institution is purchasing from or selling to a Plan, participant or beneficiary account, or IRA on behalf of the Financial Institution's own account or the account of a person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the Financial Institution.

(k) ''Retirement Investor'' means:

(1) A fiduciary of a non-participant directed Plan subject to Title I of ERISA with authority to make investment decisions for the Plan;

(2) A participant or beneficiary of a Plan subject to Title I of ERISA with authority to direct the investment of assets in his or her Plan account or to take a distribution; or

(3) The beneficial owner of an IRA acting on behalf of the IRA.

Signed at Washington, DC, this 14th day of April, 2015.

Phyllis C. Borzi,

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

[FR Doc. 2015–08833 Filed 4–15–15; 11:15 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

[Application Number D–11687]

ZRIN 1210–ZA25

Proposed Amendment to Prohibited Transaction Exemption (PTE) 75–1, Part V, Exemptions From Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers and Banks

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

ACTION: Notice of Proposed Amendment to PTE 75–1, Part V.

SUMMARY: This document contains a notice of pendency before the Department of Labor of a proposed amendment to PTE 75–1, Part V, a class exemption from certain prohibited transactions provisions of the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (the Code). The provisions at issue generally prohibit fiduciaries of employee benefit plans and individual retirement accounts (IRAs), from lending money or otherwise extending credit to the plans and IRAs and receiving compensation in return. PTE 75–1, Part V, permits the extension of credit to a plan or IRA by a broker-dealer in connection with the purchase or sale of securities; however, it does not permit the receipt of compensation for an extension of credit by broker-dealers that are fiduciaries with respect to the assets involved in the transaction. The amendment proposed in this notice would permit investment advice fiduciaries to receive compensation when they extend credit to plans and IRAs to avoid a failed securities transaction. The proposed amendment would affect participants and beneficiaries of plans, IRA owners, and fiduciaries with respect to such plans and IRAs.

DATES: *Comments:* Written comments concerning the proposed class exemption must be received by the Department on or before July 6, 2015.

Applicability: The Department proposes to make this amendment applicable eight months after publication of the final amendment in the **Federal Register**.

ADDRESSES: All written comments concerning the proposed amendment to the class exemption should be sent to the Office of Exemption Determinations by any of the following methods, identified by ZRIN: 1210–ZA25:

Federal eRulemaking Portal: http://www.regulations.gov at Docket ID number: EBSA–2014–0016. Follow the instructions for submitting comments.

Email to: e-OED@dol.gov.

Fax to: (202) 693–8474.

Mail: Office of Exemption Determinations, Employee Benefits Security Administration, (Attention: D–11687), U.S. Department of Labor, 200 Constitution Avenue NW., Suite 400, Washington, DC 20210.

Hand Delivery/Courier: Office of Exemption Determinations, Employee Benefits Security Administration, (Attention: D–11687), U.S. Department of Labor, 122 C St. NW., Suite 400, Washington, DC 20001.

Instructions. All comments must be received by the end of the comment period. The comments received will be available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N–1513, 200 Constitution Avenue NW., Washington, DC 20210. Comments will also be available online at *www.regulations.gov*, at Docket ID number: EBSA–2014–0016 and *www.dol.gov/ebsa*, at no charge.

Warning: All comments will be made available to the public. Do not include any personally identifiable information (such as Social Security number, name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

FOR FURTHER INFORMATION CONTACT: Susan Wilker, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, (202) 693–8824 (this is not a toll-free number).

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

Public Hearing: The Department plans to hold an administrative hearing within 30 days of the close of the comment period. The Department will ensure ample opportunity for public comment by reopening the record following the hearing and publication of the hearing transcript. Specific information regarding the date, location and submission of requests to testify will be published in a notice in the **Federal Register**.

Executive Summary

Purpose of Regulatory Action

The Department is proposing this amendment to PTE 75–1, Part V, in connection with its proposed regulation under ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) (Proposed Regulation), published elsewhere in this issue of the **Federal Register**. The Proposed Regulation specifies when an entity is a fiduciary by reason of the provision of investment advice for a fee or other compensation regarding assets of a plan or IRA (*i.e.*, an investment advice fiduciary). If adopted, the Proposed Regulation would replace an existing regulation that was adopted in 1975. The Proposed Regulation is intended to take into account the advent of 401(k) plans and IRAs, the dramatic increase in rollovers, and other developments that have transformed the retirement plan landscape and the associated investment market over the four decades since the existing regulation was issued. In light of the extensive changes in retirement investment practices and relationships, the Proposed Regulation would update existing rules to distinguish more appropriately between the sorts of advice relationships that should be treated as fiduciary in nature and those that should not.

This notice proposes an amendment to PTE 75–1, Part V, that would allow broker-dealers that are investment advice fiduciaries to receive compensation when they extend credit to plans and IRAs to avoid failed securities transactions entered into by the plan or IRA. In the absence of an exemption, these transactions would be prohibited under ERISA and the Code. In this regard, ERISA and the Code generally prohibit fiduciaries from lending money or otherwise extending credit to plans and IRAs, and from receiving compensation in return.

ERISA section 408(a) specifically authorizes the Secretary of Labor to grant administrative exemptions from the prohibited transaction provisions.[1] Regulations at 29 CFR 2570.30 to 2570.52 describe the procedures for applying for an administrative exemption. Before granting an exemption, the Department must find that it is administratively feasible, in the interests of plans, their participants and beneficiaries and IRA owners, and protective of the rights of participants and beneficiaries of such plans and IRA owners. Interested parties are permitted to submit comments to the Department through July 6, 2015. The Department plans to hold an administrative hearing within 30 days of the close of the comment period.

Summary of the Major Provisions

The amendment to PTE 75–1, Part V, proposed in this notice would allow investment advice fiduciaries that are broker-dealers to receive compensation when they lend money or otherwise extend credit to plans or IRAs to avoid the failure of a purchase or sale of a security. The proposed exemption contains conditions that the broker-dealer lending money or otherwise extending credit must satisfy in order to take advantage of the exemption. In particular, the potential failure of the securities transaction may not be a result of the action or inaction of the fiduciary, and the terms of the extension of credit must be at least as favorable to the plan or IRA as terms the plan or IRA could obtain in an arm's length transaction with an unrelated party. Certain advance written disclosures must be made to the plan or IRA, in particular, with respect to the rate of interest or other fees charged for the loan or other extension of credit.

Regulatory Impact Analysis

Executive Order 12866 and 13563 Statement

Under Executive Orders 12866 and 13563, the Department must determine whether a regulatory action is ''significant'' and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing and streamlining rules, and of promoting flexibility. It also requires federal agencies to develop a plan under which

[1] Code section 4975(c)(2) authorizes the Secretary of the Treasury to grant exemptions from the parallel prohibited transaction provisions of the Code. Reorganization Plan No. 4 of 1978 (5 U.S.C. app. at 214 (2000)) generally transferred the authority of the Secretary of the Treasury to issue administrative exemptions under Code section 4975 to the Secretary of Labor. This amendment to PTE 75–1, Part V, would provide relief from the indicated prohibited transaction provisions of both ERISA and the Code.

the agencies will periodically review their existing significant regulations to make the agencies' regulatory programs more effective or less burdensome in achieving their regulatory objectives.

Under Executive Order 12866, "significant" regulatory actions are subject to the requirements of the Executive Order and review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866, defines a "significant regulatory action" as an action that is likely to result in a rule (1) having an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as "economically significant" regulatory actions); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. Pursuant to the terms of the Executive Order, OMB has determined that this action is "significant" within the meaning of Section 3(f)(4) of the Executive Order. Accordingly, the Department has undertaken an assessment of the costs and benefits of the proposed amendment, and OMB has reviewed this regulatory action.

Background

Proposed Regulation

As explained more fully in the preamble to the Department's Proposed Regulation under ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B), also published in this issue of the **Federal Register**, ERISA is a comprehensive statute designed to protect the interests of plan participants and beneficiaries, the integrity of employee benefit plans, and the security of retirement, health, and other critical benefits. The broad public interest in ERISA-covered plans is reflected in the imposition of stringent fiduciary responsibilities on parties engaging in important plan activities, as well as in the tax-favored status of plan assets and investments. One of the chief ways in which ERISA protects employee benefit plans is by requiring that plan fiduciaries comply with fundamental obligations rooted in the law of trusts. In particular, plan fiduciaries must manage plan assets prudently and with undivided loyalty to the plans and their participants and beneficiaries.[2] In addition, they must refrain from engaging in "prohibited transactions," which ERISA forbids because of the dangers posed by the fiduciaries' conflicts of interest with respect to the transactions.[3] When fiduciaries violate ERISA's fiduciary duties or the prohibited transaction rules, they may be held personally liable for the breach.[4] In addition, violations of the prohibited transaction rules are subject to excise taxes under the Code.

The Code also has rules regarding fiduciary conduct with respect to tax-favored accounts that are not generally covered by ERISA, such as IRAs. Although ERISA's general fiduciary obligations of prudence and loyalty do not govern the fiduciaries of IRAs, these fiduciaries are subject to the prohibited transaction rules. In this context, fiduciaries engaging in the prohibited transactions are subject to an excise tax enforced by the Internal Revenue Service. Unlike participants in plans covered by Title I of ERISA, IRA owners do not have a statutory right to bring suit against fiduciaries for violation of the prohibited transaction rules and fiduciaries are not personally liable to IRA owners for the losses caused by their misconduct. Nor can the Secretary of Labor bring suit to enforce the prohibited transactions rules on behalf of IRA owners.

Under the statutory framework, the determination of who is a "fiduciary" is of central importance. Many of ERISA's protections, duties, and liabilities hinge on fiduciary status. In relevant part, section 3(21)(A) of ERISA and section 4975(e)(3) of the Code provide that a person is a fiduciary with respect to a plan or IRA to the extent he or she (i) exercises any discretionary authority or discretionary control with respect to management of such plan or IRA, or exercises any authority or control with respect to management or disposition of its assets; (ii) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan or IRA, or has any authority or responsibility to do so; or, (iii) has any discretionary authority or discretionary responsibility in the administration of such plan or IRA.

The statutory definition deliberately casts a wide net in assigning fiduciary responsibility with respect to plan and IRA assets. Thus, "any authority or control" over plan or IRA assets is sufficient to confer fiduciary status, and any persons who render "investment advice for a fee or other compensation, direct or indirect" are fiduciaries, regardless of whether they have direct control over the plan's or IRA's assets and regardless of their status as an investment adviser or broker under the federal securities laws. The statutory definition and associated fiduciary responsibilities were enacted to ensure that plans and IRAs can depend on persons who provide investment advice for a fee to provide recommendations that are untainted by conflicts of interest. In the absence of fiduciary status, the providers of investment advice would neither be subject to ERISA's fundamental fiduciary standards, nor accountable for imprudent, disloyal, or tainted advice under ERISA or the Code, no matter how egregious the misconduct or how substantial the losses. Plans, individual participants and beneficiaries, and IRA owners often are not financial experts and consequently must rely on professional advice to make critical investment decisions. The significance of financial advice has become still greater with increased reliance on participant-directed plans and IRAs for the provision of retirement benefits.

In 1975, the Department issued a regulation, at 29 CFR 2510.3–21(c)(1975) defining the circumstances under which a person is treated as providing "investment advice" to an employee benefit plan within the meaning of section 3(21)(A)(ii) of ERISA (the "1975 regulation").[5] The 1975 regulation narrowed the scope of the statutory definition of fiduciary investment advice by creating a five-part test that must be satisfied before a person can be treated as rendering investment advice for a fee. Under the 1975 regulation, for advice to constitute "investment advice," an adviser who does not have discretionary authority or control with respect to the purchase or sale of securities or other property of the plan must—(1) render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing or selling securities or other property (2) on a regular basis (3) pursuant to a mutual agreement, arrangement or understanding, with the plan or a plan fiduciary that (4) the advice will serve as a primary basis for investment

[2] ERISA section 404(a).

[3] ERISA section 406. ERISA also prohibits certain transactions between a plan and a "party in interest."

[4] ERISA section 409; *see also* ERISA section 405.

[5] The Department of Treasury issued a virtually identical regulation, at 26 CFR 54.4975–9(c), which interprets Code section 4975(e)(3).

decisions with respect to plan assets, and that (5) the advice will be individualized based on the particular needs of the plan. The regulation provides that an adviser is a fiduciary with respect to any particular instance of advice only if he or she meets each and every element of the five-part test with respect to the particular advice recipient or plan at issue. A 1976 Department of Labor Advisory Opinion further limited the application of the statutory definition of "investment advice" by stating that valuations of employer securities in connection with employee stock ownership plan (ESOP) purchases would not be considered fiduciary advice.[6]

As the marketplace for financial services has developed in the years since 1975, the five-part test may now undermine, rather than promote, the statutes' text and purposes. The narrowness of the 1975 regulation allows professional advisers, consultants and valuation firms to play a central role in shaping plan investments, without ensuring the accountability that Congress intended for persons having such influence and responsibility when it enacted ERISA and the related Code provisions. Even when plan sponsors, participants, beneficiaries and IRA owners clearly rely on paid consultants for impartial guidance, the regulation allows consultants to avoid fiduciary status and the accompanying fiduciary obligations of care and prohibitions on disloyal and conflicted transactions. As a consequence, these advisers can steer customers to investments based on their own self-interest, give imprudent advice, and engage in transactions that would otherwise be categorically prohibited by ERISA and Code, without any liability under ERISA or the Code.

In the Department's Proposed Regulation defining a fiduciary under ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B), the Department seeks to replace the existing regulation with one that more appropriately distinguishes between the sorts of advice relationships that should be treated as fiduciary in nature and those that should not, in light of the legal framework and financial marketplace in which plans and IRAs currently operate.[7] Under the Proposed Regulation, plans include IRAs.

The Proposed Regulation describes the types of advice that constitute "investment advice" with respect to plan or IRA assets for purposes of the definition of a fiduciary at ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B). The proposal provides, subject to certain carve-outs, that a person renders investment advice with respect to a plan or IRA if, among other things, the person provides, directly to a plan, a plan fiduciary, a plan participant or beneficiary, IRA or IRA owner one of the following types of advice:

(1) A recommendation as to the advisability of acquiring, holding, disposing or exchanging securities or other property, including a recommendation to take a distribution of benefits or a recommendation as to the investment of securities or other property to be rolled over or otherwise distributed from a plan or IRA;

(2) A recommendation as to the management of securities or other property, including recommendations as to the management of securities or other property to be rolled over or otherwise distributed from the plan or IRA;

(3) An appraisal, fairness opinion or similar statement, whether verbal or written, concerning the value of securities or other property, if provided in connection with a specific transaction or transactions involving the acquisition, disposition or exchange of such securities or other property by the plan or IRA; and

(4) A recommendation of a person who is also going to receive a fee or other compensation for providing any of the types of advice described in paragraphs (1) through (3), above.

In addition, to be a fiduciary, such person must either (1) represent or acknowledge that it is acting as a fiduciary within the meaning of ERISA or the Code with respect to the advice, or (2) render the advice pursuant to a written or verbal agreement, arrangement or understanding that the advice is individualized to, or that such advice is specifically directed to, the advice recipient for consideration in making investment or management decisions with respect to securities or other property of the plan or IRA.

For advisers who do not represent that they are acting as ERISA or Code fiduciaries, the Proposed Regulation provides that advice rendered in conformance with certain carve-outs will not cause the adviser to be treated as a fiduciary under ERISA or the Code. For example, under the "seller's carve-out," counterparties in arm's length transactions with plans may make investment recommendations without acting as fiduciaries if certain conditions are met.[8] Similarly, the proposal contains a carve-out from the fiduciary status for providers of appraisals, fairness opinions, or statements of value in specified contexts (*e.g.,* with respect to ESOP transactions). The proposal additionally carves out from fiduciary status the marketing of investment alternative platforms, certain assistance in selecting investment alternatives and other activities. Finally, the Proposed Regulation contains a carve-out from fiduciary status for the provision of investment education.

Prohibited Transactions

The Department anticipates that the Proposed Regulation will cover many broker-dealers who do not currently consider themselves to be fiduciaries under ERISA or the Code. If the Proposed Regulation is adopted, these entities will become subject to the prohibited transaction restrictions in ERISA and the Code that apply to fiduciaries. The lending of money or other extension of credit between a fiduciary and a plan or IRA, and the plan's or IRA's payment of compensation to the fiduciary in return may be prohibited by ERISA section 406(a)(1)(B) and Code section 4975(c)(1)(B) and (D).

As relevant to this notice, the Department understands that broker-dealers can be required, as part of their relationships with clearing houses, to complete securities transactions entered into by the broker-dealer's customers, even if a particular customer does not perform on its obligations. If a broker-dealer is required to advance funds to settle a trade entered into by a plan or IRA, or purchase a security for delivery on behalf of a plan or IRA, the result can potentially be viewed as a loan of money or other extension of credit to the plan or IRA. Further, in the event a broker-dealer steps into a plan's or IRA's shoes in any particular transaction, it may charge interest or other fees to the plan or IRA. These transactions potentially violate ERISA section 406(a)(1)(B) and Code section 4975(c)(1)(B) and (D).

[6] Advisory Opinion 76–65A (June 7, 1976).

[7] The Department initially proposed an amendment to its regulation under ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) on October 22, 2010, at 75 FR 65263. It subsequently announced its intention to withdraw the proposal and propose a new rule, consistent with the President's Executive Orders 12866 and 13563, in order to give the public a full opportunity to evaluate and comment on the new proposal and updated economic analysis.

[8] Although the preamble adopts the phrase "seller's carve-out" as a shorthand way of referring to the carve-out and its terms, the regulatory carve-out is not limited just to sellers but rather applies more broadly to counterparties in arm's length transactions with plan investors with financial expertise.

Prohibited Transaction Exemptions

ERISA and the Code counterbalance the broad proscriptive effect of the prohibited transaction provisions with numerous statutory exemptions. For example, ERISA section 408(b)(14) and Code section 4975(d)(17) specifically exempt transactions resulting from the provision of fiduciary investment advice to a participant or beneficiary of an individual account plan or IRA owner, including extensions of short term credit for settlements of securities trades, where the advice, resulting transaction, and the adviser's fees meet certain conditions. The Secretary of Labor may grant administrative exemptions under ERISA and the Code on an individual or class basis if the Secretary finds that the exemption is (1) administratively feasible, (2) in the interests of plans, their participants and beneficiaries and IRA owners, and (3) protective of the rights of the participants and beneficiaries of such plans and IRA owners.

Over the years, the Department has granted several conditional class exemptions from the prohibited transactions provisions of ERISA and the Code. The Department has, for example, permitted investment advice fiduciaries to receive compensation from a plan or IRA (*i.e.,* a commission) for executing or effecting securities transactions as agent for the plan.[9] Elsewhere in this issue of the **Federal Register**, a new "Best Interest Contract Exemption" is proposed for the receipt of compensation by fiduciaries who provide investment advice to IRAs, plan participants, and certain small plans. Receipt by fiduciaries of compensation that varies, or compensation from third parties, as a result of advice to plans, would otherwise violate ERISA section 406(b) and Code section 4975(c). As part of the re-proposal of the regulation defining a fiduciary, the Department is proposing to condition these existing and newly-proposed exemptions on the fiduciary's commitment to adhere to certain impartial professional conduct standards; in particular, when providing investment advice that results in varying or third-party compensation, investment advice fiduciaries will be required to act in the best interest of the plans and IRAs they are advising.

The class exemptions described above do not provide relief for any extensions of credit that may be related to a plan's or IRA's investment transactions. PTE 75–1, Part V,[10] permits such an extension of credit to a plan or IRA by a broker-dealer in connection with the purchase or sale of securities. Specifically, the Department has acknowledged that the exemption is available for extensions of credit for: the settlement of securities transactions; short sales of securities; the writing of option contracts on securities, and purchasing of securities on margin.[11]

Relief under PTE 75–1, Part V, is limited in that the broker-dealer extending credit may not have or exercise any discretionary authority or control (except as a directed trustee) with respect to the investment of the plan or IRA assets involved in the transaction, *nor render investment advice within the meaning of 29 CFR 2510.3–21(c) with respect to those plan assets,* unless no interest or other consideration is received by the broker-dealer or any affiliate of the broker-dealer in connection with the extension of credit. Therefore, broker-dealers that are deemed fiduciaries under the amended regulation would not be able to receive compensation for extending credit under PTE 75–1, Part V.

As part of its development of the Proposed Regulation, the Department has considered public input indicating the need for additional prohibited transaction exemptions for investment advice fiduciaries. The Department was informed that relief was needed for broker-dealers to extend credit to plans and IRAs to avoid failed securities transactions, and to receive compensation in return. In the Department's view, the extension of credit to avoid a failed securities transaction falls within the contours of the existing relief provided by PTE 75–1, Part V, for extensions of credit "[i]n connection with the purchase or sale of securities." Accordingly, broker-dealers that are not fiduciaries may receive compensation for extending credit to avoid a failed securities transaction. The Department is proposing this amendment to extend such relief to investment advice fiduciaries.

Description of the Proposal

This proposed amendment would add a new Section (c) to PTE 75–1, Part V, that would provide an exception to the requirement that fiduciaries not receive compensation under the exemption. Section (c) would provide that a fiduciary within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) may receive reasonable compensation for extending credit to a plan or IRA to avoid a failed purchase or sale of securities involving the plan or IRA.

In conjunction with such relief, Section (c) includes several conditions. First, the potential failure of the purchase or sale of the securities may not be the result of the action or inaction by the broker-dealer or any affiliate.[12] Additionally, the terms of the extension of credit must be at least as favorable to the plan or IRA as the terms available in an arm's length transaction between unaffiliated parties.

Finally, the plan or IRA must receive written disclosure of certain terms prior to the extension of credit. This disclosure does not need to be made on a transaction by transaction basis, and can be part of an account opening agreement or a master agreement. The disclosure must include the rate of interest or other fees that will be charged on such extension of credit, and the method of determining the balance upon which interest will be charged. The plan or IRA must additionally be provided with prior written disclosure of any changes to these terms.

The required disclosures are intended to be consistent with the requirements of Securities and Exchange Act Rule 10b–16,[13] which governs broker-dealers' disclosure of credit terms in margin transactions. The Department understands that it is the practice of many broker-dealers to provide such disclosures to all customers, regardless of whether the customer is presently opening a margin account. To the extent such disclosure is provided, the disclosure terms of the proposed exemption would be satisfied.

The proposal would define the term "IRA" as any trust, account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code.[14] The

[9] *See* PTE 86–128, Exemption for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers, 51 FR 41686 (November 18, 1986), as amended, 67 FR 64137 (October 17, 2002).

[10] 40 FR 50845 (October 31, 1975), as amended, 71 FR 5883 (February 3, 2006).

[11] *See* Preamble to PTE 75–1, Part V, 40 FR 50845 (Oct. 31, 1975); ERISA Advisory Opinion 86–12A (March 19, 1986).

[12] Because of this limitation, the Department views it as unnecessary to condition this exemption on the fiduciary's adherence to the impartial conduct standards, including the best interest standard, that are incorporated into the newly proposed exemptions and proposed amendments to other existing exemptions.

[13] 17 CFR 240.10b-16.

[14] The Department has previously determined, after consulting with the Internal Revenue Service, that plans described in 4975(e)(1) of the Code are included within the scope of relief provided by PTE 75–1 because it was issued jointly by the Department and the Service. *See* PTE 2002–13, 67 FR 9483 (March 1, 2002) (preamble discussion). For simplicity and consistency with the other new proposed exemptions and proposed amendments to other existing exemptions published elsewhere in

proposed amendment also would revise the recordkeeping provisions of the exemption to require the broker-dealer engaging in the covered transaction, as opposed to the plan or IRA, to maintain the records. The proposed revision to the recordkeeping requirement would make it consistent with other existing class exemptions as well as the recordkeeping provisions of the other notices of proposed exemption published in this issue of the **Federal Register**.

Applicability Date

The Department is proposing that compliance with the final regulation defining a fiduciary under ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) will begin eight months after the publication of the final regulation in the **Federal Register** (Applicability Date). The Department proposes to make this amendment, if granted, applicable on the Applicability Date.

No Relief Proposed From ERISA Section 406(a)(1)(C) or Code Section 4975(c)(1)(C) for the Provision of Services

If the proposed amendment is granted, the exemption will not provide relief from a transaction prohibited by ERISA section 406(a)(1)(C), or from the taxes imposed by Code section 4975(a) and (b) by reason of Code section 4975(c)(1)(C), regarding the furnishing of goods, services or facilities between a plan and a party in interest or between an IRA and a disqualified person. The provision of investment advice to a plan or IRA is a service to the plan or IRA and compliance with this exemption will not relieve an investment advice fiduciary of the need to comply with ERISA section 408(b)(2), Code section 4975(d)(2), and applicable regulations thereunder.

Paperwork Reduction Act Statement

As part of its continuing effort to reduce paperwork and respondent burden, the Department of Labor conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that the public understands the Department's collection instructions; respondents can provide the requested data in the desired format; reporting burden (time and financial resources) is minimized; collection instruments are clearly understood; and the Department can properly assess the impact of collection requirements on respondents.

Currently, the Department is soliciting comments concerning the proposed information collection request (ICR) included in the Proposed Amendment to Prohibited Transaction Exemption (PTE) 75–1, Part V, Exemptions from Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers and Banks, as part of its proposal to amend its 1975 rule that defines when a person who provides investment advice to an employee benefit plan or IRA becomes a fiduciary. A copy of the ICR may be obtained by contacting the PRA addressee shown below or at *http://www.RegInfo.gov*.

The Department has submitted a copy of the Proposed Amendment to PTE 75–1, Part V, to the Office of Management and Budget (OMB) in accordance with 44 U.S.C. 3507(d) for review of its information collections. The Department and OMB are particularly interested in comments that:

• Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

• Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

• Enhance the quality, utility, and clarity of the information to be collected; and

• Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Comments should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for the Employee Benefits Security Administration. OMB requests that comments be received within 30 days of publication of the Proposed Investment Advice Initiative to ensure their consideration.

PRA Addressee: Address requests for copies of the ICR to G. Christopher Cosby, Office of Policy and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue NW., Room N–5718, Washington, DC 20210. Telephone (202) 693–8410; Fax: (202) 219–5333. These are not toll-free numbers. ICRs submitted to OMB also are available at *http://www.RegInfo.gov*.

As discussed in detail below, Section (c)(3) of the proposed amendment requires that prior to the extension of credit, the plan must receive from the fiduciary written disclosure of (i) the rate of interest (or other fees) that will apply and (ii) the method of determining the balance upon which interest will be charged in the event that the fiduciary extends credit to avoid a failed purchase or sale of securities, as well as prior written disclosure of any changes to these terms. Section (d) requires broker-dealers engaging in the transactions to maintain records demonstrating compliance with the conditions of the PTE. These requirements are information collection requests (ICRs) subject to the Paperwork Reduction Act.

The Department believes that the disclosure requirement is consistent with the disclosure requirement mandated by the Securities and Exchange Commission (SEC) in 17 CFR 240.10b–16(1) for margin transactions. Although the SEC does not mandate any recordkeeping requirement, the Department believes that it would be a usual and customary business practice for financial institutions to maintain any records necessary to prove that required disclosures had been distributed in compliance with the SEC's rule. Therefore, the Department concludes that these ICRs produce no additional burden to the public.

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under ERISA section 408(a) and Code section 4975(c)(2) does not relieve a fiduciary or other party in interest or disqualified person with respect to a plan from certain other provisions of ERISA and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of ERISA section 404 which require, among other things, that a fiduciary discharge his or her duties respecting the plan solely in the interests of the plan's participants and beneficiaries and in a prudent fashion in accordance with ERISA section 404(a)(1)(B);

(2) Before a class exemption amendment may be granted under

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this issue of the **Federal Register**, the Department has proposed this specific definition of IRA.

ERISA section 408(a) and Code section 4975(c)(2), the Department must find that the class exemption as amended is administratively feasible, in the interests of the plan and of its participants and beneficiaries and IRA owners, and protective of the rights of the plan's participants and beneficiaries and IRA owners;

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

(4) If granted, this amended class exemption will be 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.

Proposed Amendment

Under the authority of ERISA section 408(a) and Code section 4975(c)(2), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, October 27, 2011),[15] the Department proposes to amend PTE 75–1, Part V, to read as follows:

The restrictions of section 406 of the Employee Retirement Income Security Act of 1974 (the Act) and the taxes imposed by section 4975(a) and (b) of the Internal Revenue Code of 1986 (the Code), by reason of section 4975(c)(1) of the Code, shall not apply to any extension of credit to an employee benefit plan or an individual retirement account (IRA) by a party in interest or a disqualified person with respect to the plan or IRA, provided that the following conditions are met:

(a) The party in interest or disqualified person:

(1) Is a broker or dealer registered under the Securities Exchange Act of 1934; and

(2) Does not have or exercise any discretionary authority or control (except as a directed trustee) with respect to the investment of the plan or IRA assets involved in the transaction, nor does it render investment advice (within the meaning of 29 CFR 2510.3–21) with respect to those assets, unless no interest or other consideration is received by the party in interest or disqualified person or any affiliate thereof in connection with such extension of credit.

[15] For purposes of this proposed amendment, references to ERISA should be read to refer as well to the corresponding provisions of the Code.

(b) Such extension of credit:

(1) Is in connection with the purchase or sale of securities;

(2) Is lawful under the Securities Exchange Act of 1934 and any rules and regulations promulgated thereunder; and

(3) Is not a prohibited transaction within the meaning of section 503(b) of the Code.

(c) Notwithstanding section (a)(2), a fiduciary within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) may receive reasonable compensation for extending credit to a plan or IRA to avoid a failed purchase or sale of securities involving the plan or IRA if:

(1) The potential failure of the purchase or sale of the securities is not the result of action or inaction by such fiduciary or an affiliate;

(2) The terms of the extension of credit are at least as favorable to the plan or IRA as the terms available in an arm's length transaction between unaffiliated parties;

(3) Prior to the extension of credit, the plan or IRA receives written disclosure of (i) the rate of interest (or other fees) that will apply and (ii) the method of determining the balance upon which interest will be charged, in the event that the fiduciary extends credit to avoid a failed purchase or sale of securities, as well as prior written disclosure of any changes to these terms. This Section (c)(3) will be considered satisfied if the plan or IRA receives the disclosure described in the Securities and Exchange Act Rule 10b–16;[16] and

(d) The broker-dealer engaging in the covered transaction maintains or causes to be maintained for a period of six years from the date of such transaction such records as are necessary to enable the persons described in paragraph (e) of this exemption to determine whether the conditions of this exemption have been met, except that:

(1) No party other than the broker-dealer engaging in the covered transaction shall be subject to the civil penalty which may be assessed under section 502(i) of the Act, or to the taxes imposed by section 4975(a) and (b) of the Code, if such records are not maintained, or are not available for examination as required by paragraph (e) below; and

(2) A prohibited transaction will not be deemed to have occurred if, due to circumstances beyond the control of the broker-dealer, such records are lost or destroyed prior to the end of such six-year period.

[16] 17 CFR 240.10b–16.

(e) Notwithstanding anything to the contrary in subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (d) are unconditionally available for examination during normal business hours by duly authorized employees of (1) the Department of Labor, (2) the Internal Revenue Service, (3) plan participants and beneficiaries and IRA owners, (4) any employer of plan participants and beneficiaries, and (5) any employee organization any of whose members are covered by such plan.

For purposes of this exemption, the terms "party in interest," "disqualified person" and "fiduciary" shall include such party in interest, disqualified person, or fiduciary, and any affiliates thereof, and the term "affiliate" shall be defined in the same manner as that term is defined in 29 CFR 2510.3–21(e) and 26 CFR 54.4975–9(e). Also for the purposes of this exemption, the term "IRA" means any trust, account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code.

Signed at Washington, DC, this 14th day of April, 2015.

Phyllis C. Borzi,

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

[FR Doc. 2015–08836 Filed 4–15–15; 11:15 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

[Application Number D–11850]

ZRIN: 1210–ZA25

Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption (PTE) 84–24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies and Investment Company Principal Underwriters

AGENCY: Employee Benefits Security Administration (EBSA), Department of Labor.

ACTION: Notice of Proposed Amendment to and Proposed Partial Revocation of PTE 84–24.

Item 2. Exhibits.

List below all exhibits filed as a part of the registration statement:

Instruction. See the instructions as to exhibits, set forth below.

SIGNATURE

Pursuant to the requirements of Section l2 of the Securities Exchange Act of 1934, the registrant has duly caused this registration statement to be signed on its behalf by the undersigned, thereto duly authorized.

(Registrant)

Date

By

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*Print the name and title of the signing officer under such officer's signature.

INSTRUCTIONS AS TO EXHIBITS

If the securities to be registered on this form are to be registered on an exchange on which other securities of the registrant are registered, or are to be registered pursuant to Section 12(g) of the Act, copies of all constituent instruments defining the rights of the holders of each class of such securities, including any contracts or other documents which limit or qualify the rights of such holders, shall be filed as exhibits with each copy of the registration statement filed with the Commission or with an exchange, subject to Rule 12b–32 regarding incorporation of exhibits by reference.

Note: The text of Form 8–A will not appear in the Code of Federal Regulations.

PART 260—GENERAL RULES AND REGULATIONS, TRUST INDENTURE ACT OF 1939

■ 25. The authority citation for part 260 is revised to read as follows:

Authority: 15 U.S.C. 77c, 77ddd, 77eee, 77ggg, 77nnn, 77sss, 78*ll* (d), 80b–3, 80b–4, and 80b–11, unless otherwise noted.

■ 26. Section 260.4a–1 is revised to read as follows:

§ 260.4a–1 Exempted securities under section 304(a)(8).

The provisions of the Trust Indenture Act of 1939 shall not apply to any security that has been or will be issued otherwise than under an indenture. The same issuer may not claim this exemption within a period of twelve consecutive months for more than $50,000,000 aggregate principal amount of any securities.

By the Commission.

Dated: March 25, 2015.

Brent J. Fields,

Secretary.

[FR Doc. 2015–07305 Filed 4–17–15; 8:45 am]

BILLING CODE 8011–01–P

FEDERAL REGISTER

Vol. 80 Monday,
No. 75 April 20, 2015

Part III

Department of Labor

Employee Benefits Security Administration

29 CFR Parts 2509 and 2510

Definition of the Term ‘‘Fiduciary’’; Conflict of Interest Rule—Retirement Investment Advice; Proposed Rule

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Parts 2509 and 2510

RIN 1210–AB32

Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Notice of proposed rulemaking and withdrawal of previous proposed rule.

SUMMARY: This document contains a proposed regulation defining who is a "fiduciary" of an employee benefit plan under the Employee Retirement Income Security Act of 1974 (ERISA) as a result of giving investment advice to a plan or its participants or beneficiaries. The proposal also applies to the definition of a "fiduciary" of a plan (including an individual retirement account (IRA)) under section 4975 of the Internal Revenue Code of 1986 (Code). If adopted, the proposal would treat persons who provide investment advice or recommendations to an employee benefit plan, plan fiduciary, plan participant or beneficiary, IRA, or IRA owner as fiduciaries under ERISA and the Code in a wider array of advice relationships than the existing ERISA and Code regulations, which would be replaced. The proposed rule, and related exemptions, would increase consumer protection for plan sponsors, fiduciaries, participants, beneficiaries and IRA owners. This document also withdraws a prior proposed regulation published in 2010 (2010 Proposal) concerning this same subject matter. In connection with this proposal, elsewhere in this issue of the **Federal Register**, the Department is proposing new exemptions and amendments to existing exemptions from the prohibited transaction rules applicable to fiduciaries under ERISA and the Code that would allow certain broker-dealers, insurance agents and others that act as investment advice fiduciaries to continue to receive a variety of common forms of compensation that otherwise would be prohibited as conflicts of interest.

DATES: As of April 20, 2015, the proposed rule published October 22, 2010 (75 FR 65263) is withdrawn. Submit written comments on the proposed regulation on or before July 6, 2015.

ADDRESSES: To facilitate the receipt and processing of written comment letters on the proposed regulation, EBSA encourages interested persons to submit their comments electronically. You may submit comments, identified by RIN 1210–AB32, by any of the following methods:

Federal eRulemaking Portal: http://www.regulations.gov. Follow instructions for submitting comments.

Email: e-ORI@dol.gov. Include RIN 1210–AB32 in the subject line of the message.

Mail: Office of Regulations and Interpretations, Employee Benefits Security Administration, Attn: Conflict of Interest Rule, Room N–5655, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

Hand Delivery/Courier: Office of Regulations and Interpretations, Employee Benefits Security Administration, Attn: Conflict of Interest Rule, Room N–5655, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

Instructions: All comments received must include the agency name and Regulatory Identifier Number (RIN) for this rulemaking (RIN 1210–AB32). Persons submitting comments electronically are encouraged not to submit paper copies. All comments received will be made available to the public, posted without change to *http://www.regulations.gov* and *http://www.dol.gov/ebsa,* and made available for public inspection at the Public Disclosure Room, N–1513, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, including any personal information provided.

FOR FURTHER INFORMATION CONTACT:

For Questions Regarding the Proposed Rule: Contact Luisa Grillo-Chope or Fred Wong, Office of Regulations and Interpretations, Employee Benefits Security Administration (EBSA), (202) 693–8825.

For Questions Regarding the Proposed Prohibited Transaction Exemptions: Contact Karen Lloyd, Office of Exemption Determinations, EBSA, 202–693–8824.

For Questions Regarding the Regulatory Impact Analysis: Contact G. Christopher Cosby, Office of Policy and Research, EBSA, 202–693–8425. (These are not toll-free numbers).

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Purpose of the Regulatory Action

Under ERISA and the Code, a person is a fiduciary to a plan or IRA to the extent that he or she engages in specified plan activities, including rendering "investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan . . ." ERISA safeguards plan participants by imposing trust law standards of care and undivided loyalty on plan fiduciaries, and by holding fiduciaries accountable when they breach those obligations. In addition, fiduciaries to plans and IRAs are not permitted to engage in "prohibited transactions," which pose special dangers to the security of retirement, health, and other benefit plans because of fiduciaries' conflicts of interest with respect to the transactions. Under this regulatory structure, fiduciary status and responsibilities are central to protecting the public interest in the integrity of retirement and other important benefits, many of which are tax-favored.

In 1975, the Department issued regulations that significantly narrowed the breadth of the statutory definition of fiduciary investment advice by creating a five-part test that must, in each instance, be satisfied before a person can be treated as a fiduciary adviser. This regulatory definition applies to both ERISA and the Code. The Department created the test in a very different context, prior to the existence of participant-directed 401(k) plans, widespread investments in IRAs, and the now commonplace rollover of plan assets from fiduciary-protected plans to IRAs. Today, as a result of the five-part test, many investment professionals, consultants, and advisers [1] have no obligation to adhere to ERISA's fiduciary standards or to the prohibited transaction rules, despite the critical role they play in guiding plan and IRA investments. Under ERISA and the Code, if these advisers are not fiduciaries, they may operate with conflicts of interest that they need not disclose and have limited liability under federal pension law for any harms resulting from the advice they provide. Non-fiduciaries may give imprudent and disloyal advice; steer plans and IRA owners to investments based on their own, rather than their customers' financial interests; and act on conflicts of interest in ways that would be prohibited if the same persons were fiduciaries. In light of the breadth and intent of ERISA and the Code's statutory

[1] By using the term "adviser," the Department does not intend to limit its use to investment advisers registered under the Investment Advisers Act of 1940 or under state law. For example, as used herein, an adviser can be an individual or entity who can be, among other things, a representative of a registered investment adviser, a bank or similar financial institution, an insurance company, or a broker-dealer.

definition, the growth of participant-directed investment arrangements and IRAs, and the need for plans and IRA owners to seek out and rely on sophisticated financial advisers to make critical investment decisions in an increasingly complex financial marketplace, the Department believes it is appropriate to revisit its 1975 regulatory definition as well as the Code's virtually identical regulation. With this regulatory action, the Department proposes to replace the 1975 regulations with a definition of fiduciary investment advice that better reflects the broad scope of the statutory text and its purposes and better protects plans, participants, beneficiaries, and IRA owners from conflicts of interest, imprudence, and disloyalty.

The Department has also sought to preserve beneficial business models for delivery of investment advice by separately proposing new exemptions from ERISA's prohibited transaction rules that would broadly permit firms to continue common fee and compensation practices, as long as they are willing to adhere to basic standards aimed at ensuring that their advice is in the best interest of their customers. Rather than create a highly prescriptive set of transaction-specific exemptions, the Department instead is proposing a set of exemptions that flexibly accommodate a wide range of current business practices, while minimizing the harmful impact of conflicts of interest on the quality of advice.

In particular, the Department is proposing a new exemption (the "Best Interest Contract Exemption") that would provide conditional relief for common compensation, such as commissions and revenue sharing, that an adviser and the adviser's employing firm might receive in connection with investment advice to retail retirement investors.[2] In order to protect the interests of plans, participants and beneficiaries, and IRA owners, the exemption requires the firm and the adviser to contractually acknowledge fiduciary status, commit to adhere to basic standards of impartial conduct, adopt policies and procedures reasonably designed to minimize the harmful impact of conflicts of interest, and disclose basic information on their conflicts of interest and on the cost of their advice. Central to the exemption is the adviser and firm's agreement to meet fundamental obligations of fair dealing and fiduciary conduct—to give advice that is in the customer's best interest; avoid misleading statements; receive no more than reasonable compensation; and comply with applicable federal and state laws governing advice. This principles-based approach aligns the adviser's interests with those of the plan participant or IRA owner, while leaving the adviser and employing firm with the flexibility and discretion necessary to determine how best to satisfy these basic standards in light of the unique attributes of their business. The Department is similarly proposing to amend existing exemptions for a wide range of fiduciary advisers to ensure adherence to these basic standards of fiduciary conduct. In addition, the Department is proposing a new exemption for "principal transactions" in which advisers sell certain debt securities to plans and IRAs out of their own inventory, as well as an amendment to an existing exemption that would permit advisers to receive compensation for extending credit to plans or IRAs to avoid failed securities transactions. In addition to the Best Interest Contract Exemption, the Department is also seeking public comment on whether it should issue a separate streamlined exemption that would allow advisers to receive otherwise prohibited compensation in connection with plan, participant and beneficiary accounts, and IRA investments in certain high-quality low-fee investments, subject to fewer conditions. This is discussed in greater detail in the **Federal Register** notice related to the proposed Best Interest Contract Exemption.

This broad regulatory package aims to enable advisers and their firms to give advice that is in the best interest of their customers, without disrupting common compensation arrangements under conditions designed to ensure the adviser is acting in the best interest of the advice recipient. The proposed new exemptions and amendments to existing exemptions are published elsewhere in today's edition of the **Federal Register**.

B. Summary of the Major Provisions of the Proposed Rule

The proposed rule clarifies and rationalizes the definition of fiduciary investment advice subject to specific carve-outs for particular types of communications that are best understood as non-fiduciary in nature. Under the definition, a person renders investment advice by (1) providing investment or investment management recommendations or appraisals to an employee benefit plan, a plan fiduciary, participant or beneficiary, or an IRA owner or fiduciary, and (2) either (a) acknowledging the fiduciary nature of the advice, or (b) acting pursuant to an agreement, arrangement, or understanding with the advice recipient that the advice is individualized to, or specifically directed to, the recipient for consideration in making investment or management decisions regarding plan assets. When such advice is provided for a fee or other compensation, direct or indirect, the person giving the advice is a fiduciary.

Although the new general definition of investment advice avoids the weaknesses of the current regulation, standing alone it could sweep in some relationships that are not appropriately regarded as fiduciary in nature and that the Department does not believe Congress intended to cover as fiduciary relationships. Accordingly, the proposed regulation includes a number of specific carve-outs to the general definition. For example, the regulation draws an important distinction between fiduciary investment advice and non-fiduciary investment or retirement education. Similarly, under the "seller's carve-out,"[3] the proposal would not treat as fiduciary advice recommendations made to a plan in an arm's length transaction where there is generally no expectation of fiduciary investment advice, provided that the carve-out's specific conditions are met. In addition, the proposal includes specific carve-outs for advice rendered by employees of the plan sponsor, platform providers, and persons who offer or enter into swaps or security-based swaps with plans. All of the rule's carve-outs are subject to conditions designed to draw an appropriate line between fiduciary and non-fiduciary communications, consistent with the text and purpose of the statutory provisions.

Finally, in addition to the new proposal in this Notice, the Department is simultaneously proposing a new Best Interest Contract Exemption, revising other exemptions from the prohibited transaction rules of ERISA and the Code and is exploring through a request for comments the concept of an additional low-fee exemption.

[2] For purposes of the exemption, retail investors include (1) the participants and beneficiaries of participant-directed plans, (2) IRA owners, and (3) the sponsors (including employees, officers, or directors thereof) of non participant-directed plans with fewer than 100 participants to the extent the sponsors (including employees, officers, or directors thereof) act as a fiduciary with respect to plan investment decisions.

[3] Although referred to herein as the "seller's carve-out," we note that the carve-out provided in paragraph (b)(1)(i) of the proposal is not limited to sales and would apply to incidental advice provided in connection with an arm's length sale, purchase, loan, or bilateral contract between a plan investor with financial expertise and the adviser.

C. Gains to Investors and Compliance Costs

When the Department promulgated the 1975 rule, 401(k) plans did not exist, IRAs had only just been authorized, and the majority of retirement plan assets were managed by professionals, rather than directed by individual investors. Today, individual retirement investors have much greater responsibility for directing their own investments, but they seldom have the training or specialized expertise necessary to prudently manage retirement assets on their own. As a result, they often depend on investment advice for guidance on how to manage their savings to achieve a secure retirement. In the current marketplace for retirement investment advice, however, advisers commonly have direct and substantial conflicts of interest, which encourage investment recommendations that generate higher fees for the advisers at the expense of their customers and often result in lower returns for customers even before fees.

A wide body of economic evidence supports a finding that the impact of these conflicts of interest on retirement investment outcomes is large and, from the perspective of advice recipients, negative. As detailed in the Department's Regulatory Impact Analysis (available at *www.dol.gov/ebsa/pdf/conflictsofinterestria.pdf*), the supporting evidence includes, among other things, statistical analyses of conflicted investment channels, experimental studies, government reports documenting abuse, and basic economic theory on the dangers posed by conflicts of interest and by the asymmetries of information and expertise that characterize interactions between ordinary retirement investors and conflicted advisers. This evidence takes into account existing protections under ERISA as well as other federal and state laws. A review of this data, which consistently points to substantial failures in the market for retirement advice, suggests that IRA holders receiving conflicted investment advice can expect their investments to underperform by an average of 100 basis points per year over the next 20 years. The underperformance associated with conflicts of interest—in the mutual funds segment alone—could cost IRA investors more than $210 billion over the next 10 years and nearly $500 billion over the next 20 years. Some studies suggest that the underperformance of broker-sold mutual funds may be even higher than 100 basis points, possibly due to loads that are taken off the top and/or poor timing of broker sold investments. If the true underperformance of broker-sold funds is 200 basis points, IRA mutual fund holders could suffer from underperformance amounting to $430 billion over 10 years and nearly $1 trillion across the next 20 years. While the estimates based on the mutual fund market are large, the total market impact could be much larger. Insurance products, Exchange Traded Funds (ETFs), individual stocks and bonds, and other products are all sold by agents and brokers with conflicts of interest.

The Department expects the proposal would deliver large gains for retirement investors. Because of data constraints, only some of these gains can be quantified with confidence. Focusing only on how load shares paid to brokers affect the size of loads paid by IRA investors holding load funds and the returns they achieve, the Department estimates the proposal would deliver to IRA investors gains of between $40 billion and $44 billion over 10 years and between $88 billion and $100 billion over 20 years. These estimates assume that the rule would eliminate (rather than just reduce) underperformance associated with the practice of incentivizing broker recommendations through variable front-end-load sharing; if the rule's effectiveness in this area is substantially below 100 percent, these estimates may overstate these particular gains to investors in the front-load mutual fund segment of the IRA market. The Department nonetheless believes that these gains alone would far exceed the proposal's compliance cost. For example, if only 75 percent of anticipated gains were realized, the quantified subset of such gains—specific to the front-load mutual fund segment of the IRA market—would amount to between $30 billion and $33 billion over 10 years. If only 50 percent were realized, this subset of expected gains would total between $20 billion and $22 billion over 10 years, or several times the proposal's estimated compliance cost of $2.4 billion to 5.7 billion over the same 10 years. These gain estimates also exclude additional potential gains to investors resulting from reducing or eliminating the effects of conflicts in financial products other than front-end-load mutual funds. The Department invites input that would make it possible to quantify the magnitude of the rule's effectiveness and of any additional, not-yet-quantified gains for investors.

These estimates account for only a fraction of potential conflicts, associated losses, and affected retirement assets. The total gains to IRA investors attributable to the rule may be much higher than these quantified gains alone for several reasons. The Department expects the proposal to yield large, additional gains for IRA investors, including potential reductions in excessive trading and associated transaction costs and timing errors (such as might be associated with return chasing), improvements in the performance of IRA investments other than front-load mutual funds, and improvements in the performance of defined contribution (DC) plan investments. As noted above, under current rules, adviser conflicts could cost IRA investors as much as $410 billion over 10 years and $1 trillion over 20 years, so the potential additional gains to IRA investors from this proposal could be very large.

The following accounting table summarizes the Department's conclusions:

TABLE 1—PARTIAL GAINS TO INVESTORS AND COMPLIANCE COSTS ACCOUNTING TABLE

Category	Primary estimate	Low estimate	High estimate	Year dollar	Discount rate (9%)	Period covered
Partial Gains to Investors						
Annualized, Monetized ($millions/year)	$4,243	$3,830		2015	7	2017–2026
	$5,170	4,666		2015	3	2017–2026

TABLE 1—PARTIAL GAINS TO INVESTORS AND COMPLIANCE COSTS ACCOUNTING TABLE—Continued

Category	Primary estimate	Low estimate	High estimate	Year dollar	Discount rate (9%)	Period covered
Notes: The proposal is expected to deliver large gains for retirement investors. Because of limitations of the literature and other available evidence, only some of these gains can be quantified. The estimates in this table focus only on how load shares paid to brokers affect the size of loads IRA investors holding load funds pay and the returns they achieve. These estimates assume that the rule will eliminate (rather than just reduce) underperformance associated with the practice of incentivizing broker recommendations through variable front-end-load sharing. If, however, the rule's effectiveness in reducing underperformance is substantially below 100 percent, these estimates may overstate these particular gains to investors in the front-end-load mutual fund segment of the IRA market. However, these estimates account for only a fraction of potential conflicts, associated losses, and affected retirement assets. The total gains to IRA investors attributable to the rule may be higher than the quantified gains alone for several reasons. For example, the proposal is expected to yield additional gains for IRA investors, including potential reductions in excessive trading and associated transaction costs and timing errors (such as might be associated with return chasing), improvements in the performance of IRA investments other than front-load mutual funds, and improvements in the performance of DC plan investments. The partial-gains-to-investors estimates include both economic efficiency benefits and transfers from the financial services industry to IRA holders. The partial gains estimates are discounted to December 31, 2015.						
Compliance Costs						
Annualized, Monetized ($millions/year)	$348 328		$706 664	2015 2015	7 3	2016–2025 2016–2025
Notes: The compliance costs of the current proposal including the cost of compliance reviews, comprehensive compliance and supervisory system changes, policies and procedures and training programs updates, insurance increases, disclosure preparation and distribution, and some costs of changes in other business practices. Compliance costs incurred by mutual funds or other asset providers have not been estimated.						
Insurance Premium Transfers						
Annualized Monetized ($millions/year)	$63 63			2015 2015	7 3	2016–2025 2016–2025
From/To	From: Service providers facing increased insurance premiums due to increased liability risk			To: Plans, participants, beneficiaries, and IRA investors through the payment of recoveries—funded from a portion of the increased insurance premiums		

OMB Circular A–4 requires the presentation of a social welfare accounting table that summarizes a regulation's benefits, costs and transfers (monetized, where possible). A summary of this type would differ from and expand upon Table I in several ways:

• In the language of social welfare economics as reflected in Circular A–4, investor gains comprise two parts: Social welfare ''benefits'' attributable to improvements in economic efficiency and ''transfers'' of welfare to retirement investors from the financial services industry. Due to limitations of the literature and other available evidence, the investor gains estimates presented in Table I have not been broken down into benefits and transfer components, but making the distinction between these categories of impacts is key for a social welfare accounting statement.

• The estimates in Table I reflect only a subset of the gains to investors resulting from the rule, but may overstate this subset. As noted in Table I, the Department's estimates of partial gains to investors reflect an assumption that the rule will eliminate, rather than just reduce, underperformance associated with the practice of incentivizing broker recommendations through variable front-end-load sharing. If, however, the rule's effectiveness is substantially below 100 percent, these estimates would overstate these partial gains to investors in the front-load mutual fund segment of the IRA market. The estimates in Table I also exclude additional potential gains to investors resulting from reducing or eliminating the effects of conflicts in financial products other than front-end-load mutual funds in the IRA market, and all potential gains to investors in the plan market. The Department invites input that would make it possible to quantify the magnitude of the rule's effectiveness and of any additional, not-yet-quantified gains for investors.

• Generally, the gains to investors consist of multiple parts: Transfers to IRA investors from advisers and others in the supply chain, benefits to the overall economy from a shift in the allocation of investment dollars to projects that have higher returns, and resource savings associated with, for example, reductions in excessive turnover and wasteful and unsuccessful efforts to outperform the market. Some of these gains are partially quantified in Table I. Also, the estimates in Table I assume the gains to investors arise gradually as the fraction of wealth invested based on conflicted investment advice slowly declines over time based on historical patterns of asset turnover. However, the estimates do not account for potential transition costs associated with a shift of investments to higher-performing vehicles. These transition costs have not been quantified due to lack of granularity in the literature or availability of other evidence on both the portion of investor gains that consists of resource savings, as opposed to transfers, and the amount of transitional cost that would be incurred per unit of resource savings.

• Other categories of costs not yet quantified include compliance costs incurred by mutual funds or other asset providers. Enforcement costs or other costs borne by the government are also not quantified.

The Department requests detailed comment, data, and analysis on all of the issues outlined above for incorporation into the social welfare analysis at the finalization stage of the rulemaking process.

For a detailed discussion of the gains to investors and compliance costs of the current proposal, please see Section J. Regulatory Impact Analysis, below.

II. Overview

A. Rulemaking Background

The market for retirement advice has changed dramatically since the Department first promulgated the 1975 regulation. Individuals, rather than large employers and professional money managers, have become increasingly responsible for managing retirement assets as IRAs and participant-directed plans, such as 401(k) plans, have supplanted defined benefit pensions. At the same time, the variety and complexity of financial products have increased, widening the information gap between advisers and their clients. Plan fiduciaries, plan participants and IRA investors must often rely on experts for advice, but are unable to assess the quality of the expert's advice or effectively guard against the adviser's conflicts of interest. This challenge is especially true of small retail investors who typically do not have financial expertise and can ill-afford lower returns to their retirement savings caused by conflicts. As baby boomers retire, they are increasingly moving money from ERISA-covered plans, where their employer has both the incentive and the fiduciary duty to facilitate sound investment choices, to IRAs where both good and bad investment choices are myriad and advice that is conflicted is commonplace. Such "rollovers" will total more than $2 trillion over the next 5 years. These trends were not apparent when the Department promulgated the 1975 rule. At that time, 401(k) plans did not yet exist and IRAs had only just been authorized. These changes in the marketplace, as well as the Department's experience with the rule since 1975, support the Department's efforts to reevaluate and revise the rule through a public process of notice and comment rulemaking.

On October 22, 2010, the Department published a proposed rule in the **Federal Register** (75 FR 65263) (2010 Proposal) proposing to amend 29 CFR 2510.3–21(c) (40 FR 50843, Oct. 31, 1975), which defines when a person renders investment advice to an employee benefit plan, and consequently acts as a fiduciary under ERISA section 3(21)(A)(ii) (29 U.S.C. 1002(21)(A)(ii)). In response to this proposal, the Department received over 300 comment letters. A public hearing on the 2010 Proposal was held in Washington, DC on March 1 and 2, 2011, at which 38 speakers testified. The transcript of the hearing was made available for additional public comment and the Department received over 60 additional comment letters. In addition, the Department has held many meetings with interested parties.

A number of commenters urged consideration of other means to attain the objectives of the 2010 Proposal and of additional analysis of the proposal's expected costs and benefits. In light of these comments and because of the significance of this rule, the Department decided to issue a new proposed regulation. On September 19, 2011 the Department announced that it would withdraw the 2010 Proposal and propose a new rule defining the term "fiduciary" for purposes of section 3(21)(A)(ii) of ERISA. This document fulfills that announcement in publishing both a new proposed regulation and withdrawing the 2010 Proposal. Consistent with the President's Executive Orders 12866 and 13563, extending the rulemaking process will give the public a full opportunity to evaluate and comment on the revised proposal and updated economic analysis. In addition, we are simultaneously publishing proposed new and amended exemptions from ERISA and the Code's prohibited transaction rules designed to allow certain broker-dealers, insurance agents and others that act as investment advice fiduciaries to nevertheless continue to receive common forms of compensation that would otherwise be prohibited, subject to appropriate safeguards. The existing class exemptions will otherwise remain in place, affording flexibility to fiduciaries who currently use the exemptions or who wish to use the exemptions in the future. The proposed new regulatory package takes into account robust public comment and input and represents a substantial change from the 2010 Proposal, balancing long overdue consumer protections with flexibility for the industry in order to minimize disruptions to current business models.

In crafting the current regulatory package, the Department has benefitted from the views and perspectives expressed in public comments to the 2010 Proposal. For example, the Department has responded to concerns about the impact of the prohibited transaction rules on the marketplace for retail advice by proposing a broad package of exemptions that are intended to ensure that advisers and their firms make recommendations that are in the best interest of plan participants and IRA owners, without disrupting common fee arrangements. In response to commenters, the Department has also determined not to include, as fiduciary in nature, appraisals or valuations of employer securities provided to ESOPs or to certain collective investment funds holding assets of plan investors. On a more technical point, the Department also followed recommendations that it not automatically assign fiduciary status to investment advisers under the Advisers Act, but instead follow an entirely functional approach to fiduciary status. In light of public comments, the new proposal also makes a number of other changes to the regulatory proposal. For example, the Department has addressed concerns that it could be misread to extend fiduciary status to persons that prepare newsletters, television commentaries, or conference speeches that contain recommendations made to the general public. Similarly, the rule makes clear that fiduciary status does not extend to internal company personnel who give advice on behalf of their plan sponsor as part of their duties, but receive no compensation beyond their salary for the provision of advice. The Department is appreciative of the comments it received to the 2010 Proposal, and more fully discusses a number of the comments that influenced change in the sections that follow. In addition, the Department is eager to receive comments on the new proposal in general, and requests public comment on a number of specific aspects of the package as indicated below.

The following discussion summarizes the 2010 Proposal, describes some of the concerns and issues raised by commenters, and explains the new proposed regulation, which is published with this notice.

B. The Statute and Existing Regulation

ERISA (or the "Act") is a comprehensive statute designed to protect the interests of plan participants and beneficiaries, the integrity of employee benefit plans, and the security of retirement, health, and other critical benefits. The broad public interest in ERISA-covered plans is reflected in the Act's imposition of stringent fiduciary responsibilities on parties engaging in important plan activities, as well as in the tax-favored status of plan assets and investments. One of the chief ways in which ERISA protects employee benefit plans is by requiring that plan fiduciaries comply with fundamental obligations rooted in the law of trusts. In particular, plan fiduciaries must manage plan assets prudently and with undivided loyalty to the plans and their participants and beneficiaries.[4] In addition, they must refrain from

[4] ERISA section 404(a).

engaging in "prohibited transactions," which the Act does not permit because of the dangers to the interests of the plan and IRA posed by the transactions.[5] When fiduciaries violate ERISA's fiduciary duties or the prohibited transaction rules, they may be held personally liable for any losses to the investor resulting from the breach.[6] In addition, violations of the prohibited transaction rules are subject to excise taxes under the Code.

The Code also protects individuals who save for retirement through tax-favored accounts that are not generally covered by ERISA, such as IRAs, through a more limited regulation of fiduciary conduct. Although ERISA's general fiduciary obligations of prudence and loyalty do not govern the fiduciaries of IRAs and other plans not covered by ERISA, these fiduciaries are subject to the prohibited transaction rules of the Code. In this context, however, the sole statutory sanction for engaging in the illegal transactions is the assessment of an excise tax enforced by the Internal Revenue Service (IRS). Thus, unlike participants in plans covered by Title I of ERISA, IRA owners do not have a statutory right to bring suit against fiduciaries under ERISA for violation of the prohibited transaction rules and fiduciaries are not personally liable to IRA owners for the losses caused by their misconduct.

Under this statutory framework, the determination of who is a "fiduciary" is of central importance. Many of ERISA's and the Code's protections, duties, and liabilities hinge on fiduciary status. In relevant part, section 3(21)(A) of ERISA provides that a person is a fiduciary with respect to a plan to the extent he or she (i) exercises any discretionary authority or discretionary control with respect to management of such plan or exercises any authority or control with respect to management or disposition of its assets; (ii) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so; or, (iii) has any discretionary authority or discretionary responsibility in the administration of such plan. Section 4975(e)(3) of the IRC identically defines "fiduciary" for purposes of the prohibited transaction rules set forth in Code section 4975.

The statutory definition contained in section 3(21)(A) deliberately casts a wide net in assigning fiduciary responsibility with respect to plan assets. Thus, "any authority or control" over plan assets is sufficient to confer fiduciary status, and any person who renders "investment advice for a fee or other compensation, direct or indirect" is an investment advice fiduciary, regardless of whether they have direct control over the plan's assets, and regardless of their status as an investment adviser and/or broker under the federal securities laws. The statutory definition and associated fiduciary responsibilities were enacted to ensure that plans can depend on persons who provide investment advice for a fee to make recommendations that are prudent, loyal, and untainted by conflicts of interest. In the absence of fiduciary status, persons who provide investment advice would neither be subject to ERISA's fundamental fiduciary standards, nor accountable under ERISA or the Code for imprudent, disloyal, or tainted advice, no matter how egregious the misconduct or how substantial the losses. Plans, individual participants and beneficiaries, and IRA owners often are not financial experts and consequently must rely on professional advice to make critical investment decisions. The statutory definition, prohibitions on conflicts of interest, and core fiduciary obligations of prudence and loyalty, all reflect Congress' recognition in 1974 of the fundamental importance of such advice to protect savers' retirement nest eggs. In the years since then, the significance of financial advice has become still greater with increased reliance on participant-directed plans and self-directed IRAs for the provision of retirement benefits.

In 1975, the Department issued a regulation, at 29 CFR 2510.3–21(c) defining the circumstances under which a person is treated as providing "investment advice" to an employee benefit plan within the meaning of section 3(21)(A)(ii) of ERISA (the "1975 regulation"), and the Department of the Treasury issued a virtually identical regulation under the Code.[7] The regulation narrowed the scope of the statutory definition of fiduciary investment advice by creating a five-part test that must be satisfied before a person can be treated as rendering investment advice for a fee. Under the regulation, for advice to constitute "investment advice," an adviser who is not a fiduciary under another provision of the statute must—(1) render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing or selling securities or other property (2) on a regular basis (3) pursuant to a mutual agreement, arrangement or understanding, with the plan or a plan fiduciary that (4) the advice will serve as a primary basis for investment decisions with respect to plan assets, and that (5) the advice will be individualized based on the particular needs of the plan or IRA. The regulation provides that an adviser is a fiduciary with respect to any particular instance of advice only if he or she meets each and every element of the five-part test with respect to the particular advice recipient or plan at issue.

As the marketplace for financial services has developed in the years since 1975, the five-part test may now undermine, rather than promote, the statutes' text and purposes. The narrowness of the 1975 regulation allows advisers, brokers, consultants and valuation firms to play a central role in shaping plan and IRA investments, without ensuring the accountability that Congress intended for persons having such influence and responsibility. Even when plan sponsors, participants, beneficiaries, and IRA owners clearly rely on paid advisers for impartial guidance, the regulation allows many advisers to avoid fiduciary status and disregard ERISA's fiduciary obligations of care and prohibitions on disloyal and conflicted transactions. As a consequence, these advisers can steer customers to investments based on their own self-interest (*e.g.,* products that generate higher fees for the adviser even if there are identical lower-fee products available), give imprudent advice, and engage in transactions that would otherwise not be permitted by ERISA and the Code without fear of accountability under either ERISA or the Code.

Instead of ensuring that trusted advisers give prudent and unbiased advice in accordance with fiduciary norms, the current regulation erects a multi-part series of technical impediments to fiduciary responsibility. The Department is concerned that the specific elements of the five-part test—which are not found in the text of the Act or Code—now work to frustrate statutory goals and defeat advice recipients' legitimate expectations. In

[5] ERISA section 406. The Act also prohibits certain transactions between a plan and a "party in interest."

[6] ERISA section 409; *see also* ERISA section 405.

[7] See 26 CFR 54.4975–9(c), which interprets Code section 4975(e)(3). 40 FR 50840 (Oct. 31, 1975). Under section 102 of Reorganization Plan No. 4 of 1978, the authority of the Secretary of the Treasury to interpret section 4975 of the Code has been transferred, with certain exceptions not here relevant, to the Secretary of Labor. References in this document to sections of ERISA should be read to refer also to the corresponding sections of the Code.

light of the importance of the proper management of plan and IRA assets, it is critical that the regulation defining investment advice draws appropriate distinctions between the sorts of advice relationships that should be treated as fiduciary in nature and those that should not. In practice, the current regulation appears not to do so. Instead, the lines drawn by the five-part test frequently permit evasion of fiduciary status and responsibility in ways that undermine the statutory text and purposes.

One example of the five-part test's shortcomings is the requirement that advice be furnished on a ''regular basis.'' As a result of the requirement, if a small plan hires an investment professional or appraiser on a one-time basis for an investment recommendation or valuation opinion on a large, complex investment, the adviser has no fiduciary obligation to the plan under ERISA. Even if the plan is considering investing all or substantially all of the plan's assets, lacks the specialized expertise necessary to evaluate the complex transaction on its own, and the consultant fully understands the plan's dependence on his professional judgment, the consultant is not a fiduciary because he does not advise the plan on a ''regular basis.'' The plan could be investing hundreds of millions of dollars in plan assets, and it could be the most critical investment decision the plan ever makes, but the adviser would have no fiduciary responsibility under the 1975 regulation. While a consultant who regularly makes less significant investment recommendations to the plan would be a fiduciary if he satisfies the other four prongs of the regulatory test, the one-time consultant on an enormous transaction has no fiduciary responsibility.

In such cases, the ''regular basis'' requirement, which is not found in the text of ERISA or the Code, fails to draw a sensible line between fiduciary and non-fiduciary conduct, and undermines the law's protective purposes. A specific example is the one-time purchase of a group annuity to cover all of the benefits promised to substantially all of a plan's participants for the rest of their lives when a defined benefit plan terminates or a plan's expenditure of hundreds of millions of dollars on a single real estate transaction with the assistance of a financial adviser hired for purposes of that one transaction. Despite the clear importance of the decisions and the clear reliance on paid advisers, the advisers would not be plan fiduciaries. On a smaller scale that is still immensely important for the affected individual, the ''regular basis'' requirement also deprives individual participants and IRA owners of statutory protection when they seek specialized advice on a one-time basis, even if the advice concerns the investment of all or substantially all of the assets held in their account (*e.g.,* as in the case of an annuity purchase or a roll-over from a plan to an IRA or from one IRA to another).

Under the five-part test, fiduciary status can also be defeated by arguing that the parties did not have a *mutual* agreement, arrangement, or understanding that the advice would serve as a *primary basis* for investment decisions. Investment professionals in today's marketplace frequently market retirement investment services in ways that clearly suggest the provision of tailored or individualized advice, while at the same time disclaiming in fine print the requisite ''mutual'' understanding that the advice will be used as a primary basis for investment decisions.

Similarly, there appears to be a widespread belief among broker-dealers that they are not fiduciaries with respect to plans or IRAs because they do not hold themselves out as registered investment advisers, even though they often market their services as financial or retirement planners. The import of such disclaimers—and of the fine legal distinctions between brokers and registered investment advisers—is often completely lost on plan participants and IRA owners who receive investment advice. As shown in a study conducted by the RAND Institute for Civil Justice for the Securities and Exchange Commission (SEC), consumers often do not read the legal documents and do not understand the difference between brokers and registered investment advisers particularly when brokers adopt such titles as ''financial adviser'' and ''financial manager.'' [8]

Even in the absence of boilerplate fine print disclaimers, however, it is far from evident how the ''primary basis'' element of the five-part test promotes the statutory text or purposes of ERISA and the Code. If, for example, a plan hires multiple specialized advisers for an especially complex transaction, it should be able to rely upon all of the consultants' advice, regardless of whether one could characterize any particular consultant's advice as primary, secondary, or tertiary. Presumably, paid consultants make recommendations—and retirement investors pay for them—with the hope or expectation that the recommendations could, in fact, be relied upon in making important decisions. When a plan, participant, beneficiary, or IRA owner directly or indirectly pays for advice upon which it can rely, there appears to be little statutory basis for drawing distinctions based on a subjective characterization of the advice as ''primary,'' ''secondary,'' or other.

In other respects, the current regulatory definition could also benefit from clarification. For example, a number of parties have argued that the regulation, as currently drafted, does not encompass advice as to the selection of money managers or mutual funds. Similarly, they have argued that the regulation does not cover advice given to the managers of pooled investment vehicles that hold plan assets contributed by many plans, as opposed to advice given to particular plans. Parties have even argued that advice was insufficiently ''individualized'' to fall within the scope of the regulation because the advice provider had failed to prudently consider the ''particular needs of the plan,'' notwithstanding the fact that both the advice provider and the plan agreed that individualized advice based on the plan's needs would be provided, and the adviser actually made specific investment recommendations to the plan. Although the Department disagrees with each of these interpretations of the current regulation, the arguments nevertheless suggest that clarifying regulatory text could be helpful.

Changes in the financial marketplace have enlarged the gap between the 1975 regulation's effect and the Congressional intent of the statutory definition. The greatest change is the predominance of individual account plans, many of which require participants to make investment decisions for their own accounts. In 1975, private-sector defined benefit pensions—mostly large, professionally managed funds—covered over 27 million active participants and held assets totaling almost $186 billion. This compared with just 11 million active participants in individual account defined contribution plans with assets of just $74 billion.[9] Moreover, the great majority of defined contribution plans at that time were professionally

[8] Angela A. Hung, Noreen Clancy, Jeff Dominitz, Eric Talley, Claude Berrebi, Farrukh Suvankulov, *Investor and Industry Perspectives on Investment Advisers and Broker-Dealers,* RAND Institute for Civil Justice, commissioned by the U.S. Securities and Exchange Commission, 2008, at *http://www.sec.gov/news/press/2008/2008-1_randiabdreport.pdf*

[9] U.S. Department of Labor, *Private Pension Plan Bulletin Historical Tables and Graphs,* (Dec. 2014), at *http://www.dol.gov/ebsa/pdf/historicaltables.pdf.*

managed, not participant-directed. In 1975, 401(k) plans did not yet exist and IRAs had just been authorized as part of ERISA's enactment the prior year. In contrast, by 2012 defined benefit plans covered just under 16 million active participants, while individual account-based defined contribution plans covered over 68 million active participants— including 63 million participants in 401(k)-type plans that are participant-directed.[10]

With this transformation, plan participants, beneficiaries and IRA owners have become major consumers of investment advice that is paid for directly or indirectly. By 2012, 97 percent of 401(k) participants were responsible for directing the investment of all or part of their own account, up from 86 percent as recently as 1999.[11] Also, in 2013, more than 34 million households owned IRAs.[12]

Many of the consultants and advisers who provide investment-related advice and recommendations receive compensation from the financial institutions whose investment products they recommend. This gives the consultants and advisers a strong bias, conscious or unconscious, to favor investments that provide them greater compensation rather than those that may be most appropriate for the participants. Unless they are fiduciaries, however, these consultants and advisers are free under ERISA and the Code, not only to receive such conflicted compensation, but also to act on their conflicts of interest to the detriment of their customers. In addition, plans, participants, beneficiaries, and IRA owners now have a much greater variety of investments to choose from, creating a greater need for expert advice. Consolidation of the financial services industry and innovations in compensation arrangements have multiplied the opportunities for self-dealing and reduced the transparency of fees.

The absence of adequate fiduciary protections and safeguards is especially problematic in light of the growth of participant-directed plans and self-directed IRAs; the gap in expertise and information between advisers and the customers who depend upon them for guidance; and the advisers' significant conflicts of interest.

When Congress enacted ERISA in 1974, it made a judgment that plan advisers should be subject to ERISA's fiduciary regime and that plan participants, beneficiaries and IRA owners should be protected from conflicted transactions by the prohibited transaction rules. More fundamentally, however, the statutory language was designed to cover a much broader category of persons who provide fiduciary investment advice based on their functions and to limit their ability to engage in self-dealing and other conflicts of interest than is currently reflected in the five-part test. While many advisers are committed to providing high-quality advice and always put their customers' best interests first, the 1975 regulation makes it far too easy for advisers in today's marketplace not to do so and to avoid fiduciary responsibility even when they clearly purport to give individualized advice and to act in the client's best interest, rather than their own.

C. The 2010 Proposal

In 2010, the Department proposed a new regulation that would have replaced the five-part test with a new definition of what counted as fiduciary investment advice for a fee. At that time, the Department did not propose any new prohibited transaction exemptions and acknowledged uncertainty regarding whether existing exemptions would be available, but specifically invited comments on whether new or amended exemptions should be proposed. The proposal also provided carve-outs for conduct that would not result in fiduciary status. The general definition included the following types of advice: (1) Appraisals or fairness opinions concerning the value of securities or other property; (2) recommendations as to the advisability of investing in, purchasing, holding or selling securities or other property; and (3) recommendations as to the management of securities or other property. Reflecting the Department's longstanding interpretation of the 1975 regulations, the 2010 Proposal made clear that investment advice under the proposal includes advice provided to plan participants, beneficiaries and IRA owners as well as to plan fiduciaries.

Under the 2010 Proposal, a paid adviser would have been treated as a fiduciary if the adviser provided one of the above types of advice and either: (1) Represented that he or she was acting as an ERISA fiduciary; (2) was already an ERISA fiduciary to the plan by virtue of having control over the management or disposition of plan assets, or by having discretionary authority over the administration of the plan; (3) was already an investment adviser under the Investment Advisers Act of 1940 (Advisers Act); or (4) provided the advice pursuant to an agreement or understanding that the advice may be considered in connection with plan investment or asset management decisions and would be individualized to the needs of the plan, plan participant or beneficiary, or IRA owner. The 2010 Proposal also provided that, for purposes of the fiduciary definition, relevant fees included any direct or indirect fees received by the adviser or an affiliate from any source. Direct fees are payments made by the advice recipient to the adviser including transaction-based fees, such as brokerage, mutual fund or insurance sales commissions. Indirect fees are payments to the adviser from any source other than the advice recipient such as revenue sharing payments from a mutual fund.

The 2010 Proposal included specific carve-outs for the following actions that the Department believed should not result in fiduciary status. In particular, a person would not have become a fiduciary by—

1. Providing recommendations as a seller or purchaser with interests adverse to the plan, its participants, or IRA owners, if the advice recipient reasonably should have known that the adviser was not providing impartial investment advice and the adviser had not acknowledged fiduciary status.

2. Providing investment education information and materials in connection with an individual account plan.

3. Marketing or making available a menu of investment alternatives that a plan fiduciary could choose from, and providing general financial information to assist in selecting and monitoring those investments, if these activities include a written disclosure that the adviser was not providing impartial investment advice.

4. Preparing reports necessary to comply with ERISA, the Code, or regulations or forms issued thereunder, unless the report valued assets that lack a generally recognized market, or served as a basis for making plan distributions.

The 2010 Proposal applied to the definition of an "investment advice fiduciary" in section 4975(e)(3)(B) of the Code as well as to the parallel ERISA definition. These provisions apply to both certain ERISA covered plans, and certain non-ERISA plans such as individual retirement accounts.

[10] U.S. Department of Labor, *Private Pension Plan Bulletin Abstract of 2012 Form 5500 Annual Reports,* (Jan. 2015), at *http://www.dol.gov/ebsa/PDF/2012pensionplanbulletin.PDF.*

[11] U.S. Department of Labor, *Private Pension Plan Bulletin Abstract of 1999 Form 5500 Annual Reports,* Number 12, Summer 2004 (Apr. 2008), at *http://www.dol.gov/ebsa/PDF/1999pensionplanbulletin.PDF.*

[12] Brien, Michael J., and Constantijn W.A. Panis. Analysis of Financial Asset Holdings of Households on the United States: 2013 Update. Advanced Analytic Consulting Group and Deloitte, Report Prepared for the U.S. Department of Labor, 2014.

In the preamble to the 2010 Proposal, the Department also noted that it had previously interpreted the 1975 regulation as providing that a recommendation to a plan participant on how to invest the proceeds of a contemplated plan distribution was not fiduciary investment advice. Advisory Opinion 2005–23A (Dec. 7, 2005). The Department specifically asked for comments as to whether the final rule should include such recommendations as fiduciary advice.

The 2010 Proposal prompted a large number of comments and a vigorous debate. As noted above, the Department made special efforts to encourage the regulated community's participation in this rulemaking. In addition to an extended comment period, the Department held a two-day public hearing. Additional time for comments was allowed following the hearing and publication of the hearing transcript on the Department's Web site and Department representatives held numerous meetings with interested parties. Many of the comments concerned the Department's conclusions regarding the likely economic impact of the proposal, if adopted. A number of commenters urged the Department to undertake additional analysis of expected costs and benefits particularly with regard to the 2010 Proposal's coverage of IRAs. After consideration of these comments and in light of the significance of this rulemaking to the retirement plan service provider industry, plan sponsors and participants, beneficiaries and IRA owners, the Department decided to take more time for review and to issue a new proposed regulation for comment.

D. The New Proposal

The new proposed rule makes many revisions to the 2010 Proposal, although it also retains aspects of that proposal's essential framework. The new proposal broadly updates the definition of fiduciary investment advice, and also provides a series of carve-outs from the fiduciary investment advice definition for communications that should not be viewed as fiduciary in nature. The definition generally covers the following categories of advice: (1) Investment recommendations, (2) investment management recommendations, (3) appraisals of investments, or (4) recommendations of persons to provide investment advice for a fee or to manage plan assets. Persons who provide such advice fall within the general definition of a fiduciary if they either (a) represent that they are acting as a fiduciary under ERISA or the Code or (b) provide the advice pursuant to an agreement, arrangement, or understanding that the advice is individualized or specifically directed to the recipient for consideration in making investment or investment management decisions regarding plan assets.

The new proposal includes several carve-outs for persons who do not represent that they are acting as ERISA fiduciaries, some of which were included in some form in the 2010 Proposal but many of which were not. Subject to specified conditions, these carve-outs cover—

(1) Statements or recommendations made to a "large plan investor with financial expertise" by a counterparty acting in an arm's length transaction;

(2) offers or recommendations to plan fiduciaries of ERISA plans to enter into a swap or security-based swap that is regulated under the Securities Exchange Act or the Commodity Exchange Act;

(3) statements or recommendations provided to a plan fiduciary of an ERISA plan by an employee of the plan sponsor if the employee receives no fee beyond his or her normal compensation;

(4) marketing or making available a platform of investment alternatives to be selected by a plan fiduciary for an ERISA participant-directed individual account plan;

(5) the identification of investment alternatives that meet objective criteria specified by a plan fiduciary of an ERISA plan or the provision of objective financial data to such fiduciary;

(6) the provision of an appraisal, fairness opinion or a statement of value to an ESOP regarding employer securities, to a collective investment vehicle holding plan assets, or to a plan for meeting reporting and disclosure requirements; and

(7) information and materials that constitute "investment education" or "retirement education."

The new proposal applies the same definition of "investment advice" to the definition of "fiduciary" in section 4975(e)(3) of the Code and thus applies to investment advice rendered to IRAs. "Plan" is defined in the new proposal to mean any employee benefit plan described in section 3(3) of the Act and any plan described in section 4975(e)(1)(A) of the Code. For ease of reference in this proposal, the term "IRA" has been inclusively defined to mean any account described in Code section 4975(e)(1)(B) through (F), such as a true individual retirement account described under Code section 408(a) and a health savings account described in section 223(d) of the Code.[13]

Many of the differences between the new proposal and the 2010 Proposal reflect the input of commenters on the 2010 Proposal as part of the public notice and comment process. For example, some commenters argued that the 2010 Proposal swept too broadly by making investment recommendations fiduciary in nature simply because the adviser was a plan fiduciary for purposes unconnected with the advice or an investment adviser under the Advisers Act. In their view, such status-based criteria were in tension with the Act's functional approach to fiduciary status and would have resulted in unwarranted and unintended compliance issues and costs. Other commenters objected to the lack of a requirement for these status-based categories that the advice be individualized to the needs of the advice recipient. The new proposal incorporates these suggestions: An adviser's status as an investment adviser under the Advisers Act or as an ERISA fiduciary for reasons unrelated to advice are no longer factors in the definition. In addition, unless the adviser represents that he or she is a fiduciary with respect to advice, the advice must be provided pursuant to an agreement, arrangement, or understanding that the advice is individualized or specifically directed to the recipient to be treated as fiduciary advice.

Furthermore, the carve-outs that treat certain conduct as non-fiduciary in nature have been modified, clarified, and expanded in response to comments. For example, the carve-out for certain valuations from the definition of fiduciary investment advice has been modified and expanded. Under the 2010 Proposal, appraisals and valuations for compliance with certain reporting and disclosure requirements were not treated as fiduciary advice. The new proposal additionally provides a carve-out from fiduciary treatment for appraisal and fairness opinions for ESOPs regarding employer securities. Although, the Department remains concerned about valuation advice concerning an ESOP's purchase of employer stock and about a plan's reliance on that advice, the Department has concluded that the concerns regarding valuations of closely held employer stock in ESOP transactions raise unique issues that are more

[13] As discussed below in Section E. Coverage of IRAs and Other Non-ERISA Plans, in recognition of differences among the various types of non-ERISA plan arrangements described in Code section 4975(e)(1)(B) through (F), the Department solicits comments on whether it is appropriate for the regulation to cover the full range of these arrangements. These non-ERISA plan arrangements are tax favored vehicles under the Code like IRAs, but are not intended for retirement savings.

appropriately addressed in a separate regulatory initiative. Additionally, the carve-out for valuations conducted for reporting and disclosure purposes has been expanded to include reporting and disclosure obligations outside of ERISA and the Code, and is applicable to both ERISA plans and IRAs. Many other modifications to the other carve-outs from fiduciary status, as well as new carve-outs and prohibited transaction exemptions, are described below in Section IV—''The Provisions of the New Proposal.''

III. Coordination With Other Federal Agencies

Many comments to the 2010 rulemaking emphasized the need to harmonize the Department's efforts with rulemaking activities under the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. Law No. 111–203, 124 Stat. 1376 (2010), (Dodd-Frank Act), in particular, the Security and Exchange Commission's (SEC) standards of care for providing investment advice and the Commodity Futures Trading Commission's (CFTC) business conduct standards for swap dealers. While the 2010 Proposal discussed statutes over which the SEC and CFTC have jurisdiction, it did not specifically describe inter-agency coordination efforts. In addition, commenters questioned the adequacy of coordination with other agencies regarding IRA products and services. They argued that subjecting SEC-regulated investment advisers and broker-dealers to a special set of ERISA rules for plans and IRAs could lead to additional costs and complexities for individuals who may have several different types of accounts at the same financial institution some of which may be subject only to the SEC rules, and others of which may be subject to both SEC rules and new regulatory requirements under ERISA.

In the course of developing the new proposal and the related proposed prohibited transaction exemptions, the Department has consulted with staff of the SEC and other regulators on an ongoing basis regarding whether the proposals would subject investment advisers and broker-dealers who provide investment advice to requirements that create an undue compliance burden or conflict with their obligations under other federal laws. As part of this consultative process, SEC staff has provided technical assistance and information with respect to retail investors, the marketplace for investment advice and coordinating, to the extent possible, the agencies' separate regulatory provisions and responsibilities. As the Department moves forward with this project in accordance with the specific provisions of ERISA and the Code, it will continue to consult with staff of the SEC and other regulators on its proposals and their impact on retail investors and other regulatory regimes. One result of these discussions, particularly with staff of the CFTC and SEC, is the new provision at paragraph (b)(1)(ii) of the proposed regulations concerning counterparty transactions with swap dealers, major swap participants, security-based swap dealers, and major security-based swap participants. Under the terms of that paragraph, such persons would not be treated as ERISA fiduciaries merely because, when acting as counterparties to swap or security-based swap transactions, they give information and perform actions required for compliance with the requirements of the business conduct standards of the Dodd-Frank Act and its implementing regulations.

In pursuing these consultations, the Department has aimed to coordinate and minimize conflicting or duplicative provisions between ERISA, the Code and federal securities laws, to the extent possible. However, the governing statutes do not permit the Department to make the obligations of fiduciary investment advisers under ERISA and the Code identical to the duties of advice providers under the securities laws. ERISA and the Code establish consumer protections for some investment advice that does not fall within the ambit of federal securities laws, and vice versa. Even if each of the relevant agencies were to adopt an identical definition of ''fiduciary'', the legal consequences of the fiduciary designation would vary between agencies because of differences in the specific duties and remedies established by the different federal laws at issue. ERISA and the Code place special emphasis on the elimination or mitigation of conflicts of interest and adherence to substantive standards of conduct, as reflected in the prohibited transaction rules and ERISA's standards of fiduciary conduct. The specific duties imposed on fiduciaries by ERISA and the Code stem from legislative judgments on the best way to protect the public interest in tax-preferred benefit arrangements that are critical to workers' financial and physical health. The Department has taken great care to honor ERISA and the Code's specific text and purposes.

At the same time, the Department has worked hard to understand the impact of the proposed rule on firms subject to the securities laws and other federal laws, and to take the effects of those laws into account so as to appropriately calibrate the impact of the rule on those firms. The proposed regulation reflects these efforts. In the Department's view, it neither undermines, nor contradicts, the provisions or purposes of the securities laws, but instead works in harmony with them. The Department has coordinated—and will continue to coordinate—its efforts with other federal agencies to ensure that the various legal regimes are harmonized to the fullest extent possible.

The Department has also consulted with the Department of the Treasury and the IRS, particularly on the subject of IRAs. Although the Department has responsibility for issuing regulations and prohibited transaction exemptions under section 4975 of the Code, which applies to IRAs, the IRS maintains general responsibility for enforcing the tax laws. The IRS' responsibilities extend to the imposition of excise taxes on fiduciaries who participate in prohibited transactions.[14] As a result, the Department and the IRS share responsibility for combating self-dealing by fiduciary investment advisers to tax-qualified plans and IRAs. Paragraph (e) of the proposed regulation, in particular, recognizes this jurisdictional intersection.

When the Department announced that it would issue a new proposal, it stated that it would consider proposing new and/or amended prohibited transaction exemptions to address the concerns of commenters about the broader scope of the fiduciary definition and its impact on the fee practices of brokers and other advisers. Commenters had expressed concern about whether longstanding exemptions granted by the Department allowing advisers, despite their fiduciary status under ERISA, to receive commissions in connection with mutual funds, securities and insurance products would remain applicable under the new rule. As explained more fully below, the Department is simultaneously publishing in the notice section of today's **Federal Register** proposed prohibited transaction class exemptions to address these concerns. The Department believes that existing exemptions and these new proposed exemptions would preserve the ability to engage in common fee arrangements, while protecting plan participants, beneficiaries and IRA owners from abusive practices that may result from conflicts of interest.

The terms of these new exemptions are discussed in more detail below and in the preambles to the proposed

[14] Reorganization Plan No. 4 of 1978.

exemptions. While the exemptions differ in terms and coverage, each imposes a ''best interest'' standard on fiduciary investment advisers. Thus, for example, the Best Interest Contract Exemption requires the investment advice fiduciary and associated financial institution to expressly agree to provide advice that is in the ''best interest'' of the advice recipient. As proposed, the best interest standard is intended to mirror the duties of prudence and loyalty, as applied in the context of fiduciary investment advice under sections 404(a)(1)(A) and (B) of ERISA. Thus, the ''best interest'' standard is rooted in the longstanding trust-law duties of prudence and loyalty adopted in section 404 of ERISA and in the cases interpreting those standards.

Accordingly, the Best Interest Contract Exemption provides:

> Investment advice is in the ''Best Interest'' of the Retirement Investor when the Adviser and Financial Institution providing the advice act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances and needs of the Retirement Investor, without regard to the financial or other interests of the Adviser, Financial Institution, any Affiliate, Related Entity, or other party.

This ''best interest'' standard is not intended to add to or expand the ERISA section 404 standards of prudence and loyalty as they apply to the provision of investment advice to ERISA covered plans. Advisers to ERISA-covered plans are already required to adhere to the fundamental standards of prudence and loyalty, and can be held accountable for violations of the standards. Rather, the primary impact of the ''best interest'' standard is on the IRA market. Under the Code, advisers to IRAs are subject only to the prohibited transaction rules. Incorporating the best interest standard in the proposed Best Interest Contract Exemption effectively requires advisers to comply with these basic fiduciary standards as a condition of engaging in transactions that would otherwise be prohibited because of the conflicts of interest they create. Additionally, the exemption ensures that IRA owners and investors have a contract-based claim to hold their fiduciary advisers accountable if they violate these basic obligations of prudence and loyalty. As under current law, no private right of action under ERISA is available to IRA owners.

IV. The Provisions of the New Proposal

The new proposal would amend the definition of investment advice in 29 CFR 2510.3–21 (1975) of the regulation to replace the restrictive five-part test with a new definition that better comports with the statutory language in ERISA and the Code.[15] As explained below, the proposal accomplishes this by first describing the kinds of communications and relationships that would generally constitute fiduciary investment advice if the adviser receives a fee or other compensation. Rather than add additional elements that must be met in all instances, as under the current regulation, the proposal describes several specific types of advice or communications that would not be treated as investment advice. In the Department's view, this structure is faithful to the remedial purpose of the statute, but avoids burdening activities that do not implicate relationships of trust and expectations of impartiality.

A. Categories of Advice or Recommendations

Paragraph (a)(1) of the proposal sets forth the following types of advice, which, when provided in exchange for a fee or other compensation, whether directly or indirectly, and given under circumstances described in paragraph (a)(2), would be ''investment advice'' unless one of the carve-outs in paragraph (b) applies. The listed types of advice are—

(i) A recommendation as to the advisability of acquiring, holding, disposing of or exchanging securities or other property, including a recommendation to take a distribution of benefits or a recommendation as to the investment of securities or other property to be rolled over or otherwise distributed from the plan or IRA;

(ii) A recommendation as to the management of securities or other property, including recommendations as to the management of securities or other property to be rolled over or otherwise distributed from the plan or IRA;

(iii) An appraisal, fairness opinion, or similar statement whether verbal or written concerning the value of securities or other property if provided in connection with a specific transaction or transactions involving the acquisition, disposition, or exchange, of such securities or other property by the plan or IRA; or

(iv) A recommendation of a person who is also going to receive a fee or other compensation to provide any of the types of advice described in paragraphs (i) through (iii) above.

Except for the prong of the definition concerning appraisals and valuations discussed below, the proposal is structured so that communications must constitute a ''recommendation'' to fall within the scope of fiduciary investment advice. In that regard, as stated earlier in Section III concerning coordination with other Federal Agencies, the Department has consulted with staff of other agencies with rulemaking authority over investment advisers and broker-dealers. FINRA Policy Statement 01–23 sets forth guidelines to assist brokers in evaluating whether a particular communication could be viewed as a recommendation, thereby triggering application of FINRA's Rule 2111 that requires that a firm or associated person have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer.[16] Although the regulatory context for the FINRA guidance is somewhat different, the Department believes that it provides useful standards and guideposts for distinguishing investment education from investment advice under ERISA. Accordingly, the Department specifically solicits comments on whether it should adopt some or all of the standards developed by FINRA in defining communications that rise to the level of a recommendation for purposes of distinguishing between investment education and investment advice under ERISA.

Additionally, as paragraph (d) of the proposal makes clear, the regulation does not treat the mere execution of a securities transaction at the direction of

[15] For purposes of readability, this proposed rulemaking republishes 29 CFR 2510.3–21 in its entirety, as revised, rather than only the specific amendments to this section. See 29 CFR 2510.3–21(d)—Execution of securities transactions.

[16] See also FINRA's Regulatory Notice 11–02, 12–25 and 12–55. Regulatory Notice 11–02 includes the following discussion:

> For instance, a communication's content, context and presentation are important aspects of the inquiry. The determination of whether a ''recommendation'' has been made, moreover, is an objective rather than subjective inquiry. An important factor in this regard is whether—given its content, context and manner of presentation—a particular communication from a firm or associated person to a customer reasonably would be viewed as a suggestion that the customer take action or refrain from taking action regarding a security or investment strategy. In addition, the more individually tailored the communication is to a particular customer or customers about a specific security or investment strategy, the more likely the communication will be viewed as a recommendation. Furthermore, a series of actions that may not constitute recommendations when viewed individually may amount to a recommendation when considered in the aggregate. It also makes no difference whether the communication was initiated by a person or a computer software program. These guiding principles, together with numerous litigated decisions and the facts and circumstances of any particular case, inform the determination of whether the communication is a recommendation for purposes of FINRA's suitability rule.

a plan or IRA owner as fiduciary activity. This paragraph remains unchanged from the 1975 regulation other than to update references to the proposal's structure. The definition's scope remains limited to advice relationships, as delineated in its text and does not impact merely administrative or ministerial activities necessary for a plan or IRA's functioning. It also does not apply to order taking where no advice is provided.

(1) Recommendations To Distribute Plan Assets

Paragraph (a)(1)(i) specifically includes recommendations concerning the investment of securities to be rolled over or otherwise distributed from the plan or IRA. Noting the Department's position in Advisory Opinion 2005–23A that it is not fiduciary advice to make a recommendation as to distribution options even if that is accompanied by a recommendation as to where the distribution would be invested, (Dec. 7, 2005), the 2010 Proposal did not include this type of advice, but the Department requested comments on whether it should be included in a final regulation. Some commenters stated that exclusion of this advice from the final rule would fail to protect participant accounts from conflicted advice in connection with one of the most significant financial decisions that participants make concerning retirement savings. Other commenters argued that including this advice would give rise to prohibited transactions that could disrupt the routine process that occurs when a worker leaves a job, contacts a financial services firm for help rolling over a 401(k) balance, and the firm explains the investments it offers and the benefits of a rollover.

The proposed regulation, if finalized, would supersede Advisory Opinion 2005–23A. Thus, recommendations to take distributions (and thereby withdraw assets from existing plan or IRA investments or roll over into a plan or IRA) or to entrust plan or IRA assets to particular money managers, advisers, or investments would fall within the scope of covered advice. However, as the proposal's text makes clear, one does not act as a fiduciary merely by providing participants with information about plan or IRA distribution options, including the consequences associated with the available types of benefit distributions. In this regard, the new proposal draws an important distinction between fiduciary investment advice and non-fiduciary investment information and educational materials. The Department believes that the proposal's treatment of such non-fiduciary educational and informational materials adequately covers the common types of distribution-related information that participants find useful, including information relating to annuitizations and other forms of lifetime income payment options, but welcomes input on other types of information that would help clarify the line between advice and education in this context.

(2) Recommendations as to the Management of Plan Investments

The preamble to the 2010 Proposal stated that the "management of securities or other property" would include advice and recommendations as to the exercise of rights appurtenant to shares of stock (*e.g.,* voting proxies). 75 FR 65266 (Oct. 22, 2010). The Department has long viewed the exercise of ownership rights as a fiduciary responsibility because of its material effect on plan investment goals. 29 CFR 2509.08–2 (2008). Consequently, individualized or specifically directed advice and recommendations on the exercise of proxy or other ownership rights are appropriately treated as fiduciary in nature. Accordingly, the proposed regulation's provision on advice regarding the management of securities or other property would continue to cover individualized advice or recommendations as to proxy voting and the management of retirement assets in paragraph (a)(1)(ii).

We received comments on the 2010 proposal seeking some clarification regarding its application to certain practices. In this regard, it is the Department's view that guidelines or other information on voting policies for proxies that are provided to a broad class of investors without regard to a client's individual interests or investment policy, and which are not directed or presented as a recommended policy for the plan or IRA to adopt, would not rise to the level of fiduciary investment advice under the proposal. Additionally, a recommendation addressed to all shareholders in a proxy statement would not result in fiduciary status on the part of the issuer of the statement or the person who distributes the proxy statement. These positions are clarified in the proposed regulation.

(3) Appraisals

The new proposal, like the current regulation which includes "advice as to the value of securities or other property," continues to cover certain appraisals and valuation reports. However, it is considerably more focused than the 2010 Proposal. Responding to comments, the proposal in paragraph (a)(1)(iii) covers only appraisals, fairness opinions, or similar statements that relate to a particular transaction. The Department also expanded the 2010 Proposal's carve-out for general reports or statements of value provided to satisfy required reporting and disclosure rules under ERISA or the Code. The carve-out in the 2010 proposal covered general reports or statements of value that merely reflected the value of an investment of a plan or a participant or beneficiary, and provided for purposes of compliance with the reporting and disclosure requirements of ERISA, the Code, and the regulations, forms and schedules issued thereunder, unless the reports involved assets for which there was not a generally recognized market and served as a basis on which a plan could make distributions to plan participants and beneficiaries. The carve-out was broadened in this proposal to includes valuations provided solely for purposes of compliance with the reporting and disclosure provisions under the Act, the Code, and the regulations, forms and schedules issued thereunder, or any applicable reporting or disclosure requirement under a Federal or state law, or rule or regulation or self-regulatory organization (*e.g.,* FINRA) without regard to the type of asset involved. In this manner, the new proposal focuses on instances where the plan or IRA owner is looking to the appraiser for advice on the market value of an asset that the investor is considering to acquire, dispose, or exchange. In many cases the most important investment advice that an investor receives is advice as to how much it can or should pay for hard-to-value assets. In response to comments, the proposal also contains an entirely new carve-out at paragraph (b)(5)(ii) specifically addressing valuations or appraisals provided to an investment fund (*e.g.,* collective investment fund or pooled separate account) holding assets of various investors in addition to at least one plan or IRA. Also, as mentioned, the Department has decided not to extend fiduciary coverage to valuations or appraisals for ESOPs relating to employer securities at this time because the Department has concluded that its concerns in this space raise unique issues that are more appropriately addressed in a separate regulatory initiative. The proposal's carve-outs do not apply, however, if the provider of the valuation represents or acknowledges that it is acting as a fiduciary with respect to the advice.

Some representatives of the appraisal industry submitted comments on the 2010 Proposal arguing that ERISA's fiduciary duty to act solely in the interest of the plan and its participants and beneficiaries is inconsistent with the duty of appraisers to provide objective, independent value determinations. The Department disagrees. A biased or inaccurate appraisal does not help a plan, a participant or a beneficiary make prudent investment decisions. Like other forms of investment advice, an appraisal is a tool for plan fiduciaries, participants, beneficiaries, and IRA owners to use in deciding what price to pay for assets and whether to accept or decline proposed transactions. An appraiser complies with his or her obligations as an appraiser—and as a loyal fiduciary—by giving plan fiduciaries or participants an impartial and accurate assessment of the value of an asset in accordance with appraisers' professional standard of care. Nothing in ERISA or this regulation should be read as compelling an appraiser to slant valuation opinions to reflect what the plan wishes the asset were worth rather than what it is really worth. As stated in the preamble to the 2010 Proposal, the Department would expect a fiduciary appraiser's determination of value to be unbiased, fair and objective and to be made in good faith based on a prudent investigation under the prevailing circumstances then known to the appraiser. In the Department's view, these fiduciary standards are fully consistent with professional standards, such as the Uniform Standards of Professional Appraisal Practice (USPAP).[17]

(4) Recommendations of a Person To Provide Investment Advice or Management Services

The proposal would treat recommendations on the selection of investment managers or advisers as fiduciary investment advice. In the Department's view, the current regulation already covers such advice. The proposal simply revises the regulation's text to remove any possible ambiguity. The Department believes that such advice should be treated as fiduciary in nature if provided under the circumstances in paragraph (a)(1)(iv) and for direct or indirect compensation. Covered advice would include recommendations of persons to perform asset management services or to make investment recommendations. Advice as to the identity of the person entrusted with investment authority over retirement assets is often critical to the proper management and investment of those assets. On the other hand, general advice as to the types of qualitative and quantitative criteria to consider in hiring an investment manager would not rise to the level of a recommendation of a person to manage plan investments nor would a trade journal's endorsement of an investment manager. Similarly, the proposed regulation would not cover recommendations of administrative service providers, property managers, or other service providers who do not provide investment services.

B. The Circumstances Under Which Advice Is Provided

As provided in paragraph (a)(2) of the proposal, unless a carve-out applies, a category of advice listed in the proposal would constitute "investment advice" if the person providing the advice, either directly or indirectly (*e.g.,* through or together with any affiliate)—

(i) Represents or acknowledges that it is acting as a fiduciary within the meaning of the Act or Code with respect to the advice described in paragraph (a)(1); or

(ii) Renders the advice pursuant to a written or verbal agreement, arrangement or understanding that the advice is individualized to, or that such advice is specifically directed to, the advice recipient for consideration in making investment or management decisions with respect to securities or other property of the plan or IRA.

Under paragraph (a)(2)(i), advisers who claim fiduciary status under ERISA or the Code in providing advice would be taken at their word. They may not later argue that the advice was not fiduciary in nature. Nor may they rely upon the carve-outs described in paragraph (b) on the scope of the definition of fiduciary investment advice.

The 2010 Proposal provided that investment recommendations provided by an investment adviser under the Advisers Act would, in the absence of a carve-out, automatically be treated as investment advice. In response to comments, the new proposal drops this provision. Thus, the proposal avoids making such persons fiduciaries based solely on their or an affiliate's status as an investment adviser under the Advisers Act. Instead, their fiduciary status would be determined by reference to the same functional test that applies to all persons under the regulation.

Paragraph (a)(2)(ii) of the proposal avoids treating recommendations made to the general public, or to no one in particular, as investment advice and thus addresses concerns that the general circulation of newsletters, television talk show commentary, or remarks in speeches and presentations at financial industry educational conferences would result in the person being treated as a fiduciary. This paragraph requires an agreement, arrangement, or understanding that advice is directed to, a specific recipient for consideration in making investment decisions. The parties need not have a meeting of the minds on the extent to which the advice recipient will actually rely on the advice, but they must agree or understand that the advice is individualized or specifically directed to the particular advice recipient for consideration in making investment decisions. In this respect, paragraph (a)(2)(ii) differs significantly from its counterpart in the 2010 Proposal. In particular, and in response to comments, the proposal does not require that advice be individualized to the needs of the plan, participant or beneficiary or IRA owner if the advice is specifically directed to such recipient. Under the proposal, advisers could not specifically direct investment recommendations to individual persons, but then deny fiduciary responsibility on the basis that they did not, in fact, consider the advice recipient's individual needs or intend that the recipient base investment decisions on their recommendations. Nor could they continue the practice of advertising advice or counseling that is one-on-one or that a reasonable person would believe would be tailored to their individual needs and then disclaim that the recommendations are fiduciary investment advice in boilerplate language in the advertisement or in the paperwork provided to the client.

Like the 2010 Proposal, and unlike the 1975 regulation, the new proposal does not require that advice be provided on a regular basis. Investment advice that meets the requirements of the proposal, even if provided only once, can be critical to important investment decisions. If the adviser received a direct or indirect fee in connection with its advice, the advice recipients should reasonably expect adherence to fiduciary standards on the same terms as other retirement investors who get

[17] A number of commenters also pointed to such professional standards as alternatives to fiduciary treatment under ERISA. While the Department believes that such professional standards are fully consistent with the fiduciary duties, the rights, remedies and sanctions under both ERISA and the Code importantly turn on fiduciary status, and advice on the value of an asset is often the most critical investment advice a plan receives. As a result, treating appraisals as fiduciary advice provides an additional layer of protection for consumers without conflicting with the duties of appraisers.

recommendations from the adviser on a more routine basis.

C. Carve-Outs From the General Definition

The Department recognizes that in many circumstances, plan fiduciaries, participants, beneficiaries, and IRA owners may receive recommendations or appraisals that, notwithstanding the general definition set forth in paragraph (a) of the proposal, should not be treated as fiduciary investment advice. Accordingly, paragraph (b) contains a number of specific carve-outs from the scope of the general definition. The carve-out at paragraph (b)(5) of the proposal concerning financial reports and valuations was discussed above in connection with appraisals. The carve-out in paragraph (b)(5)(iii) covers communications to a plan, a plan fiduciary, a plan participant or beneficiary, an IRA or IRA owner solely for purposes of compliance with the reporting and disclosure provisions under the Act, the Code, and the regulations, forms and schedules issued thereunder, or any applicable reporting or disclosure requirement under a Federal or state law, rule or regulation or self-regulatory organization rule or regulation. The carve-out in paragraph (b)(6) covers education. The other carve-outs are limited to communications with plans and plan fiduciaries and do not cover communications to participants, beneficiaries or IRA owners. These more limited carve-outs are described more fully below. In each instance, the proposed carve-outs are for communications that the Department believes Congress did not intend to cover as fiduciary "investment advice" and that parties would not ordinarily view as communications characterized by a relationship of trust or impartiality. None of the carve-outs apply where the adviser represents or acknowledges that it is acting as a fiduciary under ERISA with respect to the advice.

(1) Seller's and Swap Carve-Outs

(a) The "Seller's Carve-Out" [18]

Paragraph (b)(1)(i) of the proposed regulation provides a carve-out from the general definition for incidental advice provided in connection with an arm's length sale, purchase, loan, or bilateral contract between an expert plan investor and the adviser. It also applies in connection with an offer to enter into such a transaction or when the person providing the advice is acting as a representative, such as an agent, for the plan's counterparty. This carve-out is subject to the following conditions.

First, the person must provide advice to an ERISA plan fiduciary who is independent of such person and who exercises authority or control respecting the management or disposition of the plan's assets, with respect to an arm's length sale, purchase, loan or bilateral contract between the plan and the counterparty, or with respect to a proposal to enter into such a sale, purchase, loan or bilateral contract.

Second, either of two alternative sets of conditions must be met. Under alternative one, prior to providing any recommendation with respect to the transaction, such person:

(1) Obtains a written representation from the plan fiduciary that he/she is a fiduciary who exercises authority or control with respect to the management or disposition of the employee benefit plan's assets (as described in section 3(21)(A)(i) of the Act), that the employee benefit plan has 100 or more participants covered under the plan, and that the fiduciary will not rely on the person to act in the best interests of the plan, to provide impartial investment advice, or to give advice in a fiduciary capacity;

(2) fairly informs the plan fiduciary of the existence and nature of the person's financial interests in the transaction;

(3) does not receive a fee or other compensation directly from the plan, or plan fiduciary, for the provision of investment advice in connection with the transaction (this does not preclude a person from receiving a fee or compensation for other services);

(4) knows or reasonably believes that the independent plan fiduciary has sufficient expertise to evaluate the transaction and to determine whether the transaction is prudent and in the best interest of the plan participants (such person may rely on written representations from the plan or the plan fiduciary to satisfy this condition).

The second alternative applies if the person knows or reasonably believes that the independent plan fiduciary has responsibility for managing at least $100 million in employee benefit plan assets (for purposes of this condition, when dealing with an individual employee benefit plan, a person may rely on the information on the most recent Form 5500 Annual Return/Report filed by the plan to determine the value of plan assets, and, in the case of an independent fiduciary acting as an asset manager for multiple employee benefit plans, a person may rely on representations from the independent plan fiduciary regarding the value of employee benefit plan assets under management). In that circumstance, the adviser need not obtain written representations from its counterparty to avail itself of the carve-out, but must fairly inform the independent plan fiduciary that the adviser is not undertaking to provide impartial investment advice, or to give advice in a fiduciary capacity; and cannot receive a fee or other compensation directly from the plan, or plan fiduciary, for the provision of investment advice in connection with the transaction. In that circumstance, the adviser must also reasonably believe that the independent plan fiduciary has sufficient expertise to prudently evaluate the transaction.

The overall purpose of this carve-out is to avoid imposing ERISA fiduciary obligations on sales pitches that are part of arm's length transactions where neither side assumes that the counterparty to the plan is acting as an impartial trusted adviser, but the seller is making representations about the value and benefits of proposed deals. Under appropriate circumstances, reflected in the conditions to this carve-out, these counterparties to the plan do not suggest that they are an impartial fiduciary and plans do not expect a relationship of undivided loyalty or trust. Both sides of such transactions understand that they are acting at arm's length, and neither party expects that recommendations will necessarily be based on the buyer's best interests. In such a sales transaction, the buyer understands that it is buying an investment product, not advice about whether it is a good product, from a seller who has opposing financial interests. The seller's invitation to buy the product is understood as a sales pitch, not a recommendation. Also, a representative for the plan's counterparty, such as a broker, in such a transaction, would be able to use the carve-out if the conditions are met.

Although the 2010 Proposal also had a carve-out for sellers and other counterparties, the carve-out in the new proposal is significantly different. The changes are designed to ensure that the carve-out appropriately distinguishes incidental advice as part of an arm's length transactions with no expectation of trust or acting in the customer's best interest, from those instances of advice where customers may be expecting unbiased investment advice that is in their best interest. For example, the seller's carve-out is unavailable to an adviser if the plan directly pays a fee for investment advice. If a plan expressly

[18] Although the preamble uses the shorthand expression "seller's carve-out," we note that the carve-out provided in paragraph (b)(1)(i) of the proposal is not limited to sales but rather would apply to incidental advice provided in connection with an arm's length sale, purchase, loan, or bilateral contract between a plan investor with financial expertise and an adviser.

pays a fee for advice, the essence of the relationship is advisory, and the statute clearly contemplates fiduciary status. Thus, a service provider may not charge the plan a direct fee to act as an adviser, and then disclaim responsibility as a fiduciary adviser by asserting that he or she is merely an arm's length counterparty.

Commenters on the 2010 Proposal differed on whether the carve-out should apply to transactions involving plan participants, beneficiaries or IRA owners. After carefully considering the issue and the public comments, the Department does not believe such a carve-out can or should be crafted to cover recommendations to retail investors, including small plans, IRA owners and plan participants and beneficiaries. As a rule, investment recommendations to such retail customers do not fit the ''arm's length'' characteristics that the seller's carve-out is designed to preserve. Recommendations to retail investors and small plan providers are routinely presented as advice, consulting, or financial planning services. In the securities markets, brokers' suitability obligations generally require a significant degree of individualization. Research has shown that disclaimers are ineffective in alerting retail investors to the potential costs imposed by conflicts of interest, or the fact that advice is not necessarily in their best interest, and may even exacerbate these costs.[19] Most retail investors and many small plan sponsors are not financial experts, are unaware of the magnitude and impact of conflicts of interest, and are unable effectively to assess the quality of the advice they receive. IRA owners are especially at risk because they lack the protection of having a menu of investment options chosen by a plan fiduciary who is charged to protect the interests of the IRA owner. Similarly, small plan sponsors are typically experts in the day-to-day business of running an operating company, not in managing financial investments for others. In this retail market, a seller's carve-out would run the risk of creating a loophole that would result in the rule failing to improve consumer protections by permitting the same type of boilerplate disclaimers that some advisers now use to avoid fiduciary status under the current ''five-part test'' regulation. Persons making investment recommendations should be required to put the interests of the investors they serve ahead of their own. The Department has addressed legitimate concerns about preserving existing fee practices and minimizing market disruptions through proposed prohibited transaction exemptions detailed below, rather than through a blanket carve-out from fiduciary status.

Moreover, excluding retail investors from the seller's carve-out is consistent with recent congressional action, the Pension Protection Act of 2006 (PPA). Specifically, the PPA created a new statutory exemption that allows fiduciaries giving investment advice to individuals (pension plan participants, beneficiaries and IRA owners) to receive compensation from investment vehicles that they recommend in certain circumstances. 29 U.S.C. 1108(b)(14); 26 U.S.C. 4975(d)(17). Recognizing the risks presented when advisers receive fees from the investments they recommend to individuals, Congress placed important constraints on such advice arrangements that are calculated to limit the potential for abuse and self-dealing, including requirements for fee-leveling or the use of independently certified computer models. The Department has issued regulations implementing this provision at 29 CFR 2550.408g–1 and 408g–2. Including retail investors in the seller's carve-out would undermine the protections for retail investors that Congress required under this PPA provision.

Although the seller's carve-out may not be available in the retail market, the proposal is intended to ensure that small plan fiduciaries, plan participants, beneficiaries and IRA owners would be able to obtain essential information regarding important decisions they make regarding their investments without the providers of that information crossing the line into fiduciary status. Under the platform provider carve-out under paragraph (b)(3), platform providers (*i.e.,* persons that provide access to securities or other property through a platform or similar mechanism) and persons that help plan fiduciaries select or monitor investment alternatives for their plans can perform those services without incurring fiduciary status. Similarly, under the investment education carve-out of paragraph (b)(6), general plan information, financial, investment and retirement information, and information and education regarding asset allocation models would all be available to a plan, plan fiduciary, participant, beneficiary or IRA owner and would not constitute the provision of investment advice, irrespective of who receives that information. The Department invites comments on whether the proposed seller's carve-out should be available for advice given directly to plan participants, beneficiaries, and IRA owners. Further, the Department invites comments on the scope of the seller's carve-out and whether the plan size limitation of 100 plan participants and 100 million dollar asset requirement in the proposal are appropriate conditions or whether other conditions would be more appropriate proxies for identifying persons with sufficient investment-related expertise to be included in a seller's carve-out.[20] The Department is also interested in whether existing and proposed prohibited transaction exemptions eliminate or mitigate the need for any seller's carve-out.

(b) Swap and Security-Based Swap Transactions

Paragraph (b)(1)(ii) of the proposal specifically addresses advice and other communications by counterparties in connection with certain swap or security-based swap transactions under the Commodity Exchange Act or the Securities Exchange Act. This broad class of financial transactions is defined and regulated under amendments to the Commodity Exchange Act and the Securities Exchange Act by the Dodd-Frank Act. Section 4s(h) of the Commodity Exchange Act (7 U.S.C. 6s(h)), and section 15F of the Securities

[19] Loewenstein, George, Daylian Cain, Sunita Sah, *The Limits of Transparence: Pitfalls and Potential of Disclosing Conflicts of Interest,* American Economic Review: Papers and Proceedings 101, no. 3 (2011).

[20] The proposed thresholds of 100 or more participants and assets of $100 million are consistent with thresholds used for similar purposes under existing rules and practices. For example, administrators of plans with 100 or more participants, unlike smaller plans, generally are required to report to the Department details on the identity, function, and compensation of their services providers; file a schedule of assets held for investments; and submit audit reports to the Department. Smaller plans are not subject to these same filing requirements that are imposed on large plans. The vast majority of plans with fewer than 100 participants have 10 or less participants. They are much more similar to individual retail investors than to large financially sophisticated institutional investors, who employ lawyers and have the time and expertise to scrutinize advice they receive for bias. Similarly, Congress established a $100 million asset threshold in enacting the PPA statutory cross-trading exemption under ERISA section 408(b)(19). In the transactions covered by 408(b)(19), an investment manager has discretion with respect to separate client accounts that are on opposite sides of the trade. The cross trade can create efficiencies for both clients, but it also gives rise to a prohibited transaction under ERISA § 406(b)(2) because the adviser or manager is ''representing'' both sides of the transaction and, therefore, has a conflict of interest. The exemption generally allows an investment manager to effect cash purchases and sales of securities for which market quotations are readily available between large sophisticated plans with at least $100 million in assets and another account under management by the investment manager, subject to certain conditions. In this context, the $100 million threshold serves as a proxy for identifying institutional fiduciaries that can be expected to have the expertise to protect their own interests in the conflicted transaction.

Exchange Act of 1934 (15 U.S.C. 78o–10(h) establishes similar business conduct standards for dealers and major participants in swaps or security-based swaps. Special rules apply for transactions involving "special entities," a term that includes employee benefit plans under ERISA, but not IRAs and other non-ERISA plans.

In outline, paragraph (b)(1)(ii) of the proposal would allow swap dealers, security-based swap dealers, major swap participants and security-based major swap participants who make recommendations to plans to avoid becoming ERISA investment advice fiduciaries when acting as counterparties to a swap or security-based swap transaction. Under the swap carve out, if the person providing recommendations is a swap dealer or security-based swap dealer, it must not be acting as an adviser to the plan, within the meaning of the applicable business conduct standards regulations of the CFTC or the SEC. In addition, before providing any recommendations with respect to the transaction, the person providing recommendations must obtain a written representation from the independent plan fiduciary, that the fiduciary will not rely on recommendations provided by the person.

Under the Commodity Exchange Act, swap dealers or major swap participants that act as counterparties to ERISA plans, must have a reasonable basis to believe that the plans have independent representatives who are fiduciaries under ERISA. 7 U.S.C. 6s(h)(5). Similar requirements apply for security-based swap transactions. 15 U.S.C 78o–10(h)(4) and (5). The CFTC has issued a final rule to implement these requirements and the SEC has issued a proposed rule that would cover security-based swaps. 17 CFR 23.400 to 23.451 (2012).

Paragraph (b)(1)(ii) reflects the Department's coordination of its efforts with staff of the SEC and CFTC, and is intended to provide a clear road-map for swap counterparties to avoid ERISA fiduciary status in arm's length transactions with plans. The provision addresses commenters' concerns that the conduct required for compliance with the Dodd-Frank Act's business conduct standards could constitute fiduciary investment advice under ERISA even in connection with arm's length transactions with plans that are separately represented by independent fiduciaries who are not looking to their counterparties for disinterested advice. If that were the case, swaps and security-based swaps with plans would often constitute prohibited transactions under ERISA. Commenters also argued that their obligations under the business conduct standards could effectively preclude them from relying on the carve-out for counterparties in the 2010 Proposal. Although the Department does not agree that the carve-out in the 2010 Proposal would have been unavailable to plan's swap counterparty (see letter dated April 28, 2011, to CFTC Chairman Gary Gensler from EBSA's Assistant Secretary Phyllis Borzi), the separate proposed carve-out for swap and security-based swap transactions in the proposal should avoid any uncertainty.[21] The Department will continue to coordinate its efforts with staff of the SEC and CFTC to ensure that any final regulation is consistent with the agencies' work in connection with the Dodd-Frank Act's business conduct standards.

(2) Employees of the Plan Sponsor

The proposal at paragraph (b)(2) provides that employees of a plan sponsor of an ERISA plan would not be treated as investment advice fiduciaries with respect to advice they provide to the fiduciaries of the sponsor's plan as long as they receive no compensation for the advice beyond their normal compensation as employees of the plan sponsor. This carve-out from the scope of the fiduciary investment advice definition recognizes that internal employees, such as members of a company's human resources department, routinely develop reports and recommendations for investment committees and other named fiduciaries of the sponsors' plans, without acting as paid fiduciary advisers. The carve-out responds to and addresses the concerns of commenters who said that these personnel should not be treated as fiduciaries because their advice is largely incidental to their duties on behalf of the plan sponsor and they receive no compensation for these advice-related functions.

(3) Platform Providers/Selection and Monitoring Assistance

The carve-out at paragraph (b)(3) of the proposal is directed to service providers, such as recordkeepers and third party administrators, that offer a "platform" or selection of investment vehicles to participant-directed individual account plans under ERISA. Under the terms of the carve-out, the plan fiduciaries must choose the specific investment alternatives that will be made available to participants for investing their individual accounts. The carve-out merely makes clear that persons would not act as investment advice fiduciaries simply by marketing or making available such investment vehicles, without regard to the individualized needs of the plan or its participants and beneficiaries, as long as they disclose in writing that they are not undertaking to provide impartial investment advice or to give advice in a fiduciary capacity.

Similarly, a separate provision at paragraph (b)(4) carves out certain common activities that platform providers may carry out to assist plan fiduciaries in selecting and monitoring the investment alternatives that they make available to plan participants. Under paragraph (b)(4), merely identifying offered investment alternatives meeting objective criteria specified by the plan fiduciary or providing objective financial data regarding available alternatives to the plan fiduciary would not cause a platform provider to be a fiduciary investment adviser. These two carve-outs are clarifying modifications to the corresponding provisions of the 2010 Proposal. They address certain common practices that have developed with the growth of participant-directed individual account plans and recognize circumstances where the platform provider and the plan fiduciary clearly understand that the provider has financial or other relationships with the offered investments and is not purporting to provide impartial investment advice. It also accommodates the fact that platform providers often provide general financial information that falls short of constituting actual investment advice or recommendations, such as information on the historic performance of asset classes and of the investments available through the provider. The carve-outs also reflect the Department's agreement with commenters that a platform provider who merely identifies investment alternatives using objective third-party criteria (*e.g.,* expense ratios, fund size, or asset type specified by the plan fiduciary) to assist in selecting and monitoring investment alternatives should not be considered to be rendering investment advice.

While recognizing the utility of the provisions in paragraphs (b)(3) and (b)(4) for the effective and efficient operation of plans by plan sponsors, plan fiduciaries and plan service providers, the Department reiterates its longstanding view, recently codified in 29 CFR 2550.404a–5(f) and 2550.404c–1(d)(2)(iv) (2010), that a fiduciary is always responsible for prudently selecting and monitoring providers of services to the plan or designated

[21] *http://www.dol.gov/ebsa/pdf/cftc20110428.pdf.*

investment alternatives offered under the plan.

Several commenters also asked the Department to clarify that the platform provider carve-out is available in the 403(b) plan marketplace. In the Department's view, a 403(b) plan that is subject to Title I of ERISA would be an individual account plan within the meaning of ERISA section 3(34) of the Act for purposes of the proposed regulation, so the platform provider carve-out would be available with respect to such plans.

Other commenters asked that the platform provider provision be generally extended to apply to IRAs. In the IRA context, however, there typically is no separate independent ''plan fiduciary'' who interacts with the platform provider to protect the interests of the account owners. As a result, it is much more difficult to conclude that the transaction is truly arm's length or to draw a bright line between fiduciary and non-fiduciary communications on investment options. Consequently, the proposed regulation declines to extend application of this carve-out to IRAs and other non-ERISA plans. As the Department continues its work on this regulatory project, however, it requests specific comment as to the types of platforms and options that may be offered to IRA owners, how they may be similar to or different from platforms offered in connection with participant-directed individual account plans, and whether it would be appropriate for service providers not to be treated as fiduciaries under this carve-out when marketing such platforms to IRA owners. We also invite comments, alternatively, on whether the scope of this carve-out should be limited to large plans, similar to the scope of the ''Seller's Carve-out'' discussed above.

As a corollary to the proposal's restriction of the applicability of the platform provider carve-out to only ERISA plans, the selection and monitoring assistance carve-out is similarly not available in the IRA and other non-ERISA plans context. Commenters on the platform provider restriction are encouraged to offer their views on the effect of this restriction in the non-ERISA plan marketplace.

(4) Investment Education

Paragraph (b)(6) of the proposed regulation is similar to a carve-out in the 2010 Proposal for the provision of investment education information and materials within the meaning of an earlier Interpretive Bulletin issued by the Department in 1996. 29 CFR 2509.96–1 (IB 96–1). Paragraph (b)(6) incorporates much of IB 96–1's operative text, but with the important exceptions explained below. Paragraph (b)(6) of the proposed regulation, if finalized, would supersede IB 96–1. Consistent with IB 96–1, paragraph (b)(6) makes clear that furnishing or making available the specified categories of information and materials to a plan, plan fiduciary, participant, beneficiary or IRA owner will not constitute the rendering of investment advice, irrespective of who provides the information (*e.g.,* plan sponsor, fiduciary or service provider), the frequency with which the information is shared, the form in which the information and materials are provided (*e.g.,* on an individual or group basis, in writing or orally, via a call center, or by way of video or computer software), or whether an identified category of information and materials is furnished or made available alone or in combination with other categories of investment or retirement information and materials identified in paragraph (b)(6), or the type of plan or IRA involved. As a departure from IB 96–1, a new condition of the carve-out for investment education is that the information and materials not include advice or recommendations as to specific investment products, specific investment managers, or the value of particular securities or other property. The paragraph reflects the Department's view that the statutory reference to ''investment advice'' is not meant to encompass general investment information and educational materials, but rather is targeted at more specific recommendations and advice on the investment of plan and IRA assets.

Similar to IB 96–1, paragraph (b)(6) of the proposed regulation divides investment education information and materials into four general categories: (i) Plan information; (ii) general financial, investment and retirement information; (iii) asset allocation models; and (iv) interactive investment materials. The proposed regulation in paragraph (b)(6)(v) also adopts the provision from IB 96–1 stating that there may be other examples of information, materials and educational services which, if furnished, would not constitute investment advice or recommendations within the meaning of the proposed regulation and that no inference should be drawn regarding materials or information which are not specifically included in paragraph (b)(6)(i) through (iv).

Although paragraph (b)(6) incorporates most of the relevant text of IB 96–1, there are important changes. One change from IB 96–1 is that paragraph (b)(6) makes clear that the distinction between non-fiduciary education and fiduciary advice applies equally to information provided to plan fiduciaries as well as information provided to plan participants and beneficiaries and IRA owners, and that it applies equally to participant-directed plans and other plans. In addition, the provision applies without regard to whether the information is provided by a plan sponsor, fiduciary, or service provider.

Based on public input received in connection with its joint examination of lifetime income issues with the Department of the Treasury, the Department is persuaded that additional guidance may help improve retirement security by facilitating the provision of information and education relating to retirement needs that extend beyond a participant's or beneficiary's date of retirement. Accordingly, paragraph (b)(6) of the proposal includes specific language to make clear that the provision of certain general information that helps an individual assess and understand retirement income needs past retirement and associated risks (*e.g.,* longevity and inflation risk), or explains general methods for the individual to manage those risks both within and outside the plan, would not result in fiduciary status under the proposal.[22]

[22] Although the proposal would formally remove IB 96–1 from the CFR, the Department notes that paragraph (e) of IB 96–1 provides generalized guidance under section 405 and 404(c) of ERISA with respect to the selection by employers and plan fiduciaries of investment educators and the lack of responsibility of employers and fiduciaries with respect to investment educators selected by participants. Specifically, paragraph (e) states:

As with any designation of a service provider to a plan, the designation of a person(s) to provide investment educational services or investment advice to plan participants and beneficiaries is an exercise of discretionary authority or control with respect to management of the plan; therefore, persons making the designation must act prudently and solely in the interest of the plan participants and beneficiaries, both in making the designation(s) and in continuing such designation(s). See ERISA sections 3(21)(A)(i) and 404(a), 29 U.S.C. 1002 (21)(A)(i) and 1104(a). In addition, the designation of an investment advisor to serve as a fiduciary may give rise to co-fiduciary liability if the person making and continuing such designation in doing so fails to act prudently and solely in the interest of plan participants and beneficiaries; or knowingly participates in, conceals or fails to make reasonable efforts to correct a known breach by the investment advisor. See ERISA section 405(a), 29 U.S.C. 1105(a). The Department notes, however, that, in the context of an ERISA section 404(c) plan, neither the designation of a person to provide education nor the designation of a fiduciary to provide investment advice to participants and beneficiaries would, in itself, give rise to fiduciary liability for loss, or with respect to any breach of part 4 of title I of ERISA, that is the direct and necessary result of a participant's or beneficiary's exercise of independent control. 29 CFR 2550.404c–1(d). The Department also notes that a plan sponsor or

As noted, another change is that the Department is not incorporating the provisions at paragraph (d)(3)(iii) and (4)(iv) of IB 96–1. Those provisions of IB 96–1 permit the use of asset allocation models that refer to specific investment products available under the plan or IRA, as long as those references to specific products are accompanied by a statement that other investment alternatives having similar risk and return characteristics may be available. Based on its experience with the IB 96–1 since publication, as well as views expressed by commenters to the 2010 Proposal, the Department now believes that, even when accompanied by a statement as to the availability of other investment alternatives, these types of specific asset allocations that identify specific investment alternatives function as tailored, individualized investment recommendations, and can effectively steer recipients to particular investments, but without adequate protections against potential abuse.[23]

In particular, the Department agrees with those commenters to the 2010 Proposal who argued that cautionary disclosures to participants, beneficiaries, and IRA owners may have limited effectiveness in alerting them to the merit and wisdom of evaluating investment alternatives not used in the model. In practice, asset allocation models concerning hypothetical individuals, and interactive materials which arrive at specific investment products and plan alternatives, can be indistinguishable to the average retirement investor from individualized recommendations, regardless of caveats. Accordingly, paragraphs (b)(6)(iii) and (iv) relating to asset allocation models and interactive investment materials preclude the identification of specific investment alternatives available under the plan or IRA in order for the materials described in those paragraphs to be considered investment education. Thus, for example, we would not treat an asset allocation model as mere education if it called for a certain percentage of the investor's assets to be invested in large cap mutual funds, and accompanied that proposed allocation with the identity of a specific fund or provider. In that circumstance, the adviser has made a specific investment recommendation that should be treated as fiduciary advice and adhere to fiduciary standards. Further, materials that identify specific plan investment alternatives also appear to fall within the definition of "recommendation" in paragraph (f)(1) of the proposal, and could result in fiduciary status on the part of a provider if the other provisions of the proposal are met. The Department believes that effective and useful asset allocation education materials can be prepared and delivered to participants and IRA owners without including specific investment products and alternatives available under the plan. The Department understands that not incorporating the provisions of IB 96–1 at paragraph (d)(3)(iii) and (4)(iv) into the proposal represents a significant change in the information and materials that may constitute investment education. Accordingly, the Department invites comments on whether this change is appropriate.[24]

D. Fee or Other Compensation

A necessary element of fiduciary status under section 3(21)(A)(ii) of ERISA is that the investment advice be for a "fee or other compensation, direct or indirect." Consistent with the statute, paragraph (f)(6) of the proposed regulation defines this phrase to mean any fee or compensation for the advice received by the advice provider (or by an affiliate) from any source and any fee or compensation incident to the transaction in which the investment advice has been rendered or will be rendered. It further provides that the term "fee or compensation" includes, but is not limited to, brokerage fees, mutual fund sales, and insurance sales commissions.

Paragraph (c)(3) of the 2010 Proposal used similar language, but it also provided that the term included fees and compensation based on multiple transactions involving different parties. Commenters found this provision confusing and it does not appear in the new proposal. The provision was intended to confirm the Department's position that fees charged on a so-called "omnibus" basis (*e.g.,* compensation paid based on business placed or retained that includes plan or IRA business) would constitute fees and compensation for purposes of the rule.

Direct or indirect compensation also includes any compensation received by affiliates of the adviser that is connected to the transaction in which the advice was provided. For example, when a fiduciary adviser recommends that a participant or IRA owner invest in a mutual fund, it is not unusual for an affiliated adviser to the mutual fund to receive a fee. The receipt by the affiliate of advisory fees from the mutual fund is indirect compensation in connection with the rendering of investment advice to the participant.

Some commenters additionally suggested that call center employees should not be treated as investment advice fiduciaries where they are not specifically paid to provide investment advice and their compensation does not change based on their communications with participants and beneficiaries. The carve-out from the fiduciary investment advice definition for investment education provides guidelines under which call center staff and other employees providing similar investor assistance services may avoid fiduciary status. However, commenters stated that a specific carve-out for such call centers would provide a greater level of certainty so as not to inhibit mutual funds, insurance companies, broker-dealers, recordkeepers and other financial service providers from continuing to make such assistance available to participants and beneficiaries in 401(k) and similar participant-directed plans. In the Department's view, such a carve-out would be inappropriate. The fiduciary definition is intended to apply broadly to all persons who engage in the activities set forth in the regulation, regardless of job title or position, or whether the advice is rendered in person, in writing or by phone. If, in the performance of their jobs, call center employees make specific investment recommendations to plan participants or IRA owners under the circumstances

fiduciary would have no fiduciary responsibility or liability with respect to the actions of a third party selected by a participant or beneficiary to provide education or investment advice where the plan sponsor or fiduciary neither selects nor endorses the educator or advisor, nor otherwise makes arrangements with the educator or advisor to provide such services.

Unlike the remainder of the IB, this text does not belong in the investment advice regulation. Also, the principles articulated in paragraph (e) are generally understood and accepted such that retaining the paragraph as a stand-alone IB does not appear necessary or appropriate.

[23] When the Department issued IB 96–1, it expressed concern that service providers could effectively steer participants to a specific investment alternative by identifying only one particular fund available under the plan in connection with an asset allocation model. As a result, where it was possible to do so, the Department encouraged service providers to identify other investment alternatives within an asset class as part of a model. Ultimately, however, when asset allocation models and interactive investment materials identified any specific investment alternative available under the plan, the Department required an accompanying statement both indicating that other investment alternatives having similar risk and return characteristics may be available under the plan and identifying where information on those investment alternatives could be obtained. 61 FR 29586, 29587 (June 11, 1996).

[24] As indicated earlier in this Notice, the Department believes that FINRA's guidance in this area may provide useful standards and guideposts for distinguishing investment education from investment advice under ERISA. The Department specifically solicits comments on the discussion in FINRA's "Frequently Asked Questions, FINRA Rule 2111 (Suitability)" of the term "recommendation" in the context of asset allocation models and general investment strategies.

described in the proposal, it is appropriate to treat them, and possibly their employers, as fiduciaries unless they meet the conditions of one of the carve-outs set forth above.

E. Coverage of IRAs and Other Non-ERISA Plans

Certain provisions of Title I of ERISA, 29 U.S.C. 1001–1108, such as those relating to participation, benefit accrual, and prohibited transactions also appear in the Code. This parallel structure ensures that the relevant provisions apply to all tax-qualified plans, including IRAs. With regard to prohibited transactions, the Title I provisions generally authorize recovery of losses from, and imposition of civil penalties on, the responsible plan fiduciaries, while the Code provisions impose excise taxes on persons engaging in the prohibited transactions. The definition of fiduciary with respect to a plan is the same in section 4975(e)(3)(B) of the IRC as the definition in section 3(21)(A)(ii) of ERISA, 29 U.S.C. 1002(21)(A)(ii), and the Department's 1975 regulation defining fiduciary investment advice is virtually identical to regulations that define the term ''fiduciary'' under the Code. 26 CFR 54.4975–9(c) (1975).

To rationalize the administration and interpretation of dual provisions under ERISA and the Code, Reorganization Plan No. 4 of 1978 divided the interpretive and rulemaking authority for these provisions between the Secretaries of Labor and of the Treasury, so that, in general, the agency with responsibility for a given provision of Title I of ERISA would also have responsibility for the corresponding provision in the Code. Among the sections transferred to the Department were the prohibited transaction provisions and the definition of a fiduciary in both Title I of ERISA and in the Code. ERISA's prohibited transaction rules, 29 U.S.C. 1106–1108, apply to ERISA-covered plans, and the Code's corresponding prohibited transaction rules, 26 U.S.C. 4975(c), apply both to ERISA-covered pension plans that are tax-qualified pension plans, as well as other tax-advantaged arrangements, such as IRAs, that are not subject to the fiduciary responsibility and prohibited transaction rules in ERISA.[25]

Given this statutory structure, and the dual nature of the 1975 regulation, the proposal would apply to both the definition of ''fiduciary'' in section 3(21)(A)(ii) of ERISA and the definition's counterpart in section 4975(e)(3)(B) of the Code. As a result, it applies to persons who give investment advice to IRAs. In this respect, the new proposal is the same as the 2010 Proposal.

Many comments on the 2010 Proposal concerned its impact on IRAs and questioned whether the Department had adequately considered possible negative impacts. Some commenters were especially concerned that application of the new rule could disrupt existing brokerage arrangements that they believe are beneficial to customers. In particular, brokers often receive revenue sharing, 12b–1 fees, and other compensation from the parties whose investment products they recommend. If the brokers were treated as fiduciaries, the receipt of such fees could violate the Code's prohibited transaction rules, unless eligible for a prohibited transaction exemption. According to these commenters, the disruption of such current fee arrangements could result in a reduced level of assistance to investors, higher up-front fees, and less investment advice, particularly to investors with small accounts. In addition, some commenters expressed skepticism that the imposition of fiduciary standards would result in improved advice and questioned the view that current compensation arrangements could cause sub-optimal advice. Additionally, commenters stressed the need for coordination between the Department and other regulatory agencies, such as the SEC, CFTC, and Treasury.

As discussed above, to better align the regulatory definition of fiduciary with the statutory provisions and underlying Congressional goals, the Department is proposing a definition of a fiduciary investment advice that would encompass investment recommendations that are individualized or specifically directed to plans, participants, beneficiaries or IRA owners, if the adviser receives a direct or indirect fee. Neither the relevant statutory provisions, nor the current regulation, draw a distinction between brokers and other advisers or carve brokers out of the scope of the fiduciary provisions of ERISA and of the Code. The relevant statutory provisions, and accordingly the proposed regulation, establish a functional test based on the service provider's actions, rather than the provider's title (*e.g.,* broker or registered investment adviser). If one engages in specified activities, such as the provision of investment advice for a direct or indirect fee, the person engaging in those activities is a fiduciary, irrespective of labels. Moreover, the statutory definition of fiduciary advice is identical under both ERISA and the Code. There is no indication that the definition should vary between plans and IRAs.

In light of this statutory framework, the Department does not believe it would be appropriate to carve out a special rule for IRAs, or for brokers or others who make specific investment recommendations to IRA owners or to other participants in non-ERISA plans for direct or indirect fees. When Congress enacted ERISA and the corresponding Code provisions, it chose to impose fiduciary status on persons who provide investment advice to plans, participants, beneficiaries and IRA owners, and to specifically prohibit a wide variety of transactions in which the fiduciary has financial interests that potentially conflict with the fiduciary's obligation to the plan or IRA. It did not provide a special carve-out for brokers or IRAs, and the Department does not believe it would be appropriate to write such a carve-out into the regulation implementing the statutory definition.

Indeed, brokers who give investment advice to IRA owners or plan participants, and who otherwise meet the terms of the current five-part test, are already fiduciaries under the existing fiduciary regulation. If, for example, a broker regularly advises an individual IRA owner on specific investments, the IRA owner routinely follows the recommendations, and both parties understand that the IRA owner relies upon the broker's advice, the broker is almost certainly a fiduciary. In such circumstances, the broker is already subject to the excise tax on prohibited transactions if he or she receives fees from a third party in connection with recommendations to invest IRA assets in the third party's investment products, unless the broker satisfies the conditions of a prohibited transaction exemption that covers the particular fees. Indeed, broker-dealers today can provide fiduciary investment advice by complying with prohibited transaction exemptions that permit the receipt of commission-based compensation for the sale of mutual funds and other securities. Moreover, both ERISA and the Code were amended as part of the PPA to include a new prohibited transaction exemption that applies to investment advice in both the plan and IRA context. The PPA exemption clearly reflects the longstanding concern under ERISA and the Code about the dangers posed by conflicts of interest, and the need for appropriate safeguards in both the plan and IRA markets. Under the terms of the

[25] The Secretary of Labor also was transferred authority to grant administrative exemptions from the prohibited transaction provisions of the Code.

exemption, the investment recommendations must either result from the application of an unbiased and independently certified computer program or the fiduciary's fees must be level (*i.e.,* the fiduciary's compensation cannot vary based on his or her particular investment recommendations).

Moreover, as discussed in the regulatory impact analysis below, there is substantial evidence to support the statutory concern about conflicts of interest. As the analysis reflects, unmitigated conflicts can cause significant harm to investors. The available evidence supports a finding that the negative impacts are present and often times large. The proposal would curtail the harms to investors from such conflicts and thus deliver significant benefits to plan participants and IRA owners. Plans, plan participants, beneficiaries and IRA owners would all benefit from advice that is impartial and puts their interests first. Moreover, broker-dealer interactions with plan fiduciaries, participants, and IRA owners present some of the most obvious conflict of interest problems in this area. Accordingly, in the Department's view, broker-dealers that provide investment advice should be subject to fiduciary duties to mitigate conflicts of interest and increase investor protections.

Some commenters additionally suggested that the application of special fiduciary rules in the retail investment market to IRA accounts, but not savings outside of tax-preferred retirement accounts, is inappropriate and could lead to confusion among investors and service providers. The distinction between IRAs and other retail accounts, however, is a direct result of a statutory structure that draws a sensible distinction between tax-favored IRAs and other retail investment accounts. The Code itself treats IRAs differently, bestowing uniquely favorable tax treatment on such accounts and prohibiting self-dealing by persons providing investment advice for a fee. In these respects, and in light of the special public interest in retirement security, IRAs are more like plans than like other retail accounts. Indeed, as noted above, the vast majority of IRA assets today are attributable to rollovers from plans.[26] In addition, IRA owners may be at even greater risk from conflicted advice than plan participants. Unlike ERISA plan participants, IRA owners do not have the benefit of an independent plan fiduciary to represent their interests in selecting a menu of investment options or structuring advice arrangements. They cannot sue fiduciary advisers under ERISA for losses arising from fiduciary breaches, nor can the Department sue on their behalf. Compared to participants with ERISA plan accounts, IRA owners often have larger account balances and are more likely to be elderly. Thus, limiting the harms to IRA investors resulting from conflicts of interest of advisers is at least as important as protecting ERISA plans and plan participants from such harms.

The Department believes that it is important to address the concerns of brokers and others providing investment advice to IRA owners about undue disruptions to current fee arrangements, but also believes that such concerns are best resolved within a fiduciary framework, rather than by simply relieving advisers from fiduciary responsibility. As previously discussed, the proposed regulation permits investment professionals to provide important financial information and education, without acting as fiduciaries or being subject to the prohibited transaction rules. Moreover, ERISA and the Code create a flexible process that enables the Department to grant class and individual exemptions from the prohibited transaction rules for fee practices that it determines are beneficial to plan participants and IRA owners. For example, existing prohibited transaction exemptions already allow brokers who provide fiduciary advice to receive commissions generating conflicts of interest for trading the types of securities and funds that make up the large majority of IRA assets today. In addition, simultaneous with the publication of this proposed regulation, the Department is publishing new exemption proposals that would permit common fee practices, while at the same time protecting plan participants, beneficiaries and IRA owners from abuse and conflicts of interest. As noted above, in contrast with many previously adopted PTE exemptions that are transaction-specific, the Best Interest Contract PTE described below reflects a more flexible approach that accommodates a wide range of current business practices while minimizing the impact of conflicts of interest and ensuring that plans and IRAs receive investment recommendations that are in their best interests.

As discussed, the Department received extensive comment on the application of the 2010 Proposal's provisions to IRAs, but comments regarding other non-ERISA plans such as Health Savings Accounts (HSAs), Archer Medical Savings Accounts and Coverdell Education Savings Accounts were less prolific. The Department notes that these accounts are given tax preferences as are IRAs. Further, some of the accounts, such as HSAs, can be used as long term savings accounts for retiree health care expenses. These types of accounts also are expressly defined by Code section 4975(e)(1) as plans that are subject to the Code's prohibited transaction rules. Thus, although they generally may hold fewer assets and may exist for shorter durations than IRAs, the owners of these accounts or the persons for whom these accounts were established are entitled to receive the same protections from conflicted investment advice as IRA owners. Accordingly, these accounts are included in the scope of covered plans in paragraph (f)(2) of the new proposal. However, the Department solicits specific comment as to whether it is appropriate to cover and treat these plans under the proposed regulation in a manner similar to IRAs as to both coverage and applicable carve-outs.

F. Administrative Prohibited Transaction Exemptions

In addition to the new proposal in this Notice, the Department is also proposing, elsewhere in this edition of the **Federal Register**, certain administrative class exemptions from the prohibited transaction provisions of ERISA (29 U.S.C. 1106), and the Code (26 U.S.C. 4975(c)(1)) as well as proposed amendments to previously adopted exemptions. The proposed exemptions and amendments would allow, subject to appropriate safeguards, certain broker-dealers, insurance agents and others that act as investment advice fiduciaries to nevertheless continue to receive a variety of forms of compensation that would otherwise violate prohibited transaction rules and trigger excise taxes. The proposed exemptions would supplement statutory exemptions at 29 U.S.C. 1108 and 26 U.S.C. 4975(d), and previously adopted class exemptions.

Investment advice fiduciaries to plans and plan participants must meet ERISA's standards of prudence and loyalty to their plan customers. Such fiduciaries also face taxes, remedies and other sanctions for engaging in certain transactions, such as self-dealing with plan assets or receiving payments from third parties in connection with plan transactions, unless the transactions are permitted by an exemption from ERISA's and the Code's prohibited transaction rules. IRA fiduciaries do not

[26] Peter Brady, Sarah Holden, and Erin Shon, *The U.S. Retirement Market, 2009,* Investment Company Institute, Research Fundamentals, Vol. 19, No. 3, May 2010, *at http://www.ici.org/pdf/fm-v19n3.pdf.*

have the same general fiduciary obligations of prudence and loyalty under the statute, but they too must adhere to the prohibited transaction rules or they must pay an excise tax. The prohibited transaction rules help ensure that investment advice provided to plan participants and IRA owners is not driven by the adviser's financial self-interest.

Proposed Best Interest Contract Exemption (Best Interest Contract PTE)

The proposed Best Interest Contract PTE would provide broad and flexible relief from the prohibited transaction restrictions on certain compensation received by investment advice fiduciaries as a result of a plan's or IRA's purchase, sale or holding of specifically identified investments. The conditions of the exemption are generally principles-based rather than prescriptive and require, in particular, that advice be provided in the best interest of the plan or IRA. This exemption was developed partly in response to comments received that suggested such an approach. It is a significant departure from existing exemptions, examples of which are discussed below, which are limited to much narrower categories of investments under more prescriptive and less flexible and adaptable conditions.

The proposed Best Interest Contract PTE was developed to promote the provision of investment advice that is in the best interest of retail investors, such as plan participants and beneficiaries, IRA owners, and small plans. The proposed exemption would apply to compensation received by individual investment advice fiduciaries (including individual advisers [27] and firms that employ or otherwise contract with such individuals) as well as their affiliates and related entities, that is provided in connection with the purchase, sale or holding of certain assets by the plans, participants and beneficiaries, and IRAs. In order to protect the interests of these investors, the exemption requires the firm and the adviser to contractually acknowledge fiduciary status, commit to adhere to basic standards of impartial conduct, warrant that they will comply with applicable federal and state laws governing advice and that they have adopted policies and procedures reasonably designed to mitigate any harmful impact of conflicts of interest, and disclose basic information on their conflicts of interest and on the cost of their advice. The standards of impartial conduct to which the adviser and firm must commit are basic obligations of fair dealing and fiduciary conduct to which the Department believes advisers and firms often informally commit—to give advice that is in the customer's best interest; avoid misleading statements; and receive no more than reasonable compensation. This standards-based approach aligns the adviser's interests with those of the plan or IRA customer, while leaving the adviser and employing firm the flexibility and discretion necessary to determine how best to satisfy these basic standards in light of the unique attributes of their business.

As an additional protection for retail investors, the exemption would not apply if the contract contains exculpatory provisions disclaiming or otherwise limiting liability of the adviser or financial institution for violation of the contract's terms. Adopting the approach taken by FINRA, the contract could require the parties to arbitrate individual claims, but it could not limit the rights of the plan, participant, beneficiary, or IRA owner to bring or participate in a class action against the adviser or financial institution.

Additional conditions would apply to firms that limit the products that their advisers can recommend based on the receipt of third party payments or the proprietary nature of the products (*i.e.,* products offered or managed by the firm or its affiliates) or for other reasons. The conditions require, among other things, that such firms provide notice of the limitations to plans, participants and beneficiaries and IRA owners, as well as make a written finding that the limitations do not prevent advisers from providing advice in those investors' best interest.

Finally, certain notice and data collection requirements would apply to all firms relying on the exemption. Specifically, firms would be required to notify the Department in advance of doing so, and they would have to maintain certain data, and make it available to the Department upon request, to help evaluate the effectiveness of the exemption in safeguarding the interests of plan and IRA investors.

The Department's intent in crafting the Best Interest Contract PTE is to permit common compensation structures that create conflicts of interest, while minimizing the costs imposed on investors by such conflicts. The exemption is designed both to impose broad fiduciary standards of conduct on advisers and financial institutions, and to give them sufficient flexibility to accommodate a wide range of business practices and compensation structures that currently exist or that may develop in the future.

The Department is also considering an additional streamlined exemption that would apply to compensation received in connection with investments by plans, participants and beneficiaries, and IRA owners, in certain high-quality, low-fee investments, subject to fewer conditions than in the proposed Best Interest Contract PTE. If properly crafted, the streamlined exemption could achieve important goals of minimizing compliance burdens for advisers and financial institutions when they offer investment products with little potential for material conflicts of interest. The Department is not proposing text for such a streamlined exemption due to the difficulty in operationalizing this concept. However the Department is eager to receive comments on whether such an exemption would be worthwhile and, as part of the notice proposing the Best Interest Contract PTE, is soliciting comments on a number of issues relating to the design of a streamlined exemption.

Proposed Principal Transaction Exemption (Principal Transaction PTE)

Broker-dealers and other advisers commonly sell debt securities out of their own inventory to plans, participants and beneficiaries and IRA owners in a type of transaction known as a ''principal transaction.'' Fiduciaries trigger taxes, remedies and other legal sanctions when they engage in such activities, unless they qualify for an exemption from the prohibited transaction rules. These principal transactions raise issues similar to those addressed in the Best Interest Contract PTE, but also raise unique concerns because the conflicts of interest are particularly acute. In these transactions, the adviser sells the security directly from its own inventory, and may be able to dictate the price that the plan, participant or beneficiary, or IRA owner pays.

Because of the prevalence of the practice in the market for fixed income securities, the Department has proposed a separate Principal Transactions PTE that would permit principal transactions in certain debt securities between a plan or IRA owner and an investment advice fiduciary, under certain circumstances.

[27] By using the term ''adviser,'' the Department does not intend to limit the exemption to investment advisers registered under the Investment Advisers Act of 1940; under the exemption an adviser is individual who can be a representative of a registered investment adviser, a bank or similar financial institution, an insurance company, or a broker-dealer.

The Principal Transaction PTE would include all of the contract requirements of the Best Interest Contract PTE. In addition, however, it would include specific conditions related to the price of the debt security involved in the transaction. The adviser would have to obtain two price quotes from unaffiliated counterparties for the same or a similar security, and the transaction would have to occur at a price at least as favorable to the plan or IRA as the two price quotes. Additionally, the adviser would have to disclose the amount of compensation and profit (sometimes referred to as a ''mark up'' or ''mark down'') that it expects to receive on the transaction.

Amendments to Existing PTEs

In addition to the Best Interest Contract PTE and the Principal Transaction PTE, the Department is also proposing elsewhere in the **Federal Register** amendments to certain existing PTEs.

Prohibited Transaction Exemption 86–128

Prohibited Transaction Exemption (PTE) 86–128 [28] currently allows an investment advice fiduciary to cause the recipient plan or IRA to pay the investment advice fiduciary or its affiliate a fee for effecting or executing securities transactions as agent. To prevent churning, the exemption does not apply if such transactions are excessive in either amount or frequency. The exemption also allows the investment advice fiduciary to act as an agent for both the plan and the other party to the transaction (*i.e.,* the buyer and the seller of securities) and receive a reasonable fee. To use the exemption, the fiduciary cannot be a plan administrator or employer, unless all profits earned by these parties are returned to the plan. The conditions of the exemption require that a plan fiduciary independent of the investment advice fiduciary receive certain disclosures and authorize the transaction. In addition, the independent fiduciary must receive confirmations and an annual ''portfolio turnover ratio'' demonstrating the amount of turnover in the account during that year. These conditions are not presently applicable to transactions involving IRAs.

The Department is proposing to amend PTE 86–128 to require all fiduciaries relying on the exemption to adhere to the same impartial conduct standards required in the Best Interest Contract PTE. At the same time, the proposed amendment would eliminate relief for investment advice fiduciaries to IRA owners; instead they would be required to rely on the Best Interest Contract PTE for an exemption for such compensation. In the Department's view, the provisions in the Best Interest Contract Exemption better address the interests of IRAs with respect to transactions otherwise covered by PTE 86–128 and, unlike plan participants and beneficiaries, there is no separate plan fiduciary in the IRA market to review and authorize the transaction. Investment advice fiduciaries to plans would remain eligible for relief under the exemption, as would investment managers with full investment discretion over the investments of plans and IRA owners, but they would be required to comply with all the protective conditions, described above. Finally, the Department is proposing that PTE 86–128 extend to a new covered transaction, for fiduciaries who sell mutual fund shares out of their own inventory (*i.e.,* acting as principals, rather than agents) to plans and IRAs and to receive commissions for doing so. This transaction is currently the subject of another exemption, PTE 75–1, Part II(2) (discussed below) that the Department is proposing to revoke.

Several changes are proposed with respect to PTE 75–1, a multi-part exemption for securities transactions involving broker dealers and banks, and plans and IRAs.[29] Part I(b) and (c) currently provide relief for certain non-fiduciary services to plans and IRAs. The Department is proposing to revoke these provisions, and require persons seeking to engage in such transactions to rely instead on the existing statutory exemptions provided in ERISA section 408(b)(2) and Code section 4975(d)(2), and the Department's implementing regulations at 29 CFR 2550.408b–2. The Department believes the conditions of the statutory exemptions are more appropriate for the provision of these services.

PTE 75–1, Part II(2), currently provides relief for fiduciaries selling mutual fund shares to plans and IRAs in a principal transaction to receive commissions. PTE 75–1, Part II(2) currently provides relief for fiduciaries to receive commissions for selling mutual fund shares to plans and IRAs in a principal transaction. As described above, the Department is proposing to provide relief for these types of transactions in PTE 86–128, and so is proposing to revoke PTE 75–1, Part II(2), in its entirety. As discussed in more detail in the notice of proposed amendment/revocation, the Department believes the conditions of PTE 86–128 are more appropriate for these transactions.

PTE 75–1, Part V, currently permits broker-dealers to extend credit to a plan or IRA in connection with the purchase or sale of securities. The exemption does not permit broker-dealers that are fiduciaries to receive compensation when doing so. The Department is proposing to amend PTE 75–1, Part V, to permit investment advice fiduciaries to receive compensation for lending money or otherwise extending credit, but only for the limited purpose of avoiding a failed securities transaction.

Prohibited Transaction Exemption 84–24

PTE 84–24 [30] covers transactions involving mutual fund shares, or insurance or annuity contracts, sold to plans or IRA investors by pension consultants, insurance agents, brokers, and mutual fund principal underwriters who are fiduciaries as a result of advice they give in connection with these transactions. The exemption allows these investment advice fiduciaries to receive a sales commission with respect to products purchased by plans or IRA investors. The exemption is limited to sales commissions that are reasonable under the circumstances. The investment advice fiduciary must provide disclosure of the amount of the commission and other terms of the transaction to an independent fiduciary of the plan or IRA, and obtain approval for the transaction. To use this exemption, the investment advice fiduciary may not have certain roles with respect to the plan or IRA such as trustee, plan administrator, fiduciary with written authorization to manage the plan's assets and employers. However it is available to investment advice fiduciaries regardless of whether they expressly acknowledge their fiduciary status or are simply functional or ''inadvertent'' fiduciaries that have not expressly agreed to act as fiduciary advisers, provided there is no written authorization granting them discretion to acquire or dispose of the assets of the plan or IRA.

[28] Class Exemption for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers, 51 FR 41686 (Nov. 18, 1986), amended at 67 FR 64137 (Oct. 17, 2002).

[29] Exemptions from Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers and Banks, 40 FR 50845 (Oct. 31, 1975), as amended at 71 FR 5883 (Feb. 3, 2006).

[30] Class Exemption for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, Investment Companies and Investment Company Principal Underwriters, 49 FR 13208 (Apr. 3, 1984), amended at 71 FR 5887 (Feb. 3, 2006).

The Department is proposing to amend PTE 84–24 to require all fiduciaries relying on the exemption to adhere to the same impartial conduct standards required in the Best Interest Contract Exemption. At the same time, the proposed amendment would revoke PTE 84–24 in part so that investment advice fiduciaries to IRA owners would not be able to rely on PTE 84–24 with respect to (1) transactions involving variable annuity contracts and other annuity contracts that constitute securities under federal securities laws, and (2) transactions involving the purchase of mutual fund shares. Investment advice fiduciaries to IRA owners would instead be required to rely on the Best Interest Contract Exemption for most common forms of compensation received in connection with these transactions. The Department believes that investment advice transactions involving annuity contracts that are treated as securities and transactions involving the purchase of mutual fund shares should occur under the conditions of the Best Interest Contract Exemption due to the similarity of these investments, including their distribution channels and disclosure obligations, to other investments covered in the Best Interest Contract Exemption. Investment advice fiduciaries to ERISA plans would remain eligible for relief under the exemption with respect to transactions involving all insurance and annuity contracts and mutual fund shares and the receipt of commissions allowable under that exemption. Investment advice fiduciaries to IRAs could still receive commissions for transactions involving non-securities insurance and annuity contracts, but they would be required to comply with all the protective conditions, described above.

Finally, the Department is proposing amendments to certain other existing class exemptions to require adherence to the impartial conduct standards required in the Best Interest Contract PTE. Specifically, PTEs 75–1, Part III, 75–1, Part IV, 77–4, 80–83, and 83–1, would be amended. These existing class exemptions will otherwise remain in place, affording flexibility to fiduciaries who currently use the exemptions or who wish to use the exemptions in the future.

The proposed dates on which the new exemptions and amendments to existing exemptions would be effective are summarized below.

G. The Provision of Professional Services Other Than Investment Advice

Several commenters asserted that it was unclear whether investment advice under the scope of the 2010 Proposal would include the provision of information and plan services that traditionally have been performed in a non-fiduciary capacity. For example, they requested that the proposal be revised to make clear that actuaries, accountants, and attorneys, who have historically not been treated as ERISA fiduciaries for plan clients, would not become fiduciary investment advisers by reason of providing actuarial, accounting and legal services. They said that if individuals providing these services were classified as fiduciaries, the associated costs would almost certainly increase because of the need to account for their new potential fiduciary liability. This was not the intent of the 2010 proposal.

The new proposal clarifies that attorneys, accountants, and actuaries would not be treated as fiduciaries merely because they provide such professional assistance in connection with a particular investment transaction. Only when these professionals act outside their normal roles and recommend specific investments or render valuation opinions in connection with particular investment transactions, would they be subject to the proposed fiduciary definition.

Similarly, the new proposal does not alter the principle articulated in ERISA Interpretive Bulletin 75–8, D–2 at 29 CFR 2509.75–8 (1975). Under the bulletin, the plan sponsor's human resources personnel or plan service providers who have no power to make decisions as to plan policy, interpretations, practices or procedures, but who perform purely administrative functions for an employee benefit plan, within a framework of policies, interpretations, rules, practices and procedures made by other persons, are not fiduciaries with respect to the plan.

H. Effective Date; Applicability Date

Final Rule

Commenters on the 2010 Proposal asked the Department to provide sufficient time for orderly and efficient compliance, and to make it clear that the final rule would not apply in connection with advice provided before the effective date of the final rule. Many commenters also expressed concern with the provision in the Department's 2010 Proposal that the final regulation and class exemptions would be effective 90 days after their publication in the **Federal Register**. Some commenters suggested that these effective dates should be extended to as much as 12 months or longer following publication of the new rule to allow service providers sufficient time to make necessary changes in business practices, recordkeeping, communication materials, sales processes, compensation arrangements, and related agreements, as well as the time necessary to obtain and adjust to any additional individual or class exemptions. Several said that applicability of any changes in the 1975 regulation should be no earlier than two years after the promulgation of a final regulation. Other commenters thought that the effective dates in the 2010 proposal were reasonable and asked that the final rules should go into effect promptly in order to reduce ongoing harms to savers.

In response to these concerns, the Department has revised the date by which the final rule would apply. Specifically, the final rule would be effective 60 days after publication in the **Federal Register** and the requirements of the final rule would generally become applicable eight months after publication of a final rule, with the potential exceptions noted below. This modification is intended to balance the concerns raised by commenters about the need for prompt action with concerns raised about the cost and burden associated with transitioning current and future contracts or arrangements to satisfy the requirements of the final rule and any accompanying prohibited transaction exemptions.

Administrative Prohibited Transaction Exemptions

The Department proposes to make the Best Interest Contract Exemption, if granted, available on the final rule's applicability date, *i.e.,* eight months after publication of a final rule. Further, the department proposes that the other new and revised PTEs that it is proposing go into effect as of the final rule's applicability date.[31]

For those fiduciary investment advisers who choose to avail themselves of the Best Interest Contract Exemption, the Department recognizes that compliance with certain requirements of the new exemption may be difficult within the eight-month timeframe. The Department therefore is soliciting comments on whether to delay the application of certain requirements of the Best Interest Contract Exemption for several months (for example, certain data collection requirements), thereby enabling firms and advisers to benefit from the Best Interest Contract Exemption without meeting all the

[31] See the notices with respect to these proposals, published elsewhere in this issue of the **Federal Register**.

requirements for a limited period of time. Although the Department does not believe that a general delay in the application of the exemption's requirements is warranted, it recognizes that a short-term delay of some requirements may be appropriate and may not compromise the overall protections created by the proposed rule and exemptions. As discussed in more detail in the Notice proposing the Best Interest Contract Exemption published elsewhere in this issue of the **Federal Register**, the Department requests comments on this approach.

I. Public Hearing

The Department plans to hold an administrative hearing within 30 days of the close of the comment period. As with the 2010 Proposal, the Department will ensure ample opportunity for public comment by reopening the record following the hearing and publication of the hearing transcript. Specific information regarding the date, location and submission of requests to testify will be published in a notice in the **Federal Register**.

J. Regulatory Impact Analysis

Under Executive Order 12866, ''significant'' regulatory actions are subject to the requirements of the Executive Order and review by the Office of Management and Budget (OMB). Section 3(f) of the executive order defines a ''significant regulatory action'' as an action that is likely to result in a rule (1) having an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as ''economically significant''); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. OMB has determined that this proposed rule is economically significant within the meaning of section 3(f)(1) of the Executive Order, because it would be likely to have an effect on the economy of $100 million in at least one year. Accordingly, OMB has reviewed the rule pursuant to the Executive Order.

The Department's complete Regulatory Impact Analysis is available at *www.dol.gov/ebsa/pdf/conflictsofinterestria.pdf.* It is summarized below.

Tax-preferred retirement savings, in the form of private-sector, employer-sponsored retirement plans, such as 401(k) plans (''plans''), and Individual Retirement Accounts (''IRAs''), are critical to the retirement security of most U.S. workers. Investment professionals play a major role in guiding their investment decisions. However, these professional advisers often are compensated in ways that create conflicts of interest, which can bias the investment advice they render and erode plan and IRA investment results. In order to limit or mitigate conflicts of interest and thereby improve retirement security, the Department of Labor (''the Department'') is proposing to attach fiduciary status to more of the advice rendered to plan officials, participants, and beneficiaries (plan investors) and IRA investors.

Since the Department issued its 1975 rule, the retirement savings market has changed profoundly. Financial products are increasingly varied and complex. Individuals, rather than large employers, are increasingly responsible for their investment decisions as IRAs and 401(k)-type defined contribution plans have supplanted defined benefit pensions as the primary means of providing retirement security. Plan and IRA investors often lack investment expertise and must rely on experts—but are unable to assess the quality of the expert's advice or police its conflicts of interest. Most have no idea how ''advisers'' are compensated for selling them products. Many are bewildered by complex choices that require substantial financial literacy and welcome ''free'' advice. The risks are growing as baby boomers retire and move money from plans, where their employer has both the incentive and the fiduciary duty to facilitate sound investment choices, to IRAs, where both good and bad investment choices are myriad and most advice is conflicted. These ''rollovers'' are expected to approach $2.5 trillion over the next 5 years.[32] These rollovers, which will be one-time and not ''on a regular basis'' and thus not covered by the 1975 standard, will be the most important financial decisions that many consumers make in their lifetime. An ERISA plan investor who rolls her retirement savings into an IRA could lose 12 to 24 percent of the value of her savings over 30 years of retirement by accepting advice from a conflicted financial advisor.[33] Timely regulatory action to redress advisers' conflicts is warranted to avert such losses.

In the retail IRA marketplace, growing consumer demand for personalized advice, together with competition from online discount brokerage firms, has pushed brokers to offer more comprehensive guidance services rather than just transaction support. Unfortunately, their traditional compensation sources—such as brokerage commissions, revenue shared by mutual funds and funds' asset managers, and mark-ups on bonds sold from their own inventory—can introduce acute conflicts of interest. Brokers and others advising IRA investors are often able to calibrate their business practices to steer around the narrow 1975 rule and thereby avoid fiduciary status and prohibited transactions for accepting conflict-laden compensation. Many brokers market retirement investment services in ways that clearly suggest the provision of tailored or individualized advice, while at the same time relying on the 1975 rule to disclaim any fiduciary responsibility in the fine print of contracts and marketing materials. Thus, at the same time that marketing materials may characterize the financial adviser's relationship with the customer as one-on-one, personalized, and based on the client's best interest, footnotes and legal boilerplate disclaim the requisite mutual agreement, arrangement, or understanding that the advice is individualized or should serve as a primary basis for investment decisions. What is presented to an IRA investor as trusted advice is often paid for by a financial product vendor in the form of a sales commission or shelf-space fee, without adequate counter-balancing consumer protections that are designed to ensure that the advice is in the investor's best interest. In another variant of the same problem, brokers and others provide apparently tailored advice to customers under the guise of general education to avoid triggering fiduciary status and responsibility.

[32] Cerulli Associates, ''Retirement Markets 2014: Sizing Opportunities in Private and Public Retirement Plans,'' 2014.

[33] For example, an ERISA plan investor who rolls $200,000 into an IRA, earns a 6% nominal rate of return with 3% inflation, and aims to spend down her savings in 30 years, would be able to consume $10,204 per year for the 30 year period. A similar investor whose assets underperform by 1 or 2 percentage points per year would only be able to consume $8,930 or $7,750 per year, respectively, in each of the 30 years. The 1 to 2 percentage point underperformance comes from a careful review of a large and growing body of literature which consistently points to a substantial failure of the market for retirement advice. The literature is discussed in the Department's complete Regulatory Impact Analysis (available at *www.dol.gov/ebsa/pdf/conflictsofinterestria.pdf*).

Likewise in the plan market, pension consultants and advisers that plan sponsors rely on to guide their decisions often avoid fiduciary status under the five-part test and are conflicted. For example, if a plan hires an investment professional or appraiser on a one-time basis for an investment recommendation on a large, complex investment, the adviser has no fiduciary obligation to the plan under ERISA. Even if the plan official, who lacks the specialized expertise necessary to evaluate the complex transaction on his or her own, invests all or substantially all of the plan's assets in reliance on the consultant's professional judgment, the consultant is not a fiduciary because he or she does not advise the plan on a "regular basis" and therefore may stand to profit from the plan's investment due to a conflict of interest that could affect the consultant's best judgment. Too much has changed since 1975, and too many investment decisions are made as one-time decisions and not advice on a regular basis for the five-part test to be a meaningful safeguard any longer.

The proposed definition of fiduciary investment advice included in this NPRM generally covers specific recommendations on investments, investment management, the selection of persons to provide investment advice or management, and appraisals in connection with investment decisions. Persons who provide such advice would fall within the proposed regulation's ambit if they either (a) represent that they are acting as an ERISA fiduciary or (b) make investment recommendations pursuant to an agreement, arrangement, or understanding that the advice is individualized or specifically directed to the recipient for consideration in making investment or investment management decisions regarding plan or IRA assets.

The current proposal specifically includes as fiduciary investment advice recommendations concerning the investment of assets that are rolled over or otherwise distributed from a plan. This would supersede guidance the Department provided in a 2005 advisory opinion,[34] which concluded that such recommendations did not constitute fiduciary advice. However, the current proposal provides that an adviser does not act as a fiduciary merely by providing plan investors with information about plan distribution options, including the tax consequences associated with the available types of benefit distributions.

The current proposal adopts what the Department intends to be a balanced approach to prohibited transaction exemptions. The proposal narrows and attaches new protective conditions to some existing PTEs. At the same time it includes some new PTEs with broad but targeted combined scope and strong protective conditions. These elements of the proposal reflect the Department's effort to ensure that advice is impartial while avoiding larger and costlier than necessary disruptions to existing business arrangements or constraints on future innovation.

In developing the current proposal, the Department conducted an in-depth economic assessment of the market for retirement investment advice. As further discussed below, the Department found that conflicted advice is widespread, causing serious harm to plan and IRA investors, and that disclosing conflicts alone would fail to adequately mitigate the conflicts or remedy the harm. By extending fiduciary status to more providers of advice and providing broad but targeted and protective PTEs, the Department believes the current proposal would mitigate conflicts, support consumer choice, and deliver substantial gains for retirement investors and economic benefits that more than justify its costs.

Advisers' conflicts take a variety of forms and can bias their advice in a variety of ways. For example, advisers often are paid more for selling some mutual funds than others, and to execute larger and more frequent trades of mutual fund shares or other securities. Broker-dealers reap price spreads from principal transactions, so advisers may be encouraged to recommend larger and more frequent trades. These and other adviser compensation arrangements introduce direct and serious conflicts of interest between advisers and retirement investors. Advisers often are paid a great deal more if they recommend investments and transactions that are highly profitable to the financial industry, even if they are not in investors' best interests. These financial incentives can and do bias the advisers' recommendations.

Following such biased advice can inflict losses on investors in several ways. They may choose more expensive and/or poorer performing investments. They may trade too much and thereby incur excessive transaction costs, and they may incur more costly timing errors, which are a common consequence of chasing returns.

A wide body of economic evidence, reviewed in the Department's full Regulatory Impact Analysis (available at *www.dol.gov/ebsa/pdf/conflictsofinterestria.pdf*), supports a finding that the impact of these conflicts of interest on investment outcomes is large and negative. The supporting evidence includes, among other things, statistical analyses of conflicted investment channels, experimental studies, government reports documenting abuse, and economic theory on the dangers posed by conflicts of interest and by the asymmetries of information and expertise that characterize interactions between ordinary retirement investors and conflicted advisers. A review of this data, which consistently points to a substantial failure of the market for retirement advice, suggests that IRA holders receiving conflicted investment advice can expect their investments to underperform by an average of 100 basis points per year over the next 20 years. The underperformance associated with conflicts of interest—in the mutual funds segment alone—could cost IRA investors more than $210 billion over the next 10 years and nearly $500 over the next 20 years. Some studies suggest that the underperformance of broker-sold mutual funds may be even higher than 100 basis points. If the true underperformance of broker-sold funds is 200 basis points, IRA mutual fund holders could suffer from underperformance amounting to $430 billion over 10 years and nearly $1 trillion across the next 20 years. While the estimates based on the mutual fund market are large, the total market impact could be much larger. Insurance products, Exchange Traded Funds (ETFs), individual stocks and bonds, and other products are all sold by brokers with conflicts of interest.

Disclosure alone has proven ineffective to mitigate conflicts in advice. Extensive research has demonstrated that most investors have little understanding of their advisers' conflicts, and little awareness of what they are paying via indirect channels for the conflicted advice. Even if they understand the scope of the advisers' conflicts, most consumers generally cannot distinguish good advice, or even good investment results, from bad. The same gap in expertise that makes investment advice necessary frequently also prevents investors from recognizing bad advice or understanding advisers' disclosures. Recent research suggests that even if disclosure about conflicts could be made simple and clear, it would be ineffective—or even harmful.[35]

[34] DOL Advisory Opinion 2005–23A (Dec. 7, 2005).

[35] See Loewenstein *et al.*, (2011) for a summary of some relevant literature.

Excessive fees and substandard investment performance in DC plans or IRAs, which can result when advisers' conflicts bias their advice, erode benefit security. This proposal aims to ensure that advice is impartial, thereby rooting out excessive fees and substandard performance otherwise attributable to advisers' conflicts, producing gains for retirement investors. Delivering these gains would entail compliance costs—namely, the cost incurred by new fiduciary advisers to avoid the prohibited transaction rules and/or satisfy relevant PTE conditions. The Department expects investor gains would be very large relative to compliance costs, and therefore believes this proposal is economically justified and sound.

Because of limitations of the literature and other evidence, only some of these gains can be quantified with confidence. Focusing only on how load shares paid to brokers affect the size of loads IRA investors holding front-end load funds pay and the returns they achieve, we estimate the proposal would deliver to IRA investors gains of between $40 billion and $44 billion over 10 years and between $88 and $100 billion over 20 years. These estimates assume that the rule will eliminate (rather than just reduce) underperformance associated with the practice of incentivizing broker recommendations through variable front-end-load sharing; if the rule's effectiveness in this area is substantially below 100 percent, these estimates may overstate these particular gains to investors in the front-load mutual fund segment of the IRA market. The Department nonetheless believes that these gains alone would far exceed the proposal's compliance cost which are estimated to be between $2.4 billion and $5.7 billion over 10 years, mostly reflecting the cost incurred by new fiduciary advisers to satisfy relevant PTE conditions (these costs are also front-loaded and will be less in subsequent years). For example, if only 75 percent of the potential gains were realized in the subset of the market that was analyzed (the front-load mutual fund segment of the IRA market), the gains would amount to between $30 billion and $33 billion over 10 years. If only 50 percent were realized, the expected gains in this subset of the market would total between $20 billion and $22 billion over 10 years, still several times the proposal's estimated compliance cost

These estimates account for only a fraction of potential conflicts, associated losses, and affected retirement assets. The total gains to IRA investors attributable to the rule may be much higher than these quantified gains alone. The Department expects the proposal to yield large, additional gains for IRA investors, including improvements in the performance of IRA investments other than front-load mutual funds and potential reductions in excessive trading and associated transaction costs and timing errors (such as might be associated with return chasing). As noted above, under current rules, adviser conflicts could cost IRA investors as much as $410 billion over 10 years and $1 trillion over 20 years, so the potential additional gains to IRA investors from this proposal could be very large.

Just as with IRAs, there is evidence that conflicts of interest in the investment advice market also erode plan assets. For example, the U.S. Government Accountability Office (GAO) found that defined benefit pension plans using consultants with undisclosed conflicts of interest earned 1.3 percentage points per year less than other plans.[36] Other GAO reports point out how adviser conflicts may cause plan participants to roll plan assets into IRAs that charge high fees or 401(k) plan officials to include expensive or underperforming funds in investment menus.[37] A number of academic studies find that 401(k) plan investment options underperform the market,[38] and at least one study attributes such underperformance to excessive reliance on funds that are proprietary to plan service providers who may be providing investment advice to plan officials that choose the investment options.[39]

The Department expects the current proposal's positive effects to extend well beyond improved investment results for retirement investors. The IRA and plan markets for fiduciary advice and other services may become more efficient as a result of more transparent pricing and greater certainty about the fiduciary status of advisers and about the impartiality of their advice. There may be benefits from the increased flexibility that the current proposal's PTEs would provide with respect to fiduciary investment advice currently falling within the ambit of the 1975 rule. The current proposal's defined boundaries between fiduciary advice, education, and sales activity directed at large plans, may bring greater clarity to the IRA and plan services markets. Innovation in new advice business models, including technology-driven models, may be accelerated, and nudged away from conflicts and toward transparency, thereby promoting healthy competition in the fiduciary advice market.

A major expected positive effect of the current proposal in the plan advice market is improved compliance and associated improved security of plan assets and benefits. Clarity about advisers' fiduciary status would strengthen EBSA's enforcement activities resulting in fuller and faster correction, and stronger deterrence, of ERISA violations.

In conclusion, the Department believes that the current proposal would mitigate adviser conflicts and thereby improve plan and IRA investment results, while avoiding greater than necessary disruption of existing business practices and would deliver large gains to retirement investors and a variety of other economic benefits, which would more than justify its costs.

K. Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and which are likely to have a significant economic impact on a substantial number of small entities. Unless an agency determines that a proposal is not likely to have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires the agency to present an initial regulatory flexibility analysis (IRFA) of the proposed rule. The Department's IRFA of the proposed rule is provided below.

The Department believes that amending the current regulation by broadening the scope of service providers, regardless of size, that would be considered fiduciaries would enhance the Department's ability to redress service provider abuses that currently exist in the plan service provider market, such as undisclosed fees, misrepresentation of compensation arrangements, and biased appraisals of the value of plan investments.

The Department's complete Initial Regulatory Flexibility Analysis is available at *www.dol.gov/ebsa/pdf/conflictsofinterestria.pdf.* It is summarized below.

The Department believes that the proposal would provide benefits to small plans and their related small employers and IRA holders, and impose costs on small service providers

[36] GAO Report, Publication No. GAO–09–503T, 2009.

[37] GAO Report, Publication No. GAO–11–119, 2011.

[38] See *e.g.* Elton *et al.* (2013).

[39] See Pool *et al.* (2014).

providing investment advice to ERISA plans, ERISA plan participants and IRA holders. Small service providers affected by this rule are defined to include broker-dealers, registered investment advisers, consultants, appraisers, and others providing investment advice to small ERISA plans and IRA that have less than $38.5 million in revenue.

The Department anticipates that broker-dealers would experience the largest impact from the proposed rule and associated proposed exemptions. Registered investment advisers and other ERISA plan service providers would experience less of a burden from the rule. The Department assumes that firms would utilize whichever PTEs would be most cost effective for their business models. Regardless of which PTEs they use, small affected entities would incur costs associated with developing and implementing new compliance policies and procedures to minimize conflicts of interest; creating and distributing new disclosures; maintaining additional compliance records; familiarizing and training staff on new requirements; and obtaining additional liability insurance.

As discussed previously, the Department estimated the costs of implementing new compliance policies and procedures, training staff, and creating disclosures for small broker-dealers. The Department estimates that small broker-dealers could expend on average approximately $53,000 in the first year and $21,000 in subsequent years; small registered investment advisers would spend approximately $5,300 in the first year and $500 in subsequent years; and small service providers would spend approximately $5,300 in the first year and $500 in subsequent years. The estimated cost for small broker-dealers is believed to be an overestimate, especially for the smallest firms as they are believed to have on average simpler arrangements and they may have relationships with larger firms that help with compliance, thus lowering their costs. Additionally, broker-dealers and service providers would incur an expense of about $300 in additional liability insurance premiums for each representative or other individual who would now be considered a fiduciary. Of this expense, $150 is estimated to be paid to the insuring firms and the other $150 is estimated to be paid out as compensation to those harmed, which is counted as a transfer. Any disclosures produced by affected entities would cost, on average, about $1.53 in the first year and about $1.15 in subsequent years. These per-representative and per-disclosure costs are not expected to disproportionately affect small entities.

Although the PTEs allow firms to maintain their existing business models, some small affected entities may determine that it is more cost effective to shift business models. In this scenario, some BDs might incur the costs of switching to becoming RIAs, including training, testing, and licensing costs, at a cost of approximately $5,600 per representative.

Some small service providers may find that the increased costs associated with ERISA fiduciary status outweigh the benefit of continuing to service the ERISA plan market or the IRA market. The Department does not believe that this outcome would be widespread or that it would result in a diminution of the amount or quality of advice available to small or other retirement savers. It is also possible that the economic impact of the rule on small entities would not be as significant as it would be for large entities, because anecdotal evidence indicates that some small entities do not have as many business arrangements that give rise to conflicts of interest. Therefore, they would not be confronted with the same costs to restructure transactions that would be faced by large entities.

L. Paperwork Reduction Act

As part of its continuing effort to reduce paperwork and respondent burden, the Department of Labor conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that the public understands the Department's collection instructions; respondents can provide the requested data in the desired format; reporting burden (time and financial resources) is minimized; collection instruments are clearly understood; and the Department can properly assess the impact of collection requirements on respondents.

Currently, the Department is soliciting comments concerning the proposed information collection requests (ICRs) included in the ''carve-outs'' section of its proposal to amend its 1975 rule that defines when a person who provides investment advice to an employee benefit plan becomes an ERISA fiduciary. A copy of the ICRs may be obtained by contacting the PRA addressee shown below or at *http://www.RegInfo.gov.*

The Department has submitted a copy of the Conflict of Interest Proposed Rule Carveout Disclosure Requirements to the Office of Management and Budget (OMB) in accordance with 44 U.S.C. 3507(d) for review of its information collections. The Department and OMB are particularly interested in comments that:

- Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information would have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Comments should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for the Employee Benefits Security Administration. OMB requests that comments be received within 30 days of publication of the Proposed Investment Advice Initiative to ensure their consideration.

PRA Addressee: Address requests for copies of the ICR to G. Christopher Cosby, Office of Policy and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue NW., Room N–5718, Washington, DC 20210. Telephone (202) 693–8410; Fax: (202) 219–5333. These are not toll-free numbers. ICRs submitted to OMB also are available at *http://www.RegInfo.gov.*

As discussed in detail above, Paragraph (b)(1)(i) of the proposed regulation provides a carve-out to the general definition for advice provided in connection with an arm's length sale, purchase, loan, or bilateral contract between a sophisticated plan investor, which has 100 or more plan participants, and the adviser (''seller's carve-out''). It also applies in connection with an offer to enter into such a transaction or when the person providing the advice is acting as an agent or appraiser for the plan's counterparty. In order to rely on this carve-out, the person must provide advice to a plan fiduciary who is independent of such person and who exercises authority or control respecting the management or disposition of the plan's assets, with respect to an arm's length sale, purchase, loan or bilateral contract between the plan and the counterparty, or with respect to a proposal to enter into such a sale, purchase, loan or bilateral contract.

The seller's carve-out applies if certain conditions are met. Among these conditions are the following: The adviser must obtain a written representation from the plan fiduciary that (1) the plan fiduciary is a fiduciary who exercises authority or control respecting the management or disposition of the employee benefit plan's assets (as described in section 3(21)(A)(i) of the Act), (2) that the employee benefit plan has 100 or more participants covered under the plan, and that (3) the fiduciary will not rely on the person to act in the best interests of the plan, to provide impartial investment advice, or to give advice in a fiduciary capacity.

Paragraph (b)(3) of the proposed regulation provides a carve-out making clear that persons who merely market and make available, securities or other property through a platform or similar mechanism to an employee benefit plan without regard to the individualized needs of the plan, its participants, or beneficiaries do not act as investment advice fiduciaries. This carve-out applies if the person discloses in writing to the plan fiduciary that the person is not undertaking to provide impartial investment advice or to give advice in a fiduciary capacity.

Paragraph (b)(6) of the proposal makes clear that furnishing and providing certain specified investment educational information and materials (including certain investment allocation models and interactive plan materials) to a plan, plan fiduciary, participant, beneficiary or IRA owner would not constitute the rendering of investment advice if certain conditions are met. One of the conditions is that the asset allocation models or interactive materials must explain all material facts and assumptions on which the models and materials are based and include a statement indicating that, in applying particular asset allocation models to their individual situations, participants, beneficiaries, or IRA owners should consider their other assets, income, and investments in addition to their interests in the plan or IRA to the extent they are not taken into account in the model or estimate.

The seller's carve-out written representation, platform provider carve-out disclosure, and the education carve-out disclosures for asset allocation models and interactive investment materials are information collection requests (ICRs) subject to the Paperwork Reduction Act. The Department has made the following assumptions in order to establish a reasonable estimate of the paperwork burden associated with these ICRs:

- Approximately 43,000 plans would utilize the seller's carve-out;
- Approximately 1,800 service providers would utilize the platform provider carve-out;
- Approximately 2,800 financial institutions would utilize the education carve-out;
- Plans and advisers using the seller's carve-out are entities with financial expertise and would distribute substantially all of the disclosures electronically via means already used in their normal course of business and the costs arising from electronic distribution would be negligible;
- Service providers using the platform provider carve-out already maintain contracts with their customers as a regular and customary business practice and the materials costs arising from inserting the platform provider carve-out into the existing contracts would be negligible;
- Materials costs arising from inserting the required education carve-out disclosure into existing models and interactive materials would be negligible;
- Advisers would use existing in-house resources to prepare the disclosures; and
- The tasks associated with the ICRs would be performed by clerical personnel at an hourly rate of $30.42 and legal professionals at an hourly rate of $129.94.[40]

The Department estimates that each plan would require one hour of legal professional time and 30 minutes of clerical time to produce the seller's carve-out representation. Therefore, the seller's carve-out representation would result in approximately 43,000 hours of legal time at an equivalent cost of approximately $5.6 million. It would also result in approximately 21,000 hours of clerical time at an equivalent cost of approximately $653,000. In total, the burden associated with the seller's carve-out representation is approximately 64,000 hours at an equivalent cost of $6.2 million.

The Department estimates that each service provider using the platform provider carve-out would require ten minutes of legal professional time to draft the needed disclosure. Therefore, the platform provider carve-out disclosure would result in approximately 300 hours of legal time at an equivalent cost of approximately $39,000.

The Department estimates that each financial institution using the education carve-out would require twenty minutes of legal professional time to draft the disclosure. Therefore, this carve-out disclosure would result in approximately 900 hours of legal time at an equivalent cost of approximately $121,000.

In total, the hour burden for the representation and disclosures required by the carve-outs is approximately 66,000 hours at an equivalent cost of $6.4 million.

Because the Department assumes that all disclosures would be distributed electronically or require small amounts of space to include in existing materials, the Department has not associated any cost burden with these ICRs.

These paperwork burden estimates are summarized as follows:

Type of Review: New collection (Request for new OMB Control Number).

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Conflict of Interest Proposed Rule Carveout Disclosure Requirements.

OMB Control Number: 1210—NEW.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 47,532.

Estimated Number of Annual Responses: 47,532.

Frequency of Response: When engaging in excepted transaction.

Estimated Total Annual Burden Hours: 65,631 hours.

Estimated Total Annual Burden Cost: $0.

M. Congressional Review Act

The proposed rule is subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*) and, if finalized,

[40] The Department's estimated 2015 hourly labor rates include wages, other benefits, and overhead are calculated as follows: Mean wage from the 2013 National Occupational Employment Survey (April 2014, Bureau of Labor Statistics *http://www.bls.gov/news.release/pdf/ocwage.pdf*); wages as a percent of total compensation from the Employer Cost for Employee Compensation (June 2014, Bureau of Labor Statistics *http://www.bls.gov/news.release/ecec.t02.htm*); overhead as a multiple of compensation is assumed to be 25 percent of total compensation for paraprofessionals, 20 percent of compensation for clerical, and 35 percent of compensation for professional; annual inflation assumed to be 2.3 percent annual growth of total labor cost since 2013 (Employment Costs Index data for private industry, September 2014 *http://www.bls.gov/news.release/eci.nr0.htm*).

would be transmitted to Congress and the Comptroller General for review. The proposed rule is a ''major rule'' as that term is defined in 5 U.S.C. 804, because it is likely to result in an annual effect on the economy of $100 million or more.

N. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) 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. Such a mandate is deemed to be a ''significant regulatory action.'' The current proposal is expected to have such an impact on the private sector, and the Department therefore hereby provides such an assessment.

The Department is issuing the current proposal under ERISA section 3(21)(A)(ii) (29 U.S.C. 1002(21)(a)(ii)).[41] The Department is charged with interpreting the ERISA and Code provisions that attach fiduciary status to anyone who is paid to provide investment advice to plan or IRA investors. The current proposal would update and supersede the 1975 rule[42] that currently interprets these statutory provisions.

The Department assessed the anticipated benefits and costs of the current proposal pursuant to Executive Order 12866 in the Regulatory Impact Analysis for the current proposal and concluded that its benefits would justify its costs. The Department's complete Regulatory Impact Analysis is available at *www.dol.gov/ebsa/pdf/conflictsofinterestria.pdf.* To summarize, the current proposals' material benefits and costs generally would be confined to the private sector, where plans and IRA investors would, in the Department's estimation, benefit on net, partly at the expense of their fiduciary advisers and upstream financial service and product producers. The Department itself would benefit from increased efficiency in its enforcement activity. The public and overall US economy would benefit from increased compliance with ERISA and the Code and confidence in advisers, as well as from more efficient allocation of investment capital, and gains to investors.

The current proposal is not expected to have any material economic impacts on State, local or tribal governments, or on health, safety, or the natural environment. The North American Securities Administrators Association commented in support of the Department's 2010 proposal.[43]

O. Federalism Statement

Executive Order 13132 (August 4, 1999) outlines fundamental principles of federalism, and requires the adherence to specific criteria by Federal agencies 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. This proposed rule does not have federalism implications because it has no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA. The requirements implemented in the proposed rule do not alter the fundamental reporting and disclosure requirements of the statute with respect to employee benefit plans, and as such have no implications for the States or the relationship or distribution of power between the national government and the States.

Statutory Authority

This regulation is proposed pursuant to the authority in section 505 of ERISA (Pub. L. 93–406, 88 Stat. 894; 29 U.S.C. 1135) and section 102 of Plan No. 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978 (44 FR 1065, January 3, 1979), 3 CFR 1978 Comp. 332, and under Secretary of Labor's Order No. 1–2011, 77 FR 1088 (Jan. 9, 2012).

Withdrawal of Proposed Regulation

Paragraph (c) of the proposed regulation relating to the definition of fiduciary (proposed 29 CFR 2510.3(21)) that was published in the **Federal Register** on October 20, 2010 (75 FR 65263) is hereby withdrawn.

List of Subjects in 29 CFR Parts 2509 and 2510

Employee benefit plans, Employee Retirement Income Security Act, Pensions, Plan assets.

For the reasons set forth in the preamble, the Department is proposing to amend parts 2509 and 2510 of subchapters A and B of Chapter XXV of Title 29 of the Code of Federal Regulations as follows:

SUBCHAPTER A—GENERAL

PART 2509—INTERPRETIVE BULLETINS RELATING TO THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

■ 1. The authority citation for part 2509 continues to read as follows:

Authority: 29 U.S.C. 1135. Secretary of Labor's Order 1–2011, 77 FR 1088 (Jan. 9, 2012). Sections 2509.75–10 and 2509.75–2 issued under 29 U.S.C. 1052, 1053, 1054. Sec. 2509.75–5 also issued under 29 U.S.C. 1002. Sec. 2509.95–1 also issued under sec. 625, Pub. L. 109–280, 120 Stat. 780.

§ 2509.96–1 [Removed]

■ 2. Remove § 2509.96–1.

SUBCHAPTER B—DEFINITIONS AND COVERAGE UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

PART 2510—DEFINITIONS OF TERMS USED IN SUBCHAPTERS C, D, E, F, AND G OF THIS CHAPTER

■ 3. The authority citation for part 2510 is revised to read as follows:

Authority: 29 U.S.C. 1002(2), 1002(21), 1002(37), 1002(38), 1002(40), 1031, and 1135; Secretary of Labor's Order 1–2011, 77 FR 1088; Secs. 2510.3–21, 2510.3–101 and 2510.3–102 also issued under Sec. 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 237. Section 2510.3–38 also issued under Pub. L. 105–72, Sec. 1(b), 111 Stat. 1457 (1997).

■ 4. Revise § 2510.3–21 to read as follows:

§ 2510.3–21 Definition of ''Fiduciary.''

(a) *Investment advice.* For purposes of section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974 (Act) and section 4975(e)(3)(B) of the Internal Revenue Code (Code), except as provided in paragraph (b) of this section, a person renders investment advice with respect to moneys or other property of a plan or IRA described in paragraph (f)(2) of this section if—

(1) Such person provides, directly to a plan, plan fiduciary, plan participant or beneficiary, IRA, or IRA owner the

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[41] Under section 102 of the Reorganization Plan No. 4 of 1978, the authority of the Secretary of the Treasury to interpret section 4975 of the Code has been transferred, with exceptions not relevant here, to the Secretary of Labor.

[42] 29 CFR 2510.3–21(c).

[43] Available at *http://www.dol.gov/ebsa/pdf/1210-AB32-PH007.pdf.*

following types of advice in exchange for a fee or other compensation, whether direct or indirect:

(i) A recommendation as to the advisability of acquiring, holding, disposing or exchanging securities or other property, including a recommendation to take a distribution of benefits or a recommendation as to the investment of securities or other property to be rolled over or otherwise distributed from the plan or IRA;

(ii) A recommendation as to the management of securities or other property, including recommendations as to the management of securities or other property to be rolled over or otherwise distributed from the plan or IRA;

(iii) An appraisal, fairness opinion, or similar statement whether verbal or written concerning the value of securities or other property if provided in connection with a specific transaction or transactions involving the acquisition, disposition, or exchange, of such securities or other property by the plan or IRA;

(iv) A recommendation of a person who is also going to receive a fee or other compensation for providing any of the types of advice described in paragraphs (i) through (iii); and

(2) Such person, either directly or indirectly (*e.g.,* through or together with any affiliate),—

(i) Represents or acknowledges that it is acting as a fiduciary within the meaning of the Act with respect to the advice described in paragraph (a)(1) of this section; or

(ii) Renders the advice pursuant to a written or verbal agreement, arrangement or understanding that the advice is individualized to, or that such advice is specifically directed to, the advice recipient for consideration in making investment or management decisions with respect to securities or other property of the plan or IRA.

(b) *Carve-outs—investment advice.* Except for persons described in paragraph (a)(2)(i) of this section, the rendering of advice or other communications in conformance with a carve-out set forth in paragraph (b)(1) through (6) of this section shall not cause the person who renders the advice to be treated as a fiduciary under paragraph (a) of this section.

(1) *Counterparties to the plan*—(i) *Counterparty transaction with plan fiduciary with financial expertise.* (A) In such person's capacity as a counterparty (or representative of a counterparty) to an employee benefit plan (as described in section 3(3) of the Act), the person provides advice to a plan fiduciary who is independent of such person and who exercises authority or control with respect to the management or disposition of the plan's assets, with respect to an arm's length sale, purchase, loan or bilateral contract between the plan and the counterparty, or with respect to a proposal to enter into such a sale, purchase, loan or bilateral contract, if, prior to providing any recommendation with respect to the transaction, such person satisfies the requirements of either paragraph (b)(1)(i)(B) or (C) of this section.

(B) Such person—

(*1*) Obtains a written representation from the independent plan fiduciary that the independent fiduciary exercises authority or control with respect to the management or disposition of the employee benefit plan's assets (as described in section 3(21)(A)(i) of the Act), that the employee benefit plan has 100 or more participants covered under the plan, and that the independent fiduciary will not rely on the person to act in the best interests of the plan, to provide impartial investment advice, or to give advice in a fiduciary capacity;

(*2*) Fairly informs the independent plan fiduciary of the existence and nature of the person's financial interests in the transaction;

(*3*) Does not receive a fee or other compensation directly from the plan, or plan fiduciary, for the provision of investment advice (as opposed to other services) in connection with the transaction; and

(*4*) Knows or reasonably believes that the independent plan fiduciary has sufficient expertise to evaluate the transaction and to determine whether the transaction is prudent and in the best interest of the plan participants (the person may rely on written representations from the plan or the plan fiduciary to satisfy this subsection (b)(1)(i)(B)(*4*)).

(C) Such person—

(*1*) Knows or reasonably believes that the independent plan fiduciary has responsibility for managing at least $100 million in employee benefit plan assets (for purposes of this paragraph (b)(1)(i)(C), when dealing with an individual employee benefit plan, a person may rely on the information on the most recent Form 5500 Annual Return/Report filed for the plan to determine the value and, in the case of an independent fiduciary acting as an asset manager for multiple employee benefit plans, a person may rely on representations from the independent plan fiduciary regarding the value of employee benefit plan assets under management);

(*2*) Fairly informs the independent plan fiduciary that the person is not undertaking to provide impartial investment advice, or to give advice in a fiduciary capacity; and

(*3*) Does not receive a fee or other compensation directly from the plan, or plan fiduciary, for the provision of investment advice (as opposed to other services) in connection with the transaction.

(ii) *Swap and security-based swap transactions.* The person is a counterparty to an employee benefit plan (as described in section 3(3) of the Act) in connection with a swap or security-based swap, as defined in section 1(a) of the Commodity Exchange Act (7 U.S.C. 1(a) and section 3(a) of the Securities Exchange Act (15 U.S.C. 78c(a)), if—

(A) The plan is represented by a fiduciary independent of the person;

(B) The person is a swap dealer, security-based swap dealer, major swap participant, or major security-based swap participant;

(C) The person (if a swap dealer or security-based swap dealer), is not acting as an advisor to the plan (within the meaning of section 4s(h) of the Commodity Exchange Act or section 15F(h) of the Securities Exchange Act of 1934) in connection with the transaction; and

(D) In advance of providing any recommendations with respect to the transaction, the person obtains a written representation from the independent plan fiduciary, that the fiduciary will not rely on recommendations provided by the person.

(2) *Employees.* In his or her capacity as an employee of any employer or employee organization sponsoring the employee benefit plan (as described in section 3(3) of the Act), the person provides the advice to a plan fiduciary, and he or she receives no fee or other compensation, direct or indirect, in connection with the advice beyond the employee's normal compensation for work performed for the employer or employee organization.

(3) *Platform providers.* The person merely markets and makes available to an employee benefit plan (as described in section 3(3) of the Act), without regard to the individualized needs of the plan, its participants, or beneficiaries, securities or other property through a platform or similar mechanism from which a plan fiduciary may select or monitor investment alternatives, including qualified default investment alternatives, into which plan participants or beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts, if the person discloses in writing to the plan fiduciary that the person is not undertaking to provide

impartial investment advice or to give advice in a fiduciary capacity.

(4) *Selection and monitoring assistance.* In connection with the activities described in paragraph (b)(3) of this section with respect to an employee benefit plan (as described in section 3(3) of the Act), the person—

(i) Merely identifies investment alternatives that meet objective criteria specified by the plan fiduciary (*e.g.,* stated parameters concerning expense ratios, size of fund, type of asset, credit quality); or

(ii) Merely provides objective financial data and comparisons with independent benchmarks to the plan fiduciary.

(5) *Financial reports and valuations.* The person provides an appraisal, fairness opinion, or statement of value to—

(i) An employee stock ownership plan (as defined in section 407(d)(6) of the Act) regarding employer securities (as defined section 407(d)(5) of the Act);

(ii) An investment fund, such as a collective investment fund or pooled separate account, in which more than one unaffiliated plan has an investment, or which holds plan assets of more than one unaffiliated plan under 29 CFR 2510.3–101; or

(iii) A plan, a plan fiduciary, a plan participant or beneficiary, an IRA or IRA owner solely for purposes of compliance with the reporting and disclosure provisions under the Act, the Code, and the regulations, forms and schedules issued thereunder, or any applicable reporting or disclosure requirement under a Federal or state law, rule or regulation or self-regulatory organization rule or regulation.

(6) *Investment education.* The person furnishes or makes available any of the following categories of investment-related information and materials described in paragraphs (b)(6)(i) through (iv) of this section to a plan, plan fiduciary, participant or beneficiary, IRA or IRA owner irrespective of who provides or makes available the information and materials (*e.g.,* plan sponsor, fiduciary or service provider), the frequency with which the information and materials are provided, the form in which the information and materials are provided (*e.g.,* on an individual or group basis, in writing or orally, or via call center, video or computer software), or whether an identified category of information and materials is furnished or made available alone or in combination with other categories of information and materials identified in paragraphs (b)(6)(i) through (iv), provided that the information and materials do not include (standing alone or in combination with other materials) recommendations with respect to specific investment products or specific plan or IRA alternatives, or recommendations on investment, management, or value of a particular security or securities, or other property.

(i) *Plan information.* Information and materials that, without reference to the appropriateness of any individual investment alternative or any individual benefit distribution option for the plan or IRA, or a particular participant or beneficiary or IRA owner, describe the terms or operation of the plan or IRA, inform a plan fiduciary, participant, beneficiary, or IRA owner about the benefits of plan or IRA participation, the benefits of increasing plan or IRA contributions, the impact of preretirement withdrawals on retirement income, retirement income needs, varying forms of distributions, including rollovers, annuitization and other forms of lifetime income payment options (*e.g.,* immediate annuity, deferred annuity, or incremental purchase of deferred annuity), advantages, disadvantages and risks of different forms of distributions, or describe investment objectives and philosophies, risk and return characteristics, historical return information or related prospectuses of investment alternatives under the plan or IRA.

(ii) *General financial, investment and retirement information.* Information and materials on financial, investment and retirement matters that do not address specific investment products, specific plan or IRA alternatives or distribution options available to the plan or IRA or to participants, beneficiaries and IRA owners, or specific alternatives or services offered outside the plan or IRA, and inform the plan fiduciary, participant or beneficiary, or IRA owner about—

(A) General financial and investment concepts, such as risk and return, diversification, dollar cost averaging, compounded return, and tax deferred investment;

(B) Historic differences in rates of return between different asset classes (*e.g.,* equities, bonds, or cash) based on standard market indices;

(C) Effects of inflation;

(D) Estimating future retirement income needs;

(E) Determining investment time horizons;

(F) Assessing risk tolerance;

(G) Retirement-related risks (*e.g.,* longevity risks, market/interest rates, inflation, health care and other expenses); and

(H) General methods and strategies for managing assets in retirement (*e.g.,* systematic withdrawal payments, annuitization, guaranteed minimum withdrawal benefits), including those offered outside the plan or IRA.

(iii) *Asset allocation models.* Information and materials (*e.g.,* pie charts, graphs, or case studies) that provide a plan fiduciary, participant or beneficiary, or IRA owner with models of asset allocation portfolios of hypothetical individuals with different time horizons (which may extend beyond an individual's retirement date) and risk profiles, where—

(A) Such models are based on generally accepted investments theories that take into account the historic returns of different asset classes (*e.g.,* equities, bonds, or cash) over defined periods of time;

(B) All material facts and assumptions on which such models are based (*e.g.,* retirement ages, life expectancies, income levels, financial resources, replacement income ratios, inflation rates, and rates of return) accompany the models;

(C) Such models do not include or identify any specific investment product or specific alternative available under the plan or IRA; and

(D) The asset allocation models are accompanied by a statement indicating that, in applying particular asset allocation models to their individual situations, participants, beneficiaries, or IRA owners should consider their other assets, income, and investments (*e.g.,* equity in a home, Social Security benefits, individual retirement plan investments, savings accounts and interests in other qualified and non-qualified plans) in addition to their interests in the plan or IRA, to the extent those items are not taken into account in the model or estimate.

(iv) *Interactive investment materials.* Questionnaires, worksheets, software, and similar materials which provide a plan fiduciary, participant or beneficiary, or IRA owners the means to estimate future retirement income needs and assess the impact of different asset allocations on retirement income; questionnaires, worksheets, software and similar materials which allow a plan fiduciary, participant or beneficiary, or IRA owners to evaluate distribution options, products or vehicles by providing information under paragraphs (b)(6)(i) and (ii) of this section; questionnaires, worksheets, software, and similar materials that provide a plan fiduciary, participant or beneficiary, or IRA owner the means to estimate a retirement income stream that could be generated by an actual or hypothetical account balance, where—

(A) Such materials are based on generally accepted investment theories that take into account the historic returns of different asset classes (*e.g.,* equities, bonds, or cash) over defined periods of time;

(B) There is an objective correlation between the asset allocations generated by the materials and the information and data supplied by the participant, beneficiary or IRA owner;

(C) There is an objective correlation between the income stream generated by the materials and the information and data supplied by the participant, beneficiary or IRA owner;

(D) All material facts and assumptions (*e.g.,* retirement ages, life expectancies, income levels, financial resources, replacement income ratios, inflation rates, rates of return and other features and rates specific to income annuities or systematic withdrawal plan) that may affect a participant's, beneficiary's or IRA owner's assessment of the different asset allocations or different income streams accompany the materials or are specified by the participant, beneficiary or IRA owner;

(E) The materials do not include or identify any specific investment alternative available or distribution option available under the plan or IRA, unless such alternative or option is specified by the participant, beneficiary or IRA owner; and

(F) The materials either take into account other assets, income and investments (*e.g.,* equity in a home, Social Security benefits, individual retirement account/annuity investments, savings accounts, and interests in other qualified and non-qualified plans) or are accompanied by a statement indicating that, in applying particular asset allocations to their individual situations, or in assessing the adequacy of an estimated income stream, participants, beneficiaries or IRA owners should consider their other assets, income, and investments in addition to their interests in the plan or IRA.

(v) The information and materials described in paragraphs (b)(6)(i) through (iv) of this section represent examples of the type of information and materials that may be furnished to participants, beneficiaries and IRA owners without such information and materials constituting investment advice. Determinations as to whether the provision of any information, materials or educational services not described herein constitutes the rendering of investment advice must be made by reference to the criteria set forth in paragraph (a) of this section.

(c) *Scope of fiduciary duty—investment advice.* A person who is a fiduciary with respect to an employee benefit plan or IRA by reason of rendering investment advice (as defined in paragraph (a) of this section) for a fee or other compensation, direct or indirect, with respect to any securities or other property of such plan, or having any authority or responsibility to do so, shall not be deemed to be a fiduciary regarding any assets of the plan or IRA with respect to which such person does not have any discretionary authority, discretionary control or discretionary responsibility, does not exercise any authority or control, does not render investment advice (as defined in paragraph (a)(1) of this section) for a fee or other compensation, and does not have any authority or responsibility to render such investment advice, provided that nothing in this paragraph shall be deemed to:

(1) Exempt such person from the provisions of section 405(a) of the Act concerning liability for fiduciary breaches by other fiduciaries with respect to any assets of the plan; or

(2) Exclude such person from the definition of the term ''party in interest'' (as set forth in section 3(14)(B) of the Act or ''disqualified person'' as set forth in section 4975(e)(2) of the Code) with respect to a plan.

(d) *Execution of securities transactions.* (1) A person who is a broker or dealer registered under the Securities Exchange Act of 1934, a reporting dealer who makes primary markets in securities of the United States Government or of an agency of the United States Government and reports daily to the Federal Reserve Bank of New York its positions with respect to such securities and borrowings thereon, or a bank supervised by the United States or a State, shall not be deemed to be a fiduciary, within the meaning of section 3(21)(A) of the Act or section 4975(e)(3)(B) of the Code, with respect to an employee benefit plan or IRA solely because such person executes transactions for the purchase or sale of securities on behalf of such plan in the ordinary course of its business as a broker, dealer, or bank, pursuant to instructions of a fiduciary with respect to such plan or IRA, if:

(i) Neither the fiduciary nor any affiliate of such fiduciary is such broker, dealer, or bank; and

(ii) The instructions specify:

(A) The security to be purchased or sold;

(B) A price range within which such security is to be purchased or sold, or, if such security is issued by an open-end investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1, *et seq.*), a price which is determined in accordance with Rule 22c1 under the Investment Company Act of 1940 (17 CFR270.22c1);

(C) A time span during which such security may be purchased or sold (not to exceed five business days); and

(D) The minimum or maximum quantity of such security which may be purchased or sold within such price range, or, in the case of a security issued by an open-end investment company registered under the Investment Company Act of 1940, the minimum or maximum quantity of such security which may be purchased or sold, or the value of such security in dollar amount which may be purchased or sold, at the price referred to in paragraph (d)(1)(ii)(B) of this section.

(2) A person who is a broker-dealer, reporting dealer, or bank which is a fiduciary with respect to an employee benefit plan or IRA solely by reason of the possession or exercise of discretionary authority or discretionary control in the management of the plan or IRA, or the management or disposition of plan or IRA assets in connection with the execution of a transaction or transactions for the purchase or sale of securities on behalf of such plan or IRA which fails to comply with the provisions of paragraph (d)(1) of this section, shall not be deemed to be a fiduciary regarding any assets of the plan or IRA with respect to which such broker-dealer, reporting dealer or bank does not have any discretionary authority, discretionary control or discretionary responsibility, does not exercise any authority or control, does not render investment advice (as defined in paragraph (a) of this section) for a fee or other compensation, and does not have any authority or responsibility to render such investment advice, provided that nothing in this paragraph shall be deemed to:

(i) Exempt such broker-dealer, reporting dealer, or bank from the provisions of section 405(a) of the Act concerning liability for fiduciary breaches by other fiduciaries with respect to any assets of the plan; or

(ii) Exclude such broker-dealer, reporting dealer, or bank from the definition of the term party in interest (as set forth in section 3(14)(B) of the Act) or disqualified person 4975(e)(2) of the Code with respect to any assets of the plan or IRA.

(2) A prohibited transaction will not be deemed to have occurred if, due to circumstances beyond the control of the broker-dealer, reporting dealer, or bank, such records are lost or destroyed prior to the end of such six year period.

(f)(1) Notwithstanding anything to the contrary in subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (e) are unconditionally available for examination during normal business hours by:

A. Any duly authorized employee or representative of the Department or the Internal Revenue Service;

B. Any fiduciary of the plan or any duly authorized employee or representative of such fiduciary;

C. Any contributing employer and any employee organization whose members are covered by the plan, or any authorized employee or representative of these entities; or

D. Any participant or beneficiary of the plan or the duly authorized representative of such participant or beneficiary; and

(2) None of the persons described in subparagraph (1)(B)–(D) above shall be authorized to examine trade secrets or commercial or financial information of the broker-dealer, reporting dealer, or bank which is privileged or confidential.

(3) Should such broker-dealer, reporting dealer, or bank refuse to disclose information on the basis that such information is exempt from disclosure, the broker-dealer, reporting dealer, or bank shall, by the close of the thirtieth (30th) day following the request, provide a written notice advising that person of the reasons for the refusal and that the Department may request such information.

For purposes of this exemption, the terms ''broker-dealer,'' ''reporting dealer'' and ''bank'' shall include such persons and any affiliates thereof, and the term ''affiliate'' shall be defined in the same manner as that term is defined in 29 CFR 2510.3–21(e) and 26 CFR 54.4975–9(e).

Signed at Washington, DC, this 14th day of April, 2015.

Phyllis C. Borzi,

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

[FR Doc. 2015–08838 Filed 4–15–15; 11:15 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

[Application Number D–11820]

ZRIN 1210–ZA25

Proposed Amendments to Class Exemptions 75–1, 77–4, 80–83 and 83–1

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

ACTION: Notice of proposed amendments to class exemptions.

SUMMARY: This document contains a notice of pendency before the Department of Labor of proposed amendments to prohibited transaction exemptions (PTEs) 75–1, 77–4, 80–83 and 83–1. Generally, the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (the Code) prohibit fiduciaries with respect to employee benefit plans and individual retirement accounts (IRAs) from engaging in self-dealing, including using their authority, control or responsibility to affect or increase their own compensation. These existing exemptions generally permit fiduciaries to receive compensation or other benefits as a result of the use of their fiduciary authority, control or responsibility in connection with investment transactions involving plans or IRAs. The proposed amendments would require the fiduciaries to satisfy uniform Impartial Conduct Standards in order to obtain the relief available under each exemption. The proposed amendments would affect participants and beneficiaries of plans, IRA owners, and fiduciaries with respect to such plans and IRAs.

DATES: *Comments:* Written comments must be received by the Department on or before July 6, 2015.

Applicability: The Department proposes to make these amendments applicable eight months after publication of the final exemption in the **Federal Register**.

ADDRESSES: All written comments concerning the proposed amendments to the class exemptions should be sent to the Office of Exemption Determinations by any of the following methods, identified by ZRIN: 1210–ZA25:

Federal eRulemaking Portal: http://www.regulations.gov at Docket ID number: EBSA–2014–0016. Follow the instructions for submitting comments.

Email to: e-OED@ dol.gov.

Fax to: (202) 693–8474.

Mail: Office of Exemption Determinations, Employee Benefits Security Administration, (Attention: D–11820), U.S. Department of Labor, 200 Constitution Avenue NW., Suite 400, Washington, DC 20210.

Hand Delivery/Courier: Office of Exemption Determinations, Employee Benefits Security Administration, (Attention: D–11820), U.S. Department of Labor, 122 C St. NW., Suite 400, Washington, DC 20001. *Instructions.* All comments must be received by the end of the comment period. The comments received will be available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N–1513, 200 Constitution Avenue NW., Washington, DC 20210. Comments will also be available online at *www.regulations.gov,* at Docket ID number: EBSA–2014–0016 and *www.dol.gov/ebsa,* at no charge.

Warning: All comments will be made available to the public. Do not include any personally identifiable information (such as Social Security number, name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

FOR FURTHER INFORMATION CONTACT: Brian Shiker, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, (202) 693–8854 (this is not a toll-free number).

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

Executive Summary

Purpose of Regulatory Action

The Department is proposing these amendments to existing class exemptions in connection with its proposed regulation defining a fiduciary under ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) (Proposed Regulation), published elsewhere in this issue of the **Federal Register**. The Proposed Regulation specifies when an entity is a fiduciary by reason of the provision of investment advice for a fee or other compensation regarding assets of a plan or IRA. If adopted, the Proposed Regulation would replace an existing regulation that was adopted in 1975. The Proposed Regulation is intended to take into account the advent of 401(k) plans and IRAs, the dramatic increase in rollovers, and other developments that have transformed the retirement plan landscape and the associated investment market over the four decades since the existing regulation was issued. In light of the extensive changes in retirement investment practices and relationships, the Proposed Regulation would update existing rules to distinguish more appropriately between the sorts of advice relationships that should be treated as fiduciary in nature and those that should not.

This notice proposes that new "Impartial Conduct Standards" be made conditions of the following exemptions: PTEs 75–1, Part III, 75–1, Part IV, 77–4, 80–83 and 83–1. Fiduciaries would be required to act in accordance with these standards in transactions permitted by the exemptions. The standards will be uniformly imposed in multiple class exemptions, including new proposed exemptions published elsewhere in this issue of the **Federal Register**, to ensure that fiduciaries relying on the exemptions are held to a uniform set of standards and that these standards are applicable to transactions involving both plans and IRAs. The proposed amendments, if granted, would apply prospectively to fiduciaries relying on the exemptions.

Section 408(a) of ERISA specifically authorizes the Secretary of Labor to grant administrative exemptions from ERISA's prohibited transaction provisions.[1] Regulations at 29 CFR 2570.30 to 2570.52 describe the procedures for applying for an administrative exemption. Before granting an exemption, the Department must find that it is administratively feasible, in the interests of plans and their participants and beneficiaries and IRA owners, and protective of the rights of participants and beneficiaries of such plans and IRA owners. Interested parties are permitted to submit comments to the Department on these proposed amendments, through July 6, 2015. Additionally, the Department plans to hold an administrative hearing within 30 days of the close of the comment period. The Department will ensure ample opportunity for public comment by reopening the record following the hearing and publication of the hearing transcript. Specific information regarding the date, location and submission of requests to testify will be published in a notice in the **Federal Register**.

Summary of the Major Provisions

The proposal would amend prohibited transaction exemptions 75–1, Part III, 75–1, Part IV, 77–4, 80–83 and 83–1. Each proposed amendment would apply the same Impartial Conduct Standards. The amendments would require a fiduciary that satisfies ERISA section 3(21)(A)(i) or (ii), or the corresponding provisions of Code section 4975(e)(3)(A) or (B), with respect to the assets involved in the investment transaction, to meet the standards with respect to the investment transactions described in the applicable exemption.

Regulatory Impact Analysis

Executive Order 12866 and 13563 Statement

Under Executive Orders 12866 and 13563, the Department must determine whether a regulatory action is "significant" and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing and streamlining rules, and of promoting flexibility. It also requires federal agencies to develop a plan under which the agencies will periodically review their existing significant regulations to make the agencies' regulatory programs more effective or less burdensome in achieving their regulatory objectives.

Under Executive Order 12866, "significant" regulatory actions are subject to the requirements of the Executive Order and review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866, defines a "significant regulatory action" as an action that is likely to result in a rule (1) having an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as "economically significant" regulatory actions); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. Pursuant to the terms of the Executive Order, OMB has determined that this action is "significant" within the meaning of Section 3(f)(4) of the Executive Order. Accordingly, the Department has undertaken an assessment of the costs and benefits of the proposed amendment, and OMB has reviewed this regulatory action.

Background

Proposed Regulation

As explained more fully in the preamble to the Department's Proposed Regulation on the definition of fiduciary under ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B), also published in this issue of the **Federal Register**, ERISA is a comprehensive statute designed to protect the interests of plan participants and beneficiaries, the integrity of employee benefit plans, and the security of retirement, health, and other critical benefits. The broad public interest in ERISA-covered plans is reflected in its imposition of stringent fiduciary responsibilities on parties engaging in important plan activities, as well as in the tax-favored status of plan assets and investments. One of the chief ways in which ERISA protects employee benefit plans is by requiring that plan fiduciaries comply with fundamental obligations rooted in the law of trusts. In particular, plan fiduciaries must manage plan assets prudently and with undivided loyalty to the plans and their participants and beneficiaries.[2] In addition, they must refrain from engaging in "prohibited transactions," which ERISA forbids because of the dangers posed by the fiduciaries' conflicts of interest with respect to the transactions.[3] When fiduciaries violate

[1] Code section 4975(c)(2) authorizes the Secretary of the Treasury to grant exemptions from the parallel prohibited transaction provisions of the Code. Reorganization Plan No. 4 of 1978 (5 U.S.C. app. at 214 (2000)) generally transferred the authority of the Secretary of the Treasury to grant administrative exemptions under Code section 4975 to the Secretary of Labor. References in this document to sections of ERISA should be read to refer also to the corresponding sections of the Code. These proposed amendments to the class exemptions would apply to relief from the indicated prohibited transaction provisions of both ERISA and the Code.

[2] ERISA section 404(a).

[3] ERISA section 406. ERISA also prohibits certain transactions between a plan and a "party in interest."

ERISA's fiduciary duties or the prohibited transaction rules, they may be held personally liable for the breach.[4] In addition, violations of the prohibited transaction rules are subject to excise taxes under the Code.

The Code also has rules regarding fiduciary conduct with respect to tax-favored accounts that are not generally covered by ERISA, such as IRAs. Although ERISA's general fiduciary obligations of prudence and loyalty do not govern the fiduciaries of IRAs, these fiduciaries are subject to the prohibited transaction rules. In this context, fiduciaries engaging in the illegal transactions are subject to an excise tax enforced by the Internal Revenue Service. Unlike participants in plans covered by Title I of ERISA, under the Code, IRA owners cannot bring suit against fiduciaries under ERISA for violation of the prohibited transaction rules and fiduciaries are not personally liable to IRA owners for the losses caused by their misconduct. Elsewhere in this issue of the **Federal Register**, however, the Department is proposing two new class exemptions that would create contractual obligations for the adviser to adhere to certain standards (the Impartial Conduct Standards). IRA owners would have a right to enforce these new contractual rights.

Under this statutory framework, the determination of who is a "fiduciary" is of central importance. Many of ERISA's protections, duties, and liabilities hinge on fiduciary status. In relevant part, section 3(21)(A) of ERISA and section 4975(e)(3) of the Code provide that a person is a fiduciary with respect to a plan or IRA to the extent he or she (1) exercises any discretionary authority or discretionary control with respect to management of such plan or IRA, or exercises any authority or control with respect to management or disposition of its assets; (2) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan or IRA, or has any authority or responsibility to do so; or, (3) has any discretionary authority or discretionary responsibility in the administration of such plan or IRA.

The statutory definition deliberately casts a wide net in assigning fiduciary responsibility with respect to plan and IRA assets. Thus, "any authority or control" over plan or IRA assets is sufficient to confer fiduciary status, and any persons who render "investment advice for a fee or other compensation, direct or indirect" are fiduciaries, regardless of whether they have direct control over the plan's or IRA's assets and regardless of their status as an investment adviser or broker under the federal securities laws. The statutory definition and associated fiduciary responsibilities were enacted to ensure that plans and IRAs can depend on persons who provide investment advice for a fee to provide recommendations that are untainted by conflicts of interest. In the absence of fiduciary status, persons who provide investment advice would neither be subject to ERISA's fundamental fiduciary standards, nor accountable for imprudent, disloyal, or tainted advice under ERISA or the Code, no matter how egregious the misconduct or how substantial the losses. Plans, individual participants and beneficiaries, and IRA owners often are not financial experts and consequently must rely on professional advice to make critical investment decisions. The statutory definition, prohibitions on conflicts of interest, and core fiduciary obligations of prudence and loyalty, all reflect Congress' recognition in 1974 of the fundamental importance of such advice. In the years since then, the significance of financial advice has become still greater with increased reliance on participant-directed plans and IRAs for the provision of retirement benefits.

In 1975, the Department issued a regulation, at 29 CFR 2510.3–21(c) defining the circumstances under which a person is treated as providing "investment advice" to an employee benefit plan within the meaning of section 3(21)(A)(ii) of ERISA (the "1975 regulation").[5] The regulation narrowed the scope of the statutory definition of fiduciary investment advice by creating a five-part test that must be satisfied before a person can be treated as rendering investment advice for a fee. Under the regulation, for advice to constitute "investment advice," an adviser who does not have discretionary authority or control with respect to the purchase or sale of securities or other property of the plan must—(1) render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing or selling securities or other property (2) on a regular basis (3) pursuant to a mutual agreement, arrangement or understanding, with the plan or a plan fiduciary that (4) the advice will serve as a primary basis for investment decisions with respect to plan assets, and that (5) the advice will be individualized based on the particular needs of the plan. The regulation provides that an adviser is a fiduciary with respect to any particular instance of advice only if he or she meets each and every element of the five-part test with respect to the particular advice recipient or plan at issue. A 1976 Department of Labor Advisory Opinion further limited the application of the statutory definition of "investment advice" by stating that valuations of employer securities in connection with employee stock ownership plan (ESOP) purchases would not be considered fiduciary advice.[6]

As the marketplace for financial services has developed in the years since 1975, the five-part test may now undermine, rather than promote, the statutes' text and purposes. The narrowness of the 1975 regulation allows professional advisers, consultants and valuation firms to play a central role in shaping plan investments, without ensuring the accountability that Congress intended for persons having such influence and responsibility when it enacted ERISA and the related Code provisions. Even when plan sponsors, participants, beneficiaries and IRA owners clearly rely on paid consultants for impartial guidance, the regulation allows consultants to avoid fiduciary status and disregard ERISA's fiduciary obligations of care and prohibitions on disloyal and conflicted transactions. As a consequence, these advisers can steer customers to investments based on their own self-interest, give imprudent advice, and engage in transactions that would otherwise be categorically prohibited by ERISA and Code, without any liability under ERISA or the Code. In the Proposed Regulation, the Department seeks to replace the existing regulation with one that more appropriately distinguishes between the sorts of advice relationships that should be treated as fiduciary in nature and those that should not, in light of the legal framework and financial marketplace in which plans and IRAs currently operate.[7]

The Proposed Regulation describes the types of advice that constitute "investment advice" with respect to plan or IRA assets for purposes of the

[4] ERISA section 409; *see also* ERISA section 405.

[5] The Department of Treasury issued a virtually identical regulation, at 26 CFR 54.4975–9(c), which interprets Code section 4975(e)(3).

[6] Advisory Opinion 76–65A (June 7, 1976).

[7] The Department initially proposed an amendment to its regulation under ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) on October 22, 2010, at 75 FR 65263. It subsequently announced its intention to withdraw the proposal and propose a new rule, consistent with the President's Executive Orders 12866 and 13563, in order to give the public a full opportunity to evaluate and comment on the new proposal and updated economic analysis.

definition of a fiduciary at ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B). The proposal provides, subject to certain carve-outs, that a person renders investment advice with respect to a plan or IRA if, among other things, the person provides, directly to a plan, a plan fiduciary, a plan participant or beneficiary, IRA or IRA owner one of the following types of advice:

(1) A recommendation as to the advisability of acquiring, holding, disposing or exchanging securities or other property, including a recommendation to take a distribution of benefits or a recommendation as to the investment of securities or other property to be rolled over or otherwise distributed from a plan or IRA;

(2) A recommendation as to the management of securities or other property, including recommendations as to the management of securities or other property to be rolled over or otherwise distributed from the plan or IRA;

(3) An appraisal, fairness opinion or similar statement, whether verbal or written, concerning the value of securities or other property, if provided in connection with a specific transaction or transactions involving the acquisition, disposition or exchange of such securities or other property by the plan or IRA; and

(4) A recommendation of a person who is also going to receive a fee or other compensation for providing any of the types of advice described in paragraphs (1) through (3), above.

In addition, to be a fiduciary, such person must either (1) represent or acknowledge that it is acting as a fiduciary within the meaning of ERISA (or the Code) with respect to the advice, or (2) render the advice pursuant to a written or verbal agreement, arrangement or understanding that the advice is individualized to, or that such advice is specifically directed to, the advice recipient for consideration in making investment or management decisions with respect to securities or other property of the plan or IRA.

For advisers who do not represent that they are acting as ERISA (or Code) fiduciaries, the Proposed Regulation provides that advice rendered in conformance with certain carve-outs will not cause the adviser to be treated as a fiduciary under ERISA or the Code. For example, under the seller's carve-out, counterparties in arm's length transactions with plans may make investment recommendations without acting as fiduciaries if certain conditions are met.[8] Similarly, the proposal contains a carve-out from fiduciary status for persons who provide appraisals, fairness opinions, or statements of value in specified contexts (*e.g.,* with respect to ESOP transactions). The proposal additionally carves out from fiduciary status the marketing of investment alternative platforms, certain assistance in selecting investment alternatives and other activities. Finally, the Proposed Regulation contains a carve-out from fiduciary status for the provision of investment education.

Prohibited Transactions

Fiduciaries under ERISA and the Code are subject to certain prohibited transaction restrictions. ERISA section 406(b)(1) and Code section 4975(c)(1)(E) prohibit a fiduciary from dealing with the income or assets of a plan or IRA in his own interest or his own account. ERISA section 406(b)(2) provides that a fiduciary with respect to an employee benefit plan shall not ''in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries.''[9] ERISA section 406(b)(3) and Code section 4975(c)(1)(F) prohibit a fiduciary from receiving any consideration for his own personal account from any party dealing with the plan or IRA in connection with a transaction involving the plan or IRA. Parallel regulations issued by the Departments of Labor and the Treasury explain that these provisions impose on fiduciaries a duty not to act on conflicts of interest that may affect the fiduciary's best judgment on behalf of the plan or IRA.[10]

Prohibited Transaction Exemptions

ERISA and the Code counterbalance the broad proscriptive effect of the prohibited transaction provisions with numerous statutory exemptions. For example, ERISA section 408(b)(14) and Code section 4975(d)(17) specifically exempt transactions in connection with the provision of fiduciary investment advice to a participant or beneficiary of an individual account plan or IRA owner, where the advice, resulting transaction, and the adviser's fees meet certain conditions. ERISA and the Code also provide for administrative exemptions that the Secretary of Labor may grant on an individual or class basis if the Secretary finds that the exemption is (1) administratively feasible, (2) in the interests of plans and of their participants and beneficiaries and IRA owners and (3) protective of the rights of the participants and beneficiaries of such plans and IRA owners.

Over the years, the Department has granted several conditional administrative class exemptions from the prohibited transactions provisions of ERISA and the Code pursuant to which fiduciaries may receive compensation or other benefits in connection with investment transactions by plans and IRAs, under circumstances that would otherwise violate ERISA section 406(b) and Code section 4975(c)(1)(E) and (F). The exemptions focus on specific types of transactions or specific types of compensation arrangements. Reliance on these exemptions is subject to certain conditions that the Department has found necessary to protect the interests of plans and IRAs.

In connection with the development of the Department's proposed definition of fiduciary under ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B), the Department has considered public input indicating the need for additional prohibited transaction relief for the wide variety of compensation structures that exist today in the marketplace for investment transactions. After consideration of the issue, the Department determined to propose, elsewhere in this issue of the **Federal Register**, two new class exemptions as well as amendments to two other existing class exemptions. These new and amended class exemptions provide relief for a fiduciary's receipt of compensation or other benefit resulting from its provision of investment advice to plans and IRAs in the context of many different types of investment transactions.

While each of the proposed new and amended class exemptions sets forth conditions that are tailored to their respective transactions, each also conditions relief on a fiduciary's compliance with certain Impartial Conduct Standards. The Department has determined that the Impartial Conduct Standards comprise important baseline safeguards that should be required of fiduciaries relying on other existing exemptions providing relief for plan and IRA investment transactions. Accordingly, this notice proposes that the Impartial Conduct Standards be made conditions of the following

[8] Although the preamble adopts the phrase ''seller's carve-out'' as a shorthand way of referring to the carve-out and its terms, the regulatory carve-out is not limited to sellers but rather applies more broadly to counterparties in arm's length transactions with plan investors with financial expertise.

[9] The Code does not contain a parallel provision.

[10] *See* 29 CFR 2550.408b–2(e); 26 CFR 54.4975–6(a)(5).

existing exemptions: PTEs 75–1, Part III, 75–1, Part IV, 77–4, 80–83 and 83–1.

Under the amendments, fiduciaries would be required to act in accordance with the Impartial Conduct Standards in transactions governed by the exemptions. This will result in additional protections for all plans, but most particularly for IRA owners. That is because fiduciaries' dealings with IRAs are governed by the Code, not by ERISA,[11] and the Code, unlike ERISA, does not directly impose responsibilities of prudence and loyalty on fiduciaries. The amendments to the exemptions would condition relief under the exemptions on the satisfaction of these responsibilities. For purposes of these amendments, the term IRA means any trust, account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code.[12] The impartial conduct standards will work across multiple class exemptions to ensure that these fiduciaries are held to a single set of standards and that these standards are applicable to both plans and IRAs. The proposed amendments, if granted, will apply prospectively to fiduciaries relying on the exemptions.

Description of the Proposal

The proposal would amend prohibited transaction exemptions 75–1, Part III, 75–1, Part IV, 77–4, 80–83 and 83–1. Specifically, these exemptions provide the following relief:

- PTE 75–1, Part III[13] permits a fiduciary to cause a plan or IRA to purchase securities from a member of an underwriting syndicate other than the fiduciary, when the fiduciary is also a member of the syndicate;
- PTE 75–1, Part IV[14] permits a plan or IRA to purchase securities in a principal transaction from a fiduciary that is a market maker with respect to such securities;
- PTE 77–4[15] provides relief for a plan's or IRA's purchase or sale of open-end investment company shares where the investment adviser for the open-end investment company is also a fiduciary to the plan or IRA;
- PTE 80–83[16] provides relief for a fiduciary causing a plan or IRA to purchase a security when the proceeds of the securities issuance may be used by the issuer to retire or reduce indebtedness to the fiduciary or an affiliate; and
- PTE 83–1[17] provides relief for the sale of certificates in an initial issuance of certificates, by the sponsor of a mortgage pool to a plan or IRA, when the sponsor, trustee or insurer of the mortgage pool is a fiduciary with respect to the plan or IRA assets invested in such certificates.

This proposal sets forth an amendment to each of these exemptions. Each of the amendments is tailored to the structure and language of the applicable exemption. Therefore, the terminology and numbering varies from amendment to amendment. Despite such variation, each amendment would apply the same Impartial Conduct Standards uniformly across each exemption.

More specifically, the amendments would require a fiduciary that satisfies ERISA section 3(21)(A)(i) or (ii), or the corresponding provisions of Code section 4975(e)(3)(A) or (B), with respect to the assets involved in the investment transaction, to meet the Impartial Conduct Standards described in the applicable exemption. Under the proposed amendments' first conduct standard, the fiduciary must act in the best interest of the plan or IRA. Best interest is defined to mean acting with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and the needs of the plan or IRA when providing investment advice to the plan or IRA or managing the plan's or IRA's assets. Further, under the best interest standard, the fiduciary must act without regard to the financial or other interests of the fiduciary or its affiliates or any other party. Under this standard, the fiduciary must put the interests of the plan or IRA ahead of its own financial interests or those of any affiliate or other party.

In this regard, the Department notes that while fiduciaries of plans covered by ERISA are subject to the ERISA section 404 standards of prudence and loyalty, the Code contains no provisions that hold IRA fiduciaries to those standards. However, as a condition of relief under the proposed amendments, both IRA and plan fiduciaries would have to agree to, and uphold, the best interest requirement. The best interest standard is defined to effectively mirror the ERISA section 404 duties of prudence and loyalty, as applied in the context of fiduciary investment advice. Failure to satisfy the best interest standard would render the exemption unavailable to the fiduciary with respect to compensation received in connection with the transaction.

The second conduct standard requires that all compensation received by the fiduciary and its affiliates in connection with the applicable transaction be reasonable in relation to the total services they provide to the plan or IRA. The third conduct standard requires that statements about recommended investments, fees, material conflicts of interest, and any other matters relevant to a plan's or IRA owner's investment decisions, not be misleading. The Department notes in this regard that a fiduciary's *failure* to disclose a material conflict of interest may be considered a misleading statement. Transactions that violate these requirements are not likely to be in the interests of plans, their participants and beneficiaries, or IRA owners, or protective of their rights.

Unlike the new exemption proposals published elsewhere in the **Federal Register**, these proposed amendments do not require fiduciaries to contractually warrant compliance with applicable federal and state laws. However, the Department notes that significant violations of applicable federal or state law could also amount to violations of the Impartial Conduct Standards, such as the best interest standard, in which case these exemptions, as amended, would be deemed unavailable for transactions occurring in connection with such violations.

[11] *See* ERISA section 404.

[12] The Department notes that PTE 2002–13 amended PTEs 80–83 and 83–1 so that the terms "employee benefit plan" and "plan" refer to an employee benefit plan described in ERISA section 3(3) and/or a plan described in section 4975(e)(1) of the Code. *See* 67 FR 9483 (March 1, 2002). At the same time, in the preamble to PTE 2002–13, the Department explained that it had determined, after consulting with the Internal Revenue Service, that plans described in 4975(e)(1) of the Code are included within the scope of relief provided by PTEs 75–1 and 77–4, because they were issued jointly by the Department and the Service. For simplicity and consistency with the other new proposed exemptions and proposed amendments to existing exemptions published elsewhere in this issue of the **Federal Register**, the Department has proposed this specific definition of IRA.

[13] Exemptions from Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers and Banks, 40 FR 50845 (Oct. 31, 1975), as amended at 71 FR 5883 (Feb. 3, 2006).

[14] Exemptions from Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers and Banks, 40 FR 50845 (Oct. 31, 1975), as amended at 71 FR 5883 (Feb. 3, 2006).

[15] Class Exemption for Certain Transactions Between Investment Companies and Employee Benefit Plans, 42 FR 18732 (Apr. 8, 1977).

[16] Class Exemption for Certain Transactions Involving Purchase of Securities Where Issuer May Use Proceeds to Reduce or Retire Indebtedness to Parties in Interest, 45 FR 73189 (Nov. 4, 1980), as amended at 67 FR 9483 (March 1, 2002).

[17] Class Exemption for Certain Transactions Involving Mortgage Pool Investment Trusts, 48 FR 895 (Jan. 7, 1983), as amended at 67 FR 9483 (March 1, 2002).

Applicability Date

The Department is proposing that compliance with the final regulation defining a fiduciary under ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) will begin eight months after publication of the final regulation in the **Federal Register** (Applicability Date). The Department proposes to make these amendments, if granted, applicable on the Applicability Date.

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under ERISA section 408(a) and Code section 4975(c)(2) does not relieve a fiduciary or other party in interest or disqualified person with respect to a plan from certain other provisions of ERISA and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of ERISA section 404 which require, among other things, that a fiduciary discharge his or her duties respecting the plan solely in the interests of the plan's participants and beneficiaries and in a prudent fashion in accordance with ERISA section 404(a)(1)(B);

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

(3) If granted, an exemption will be applicable to a particular transactions only if the transactions satisfy the conditions specified in the amendments; and

(4) If granted, the amended exemptions will be 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.

Proposed Amendments to Class Exemptions

I. Prohibited Transaction Exemption 75–1, Part III

The Department proposes to amend Prohibited Transaction Exemption 75–1, Part III, under the authority of ERISA section 408(a) and Code section 4975(c)(2), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, October 27, 2011).

A. A new section III(f) is inserted to read as follows:

(f) *Standards of Impartial Conduct.* If the fiduciary is a fiduciary within the meaning of ERISA section 3(21)(A)(i) or (ii), or Code section 4975(e)(3)(A) or (B), with respect to the assets of a plan or IRA involved in the transaction, the fiduciary must comply with the following conditions with respect to the transaction:

(1) The fiduciary acts in the Best Interest of the plan or IRA.

(2) All compensation received by the fiduciary in connection with the transaction is reasonable in relation to the total services the fiduciary provides to the plan or IRA.

(3) The fiduciary's statements about recommended investments, fees, material conflicts of interest, and any other matters relevant to a plan's or IRA owner's investment decisions, are not misleading. A ''material conflict of interest'' exists when a fiduciary has a financial interest that could affect the exercise of its best judgment as a fiduciary in rendering advice to a plan or IRA owner. For this purpose, a fiduciary's failure to disclose a material conflict of interest relevant to the services the fiduciary is providing or other actions it is taking in relation to a plan's or IRA owner's investment decisions is deemed to be a misleading statement.

For purposes of this section, a fiduciary acts in the ''Best Interest'' of the plan or IRA when the fiduciary acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the plan or IRA, without regard to the financial or other interests of the fiduciary or any other party. Also for the purposes of this section, the term IRA means any trust, account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code.

B. Sections III(f) and III(g) are redesignated, respectively, as sections III(g) and III(h).

II. Prohibited Transaction Exemption 75–1, Part IV

The Department proposes to amend Prohibited Transaction Exemption 75–1, Part IV, under the authority of ERISA section 408(a) and Code section 4975(c)(2), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, October 27, 2011).

A. A new section IV(e) is inserted to read as follows:

(e) *Standards of Impartial Conduct.* If the fiduciary is a fiduciary within the meaning of ERISA section 3(21)(A)(i) or (ii), or Code section 4975(e)(3)(A), or (B), with respect to the assets of a plan or IRA involved in the transaction, the fiduciary must comply with the following conditions with respect to the transaction:

(1) The fiduciary acts in the Best Interest of the plan or IRA.

(2) All compensation received by the fiduciary in connection with the transaction is reasonable in relation to the total services the fiduciary provides to the plan or IRA.

(3) The fiduciary's statements about recommended investments, fees, material conflicts of interest, and any other matters relevant to a plan's or IRA owner's investment decisions, are not misleading. A ''material conflict of interest'' exists when a fiduciary has a financial interest that could affect the exercise of its best judgment as a fiduciary in rendering advice to a plan or IRA owner. For this purpose, a fiduciary's failure to disclose a material conflict of interest relevant to the services the fiduciary is providing or other actions it is taking in relation to a plan's or IRA owner's investment decisions is deemed to be a misleading statement.

For purposes of this section, a fiduciary acts in the ''Best Interest'' of the plan or IRA when the fiduciary acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the plan or IRA, without regard to the financial or other interests of the fiduciary or any other party. Also for the purposes of this section, the term IRA means any trust, account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code.

B. Sections IV(e) and IV(f) are redesignated, respectively, as sections IV(f) and IV(g).

III. Prohibited Transaction Exemption 77–4

The Department proposes to amend Prohibited Transaction Exemption 77–4 under the authority of ERISA section 408(a) and Code section 4975(c)(2), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, October 27, 2011).

A new section II(g) is inserted to read as follows:

(g) *Standards of Impartial Conduct.* If the fiduciary is a fiduciary within the meaning of ERISA section 3(21)(A)(i) or (ii), or Code section 4975(e)(3)(A), or (B), with respect to the assets of a plan or IRA involved in the transaction, the fiduciary must comply with the following conditions with respect to the transaction:

(1) The fiduciary acts in the Best Interest of the plan or IRA.

(2) All compensation received by the fiduciary and its affiliates in connection with the transaction is reasonable in relation to the total services the fiduciary provides to the plan or IRA.

(3) The fiduciary's statements about recommended investments, fees, material conflicts of interest, and any other matters relevant to a plan's or IRA owner's investment decisions, are not misleading. A ''material conflict of interest'' exists when a fiduciary has a financial interest that could affect the exercise of its best judgment as a fiduciary in rendering advice to a plan or IRA owner. For this purpose, a fiduciary's failure to disclose a material conflict of interest relevant to the services the fiduciary is providing or other actions it is taking in relation to a plan's or IRA owner's investment decisions is deemed to be a misleading statement.

For purposes of this section, a fiduciary acts in the ''Best Interest'' of the plan or IRA when the fiduciary acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the plan or IRA, without regard to the financial or other interests of the fiduciary, any affiliate or other party. Also for the purposes of this section, the term IRA means any trust, account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code.

IV. Prohibited Transaction Exemption 80–83

The Department proposes to amend Prohibited Transaction Exemption 80–83 under the authority of ERISA section 408(a) and Code section 4975(c)(2), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, October 27, 2011).

A. A new section II(A)(2) is inserted to read as follows:

(2) *Standards of Impartial Conduct.* If the fiduciary is a fiduciary within the meaning of ERISA section 3(21)(A)(i) or (ii), or Code section 4975(e)(3)(A), or (B), with respect to the assets of a plan or IRA involved in the transaction, the fiduciary must comply with the following conditions with respect to the transaction:

(a) The fiduciary acts in the Best Interest of the plan or IRA.

(b) All compensation received by the fiduciary and its affiliates in connection with the transaction is reasonable in relation to the total services the fiduciary provides to the plan or IRA.

(c) The fiduciary's statements about recommended investments, fees, material conflicts of interest, and any other matters relevant to a plan's or IRA owner's investment decisions, are not misleading. A ''material conflict of interest'' exists when a fiduciary has a financial interest that could affect the exercise of its best judgment as a fiduciary in rendering advice to a plan or IRA owner. For this purpose, a fiduciary's failure to disclose a material conflict of interest relevant to the services the fiduciary is providing or other actions it is taking in relation to a plan's or IRA owner's investment decisions is deemed to be a misleading statement.

For purposes of this section, a fiduciary acts in the ''Best Interest'' of the employee benefit plan or IRA when the fiduciary acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the employee benefit plan or IRA, without regard to the financial or other interests of the fiduciary, any affiliate or other party. Also for the purposes of this section, the term IRA means any trust, account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code.

B. Section II(A)(2) is redesignated as section II(A)(3).

V. Prohibited Transaction Exemption 83–1

The Department proposes to amend Prohibited Transaction Exemption 83–1 under the authority of ERISA section 408(a) and Code section 4975(c)(2), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, October 27, 2011).

A. A new section II(B) is inserted to read as follows:

(B) *Standards of Impartial Conduct.* Solely with respect to the relief provided under section I(B), if the sponsor, trustee or insurer of such pool who is a fiduciary is a fiduciary within the meaning of ERISA section 3(21)(A)(i) or (ii), or Code section 4975(e)(3)(A), or (B), with respect to the assets of a plan or IRA involved in the transaction, the fiduciary must comply with the following conditions with respect to the transaction:

(1) The fiduciary acts in the Best Interest of the plan or IRA.

(2) All compensation received by the fiduciary and its affiliates in connection with the transaction is reasonable in relation to the total services the fiduciary and its affiliates provide to the plan or IRA.

(3) The fiduciary's statements about recommended investments, fees, material conflicts of interest, and any other matters relevant to a plan's or IRA owner's investment decisions, are not misleading. A ''material conflict of interest'' exists when a fiduciary has a financial interest that could affect the exercise of its best judgment as a fiduciary in rendering advice to a plan or IRA owner. For this purpose, a fiduciary's failure to disclose a material conflict of interest relevant to the services the fiduciary is providing or other actions it is taking in relation to a plan's or IRA owner's investment decisions is deemed to be a misleading statement.

For purposes of this section, a fiduciary acts in the ''Best Interest'' of the plan or IRA when the fiduciary acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the plan or IRA, without regard to the financial or other interests of the plan or IRA to the financial interests of the fiduciary, any affiliate or other party. Also for the purposes of this section, the term IRA means any trust, account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code.

Signed at Washington, DC, this 14th day of April, 2015.

Phyllis C. Borzi,

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

[FR Doc. 2015–08839 Filed 4–15–15; 11:15 am]

BILLING CODE 4510–29–P

APPENDIX I FINANCIAL INSTITUTION ABC—WEB SITE DISCLOSURE MODEL FORM

Type of investment	Provider, name, sub-type	Transactional			Ongoing			Affiliate	Special rules
		Charges to investor	Compensation to firm	Compensation to adviser	Charges to investor	Compensation to firm	Compensation to adviser		
Non-Proprietary Mutual Fund (Load Fund).	XYZ MF Large Cap Fund, Class A Class B Class C.	[•]% sales load as applicable.	[•]% dealer concession.	[•]% of transactional fee Extent considered in annual bonus.	[•]% expense ratio.	[•]% 12b–1 fee, revenue sharing (paid by fund/affiliate).	[•]% of ongoing fees. Extent considered in annual bonus.	N/A	Breakpoints (as applicable) Contingent deferred shares charge (as applicable)
Proprietary Mutual Fund (No load).	ABC MF Large Cap Fund.	No upfront charge.	N/A	N/A	[•]% expense ratio.	[•]% asset-based annual fee for shareholder servicing (paid by fund/affiliate).	[•]% of ongoing fees Extent considered in annual bonus.	[•]% asset-based investment advisory fee paid by fund to affiliate of Financial Institution.	N/A
Equities, ETFs, Fixed Income.	....	$[•] commission per transaction.	$[•] commission per transaction.	[•]% of commission Extent considered in annual bonus.	N/A	N/A	N/A Extent considered in annual bonus.	N/A	N/A
Annuities (Fixed and Variable).	Insurance Company A.	No upfront charge on amount invested.	$[•] commission (paid by insurer).	[•]% of commission Extent considered in annual bonus.	[•]% M&E fee [•]% underlying expense ratio.	$[•] Ongoing trailing commission (paid by underlying investment providers).	[•]% of ongoing fees Extent considered in annual bonus.	N/A	Surrender charge

APPENDIX II FINANCIAL INSTITUTION XZY—TRANSACTION DISCLOSURE MODEL CHART

	Your investment	Total cost of your investment if held for:		
		1 year	5 years	10 years
Asset 1				
Asset 2				
Asset 3				
Account fees				
Total				

[FR Doc. 2015–08832 Filed 4–15–15; 11:15 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

[Application Number D–11713]

ZRIN 1210–ZA25

Proposed Class Exemption for Principal Transactions in Certain Debt Securities between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs

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

ACTION: Notice of Proposed Class Exemption.

SUMMARY: This document contains a notice of pendency before the U.S. Department of Labor of a proposed exemption from certain prohibited transactions provisions of the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (the Code). The provisions at issue generally prohibit fiduciaries with respect to employee benefit plans and individual retirement accounts (IRAs) from purchasing and selling securities when the fiduciaries are acting on behalf of their own accounts (principal transactions). The exemption proposed in this notice would permit principal transactions in certain debt securities between a plan, plan participant or beneficiary account, or an IRA, and a fiduciary that provides investment advice to the plan or IRA, under conditions to safeguard the interests of these investors. The proposed exemption would affect participants and beneficiaries of plans, IRA owners, and fiduciaries with respect to such plans and IRAs.

DATES: *Comments:* Written comments concerning the proposed class exemption must be received by the Department on or before July 6, 2015.

Applicability: The Department proposes to make this exemption available eight months after publication of the final exemption in the **Federal Register**.

ADDRESSES: All written comments concerning the proposed class exemption should be sent to the Office of Exemption Determinations by any of the following methods, identified by ZRIN: 1210–ZA25:

Federal eRulemaking Portal: http://www.regulations.gov at Docket ID number: EBSA–EBSA–2014–0016. Follow the instructions for submitting comments.

Email to: e-OED@dol.gov.

Fax to: (202) 693–8474.

Mail: Office of Exemption Determinations, Employee Benefits Security Administration, (Attention: D–11713), U.S. Department of Labor, 200 Constitution Avenue NW., Suite 400, Washington, DC 20210.

Hand Delivery/Courier: Office of Exemption Determinations, Employee Benefits Security Administration, (Attention: D–11713), U.S. Department of Labor, 122 C St. NW., Suite 400, Washington, DC 20001.

Instructions. All comments must be received by the end of the comment period. The comments received will be available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N–1513, 200 Constitution Avenue NW., Washington, DC 20210. Comments will also be available online at *www.regulations.gov,* at Docket ID number: EBSA–2014–0016 and *www.dol.gov/ebsa,* at no charge.

Warning: All comments will be made available to the public. Do not include any personally identifiable information (such as Social Security number, name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

FOR FURTHER INFORMATION CONTACT: Brian Shiker, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor (202) 693–8824 (not a toll-free number).

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

Public Hearing: The Department plans to hold an administrative hearing within 30 days of the close of the comment period. The Department will ensure ample opportunity for public comment by reopening the record following the hearing and publication of the hearing transcript. Specific information regarding the date, location and submission of requests to testify will be published in a notice in the **Federal Register**.

Executive Summary

Purpose of Regulatory Action

The Department is proposing this exemption in connection with its proposed regulation under ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) (Proposed Regulation), published elsewhere in this issue of the **Federal Register**. The Proposed Regulation specifies when an entity is a fiduciary by reason of the provision of investment advice for a fee or other compensation regarding assets of a plan or IRA. If adopted, the Proposed Regulation would replace an existing regulation that was adopted in 1975. The Proposed Regulation is intended to take into account the advent of 401(k) plans and IRAs, the dramatic increase in rollovers, and other developments that have transformed the retirement plan landscape and the associated investment market over the four decades since the existing regulation was issued. In light of the extensive changes in retirement investment practices and relationships, the Proposed Regulation would update existing rules to distinguish more appropriately between the sorts of advice relationships that should be treated as fiduciary in nature and those that should not.

The exemption proposed in this notice would allow investment advice fiduciaries to engage in purchases and sales of certain debt securities out of their inventory (*i.e.,* engage in principal transactions) with plans, participant or beneficiary accounts, and IRAs, under conditions designed to safeguard the interests of these investors. In the absence of an exemption, these transactions would be prohibited under ERISA and the Code. In this regard, ERISA and the Code generally prohibit fiduciaries with respect to plans and IRAs from purchasing or selling any property to plans, participant or beneficiary accounts, or IRAs. Fiduciaries also may not engage in self-dealing or, under ERISA, act in any transaction involving the plan on behalf of a party whose interests are adverse to the interests of the plan or the interests of its participants and beneficiaries. When a fiduciary sells a security out of its own inventory in a principal transaction, it violates these prohibitions.

ERISA section 408(a) specifically authorizes the Secretary of Labor to grant administrative exemptions from ERISA's prohibited transaction provisions.[1] Regulations at 29 CFR 2570.30 to 2570.52 describe the procedures for applying for an administrative exemption. Before granting an exemption, the Department must find that it is administratively feasible, in the interests of plans and their participants and beneficiaries and IRA owners, and protective of the rights of participants and beneficiaries of such plans and IRA owners. Interested parties are permitted to submit comments to the Department through July 6, 2015. The Department plans to hold an administrative hearing within 30 days of the close of the comment period.

Summary of the Major Provisions

The proposed exemption would allow an individual investment advice fiduciary (an adviser)[2] and the firm that employs or otherwise contracts with the adviser (a financial institution) to engage in principal transactions involving certain debt securities, with plans, participant and beneficiary accounts, and IRAs. The proposed exemption limits the type of debt securities that may be purchased or sold and contains conditions which the adviser and financial institution must satisfy in order to rely on the exemption. To safeguard the interests of plans, participants and beneficiaries, and IRA owners, the exemption would require the adviser and financial institution to contractually acknowledge fiduciary status and commit to adhere to certain "Impartial Conduct Standards" when providing investment advice regarding the principal transaction to the plan fiduciary with authority to make investment decisions for the plan, the participant or beneficiary of a plan, or the IRA owner (referred to herein as retirement investors), including providing advice that is in their best interest. The financial institution would further be required to warrant that it has adopted policies and procedures designed to mitigate the impact of material conflicts of interest and ensure that the individual advisers adhere to the Impartial Conduct Standards. The retirement investor would be required to consent to the principal transactions following disclosure of the material conflicts of interest associated with such transactions and of the debt security's pricing information. Financial institutions would be subject to recordkeeping requirements.

Executive Order 12866 and 13563 Statement

Under Executive Orders 12866 and 13563, the Department must determine whether a regulatory action is "significant" and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing and streamlining rules, and of promoting flexibility. It also requires federal

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[1] Code section 4975(c)(2) authorizes the Secretary of the Treasury to grant exemptions from the parallel prohibited transaction provisions of the Code. Reorganization Plan No. 4 of 1978 (5 U.S.C. app. at 214 (2000)) generally transferred the authority of the Secretary of the Treasury to grant administrative exemptions under Code section 4975 to the Secretary of Labor. This proposed exemption would provide relief from the indicated prohibited transaction provisions of both ERISA and the Code.

[2] By using the term "adviser," the Department does not intend to limit the exemption to investment advisers registered under the Investment Advisers Act of 1940 or under state law. As explained herein, an adviser must be an investment advice fiduciary of a plan or IRA who is an employee, independent contractor, agent, or registered representative of a registered investment adviser, bank, or registered broker-dealer.

agencies to develop a plan under which the agencies will periodically review their existing significant regulations to make the agencies' regulatory programs more effective or less burdensome in achieving their regulatory objectives.

Under Executive Order 12866, "significant" regulatory actions are subject to the requirements of the Executive Order and review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866, defines a "significant regulatory action" as an action that is likely to result in a rule (1) having an annual effect on the economy of $100 million or more, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as "economically significant" regulatory actions); (2) creating serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. Pursuant to the terms of the Executive Order, OMB has determined that this action is "significant" within the meaning of Section 3(f)(4) of the Executive Order. Accordingly, the Department has undertaken an assessment of the costs and benefits of the proposed amendment, and OMB has reviewed this regulatory action.

Background

Proposed Regulation Defining a Fiduciary

As explained more fully in the preamble to Department's Proposed Regulation under ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B), also published in this issue of the **Federal Register**, ERISA is a comprehensive statute designed to protect the interests of plan participants and beneficiaries, the integrity of employee benefit plans, and the security of retirement, health, and other critical benefits. The broad public interest in ERISA-covered plans is reflected in its imposition of stringent fiduciary responsibilities on parties engaging in important plan activities, as well as in the tax-favored status of plan assets and investments. One of the chief ways in which ERISA protects employee benefit plans is by requiring that plan fiduciaries comply with fundamental obligations rooted in the law of trusts. In particular, plan fiduciaries must manage plan assets prudently and with undivided loyalty to the plans and their participants and beneficiaries.[3] In addition, they must refrain from engaging in "prohibited transactions," which ERISA forbids because of the dangers posed by the fiduciaries' conflicts of interest with respect to the transactions.[4] When fiduciaries violate ERISA's fiduciary duties or the prohibited transaction rules, they may be held personally liable for the breach.[5] In addition, violations of the prohibited transaction rules are subject to excise taxes under the Code.

The Code also has rules regarding fiduciary conduct with respect to tax-favored accounts that are not generally covered by ERISA, such as IRAs. Although ERISA's general fiduciary obligations of prudence and loyalty do not govern the fiduciaries of IRAs, these fiduciaries are subject to the prohibited transaction rules. In this context fiduciaries engaging in the prohibited transactions are subject to an excise tax enforced by the Internal Revenue Service. Unlike participants in plans covered by Title I of ERISA, under the Code, IRA owners cannot bring suit against fiduciaries under ERISA for violation of the prohibited transaction rules and fiduciaries are not personally liable to IRA owners for the losses caused by their misconduct, nor can the Secretary of Labor bring suit to enforce the prohibited transaction rules. The exemption proposed herein, as well as another exemption for the receipt of compensation by investment advice fiduciaries published elsewhere in this issue of the **Federal Register**, would create contractual obligations for the adviser to adhere to certain standards (the Impartial Conduct Standards). IRA owners would have a right to enforce these new contractual rights.

Under this statutory framework, the determination of who is a "fiduciary" is of central importance. Many of ERISA's protections, duties, and liabilities hinge on fiduciary status. In relevant part, section 3(21)(A) of ERISA and section 4975(e)(3) of the Code provide that a person is a fiduciary with respect to a plan or IRA to the extent he or she (1) exercises any discretionary authority or discretionary control with respect to management of such plan or IRA, or exercises any authority or control with respect to management or disposition of its assets; (2) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan or IRA, or has any authority or responsibility to do so; or, (3) has any discretionary authority or discretionary responsibility in the administration of such plan or IRA.

The statutory definition deliberately casts a wide net in assigning fiduciary responsibility with respect to plan and IRA assets. Thus, "any authority or control" over plan or IRA assets is sufficient to confer fiduciary status, and any persons who render "investment advice for a fee or other compensation, direct or indirect" are fiduciaries, regardless of whether they have direct control over the plan's or IRA's assets and regardless of their status as an investment adviser or broker under the federal securities laws. The statutory definition and associated fiduciary responsibilities were enacted to ensure that plans and IRAs can depend on persons who provide investment advice for a fee to provide recommendations that are untainted by conflicts of interest. In the absence of fiduciary status, the providers of investment advice would neither be subject to ERISA's fundamental fiduciary standards, nor accountable for imprudent, disloyal, or tainted advice under ERISA or the Code, no matter how egregious the misconduct or how substantial the losses. Plans, individual participants and beneficiaries, and IRA owners often are not financial experts and consequently must rely on professional advice to make critical investment decisions. In the years since then, the significance of financial advice has become still greater with increased reliance on participant-directed plans and IRAs for the provision of retirement benefits.

In 1975, the Department issued a regulation, at 29 CFR 2510.3–21(c)(1975) defining the circumstances under which a person is treated as providing "investment advice" to an employee benefit plan within the meaning of section 3(21)(A)(ii) of ERISA (the "1975 regulation").[6] The regulation narrowed the scope of the statutory definition of fiduciary investment advice by creating a five-part test that must be satisfied before a person can be treated as rendering investment advice for a fee. Under the regulation, for advice to constitute "investment advice," an adviser who does not have discretionary authority or control with

[3] ERISA section 404(a).

[4] ERISA section 406. ERISA also prohibits certain transactions between a plan and a "party in interest."

[5] ERISA section 409; *see also* ERISA section 405.

[6] The Department of Treasury issued a virtually identical regulation, at 26 CFR 54.4975–9(c), which interprets Code section 4975(e)(3).

respect to the purchase or sale of securities or other property of the plan must—(1) render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing or selling securities or other property (2) on a regular basis (3) pursuant to a mutual agreement, arrangement or understanding, with the plan or a plan fiduciary that (4) the advice will serve as a primary basis for investment decisions with respect to plan assets, and that (5) the advice will be individualized based on the particular needs of the plan. The regulation provides that an adviser is a fiduciary with respect to any particular instance of advice only if he or she meets each and every element of the five-part test with respect to the particular advice recipient or plan at issue. A 1976 Department of Labor Advisory Opinion further limited the application of the statutory definition of ''investment advice'' by stating that valuations of employer securities in connection with employee stock ownership plan (ESOP) purchases would not be considered fiduciary advice.[7]

As the marketplace for financial services has developed in the years since 1975, the five-part test may now undermine, rather than promote, the statutes' text and purposes. The narrowness of the 1975 regulation allows professional advisers, consultants and valuation firms to play a central role in shaping plan investments, without ensuring the accountability that Congress intended for persons having such influence and responsibility when it enacted ERISA and the related Code provisions. Even when plan sponsors, participants, beneficiaries and IRA owners clearly rely on paid consultants for impartial guidance, the regulation allows consultants to avoid fiduciary status and disregard the accompanying obligations of care and prohibitions on disloyal and conflicted transactions. As a consequence, these advisers can steer customers to investments based on their own self-interest, give imprudent advice, and engage in transactions that would otherwise be categorically prohibited by ERISA and the Code without liability under ERISA or the Code.

In the Proposed Regulation, the Department seeks to replace the existing regulation with one that more appropriately distinguishes between the sorts of advice relationships that should be treated as fiduciary in nature and those that should not, in light of the legal framework and financial marketplace in which plans and IRAs currently operate.[8] The Proposed Regulation describes the types of advice that constitutes ''investment advice'' with respect to plan or IRA assets for purposes of the definition of a fiduciary at ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B). The proposal provides, subject to certain carve-outs, that a person renders investment advice with respect to a plan or IRA if, among other things, the person provides, directly to a plan, a plan fiduciary, a plan participant or beneficiary, IRA or IRA owner one of the following types of advice:

(1) A recommendation as to the advisability of acquiring, holding, disposing or exchanging securities or other property, including a recommendation to take a distribution of benefits or a recommendation as to the investment of securities or other property to be rolled over or otherwise distributed from a plan or IRA;

(2) A recommendation as to the management of securities or other property, including recommendations as to the management of securities or other property to be rolled over or otherwise distributed from the plan or IRA;

(3) An appraisal, fairness opinion or similar statement, whether verbal or written, concerning the value of securities or other property, if provided in connection with a specific transaction or transactions involving the acquisition, disposition or exchange of such securities or other property by the plan or IRA; and

(4) A recommendation of a person who is also going to receive a fee or other compensation for providing any of the types of advice described in paragraphs (1) through (3), above.

In addition, to be a fiduciary, such person must either (1) represent or acknowledge that it is acting as a fiduciary within the meaning of ERISA (or the Code) with respect to the advice, or (2) render the advice pursuant to a written or verbal agreement, arrangement or understanding that the advice is individualized to, or that such advice is specifically directed to, the advice recipient for consideration in making investment or management decisions with respect to securities or other property of the plan or IRA.

In the Proposed Regulation, the Department refers to FINRA guidance on whether particular communications should be viewed as ''recommendations'' [9] within the meaning of the fiduciary definition, and requests comment on whether the Proposed Regulation should adhere to or adopt some or all of the standards developed by FINRA in defining communications which rise to the level of a recommendation. For more detailed information regarding the Proposed Regulation, see the Notice of the Proposed Regulation published in this issue of the **Federal Register**.

For advisers who do not represent that they are acting as ERISA (or Code) fiduciaries, the Proposed Regulation provides that advice rendered in conformance with certain carve-outs will not cause the adviser to be treated as a fiduciary under ERISA or the Code. For example, under the seller's carve-out, counterparties in arm's-length transactions with plans may make investment recommendations without acting as fiduciaries if certain conditions are met.[10] Similarly, the proposal contains a carve-out from fiduciary status for providers of appraisals, fairness opinions, or statements of value in specified contexts (*e.g.,* with respect to ESOP transactions). The proposal additionally carves out from fiduciary status the marketing of investment alternative platforms to plans, certain assistance in selecting investment alternatives, and other activities. Finally, the Proposed Regulation contains a carve-out from fiduciary status for the provision of investment education.

Prohibited Transactions

The Department anticipates that the Proposed Regulation will cover many investment professionals who do not currently consider themselves to be fiduciaries under ERISA or the Code. If the Proposed Regulation is adopted, these entities will become subject to the prohibited transaction restrictions in ERISA and the Code that apply specifically to fiduciaries. ERISA section 406(b)(1) and Code section 4975(c)(1)(E) prohibit a fiduciary from dealing with the income or assets of a plan or IRA in his own interest or his own account. ERISA section 406(b)(2)

[7] Advisory Opinion 76–65A (June 7, 1976).

[8] The Department initially proposed an amendment to its regulation under ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) on October 22, 2010, at 75 FR 65263. It subsequently announced its intention to withdraw the proposal and propose a new rule, consistent with the President's Executive Orders 12866 and 13563, in order to give the public a full opportunity to evaluate and comment on the new proposal and updated economic analysis.

[9] *See* NASD Notice to Members 01–23 and FINRA Regulatory Notices 11–02, 12–25 and 12–55.

[10] Although the preamble adopts the phrase ''seller's carve-out'' as a shorthand way of referring to the carve-out and its terms, the regulatory carve-out is not limited to sellers but rather applies more broadly to counterparties in arm's length transactions with plan investors with financial expertise.

provides that a fiduciary shall not ''in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries.'' [11] ERISA section 406(b)(3) and Code section 4975(c)(1)(F) prohibit a fiduciary from receiving any consideration for his own personal account from any party dealing with the plan in connection with a transaction involving assets of the plan or IRA. Parallel regulations issued by the Departments of Labor and the Treasury explain that these provisions impose on fiduciaries of plans and IRAs a duty not to act on conflicts of interest that may affect the fiduciary's best judgment on behalf of the plan or IRA. Given these prohibitions, conferring fiduciary status on particular investment advice activities will have important implications for many investment professionals.

The purchase or sale of a security in a principal transaction between a plan or IRA and a fiduciary, resulting from the fiduciary's provision of investment advice, raises issues under ERISA section 406(b) and Code section 4975(c)(1)(E).[12] Nevertheless, the Department recognizes that certain investment advice fiduciaries view the ability to execute principal transactions as integral to the economically efficient distribution of fixed income securities. The Department has carefully considered requests for exemptive relief for principal transactions in connection with the development of the Proposed Regulation, in light of the existing legal framework. In this regard, as further discussed below, fiduciaries who engage in principal transactions under certain circumstances can avoid the ERISA and Code restrictions. Moreover, there are existing statutory and administrative exemptions, also discussed below, that already provide prohibited transaction relief for fiduciaries engaging in principal transactions with plans and IRAs. This notice proposes a new class exemption which would provide additional prohibited transaction relief for investment advice fiduciaries to engage in principal transactions with plans and IRAs.

1. Blind Transactions

Certain principal transactions between a plan or IRA and an investment advice fiduciary may not need exemptive relief because they are blind transactions executed on an exchange. The ERISA Conference Report states that a transaction will, generally, not be a prohibited transaction if the transaction is an ordinary ''blind'' purchase or sale of securities through an exchange where neither the buyer nor the seller (nor the agent of either) knows the identity of the other party involved.[13]

2. Principal Transactions Permitted Under an Exemption

ERISA and the Code counterbalance the broad proscriptive effect of the prohibited transaction provisions with numerous statutory exemptions. ERISA and the Code also provide for administrative exemptions that the Secretary of Labor may grant on an individual or class basis if the Secretary finds that the exemption is (1) administratively feasible, (2) in the interests of plans and their participants and beneficiaries, and (3) protective of the rights of the participants and beneficiaries of such plans.

A. Statutory Exemptions

ERISA section 408(b)(14) provides a statutory exemption for transactions entered into in connection with the provision of fiduciary investment advice to a participant or beneficiary of an individual account plan or an IRA owner. The exemption provides relief for, among other things, the acquisition, holding, or sale of a security or other property as an investment under the plan pursuant to the investment advice. As set forth in ERISA section 408(g), the exemption is available if the advice is provided under an ''eligible investment advice arrangement'' which either (1) ''provides that any fees (including any commission or other compensation) received by the fiduciary adviser for investment advice or with respect to the sale, holding or acquisition of any security or other property for purposes of investment of plan assets do not vary depending on the basis of any investment option selected'' or (2) ''uses a computer model under an investment advice program meeting the requirements of [ERISA section 408(g)(3)].'' Additional conditions apply. Code section 4975(d)(17) provides the same relief from the taxes imposed by Code section 4975(a) and (b).

ERISA section 408(b)(16) provides relief for transactions involving the purchase or sale of securities between a plan and a party in interest, including an investment advice fiduciary, if the transactions are executed through an electronic communication network, alternative trading system, or similar execution system or trading venue. Among other conditions, subparagraph (B) of the statutory exemption requires that either: (i) ''the transaction is effected pursuant to rules designed to match purchases and sales at the best price available through the execution system in accordance with applicable rules of the Securities and Exchange Commission or other relevant governmental authority,'' or (ii) ''neither the execution system nor the parties to the transaction take into account the identity of the parties in the execution of trades[.]'' The transactions covered by ERISA section 408(b)(16) include principal transactions between a plan and an investment advice fiduciary. Code section 4975(d)(19) provides the same relief from the taxes imposed by Code section 4975(a) and (b).

B. Administrative Exemptions

An administrative exemption for certain principal transactions will continue to be available through PTE 75–1.[14] Specifically, PTE 75–1, Part IV, provides an exemption that is available to investment advice fiduciaries who are ''market-makers.'' Relief is available from ERISA section 406 for the purchase or sale of securities by a plan or IRA, from or to a market-maker with respect to such securities who is also an investment advice fiduciary with respect to the plan or IRA, or an affiliate of such fiduciary.

Further, Part II(1) of PTE 75–1 currently provides relief from ERISA section 406(a) and Code section 4975(c)(1)(A) through (D) for the purchase or sale of a security in a principal transaction between a plan or IRA and a broker-dealer registered under the Securities Exchange Act of 1934. However, the exemption permits plans and IRAs to engage in principal transactions with broker-dealers only if they do not have or exercise any discretionary authority or control (except as a directed trustee) with respect to the investment of plan or IRA assets involved in the transaction, and *do not render investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to the investment of those assets.* PTE 75–1, Part II(1) will continue to be available to parties in interest that are not fiduciaries and that satisfy its conditions.

[11] The Code does not contain this prohibition.

[12] The purchase or sale of a security in a principal transaction between a plan or IRA and a fiduciary also is prohibited by ERISA section 406(a)(1)(A) and (D) and Code section 4975(c)(1)(A) and (D).

[13] *See* H.R. Rep. 93–1280, 93rd Cong., 2d Sess. 307 (1974); *see also* ERISA Advisory Opinion 2004–05A (May 24, 2004).

[14] 40 FR 50845 (Oct. 31, 1975), as amended, 71 FR 5883 (Feb. 3, 2006).

C. New Exemption Proposed in This Notice

In response to public concerns, the Department is proposing in this notice additional relief for principal transactions in certain debt securities between a plan, participant or beneficiary account, or an IRA, and an investment advice fiduciary. While relief was informally requested with respect to a broad range of principal transactions (*e.g.,* those involving equities, debt securities, futures, derivatives, currencies, *etc.*), the Department has elected to propose relief solely with respect to certain widely-held debt securities. This limitation is based on the Department's view that principal transactions involve a potentially severe conflict of interest when engaged in by a fiduciary with respect to a plan, participant or beneficiary account, or an IRA. The Department is concerned that, when acting as a principal in a transaction involving a plan, participant or beneficiary account, or an IRA, a fiduciary may have difficulty reconciling its duty to avoid conflicts of interest with its concern for its own financial interests. Of primary concern are issues involving liquidity, pricing, transparency, and the fiduciary's possible incentive to ''dump'' unwanted assets. Accordingly, when crafting the exemption, the Department focused on debt securities as common investments of plans, participant or beneficiary accounts, and IRAs that may need to be sold on a principal basis because particular bond issues may be sold by only one or a limited number of financial institutions. Without an exemption, plans, participant or beneficiary accounts, and IRAs may face reduced choice in the market for these debt securities.

Under this rationale, however, the Department is not persuaded at this point that additional exemptive relief for principal transactions involving other types of assets would be in the interests of, and protective of, plans, their participants and beneficiaries and IRA owners. Equity securities, for example, are widely available through agency transactions that do not involve the particular conflicts of interest associated with principal transactions. Other assets such as futures, derivatives and currencies, may possess a level of complexity and risk that would require a retirement investor to rely heavily on a fiduciary's advice. In such cases, the Department is concerned that the class exemption proposed here would be insufficiently protective of plans, participants and beneficiaries, and IRA owners.

The Department requests comment on the limitation of the proposed exemption to debt securities. Public input is requested on whether there are additional assets that are commonly held by plans, participant or beneficiary accounts, and IRAs that are sold primarily in principal transactions. Commenters should provide specifics about the characteristics of such assets and the proposed safeguards that would apply to an exemption permitting their sale in a principal transaction. To the extent interested parties believe it is possible or appropriate to provide relief for additional transactions, the Department would also invite applications for additional exemptions tailored to the unique characteristics of those transactions and protective of the interests of plan participants and IRA owners.

Proposed Exemption for Principal Transactions in Certain Debt Securities

Section I of the proposed exemption would provide relief for ''Advisers'' and ''Financial Institutions'' to enter into ''principal transactions'' in ''debt securities'' with plans and IRAs. The proposed exemption uses the term ''Retirement Investor'' to describe the types of persons who can be investment advice recipients under the exemption, and the term ''Affiliate'' to describe people and entities with a connection to the Adviser or Financial Institution. These terms are defined in Section VI of this proposed exemption. The following sections discuss key definitional terms of the exemption as well as the scope and conditions of the proposed exemption.

Defined Terms

1. Adviser

The proposed exemption contemplates that an individual person, an Adviser, will provide advice to the Retirement Investor. An Adviser must be an investment advice fiduciary of a plan or IRA who is an employee, independent contractor, agent, or registered representative of a ''Financial Institution'' (discussed in the next section), and the Adviser must satisfy the applicable banking and securities laws with respect to the covered transaction.[15] Advisers may be, for example, registered representatives of broker-dealers registered under the Securities Exchange Act of 1934.

2. Financial Institutions

For purposes of the proposed exemption, a Financial Institution is the entity that employs an Adviser or otherwise retains the Adviser as an independent contractor, agent or registered representative.[16] Financial Institutions must be registered investment advisers, banks, or registered broker-dealers. This limitation is based on the Department's understanding that these entities may commonly sell debt securities out of inventory. The Department requests comment on whether there are other types of financial institutions that should be included in the definition.

3. Affiliates

The proposed exemption uses the term Affiliate to describe persons or entities with certain relationships to the Adviser and Financial Institution. An ''Affiliate'' means: (1) any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the Adviser or Financial Institution; (2) any officer, director, employee, relative (as defined in ERISA section 3(15)) or member of family (as defined in Code section 4975(e)(6)), agent or registered representative of, or partner in such Adviser or Financial Institution; and (3) any corporation or partnership of which the Adviser or Financial Institution is an officer, director, or employee, or in which the Adviser or Financial Institution is a partner. For purposes of this definition, the term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

4. Retirement Investor

The proposed exemption uses the term ''Retirement Investor,'' to mean a plan fiduciary of a non-participant directed ERISA plan with authority to make investment decisions for the plan, a plan participant or beneficiary with authority to direct the investment of assets in his or her plan account or to take a distribution, or, in the case of an IRA, the beneficial owner of the IRA (*i.e.,* the IRA owner).

5. Principal Transaction

For purposes of the proposed exemption, a principal transaction is a purchase or sale of a debt security where an Adviser or Financial Institution is purchasing from or selling to the plan, participant or beneficiary account, or IRA on behalf of the account of the Financial Institution or the

[15] *See* Section VI(a) of the proposed exemption.

[16] *See* Section VI(f) of the proposed exemption.

account of any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the Financial Institution. The Department requests comment as to whether, and on what grounds, relief is also necessary for the purchase or sale of a debt security from the Adviser's own account in addition to the Financial Institution's own account.

6. Debt Securities

The proposed exemption is limited to principal transactions in certain debt securities. For purposes of the exemption, the term ''debt security,'' is defined by reference to Rule 10b–10(d)(4) under the Securities Exchange Act of 1934. The categories of covered debt securities include securities that are (1) dollar denominated, issued by a U.S. corporation and offered pursuant to a registration statement under the Securities Act of 1933; (2) U.S. agency debt securities (as defined in FINRA Rule 6710(l)); and (3) U.S. Treasury securities (as defined in FINRA Rule 6710(p)).

The debt security may not have been issued by the Financial Institution or any Affiliate. Additionally, the debt security may not be purchased by the plan, participant or beneficiary account, or IRA, in an underwriting or underwriting syndicate in which the Financial Institution or any Affiliate is the underwriter or a member. Purchases by plans, participant or beneficiary accounts, or IRAs may occur, however, if a debt security originally underwritten by the Financial Institution or an Affiliate was later obtained for sale in the secondary market.

The debt security must also possess no greater than moderate credit risk and be sufficiently liquid that the debt security could be sold at or near its fair market value within a reasonably short period of time. Debt securities subject to a moderate credit risk should possess at least average credit-worthiness relative to other similar debt issues. Moderate credit risk would denote current low expectations of default risk, with an adequate capacity for payment of principal and interest. These securities have a level of creditworthiness similar to investment grade securities.[17]

Scope of Relief in the Proposed Exemption

The proposed exemption provides relief for principal transactions in debt securities between a plan, participant or beneficiary account, or IRA and a Financial Institution or an entity in a control relationship with the Financial Institution, when the principal transaction is a result of the Adviser's and Financial Institution's provision of investment advice. Relief is proposed from ERISA sections 406(a)(1)(A) and (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), (D) and (E). Relief has not been proposed in this exemption from ERISA section 406(b)(3) and Code section 4975(c)(1)(F), which prohibit a plan fiduciary from receiving any consideration for its own personal account from any party dealing with the plan in connection with a transaction involving the assets of the plan. As a result, the proposed exemption does not include relief for the receipt by a fiduciary of consideration from a trading venue in connection with the execution of purchases and sales thereon (*e.g.,* payment for order flow).

Several limitations apply to the scope of the proposed exemption. First, relief is limited to Advisers whose fiduciary authority with respect to the plan, participant or beneficiary account, or IRA assets involved in the transaction is as a provider of investment advice.[18] Advisers who have full investment discretion with respect to the assets of a plan, participant or beneficiary account, or IRA or who have discretionary authority over the administration of the plan, participant or beneficiary account, or IRA, for example, may not take advantage of relief under the exemption.

Second, the exemption is not available to a transaction involving a plan covered by Title I of ERISA if the Adviser or Financial Institution, or any Affiliate is the employer of employees covered by the plan which is the recipient of the advice.[19] This restriction on employers does not apply in the case of an IRA or other similar plan that is not covered by Title I of ERISA. Accordingly, an Adviser or Financial Institution may provide advice to the beneficial owner of an IRA who is employed by the Adviser, its Financial Institution or an Affiliate, and receive compensation as a result, provided the IRA is not covered by Title I of ERISA.

Finally, the exemption does not apply if the Adviser or Financial Institution is a named fiduciary or plan administrator, as defined in ERISA section 3(16)(A) with respect to an ERISA plan, or an affiliate thereof, that was selected to provide advice to the plan by a fiduciary who is not independent of them.[20] This provision is intended to disallow selection of Advisers and Financial Institutions by named fiduciaries or plan administrators that have an interest in them.

Conditions of the Proposed Exemption

Sections II–V of the proposal set forth the conditions of the exemption. All applicable conditions must be satisfied in order to avoid application of the specified prohibited transaction provisions of ERISA and the Code. The Department believes that these conditions are necessary for the Secretary to find that the exemption is administratively feasible, in the interests of plans, their participants and beneficiaries and IRA owners, and protective of the rights of the participants and beneficiaries of such plans and IRA owners. Under ERISA section 408(a)(2), and Code section 4975(c)(2), the Secretary may not grant an exemption without making such findings. The proposed conditions are described below.

Contractual Obligations (Section II)

Section II(a) of the proposal requires that an Adviser and the Financial Institution enter into a written contract with the Retirement Investor prior to engaging in a principal transaction with a plan, participant or beneficiary account, or IRA. The contract must be executed by the Adviser and Financial Institution as well as the Retirement Investor, acting on behalf of the plan, participant or beneficiary account, or IRA. In the case of advice provided to a participant or beneficiary in a plan, the participant or beneficiary should be the Retirement Investor that is the party to the contract, on behalf of his or her individual account.

The contract may be part of a master agreement with the Retirement Investor and does not require execution prior to each additional principal transaction. The exemption does not, by its terms, mandate an ongoing or long-term advisory relationship, but rather leaves that to the parties. The terms of the contract, along with other representations, agreements, or understandings between the Adviser, Financial Institution and Retirement

[17] The U.S. Securities and Exchange Commission has similarly referred to securities that are 'subject to no greater than moderate credit risk' and sufficiently liquid that [the security] can be sold at or near its carrying value within a reasonably short period of time'' in setting standards of creditworthiness in its regulations. *See, e.g.,* Rule 6a–5 issued under Investment Company Act,17 CFR 270.6a–5 (77 FR 70117, November 23, 2012).

[18] *See* Section I(c)(1) of the proposed exemption.

[19] *See* Section I(c)(2) of the proposed exemption.

[20] *See* Section VI(f), defining the term ''Independent.''

Investor, will govern the ongoing or transactional nature of the relationship between the parties.

The contract is the cornerstone of the proposed exemption, and the Department believes that by requiring a contract as a condition of the proposed exemption, it creates a mechanism by which a Retirement Investor can be alerted to the Adviser's and Financial Institution's obligations and be provided with a basis upon which its rights can be enforced. In order to comply with the exemption, the contract must contain every required element set forth in Section II(b)–(e) and also must not include any of the prohibited provisions described in Section II(f). It is intended that the contract creates actionable obligations with respect to both the Impartial Conduct Standards and the warranties, described below. In addition, failure to satisfy the Independent Conduct Standards will result in loss of the exemption.

1. Fiduciary Status

The proposal sets forth multiple contractual requirements. The first and most fundamental contractual requirement, which is set out in Section II(b) of proposal, is that both the Adviser and Financial Institution must acknowledge fiduciary status under ERISA or the Code, or both, with respect to the investment recommendations to the Retirement Investor regarding principal transactions. If this acknowledgment of fiduciary status does not appear in a contract with a Retirement Investor, the exemption is not satisfied with respect to principal transactions involving that Retirement Investor. This fiduciary acknowledgment is critical to ensuring that there is no uncertainty—before or after investment advice is given with regard to the principal transaction—that both the Adviser and Financial Institution are acting as fiduciaries under ERISA and the Code. Nevertheless, it is important to note that the contractual language is only required to apply to communications that are investment recommendations to the Retirement Investor regarding principal transactions. Compliance with all the exemption's conditions is necessary only with respect to transactions that otherwise would constitute prohibited transactions under ERISA and the Code.

2. Standards of Impartial Conduct

Building upon the required acknowledgment of fiduciary status, the proposal additionally requires that both the Adviser and the Financial Institution contractually commit to adhering to specifically delineated Impartial Conduct Standards when providing investment advice to the Retirement Investor regarding principal transactions, and that they in fact do adhere to such standards. Therefore, if an Adviser and/or Financial Institution fail to comply with the Impartial Conduct Standards, relief under the exemption is no longer available and the contract is violated.

Specifically, Section II(c)(1) of the proposal requires that under the contract the Adviser and Financial Institution provide advice regarding principal transactions that is in the "best interest" of the Retirement Investor. Best interest is defined to mean that the Adviser and Financial Institution act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and the needs of the Retirement Investor when providing investment advice to the Retirement Investor. Further, under the best interest standard, the Adviser and Financial Institution must act without regard to the financial or other interests of the Adviser, Financial Institution, their Affiliates or any other party. Under this standard, the Adviser and Financial Institution must put the interests of the Retirement Investor ahead of the financial interests of the Adviser, Financial Institution, their Affiliates or any other party.

The best interest standard set forth in this exemption is based on longstanding concepts derived from ERISA and the law of trusts. For example, ERISA section 404 requires a fiduciary to act "solely in the interest of the participants . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." Similarly, both ERISA section 404(a)(1)(A) and the trust-law duty of loyalty require fiduciaries to put the interests of trust beneficiaries first, without regard to the fiduciaries' own self-interest. Accordingly, the Department would expect the standard to be interpreted in light of forty years of judicial experience with ERISA's fiduciary standards and hundreds more with the duties imposed on trustees under the common law of trusts. In general, courts focus on the process the fiduciary used to reach its determination or recommendation—whether the fiduciaries, "at the time they engaged in the challenged transactions, employed the proper procedures to investigate the merits of the investment and to structure the investment." *Donovan* v. *Mazzola,* 716 F.2d 1226, 1232 (9th Cir. 1983). Moreover, a fiduciary's investment recommendation is measured based on the circumstances prevailing at the time of the transaction, not on how the investment turned out with the benefit of hindsight.

In this regard, the Department notes that while fiduciaries of plans covered by ERISA are subject to the ERISA section 404 standards of prudence and loyalty, the Code contains no provisions that hold IRA fiduciaries to these standards. However, as a condition of relief under the proposed exemption, both IRA and plan fiduciaries would have to agree to, and uphold, the best interest requirement that is set forth in Section II(c). The best interest standard is defined to effectively mirror the ERISA section 404 duties of prudence and loyalty, as applied in the context of fiduciary investment advice.

The Impartial Conduct Standards continue in Section II(c) of the proposal. Section II(c)(2) requires that the Adviser and Financial Institution agree that they will not enter into a principal transaction with the plan, participant or beneficiary account, or IRA if the purchase or sales price of the debt security (including the mark-up or mark-down) is unreasonable under the circumstances. Finally, Section II(c)(3) requires that the Adviser's and Financial Institution's statements about the debt security, fees, material conflicts of interest, and any other matters relevant to a Retirement Investor's investment decisions, are not misleading.

Under ERISA section 408(a) and Code section 4975(c), the Department cannot grant an exemption unless it first finds that the exemption is administratively feasible, in the interests of plans and their participants and beneficiaries and IRA owners, and protective of the rights of participants and beneficiaries of plans and IRA owners. An exemption permitting transactions that violate the requirements of Section II(c) would be unlikely to meet these standards.

3. Warranty—Compliance With Applicable Law

Section II(d) of the proposal requires that contract include certain warranties intended to be protective of the rights of Retirement Investors. In particular, to satisfy the exemption, the Adviser, and Financial Institution must warrant that they and their Affiliates will comply with all applicable federal and state laws regarding the rendering of the investment advice and the purchase and sale of debt securities. This warranty must be in the contract but the exemption is not conditioned on compliance with the warranty. Accordingly, the failure to comply with applicable federal or state law could result in contractual liability for breach of warranty, but it would not result in loss of the exemption, as long as the breach did not involve a violation of one of the exemption's other conditions (*e.g.,* the best interest standard). Thus, for example, de minimis violations of state or federal law would not result in the loss of the exemption.

4. Warranty—Policies and Procedures

The Financial Institution must also contractually warrant that it has adopted written policies and procedures that are reasonably designed to mitigate the impact of material conflicts of interest that exist with respect to the provision of investment advice to Retirement Investors regarding principal transactions and ensure that individual Advisers adhere to the Impartial Conduct Standards described above. For purposes of the exemption, a material conflict of interest is deemed to exist when an Adviser or Financial Institution has a financial interest that could affect the exercise of its best judgment as a fiduciary in rendering advice to a Retirement Investor.[21] Like the warranty on compliance with applicable law, discussed above, this warranty must be in the contract but the exemption is not conditioned on compliance with the warranty. Failure to comply with the warranty, however, could result in contractual liability for breach of warranty.

As part of the contractual warranty on policies and procedures, the Financial Institution must state that in formulating its policies and procedures, it specifically identified material conflict of interests and adopted measures to prevent those material conflicts of interest from causing violations of the Impartial Conduct Standards. Further, the Financial Institution must state that neither it nor (to the best of its knowledge) its Affiliates will use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differentiated compensation or other actions or incentives to the extent they would tend to encourage individual Advisers to make recommendations regarding principal transactions that are not in the best interest of Retirement Investors.

While these warranties must be part of the contract between the Adviser and Financial Institution and the Retirement Investor, the proposal does not mandate the specific content of the policies and procedures. This flexibility is intended to allow Financial Institutions to develop policies and procedures that are effective for their particular business models, within the constraints of their fiduciary obligations and the Impartial Conduct Standards. A more detailed description of the policies and procedures requirement is included in the discussion of the similar requirement in the Proposed Exemption for the Receipt of Compensation by Investment Advice Fiduciaries, published in this same issue of the **Federal Register**.

5. Contractual Disclosures

Finally, Section II(e) of the proposal requires certain disclosures in the written contract. If the disclosures do not appear in a contract with a Retirement Investor, the exemption is not satisfied with respect to transactions involving that Retirement Investor. The written contract must (i) set forth the circumstances under which the Adviser and Financial Institution may engage in principal transactions with the plan, participant or beneficiary account, or IRA and (ii) identify and disclose the material conflicts of interest associated with principal transactions. The contract must also document the Retirement Investor's affirmative written consent, on a prospective basis, to principal transactions with the Adviser or Financial Institution. Finally, the contract must inform the Retirement Investor (i) that the consent to principal transactions is terminable at will by the Retirement Investor at any time, without penalty to the plan, participant or beneficiary account, or IRA, and (ii) of the right to obtain complete information about all the fees and other payments currently associated with its investments.

Enforcement of the Contractual Obligations

The contractual conditions set forth in Section II of the proposal are enforceable. Plans, plan participants and beneficiaries, IRA owners, and the Department may use the contract as a tool to ensure compliance with the exemption. The Department notes, however, that this contractual tool creates different rights with respect to plans, participant and beneficiaries, IRA owners and the Department.

1. IRA Owners

The contract between the IRA owner and the Adviser and Financial Institution forms the basis of the IRA owner's enforcement rights. As outlined above, the contract embodies obligations on the part of the Adviser and Financial Institution. The Department intends that all the contractual obligations (the Impartial Conduct Standards and the warranties) will be actionable by IRA owners. The most important of these contractual obligations for enforcement purposes is the obligation imposed on both the Adviser and the Financial Institution to comply with the Impartial Conduct Standards. Because these standards are contractually imposed, the IRA owner has a claim if, for example, the Adviser recommends an investment product that is not in fact in the best interest of the IRA owner.

2. Plans, Plan Participants and Beneficiaries

The protections of the exemption and contractual terms will also be enforceable by plans, plan participants and beneficiaries. Specifically, if an Adviser or Financial Institution receives compensation in a prohibited transaction but fails to satisfy any of the Impartial Conduct Standards or any other condition of the exemption, the Adviser and Financial Institution would be unable to qualify for relief under the exemption, and, as a result, could be liable under ERISA section 502(a)(2) and (3). An Adviser's failure to comply with the exemption or the Impartial Conduct Standards would result in a non-exempt prohibited transaction and would likely constitute a fiduciary breach. As a result, a plan, plan participant or beneficiary would be able to sue under ERISA section 502(a)(2) or (3) to recover any loss in value to the plan (including the loss in value to an individual account), or to obtain disgorgement of any wrongful profits or unjust enrichment. Additionally, plans, participants and beneficiaries could enforce their obligations in an action based on breach of the agreement.

3. The Department

In addition, the Department will be able to enforce ERISA's prohibited transaction provisions with respect to employee benefit plans, but not IRAs, in the event that the Adviser or Financial Institution receives compensation in a prohibited transaction but fails to comply with the Impartial Conduct Standards or any other conditions of the exemption. If any of the specific conditions of the exemption are not met, the Adviser and Financial Institution will have engaged in a non-exempt prohibited transaction, and the Department will be entitled to seek relief under ERISA section 502(a)(2) and (5).

[21] *See* Section VI(h) of the proposed exemption.

4. Excise Taxes Under the Code

In addition to the claims described above that may be brought by IRA owners, plans, plan participants and beneficiaries, and the Department, to enforce the contract and ERISA, Advisers and Financial Institutions that engage in prohibited transactions under the Code are subject to an excise tax. The excise tax is generally equal to 15% of the amount involved. Parties who have participated in a prohibited transaction for which an exemption is not available must pay the excise tax and file Form 5330 with the Internal Revenue Service.

Prohibited Provisions

Finally, in order to preserve these various enforcement rights, Section II(f) of the proposal provides that certain provisions may not be in the contract. If these provisions appear in a contract with a Retirement Investor, the exemption is not satisfied with respect to transactions involving that Retirement Investor. First, the proposal provides that the contract may not contain exculpatory provisions that disclaim or otherwise limit liability for an Adviser's or Financial Institution's violations of the contract's terms. Second, the contract may not require the plan, IRA or Retirement Investor to agree to waive its right to bring or participate in a class action or other representative action in court in a contract dispute with the Adviser or Financial Institution. The right of a Retirement Investor to bring a class-action claim in court (and the corresponding limitation on fiduciaries' ability to mandate class-action arbitration) is consistent with FINRA's position that its arbitral forum is not the correct venue for class-action claims. As proposed, this section would not impact the ability of a Financial Institution or Adviser, and a Retirement Investor, to enter into pre-dispute binding arbitration agreement with respect to individual contract claims. The Department expects that most such individual arbitration claims under this exemption will be subject to FINRA's arbitration procedures and consumer protections. The Department seeks comments on whether there are certain procedures and/or consumer protections that it should adopt or mandate for those contract disputes not covered by FINRA.

General Conditions Applicable to Each Transaction (Section III)

Section III of the proposal sets forth conditions that apply to the terms of each principal transaction entered into under the exemption. As noted above, Section III(a) of the proposal provides that the debt security being bought or sold must not have been issued or, at the time of the transaction, underwritten by the Financial Institution or any Affiliate. The debt security also must possess no greater than a moderate credit risk and be sufficiently liquid that the debt security could be sold at or near its fair market value within a reasonably short period of time.

Section III(b) provides that the principal transaction may not be part of an agreement, arrangement, or understanding designed to evade compliance with ERISA or the Code, or to otherwise impact the value of the debt security. Such a condition protects against the Adviser or Financial Institution manipulating the terms of the principal transaction, either as an isolated transaction or as a part of a series of transactions, to benefit themselves or their Affiliates. Further, this condition would also prohibit an Adviser or Financial Institution from engaging in principal transactions with Retirement Investors for the purpose of ridding inventory of unwanted or poorly performing debt securities.

Section III(c) of the proposal provides that the purchase or sale of the debt security must be for no consideration other than cash. By limiting a purchase or sale of debt securities to cash consideration, the Department intends that relief will not be provided for a principal transaction that is executed on an in-kind basis.

Finally, Section III(d) of the proposal addresses the pricing of the principal transaction. Section III(d)(1) provides that the purchase or sale of the debt security must be executed at a price that the Adviser and Financial Institution reasonably believe is at least as favorable to the plan, participant or beneficiary account, or IRA than the price available to the plan, participant or beneficiary account, or IRA in a transaction that is not a principal transaction. Section III(d)(2) provides that the purchase or sale of the debt security must be at least as favorable to the plan, participant or beneficiary account, or IRA as the contemporaneous price for the debt security, or a similar security if a price is not available with respect to the same debt security, offered by two ready and willing counterparties that are not Affiliates in agency transactions. When evaluating the price offered by the counterparties, the Adviser and Financial Institution may take into account the resulting price to the plan, participant or beneficiary account, or IRA, including commissions. The Department intends that the proposal should allow a comparison between the actual cost to the plan, participant or beneficiary account, or IRA of the principal transaction (including the mark-up or mark-down) and the actual cost to the plan, participant or beneficiary account, or IRA of a non-principal transaction (*e.g.,* an agency transaction) in the same or a similar debt security, including a commission.

For purposes of Section III(d)(2), the similarity of a debt security should be construed in accordance with FINRA Rule 2121, or its successor, and the guidance promulgated thereunder. Generally, such guidance has stated that a similar debt security is one which is sufficiently similar to the subject debt security that it would serve as a reasonable alternative investment for the applicable investor.

Disclosure Requirements (Section IV)

Prior to engaging in a principal transaction, Section IV(a) of the proposal provides that the Adviser or Financial Institution must provide a pre-transaction disclosure to the Retirement Investor, either orally or in writing. The disclosure must notify the Retirement Investor that the purchase or sale of the debt security will be executed as a principal transaction between the Adviser or Financial Institution and the plan, participant or beneficiary account, or the IRA. Further, the disclosure must also provide the Retirement Investor with any available pricing information regarding the debt security, including two quotes obtained from unaffiliated parties required by Section III(d)(2).

As proposed, the pre-transaction disclosure set forth in Section IV(a) would also include the mark-up or mark-down to be charged in connection with the principal transaction. The purpose of this requirement would be to permit the Retirement Investor to evaluate the compensation and other transaction costs associated with the principal transaction. The Department believes it is important that the Financial Institution and Adviser disclose the compensation they will receive before the Retirement Investor consents to engage in the principal transaction.

For purpose of Section IV, the Department is considering defining a mark-up as the amount in excess of the "prevailing market price" that a customer pays for the debt security. Mark-down would be defined as the amount by which the price of a debt security is reduced from the "prevailing market price" that a customer receives for the debt security. The Department is further considering whether to define the "prevailing market price" by reference to FINRA Rule 2121 and Supplementary Material .02 thereunder, which sets forth a methodology for determining the prevailing market price.

We request comment on our proposed approach to the definition of mark-up and mark-down, and in particular, our potential reliance on the FINRA guidance in Rule 2121 for purposes of the disclosure requirement in this exemption. Would a disclosure of the mark-up/down as defined in this manner provide information that will be useful to Retirement Investors in evaluating the principal transaction? Are there practical difficulties with our approach? Are there other formulations of the mark-up mark-down definition that have advantages in these respects?

Section IV(b) of the proposal provides that the Financial Institution must provide a written confirmation of the principal transaction in accordance with Rule 10b–10 under the Securities Exchange Act of 1934 [22] that also includes disclosure of the mark-up, mark-down, or other payment to the Adviser, Financial Institution or Affiliate in connection with the Principal Transaction.

Section IV(c) of the proposal provides that the Adviser or the Financial Institution must provide the Retirement Investor with an annual statement that lists the principal transactions engaged in during the year, provides the prevailing market price at which the debt security was purchased or sold, and provides the applicable mark-up or mark-down or other payment for each debt security. The annual statement must also remind the Retirement Investor that it may withdraw its consent to principal transactions at any time, without penalty to the plan, participant or beneficiary account, or IRA. The annual statement may be provided in combination with other statements provided to the Retirement Investor by the Adviser or Financial Institution.

Finally, Section IV(d) of the proposal provides that, upon reasonable request, the Adviser or Financial Institution must provide the Retirement Investor with additional information regarding the debt security and the transaction for any principal transaction that has occurred within the past 6 years preceding the date of the request.

Recordkeeping (Section V) and Definitions (Section VI)

Section V of the proposal establishes a recordkeeping requirement, and Section VI sets forth definitions that are used in the proposed exemption.

Applicability Date

The Department is proposing that compliance with the final regulation defining a fiduciary under ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) will begin eight months after publication of the final regulation in the **Federal Register** (Applicability Date). The Department proposes to make this exemption, if granted, available on the Applicability Date.

No Relief Proposed From ERISA Section 406(a)(1)(C) or Code section 4975(c)(1)(C) for the Provision of Services

If granted, this proposed exemption will not provide relief from a transaction prohibited by ERISA section 406(a)(1)(C), or from the taxes imposed by Code section 4975(a) and (b) by reason of Code section 4975(c)(1)(C), regarding the furnishing of goods, services or facilities between a plan and a party in interest. The provision of investment advice to a plan under a contract with a fiduciary is a service to the plan and compliance with this exemption will not relieve an Adviser or Financial Institution of the need to comply with ERISA section 408(b)(2), Code section 4975(d)(2), and applicable regulations thereunder.

Paperwork Reduction Act Statement

As part of its continuing effort to reduce paperwork and respondent burden, the Department conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that the public understands the Department's collection instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

Currently, the Department is soliciting comments concerning the proposed information collection request (ICR) included in the Proposed Class Exemption for Principal Transactions in Certain Debt Securities between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs as part of its proposal to amend its 1975 rule that defines when a person who provides investment advice to an employee benefit plan, participant or beneficiary, or IRA owner, becomes a fiduciary. A copy of the ICR may be obtained by contacting the PRA addressee shown below or at *http://www.RegInfo.gov*.

The Department has submitted a copy of the Proposed Class Exemption for Principal Transactions in Certain Debt Securities between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs to the Office of Management and Budget (OMB) in accordance with 44 U.S.C. 3507(d) for review of its information collections. The Department and OMB are particularly interested in comments that:

- Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submission of responses.

Comments should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for the Employee Benefits Security Administration. OMB requests that comments be received within 30 days of publication of the Proposed Investment Advice Initiative to ensure their consideration.

PRA Addressee: Address requests for copies of the ICR to G. Christopher Cosby, Office of Policy and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue NW, Room N–5718, Washington, DC 20210. Telephone (202) 693–8410; Fax: (202) 219–5333. These are not toll-free numbers. ICRs submitted to OMB also are available at *http://www.RegInfo.gov*.

As discussed in detail below, the proposed class exemption would permit principal transactions in certain debt securities between a plan, participant or beneficiary account, or an IRA, and a financial institution or certain of its affiliates. The proposed class exemption

[22] 17 CFR 240.10b–10.

would require financial institutions and their advisers to enter into a contractual arrangement with the retirement investor (*i.e.,* the plan fiduciary, participant or beneficiary, or the IRA owner), make certain disclosures to the retirement investors and maintain records necessary to prove that the conditions of the exemption have been met for a period of six (6) years from the date of each principal transaction. These requirements are ICRs subject to the PRA.

The Department has made the following assumptions in order to establish a reasonable estimate of the paperwork burden associated with these ICRs:

- Approximately 2,800 financial institutions[23] will utilize the proposed exemption to engage in principal transactions and eight percent will be new each year;
- Financial Institutions and advisers will use existing in-house resources to obtain the required quotes and maintain the recordkeeping systems necessary to meet the requirements of the exemption; and
- A combination of personnel will perform the tasks associated with the ICRs at an hourly wage rate of $125.95 for a financial manager, $30.42 for clerical personnel, $79.67 for an IT professional, and $129.94 for a legal professional.[24]

Obtaining Quotes

In order to engage in principal transactions, Section III(d) of the proposed class exemption requires financial institutions to obtain two price quotes from unaffiliated parties in agency transactions. The Department estimates that ten percent of defined benefit (DB) plans that obtain investment advice from fiduciaries will engage in principal transactions. These plans are assumed to engage in one transaction per year requiring a total of approximately 2,000 quotes annually. Similarly, the Department estimates that ten percent of defined contribution (DC) plans that do not allow participants to direct investments that obtain investment advice from fiduciaries will engage in principal transactions. These plans are assumed to engage in one transaction per year requiring a total of approximately 6,000 quotes annually. The Department estimates that one percent of DC plan participants, who direct their own investments and obtain investment advice from fiduciaries, will engage in 12 principal transactions annually (one per month) requiring approximately 261,000 quotes. Finally, the Department estimates that ten percent of IRA owners who obtain investment advice from fiduciaries will engage in principal transactions. They are assumed to engage in one transaction per year requiring a total of approximately 4 million quotes annually.

Overall, the terms of this exemption will result in financial institutions and advisers obtaining approximately 4.3 million quotes per year. The Department assumes that a financial manager will spend five minutes to obtain the quotes. Therefore, obtaining quotes will produce approximately 359,000 hours of burden annually at an equivalent cost of $45.2 million.

Contract

In order to engage in principal transactions under this proposed class exemption, Section II requires financial institutions and advisers to enter into a written contract with retirement investors affirmatively stating that the financial institution and adviser are fiduciaries under ERISA or the Code with respect to recommendations regarding principal transactions, and that the financial institution and adviser will act in the best interest of the retirement investor.

The Department assumes that financial institutions already maintain contracts with their clients. Drafting the contractual provisions required by Section II and inserting them into the existing contracts will require 24 hours of legal time during the first year that the financial institution uses the class exemption. This legal work results in approximately 67,000 hours of burden during the first year and approximately 5,000 hours of burden during subsequent years at an equivalent cost of $8.7 million and $699,000 respectively.

Because the Department assumes that financial institutions already maintain contracts with their clients, the required contractual provisions will not require any additional costs for production or distribution.

Disclosures and Statement

The conditions of this PTE require the financial institution and adviser to make certain disclosures to the retirement investor. These disclosures include the two price quotes obtained from unaffiliated parties in agency transactions, other available pre-transaction pricing information, as well as the mark-up/mark-down to be charged, and an annual statement describing all transactions made during the year. The quotes and pre-transaction pricing and mark-up disclosures may be made orally or in writing. The Department assumes that all financial institutions and advisers will use the oral option at no additional burden.

The Department estimates that 2 million plans and IRAs will receive a one-page annual statement. DB and DC plans that do not allow participants to direct investments will receive the statement electronically at de minimis cost. The statement will be distributed electronically to 38 percent of the 11,000 DC plan participants and 50 percent of 2 million IRA holders at de minimis cost. Paper statements will be mailed to 62 percent of DC plan participants and 50 percent of IRA owners. The Department estimates that electronic distribution will result in de minimis cost, while paper distribution will cost approximately $548,000. Paper distribution will also require two minutes of clerical time to print and mail the statement, resulting in 34,000 hours at an equivalent cost of $1 million annually.

Confirmation

The conditions of this PTE require the financial institution to provide a confirmation notice upon completion of each transaction. The Department believes that providing confirmation notices is a regular and customary business practice, and therefore no additional burden is imposed by this requirement.

Recordkeeping Requirement

Section V of the class exemption requires the financial institution to maintain or cause to be maintained for six years and disclosed upon request the records necessary for the Department, Internal Revenue Service, plan fiduciary, contributing employer or

[23] As described in the regulatory impact analysis for the accompanying rule, the Department estimates that approximately 2,619 broker-dealers service the retirement market. The Department anticipates that the exemption will be used primarily, but not exclusively, by broker-dealers. Further, the Department assumes that all broker-dealers servicing the retirement market will use the exemption. Beyond the 2,619 broker-dealers, the Department estimates that almost 200 other financial institutions will use the exemption.

[24] The Department's estimated 2015 hourly labor rates include wages, other benefits, and overhead, and are calculated as follows: Mean wage from the 2013 National Occupational Employment Survey (April 2014, Bureau of Labor Statistics *http://www.bls.gov/news.release/pdf/ocwage.pdf*); wages as a percent of total compensation from the Employer Cost for Employee Compensation (June 2014, Bureau of Labor Statistics *http://www.bls.gov/news.release/ecec.t02.htm*); overhead as a multiple of compensation is assumed to be 25 percent of total compensation for paraprofessionals, 20 percent of compensation for clerical, and 35 percent of compensation for professional; annual inflation assumed to be 2.3 percent annual growth of total labor cost since 2013 (Employment Costs Index data for private industry, September 2014 *http://www.bls.gov/news.release/eci.nr0.htm*).

employee organization whose members are covered by the plan, participants, beneficiaries and IRA owners to determine whether the conditions of this exemption have been met in a manner that is accessible for audit and examination.

The Department assumes that each financial institution will maintain these records in the normal course of business. Therefore, the Department has estimated that the additional time needed to maintain records consistent with the exemption will only require about one-half hour, on average, annually for a financial manager to organize and collate the documents or else draft a notice explaining that the information is exempt from disclosure, and an additional 15 minutes of clerical time to make the documents available for inspection during normal business hours or prepare the paper notice explaining that the information is exempt from disclosure. Thus, the Department estimates that a total of 45 minutes of professional time per firm would be required for a total hour burden of 2,100 hours at an equivalent cost of $198,000.

In connection with this recordkeeping and disclosure requirements discussed above, Section V(b)(2) and (3) provides that financial institutions relying on the exemption do not have to disclose trade secrets or other confidential information to members of the public (*i.e.,* plan fiduciaries, contributing employers or employee organizations whose members are covered by the plan, participants and beneficiaries and IRA owners), but that in the event they refuse to disclose information on this basis, they must provide a written notice to the requester advising of the reasons for the refusal and advising that the Department may request such information. The Department's experience indicates that this provision is not commonly invoked, and therefore, the written notice is rarely, if ever, generated. Therefore, the Department believes the cost burden associated with this clause is de minimis. No other cost burden exists with respect to recordkeeping.

IT Costs

The Department estimates that updating computer systems to insert the contract provisions into existing contracts, maintain the required records, and insert the required markup information into existing confirmation notices will require eight hours of IT staff time during the first year that the financial institution uses the PTE. This IT work results in approximately 22,000 hours of burden during the first year and approximately 1,800 hours of burden during subsequent years at an equivalent cost of $1.8 million and $142,000 respectively.

Overall Summary

Overall, the Department estimates that in order to meet the conditions of this class exemption, financial institutions and advisers will obtain approximately 4.3 million price quotes and distribute an additional 2 million statements annually. Obtaining these quotes, distributing statements, adjusting contracts, and maintaining records that the conditions of the exemption have been fulfilled will result in a total of 484,000 hours of burden during the first year and 402,000 hours of burden in subsequent years. The equivalent cost of this burden is $51.1million during the first year and $47.2 million in subsequent years. This exemption will result in a materials and postage cost burden of $548,000 annually.

These paperwork burden estimates are summarized as follows:

Type of Review: New collection (Request for new OMB Control Number).

Agency: Employee Benefits Security Administration, Department of Labor.

Titles: (1) Proposed Exemption for Principal Transactions in Certain Debt Securities between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs and (2) Proposed Investment Advice Regulation.

OMB Control Number: 1210–NEW.

Affected Public: Business or other for-profit.

Estimated Number of Respondents: 2,800.

Estimated Number of Annual Responses: 6,333,921.

Frequency of Response: When engaging in exempted transaction; Annually.

Estimated Total Annual Burden Hours: 484,072 hours during the first year, 401,643 in subsequent years.

Estimated Total Annual Burden Cost: $548,079.

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under ERISA section 408(a) and Code section 4975(c)(2) does not relieve a fiduciary or other party in interest or disqualified person with respect to a plan or IRA from certain other provisions of ERISA and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of ERISA section 404 which require, where applicable, among other things, that a fiduciary discharge his or her duties respecting the plan solely in the interests of the plan's participants and beneficiaries and in a prudent fashion in accordance with ERISA section 404(a)(1)(B);

(2) If granted, this class exemption does not extend to transactions prohibited under ERISA section 406(a)(1)(B) and (C), ERISA section 406(b)(3) and Code section 4975(c)(1)(B), (C), and (F);

(3) Before a class exemption may be granted under ERISA section 408(a) and Code section 4975(c)(2), the Department must find that the class exemption is administratively feasible, in the interests of plans and their participants and beneficiaries and IRA owners, and protective of the rights of the plan's participants and beneficiaries and IRA owners;

(4) If granted, this class exemption will be applicable to a particular transaction only if the transaction satisfies the conditions specified in the class exemption; and

(5) If granted, this class exemption will be 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.

Proposed Exemption

The Department is proposing the following exemption under the authority of ERISA section 408(a) and Code section 4975(c)(2), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, October 27, 2011).[25]

Section I—Exemption

(a) *In general.* ERISA and the Internal Revenue Code prohibit fiduciary advisers to employee benefit plans (Plans) and individual retirement plans (IRAs) from self-dealing, including receiving compensation that varies based on their investment recommendations. ERISA and the Code also prohibit fiduciaries from engaging in securities purchases and sales with Plans or IRAs on behalf of their own accounts (Principal Transactions). This exemption permits certain persons who provide investment advice to Retirement Investors (*i.e.,* fiduciaries of Plans, Plan participants or beneficiaries,

[25] For purposes of this proposed exemption, references to ERISA should be read to refer as well to the corresponding provisions of the Code.

or IRA owners) to engage in certain Principal Transactions as described below.

(b) *Exemption for Certain Principal Transactions.* This exemption permits an Adviser or Financial Institution to engage in the purchase or sale of a Debt Security in a Principal Transaction with a Plan, participant or beneficiary account, or IRA, and receive a mark-up, mark-down or other payment for themselves or any Affiliate, as a result of the Adviser's and Financial Institution's advice. As detailed below, parties seeking to rely on the exemption must contractually acknowledge fiduciary status, agree to adhere to Impartial Conduct Standards in rendering advice, disclose Material Conflicts of Interest associated with Principal Transactions and obtain the prospective written consent of the Plan or IRA; warrant that they have adopted policies and procedures designed to mitigate the dangers posed by Material Conflicts of Interest; disclose important information about the cost of the security in the Principal Transaction and retain certain records. This exemption provides relief from ERISA section 406(a)(1)(A) and (D) and 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), (D), and (E). The Adviser and Financial Institution must comply with the conditions of Sections II–V.

(c) *Scope of this exemption:* This exemption does not apply if:

(1) The Adviser: (i) Exercises any discretionary authority or discretionary control respecting management of the assets of the Plan or IRA involved in the transaction or exercises any discretionary authority or control respecting management or the disposition of the assets; or (ii) has any discretionary authority or discretionary responsibility in the administration of the Plan or IRA; or

(2) The Plan is covered by Title I of ERISA and (i) the Adviser, Financial Institution or any Affiliate is the employer of employees covered by the Plan, or (ii) the Adviser or Financial Institution is a named fiduciary or plan administrator (as defined in ERISA section 3(16)(A)) with respect to the Plan, or an affiliate thereof, that was selected to provide investment advice to the plan by a fiduciary who is not Independent.

Section II—Contract, Impartial Conduct, and Other Requirements

(a) *Contract.* Prior to engaging in the Principal Transaction, the Adviser and Financial Institution enter into a written contract with the Retirement Investor, acting on behalf of the Plan, participant or beneficiary account, or IRA, that incorporates the terms required by Section II(b)–(e).

(b) *Fiduciary.* The written contract affirmatively states that the Adviser and Financial Institution are fiduciaries under ERISA or the Code, or both, with respect to any investment recommendation to the Retirement Investor regarding Principal Transactions.

(c) *Impartial Conduct Standards.* The Adviser and Financial Institution affirmatively agree to, and comply with, the following:

(1) When providing investment advice to a Retirement Investor regarding the Principal Transaction, the Adviser and Financial Institution will provide investment advice that is in the Best Interest of the Retirement Investor (*i.e.,* advice that reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, without regard to the financial or other interests of the Adviser, Financial Institution, or any Affiliate or other party);

(2) The Adviser and Financial Institution will not enter into a Principal Transaction with the Plan, participant or beneficiary account, or IRA if the purchase or sales price of the Debt Security (including the mark-up or mark-down) is unreasonable under the circumstances; and

(3) The Adviser's and Financial Institution's statements about the Debt Security, fees, Material Conflicts of Interest, the Principal Transaction, and any other matters relevant to a Retirement Investor's investment decision in the Debt Security, are not misleading.

(d) *Warranty.* The Adviser and Financial Institution affirmatively warrant the following:

(1) The Adviser, Financial Institution and Affiliates will comply with all applicable federal and state laws regarding the rendering of the investment advice and the purchase and sale of the Debt Security;

(2) The Financial Institution has adopted written policies and procedures reasonably designed to mitigate the impact of Material Conflicts of Interest and to ensure that its individual Advisers adhere to the Impartial Conduct Standards set forth in Section II(c);

(3) In formulating its policies and procedures, the Financial Institution has specifically identified Material Conflicts of Interest and adopted measures to prevent the Material Conflicts of Interest from causing violations of the Impartial Conduct Standards set forth in Section II(c); and

(4) Neither the Financial Institution nor (to the best of its knowledge) any Affiliate uses quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differentiated compensation or other actions or incentives to the extent they would tend to encourage individual Advisers to make recommendations regarding Principal Transactions that are not in the Best Interest of the Retirement Investor.

(e) *Principal Transaction Disclosures.* The written contract must specifically:

(1) Set forth in writing (i) the circumstances under which the Adviser and Financial Institution may engage in Principal Transactions with the Plan, participant or beneficiary account, or IRA and (ii) identify and disclose the Material Conflicts of Interest associated with Principal Transactions;

(2) Document the Retirement Investor's affirmative written consent, on a prospective basis, to Principal Transactions between the Adviser or Financial Institution and the Plan, participant or beneficiary account, or IRA; and

(3) Inform the Retirement Investor (i) that the consent set forth in Section II(e)(2) is terminable at will by the Retirement Investor at any time, without penalty to the Plan or IRA, and (ii) of the right to obtain complete information about all the fees and other payments currently associated with its investments.

(f) *Prohibited Contractual Provisions.* The written contract shall not contain the following:

(1) Exculpatory provisions disclaiming or otherwise limiting liability of the Adviser or Financial Institution for a violation of the contract's terms; and

(2) A provision under which the Plan, IRA or the Retirement Investor waives or qualifies its right to bring or participate in a class action or other representative action in court in a dispute with the Adviser or Financial Institution.

Section III—General Conditions

(a) *Debt Security.* The Debt Security being purchased or sold:

(1) Was not issued by the Financial Institution or any Affiliate;

(2) Is not purchased by the Plan, participant or beneficiary account, or IRA in an underwriting or underwriting syndicate in which the Financial

Institution or any Affiliate is the underwriter or a member;

(3) Possesses no greater than a moderate credit risk; and

(4) Is sufficiently liquid that the Debt Security could be sold at or near its fair market value within a reasonably short period of time.

(b) *Arrangement.* The Principal Transaction is not part of an agreement, arrangement, or understanding designed to evade compliance with ERISA or the Code, or to otherwise impact the value of the Debt Security.

(c) *Cash.* The purchase or sale of the Debt Security is for cash.

(d) *Pricing.* The purchase or sale of the Debt Security is executed at a price that:

(1) The Adviser and Financial Institution reasonably believe is at least as favorable to the Plan, participant or beneficiary account, or IRA than the price available to the Plan, participant or beneficiary account, or IRA in a transaction that is not a Principal Transaction; and

(2) Is at least as favorable to the Plan, participant or beneficiary account, or IRA as the contemporaneous price for the Debt Security, or a similar security if a price is not available with respect to the same Debt Security, offered by two ready and willing counterparties that are not Affiliates.

When comparing the price offered by the counterparties referred to in (2), the Adviser and Financial Institution may take into account a commission as part of the resulting price to the Plan, participant or beneficiary account, or IRA, as compared to the price of the Debt Security, including any mark-up or mark-down.

Section IV—Disclosure Requirements

(a) *Pre-Transaction Disclosure.* Prior to engaging in the Principal Transaction, the Adviser or Financial Institution provides the following, orally or in writing, to the Retirement Investor:

(1) A statement that the purchase or sale of the Debt Security will be executed as a Principal Transaction between the Adviser or Financial Institution and the Plan, participant or beneficiary account, or IRA; and

(2) Any available pricing information regarding the Debt Security, including the two quotes obtained pursuant to Section III(d). The mark-up or mark-down or other payment that will be charged also must be disclosed.

(b) *Confirmation.* The Financial Institution provides a written confirmation of the Principal Transaction in accordance with Rule 10b–10 under the Securities Exchange Act of 1934 that also includes disclosure of the mark-up, mark-down, or other payment to the Adviser, Financial Institution or Affiliate in connection with the Principal Transaction.

(c) *Annual Disclosure.* The Adviser or Financial Institution provides the following written information to the Retirement Investor, annually, within 45 days of the end of the applicable year, in a single disclosure:

(1) A list identifying each Principal Transaction engaged in during the applicable period, the prevailing market price at which the Debt Security was purchased or sold, and the applicable mark-up or mark-down or other payment for each Debt Security; and

(2) A statement that the consent required pursuant to Section II(e)(2) is terminable at will, without penalty to the Plan or IRA.

(d) *Upon Request.* Upon the Retirement Investor's reasonable request, prior to or following the completion of a Principal Transaction, the Adviser or Financial Institution must provide the Retirement Investor with additional information regarding the Debt Security and its purchase or sale; provided that such request may not relate to a Principal Transaction that was executed more than six (6) years from the date of the request.

Section V—Recordkeeping

(a) The Financial Institution maintains for a period of six (6) years from the date of each Principal Transaction the records necessary to enable the persons described in Section V(b) to determine whether the conditions of this exemption have been met, except that:

(1) If such records are lost or destroyed, due to circumstances beyond the control of the Financial Institution, then no prohibited transaction will be considered to have occurred solely on the basis of the unavailability of those records; and

(2) No party other than the Financial Institution that is engaging in the Principal Transaction shall be subject to the civil penalty that may be assessed under ERISA section 502(i) or to the taxes imposed by Code sections 4975(a) and (b) if the records are not maintained or are not available for examination as required by Section V(b).

(b)

(1) Except as provided in Section V(b)(2) and notwithstanding any provisions of ERISA sections 504(a)(2) and 504(b), the records referred to in Section V(a) are unconditionally available at their customary location for examination during normal business hours by:

(i) Any duly authorized employee or representative of the Department or the Internal Revenue Service;

(ii) any fiduciary of the Plan or IRA that was a party to a Principal Transaction described in this exemption, or any duly authorized employee or representative of such fiduciary;

(iii) any employer of participants and beneficiaries and any employee organization whose members are covered by the Plan, or any authorized employee or representative of these entities; and

(iv) any participant or beneficiary of the Plan, or the beneficial owner of an IRA.

(2) None of the persons described in subparagraph (1)(ii) through (iv) are authorized to examine trade secrets of the Financial Institution, or commercial or financial information which is privileged or confidential; and

(3) Should the Financial Institution refuse to disclose information on the basis that such information is exempt from disclosure, the Financial Institution must by the close of the thirtieth (30th) day following the request, provide a written notice advising the requestor of the reasons for the refusal and that the Department may request such information.

Section VI—Definitions

(a) ''Adviser'' means an individual who:

(1) Is a fiduciary of a Plan or IRA solely by reason of the provision of investment advice described in ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B), or both, and the applicable regulations, with respect to the Assets involved in the transaction;

(2) Is an employee, independent contractor, agent, or registered representative of a Financial Institution; and

(3) Satisfies the applicable banking, and securities laws with respect to the covered transaction.

(b) ''Affiliate'' of an Adviser or Financial Institution mean:

(1) Any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the Adviser or Financial Institution. For this purpose, the term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual;

(2) Any officer, director, employee, relative (as defined in ERISA section 3(15)) or member of family (as defined in Code section 4975(e)(6)), agent or registered representative of, or partner

in the Adviser or Financial Institution; and

(3) Any corporation or partnership of which the Adviser or Financial Institution is an officer, director, or employee, or in which the Adviser or Financial Institution is a partner.

(c) Investment advice is in the ''Best Interest'' of the Retirement Investor when the Adviser and Financial Institution providing the advice act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, without regard to the financial or other interests of the Adviser, Financial Institution, any Affiliate or other party.

(d) ''Debt Security'' means a ''debt security'' as defined in Rule 10b–10(d)(4) of the Exchange Act that is:

(1) U.S. dollar denominated, issued by a U.S. corporation and offered pursuant to a registration statement under the Securities Act of 1933;

(2) An ''Agency Debt Security'' as defined in FINRA Rule 6710(l) or its successor; or

(3) A ''U.S. Treasury Security'' as defined in FINRA Rule 6710(p) or its successor.

(e) ''Financial Institution'' means the entity that (i) employs the Adviser or otherwise retains such individual as an independent contractor, agent or registered representative, and (ii) customarily purchases or sells Debt Securities for its own account in the ordinary course of its business, and that is:

(1) Registered as an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 *et seq.*) or under the laws of the state in which the adviser maintains its principal office and place of business;

(2) A bank or similar financial institution supervised by the United States or state, or a savings association (as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1))), but only if the advice resulting in the compensation is provided through a trust department of the bank or similar financial institution or savings association which is subject to periodic examination and review by federal or state banking authorities; and

(3) A broker or dealer registered under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*).

(f) ''Independent'' means a person that:

(1) Is not the Adviser or Financial Institution or an Affiliate;

(2) Does not receive compensation or other consideration for his or her own account from the Adviser, Financial Institution or an Affiliate; and

(3) Does not have a relationship to or an interest in the Adviser, Financial Institution or an Affiliate that might affect the exercise of the person's best judgment in connection with transactions described in this exemption.

(g) ''Individual Retirement Account'' or ''IRA'' means any trust, account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in Code section 408(a) and a health savings account described in Code section 223(d).

(h) A ''Material Conflict of Interest'' exists when an Adviser or Financial Institution has a financial interest that could affect the exercise of its best judgment as a fiduciary in rendering advice to a Retirement Investor regarding Principal Transactions.

(i) ''Plan'' means an employee benefit plan described in ERISA section 3(3) and any plan described in Code section 4975(e)(1)(A).

(j) ''Principal Transaction'' means a purchase or sale of a Debt Security where an Adviser or Financial Institution is purchasing from or selling to a Plan, participant or beneficiary account, or IRA on behalf of the Financial Institution's own account or the account of a person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the Financial Institution.

(k) ''Retirement Investor'' means:

(1) A fiduciary of a non-participant directed Plan subject to Title I of ERISA with authority to make investment decisions for the Plan;

(2) A participant or beneficiary of a Plan subject to Title I of ERISA with authority to direct the investment of assets in his or her Plan account or to take a distribution; or

(3) The beneficial owner of an IRA acting on behalf of the IRA.

Signed at Washington, DC, this 14th day of April, 2015.

Phyllis C. Borzi,

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

[FR Doc. 2015–08833 Filed 4–15–15; 11:15 am]

BILLING CODE 4510–29–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

[Application Number D–11687]

ZRIN 1210–ZA25

Proposed Amendment to Prohibited Transaction Exemption (PTE) 75–1, Part V, Exemptions From Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers and Banks

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

ACTION: Notice of Proposed Amendment to PTE 75–1, Part V.

SUMMARY: This document contains a notice of pendency before the Department of Labor of a proposed amendment to PTE 75–1, Part V, a class exemption from certain prohibited transactions provisions of the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (the Code). The provisions at issue generally prohibit fiduciaries of employee benefit plans and individual retirement accounts (IRAs), from lending money or otherwise extending credit to the plans and IRAs and receiving compensation in return. PTE 75–1, Part V, permits the extension of credit to a plan or IRA by a broker-dealer in connection with the purchase or sale of securities; however, it does not permit the receipt of compensation for an extension of credit by broker-dealers that are fiduciaries with respect to the assets involved in the transaction. The amendment proposed in this notice would permit investment advice fiduciaries to receive compensation when they extend credit to plans and IRAs to avoid a failed securities transaction. The proposed amendment would affect participants and beneficiaries of plans, IRA owners, and fiduciaries with respect to such plans and IRAs.

DATES: *Comments:* Written comments concerning the proposed class exemption must be received by the Department on or before July 6, 2015.

Applicability: The Department proposes to make this amendment applicable eight months after publication of the final amendment in the **Federal Register**.

ADDRESSES: All written comments concerning the proposed amendment to the class exemption should be sent to