4510-29-P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

[Application No. D-12060]

ZRIN 1210-ZA33

Amendment to Prohibited Transaction Exemption 84-24

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

ACTION: Amendment to Prohibited Transaction Exemption 84-24.

SUMMARY: This document contains a notice of 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 amendment affects participants and beneficiaries of plans, individual retirement account (IRA) owners, and certain fiduciaries of plans and IRAs.

DATES: The amendment is effective [INSERT DATE THAT IS 150 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Susan Wilker, (202) 693-8540 (not a toll-free number), Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor.

SUPPLEMENTARY INFORMATION:

Background

The Employee Retirement Income Security Act of 1974 (ERISA) provides, in relevant part, that a person is a fiduciary with respect to a plan to the extent they render 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. Title I of the ERISA (referred to herein as Title I), which generally applies to employer-sponsored plans, includes this provision in ERISA section 3(21)(A)(ii).[1] ERISA's Title II (referred to herein as the Code), includes a parallel provision in Code section 4975(e)(3)(B), which defines a fiduciary of a tax-qualified plan, including individual retirement accounts (IRAs).

In addition to fiduciary obligations, ERISA and the Code "categorically bar[]" plan fiduciaries from engaging in transactions deemed "likely to injure the pension plan."[2] These prohibitions broadly forbid a fiduciary from "deal[ing] with the assets of the plan in his own interest or for his own account," and "receiv[ing] any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan."[3] Congress also gave the Department of Labor (the Department) authority to grant conditional administrative exemptions from the prohibited transaction provisions, but only if the Department finds that the exemption is (1) administratively feasible for the Department, (2) in the interests of the plan and of its

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[1] Section 3(21)(A)(ii) of the Act is codified at 29 U.S.C. 1002(3)(21)(A)(ii). As noted above, Title I of the Act was codified in Title 29 of the U.S. Code. As a matter of practice, this preamble refers to the codified provisions in Title I by reference to the sections of ERISA, as amended, and not by its numbering in the U.S. Code.

[2] *Harris Trust Sav. Bank* v. *Salomon Smith Barney Inc.,* 530 U.S. 238, 241–42 (2000) (citation and quotation marks omitted).

[3] ERISA section 406(b)(1), (3), 29 U.S.C. 1106(b)(1), (3).

participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries of such plan.[4]

On October 31, 2023, the Department released the proposed Retirement Security Rule: Definition of an Investment Advice Fiduciary, along with proposed amendments to PTE 2020-02 and other administrative prohibited transaction exemptions available to investment advice fiduciaries.[5] The proposed rule was designed to ensure that the protections established by Titles I and II of ERISA would uniformly apply to all advice that Retirement Investors (receive concerning investment of their retirement assets in a way that ensures that Retirement Investors' reasonable expectations are honored when they receive advice from financial professionals who hold themselves out as trusted advice providers (Retirement Investors are defined to include Plans, Plan participants and beneficiaries, IRAs, IRA owners and beneficiaries, Plan fiduciaries within the meaning of ERISA section (3)(21)(A)(i) or (iii) and Code section 4975(e)(3)(A) or (C) with respect to the Plan, or IRA fiduciaries within the meaning of Code section 4975(e)(3)(A) or (C) with respect to the IRA).

At the same time, the Department released the proposed amendment to PTE 84-24 (the Proposed Amendment) and invited all interested persons to submit written comments.[6] The Department also proposed amendments to PTEs 75-1, 77-4, 80-83, 83-1, 86-128, and 2020-02.

[4] ERISA section 408(a), 29 U.S.C. 1108(a). Under the Reorganization Plan No. 4 of 1978, which Congress subsequently ratified in 1984, Sec. 1, Pub. L. 98-532, 98 Stat. 2705 (Oct. 19, 1984), Congress generally granted the Department authority to interpret the fiduciary definition and issue administrative exemptions from the prohibited transaction provisions in Code section 4975. 5 U.S.C. App. (2018).
[5] The proposals were released on the Department's website on October 31, 2023. They were published in the *Federal Register* on November 3, 2023, at 88 FR 75890, 88 FR 75979, 88 FR 76004, and 88 FR 76032.
[6] The Proposed Amendment was released on October 31, 2023, and was published in the *Federal Register* on November 3, 2023. 88 FR 75979.

The Department received written comments on the Proposed Amendment, and on December 12 and 13, 2023, held a virtual public hearing at which witnesses provided commentary on the Proposed Amendment. After carefully considering the comments it received and the testimony presented at the hearing, including representations Insurers have made to the Department regarding impediments they have confronted in complying with the current conditions of PTE 2020-02 when distributing annuities through independent agents (Independent Producers), the Department is granting this amendment to PTE 84-24 as provided herein (the "Final Amendment") on its own motion pursuant to its authority under ERISA section 408(a) and Code section 4975(c)(2) and in accordance with its exemption procedures set forth in 29 CFR part 2570, Subpart B (76 FR 66637 (October 27, 2011)).[7] Elsewhere in this edition of the *Federal Register*, the Department is finalizing (1) its proposed rule defining when a person renders "investment advice for a fee or other compensation, direct or indirect" with respect to any moneys or other property of an employee benefit plan for purposes of the definition of a "fiduciary" in ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) (the "Regulation"), and (2) amendments to several existing prohibited transaction exemptions (PTEs)—namely PTEs 75-1, 77-4, 80-83, 83-1, 86-128, and 2020-02—that apply to the provision of fiduciary investment advice.

PTE 2020-02

As described elsewhere in this edition of the *Federal Register*, the Department is also adopting amendments to PTE 2020-02. That exemption remains generally available

[7] Reorganization Plan No. 4 of 1978 (5 U.S.C. App. 1 (2018)) generally transferred the authority of the Secretary of the Treasury to grant administrative exemptions under Code section 4975 to the Secretary of Labor. Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications were amended effective April 8, 2024 (29 CFR part 2570, Subpart B (89 FR 4662 (January 24, 2024)).

for all investment advice, including recommendations of insurance products. The Department maintains its long-held position that insurance companies can effectively exercise fiduciary oversight with respect to Independent Producers' recommendations of the insurance company's own products under PTE 2020-02. PTE 2020-02 offers a broad, flexible, and principles-based approach that applies across different financial sectors and business models and provides relief for multiple categories of financial institutions and investment professionals, including insurance companies selling their products through Independent Producers. As fully discussed below, however, the Department is amending PTE 84–24 to provide a specially tailored, alternative exemption allowing an Independent Producer to receive commissions from an insurance company with respect to annuity recommendations of the insurance company's products.

Comments and Overview of the Amendment to PTE 84-24

Overview of Amended Exemption

The Department is amending PTE 84-24 to exclude sales and compensation received as a result of providing investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder from the existing relief provided in Section II, which the Department has redesignated as Section II(a). The amendment adds new Section II(b), which provides relief from the restrictions of ERISA sections 406(a)(1)(A), (D) and 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(A), (D), (E) and (F) for Independent Producers that provide fiduciary investment advice and engage in the following transactions, including as part of a rollover, as a result of providing investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder:

(1) The receipt, directly or indirectly, by an Independent Producer of reasonable compensation; and

(2) the sale of a non-security annuity contract or other insurance product that does not meet the definition of "security" under Federal securities laws.

The exemption is subject to certain conditions. These conditions are similar to the conditions contained in amended PTE 2020-02, but the Department has tailored the conditions to protect Retirement Investors from the specific conflicts that can arise when Independent Producers that are compensated through commissions and other compensation provide investment advice to Retirement Investors regarding the purchase of an annuity. The amended exemption includes an eligibility provision in Section VIII for investment advice transactions and a new recordkeeping condition in Section IX that is similar to the recordkeeping provision in PTE 2020-02.

The Department's Role Related to the Sale of Insurance Products to Retirement Investors

Several commenters raised concerns with the Department's approach to amending PTE 84-24 and insurance recommendations more generally. Some commenters argued that the Federal Government should not be regulating the sales of insurance products. They argued that the McCarran-Ferguson Act assigns to the States, not the Federal Government, primary authority to regulate the business of insurance. Furthermore, several commenters pointed out that many States have adopted the 2020 National Association of Insurance Commissioners (NAIC) Suitability In Annuity Transactions

Model Regulation 275 (the NAIC Model Regulation), which imposes a "best interest" standard on insurance producers. Some commenters argued that the Department should rely entirely on the NAIC Model Regulation instead of relying on the specific standards in ERISA and the Code.

However, many of these same commenters also noted that Insurers have long relied on the relief provided in PTE 84-24, thereby implicitly acknowledging that the Department has long regulated the business of insurance with respect to the sale of insurance products to Retirement Investors. ERISA and the Code broadly regulate Plan and IRA investments, including investments in insurance. As the Supreme Court held in *Hancock v. Harris Trust*,[8] Congress enacted ERISA with the broad purpose of protecting retirement benefits, including benefits supported by insurance contracts. During the more than 45 years that has passed since the Department issued PTE 77-9, the predecessor to PTE 84-24, it has consistently imposed conditions on insurance companies and agents receiving commissions and other compensation that would otherwise be prohibited under ERISA. Indeed, the interaction between the NAIC Model Regulation and the fiduciary protections under Title I and Title II of ERISA is explicitly recognized in the NAIC Model Regulation's safe harbor, which provides that recommendations and sales of annuities in compliance with comparable standards to the NAIC Model Regulation satisfy its requirements, including those applicable to fiduciaries under ERISA section 3(21) and Code section 4975(e)(3).[9]

[8] *See John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 96 (1993) (noting ERISA's "broadly protective purposes" regarding retirement benefits and that fiduciary status applies to "persons whose actions affect the amount of benefits retirement plan participants will receive").
[9] NAIC Model Regulation at section 6.E.4.c.

In recent years, many States have increased investor protections with respect to recommendations to purchase annuities. These increased protections reflect a recognition by the States of the increased importance of ensuring that investors receive sound investment advice, as insurance products have grown in complexity and individuals have increasingly become dependent upon receiving sound advice from investment professionals, including insurance agents. The amendments to this exemption and related amendments to PTE 2020-02 supplement those State-law protections by ensuring that trusted professionals' recommendations of insurance products to Retirement Investors are subject to the same stringent standards of conduct that apply to recommendations of other investment products.

Titles I and II of ERISA reflect a strong Federal interest in the regulation and protection of retirement investments and Retirement Investors. Critical to this Federal regulatory system are the prohibited transaction provisions, which preclude fiduciaries from engaging in a wide range of conflicted transactions with Retirement Investors, unless there is an applicable statutory exemption or the Department grants an administrative exemption with protective conditions carefully designed to protect Retirement Investors from injury associated with unregulated conflicts of interest. As compared to State insurance law, ERISA and the Code place greater emphasis on the stringent regulation of conflicts of interest and impose fiduciary obligations on persons who engage in important activities related to investment management or advice. PTE 84-24, together with PTE 2020-02, reflects the Department's independent statutory authority and obligation under ERISA section 408(a) and Code section 4975(c)(2) to ensure that it only grants exemptive relief for prohibited transactions that is protective of the rights of plan participants and beneficiaries and in their interests. The Department is finalizing this amendment consistent with its statutory obligation.

Taken together, amended PTE 84-24 and PTE 2020-02 ensure that when trusted advisers,[10] including Independent Producers, recommend insurance products to Retirement Investors, they will adhere to fundamental standards of fiduciary conduct subject to supervision by a responsible financial institution. Under the core standards of both amended exemptions investment professionals advice must:

- acknowledge their fiduciary status[11] in writing to the Retirement Investor;
- disclose their services and material conflicts of interest to the Retirement Investor;
- adhere to Impartial Conduct Standards requiring them to:
    - investigate and evaluate investments, provide advice, and exercise sound judgment in the same way that knowledgeable and impartial professionals would in similar circumstances (the “Care Obligation”);
    - never place their own interests ahead of the Retirement Investor’s interest or subordinate the Retirement Investor’s interests to their own (the “Loyalty Obligation”);
    - charge no more than reasonable compensation and, if applicable, comply with Federal securities laws regarding “best execution”; and

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[10] When using the term “adviser,” the Department does not refer only to investment advisers registered under the Investment Advisers Act of 1940 or under state law, but rather to any person rendering fiduciary investment advice under the Regulation. For example, as used herein, an adviser can be an individual who is, among other things, a representative of a registered investment adviser, a bank or similar financial institution, an insurance company, or a broker-dealer.

[11] For purposes of this disclosure, and throughout the exemption, the term “fiduciary status” is limited to fiduciary status under Title I of ERISA, the Code, or both. While this exemption uses some of the same terms that are used in the SEC’s Regulation Best Interest and/or in the Investment Advisers Act of 1940 and related interpretive materials issued by the SEC or its staff, the Department retains interpretive authority with respect to satisfaction of this exemption.

    - avoid making misleading statements about investment transactions and other relevant matters;
- adopt firm-level policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards and mitigate conflicts of interest that could otherwise cause violations of those standards;
- document and disclose the specific reasons for any rollover recommendations; and
- conduct an annual retrospective compliance review.

As discussed in greater detail below, the Department has concluded that amended PTEs 84-24 and 2020-02 flexible and workable exemptions that provide a sound and uniform framework for financial institutions and investment professionals to provide fiduciary investment advice to Retirement Investors. Taken together, these amended exemptions are broadly available for fiduciary investment advice, without regard to business model, fee structure, or type of product recommended, subject to financial institutions' and investment professionals' compliance with the fundamental standards for the protection of Retirement Investors set forth above. To the extent the terms of the exemptions are honored, Retirement Investors will benefit from the application of a common standard, applicable to all fiduciary recommendations to Retirement Investors, that ensures prudent and loyal investment recommendations from fiduciary investment advice providers competing on a level playing field that is protective of Retirement Investors. The chief difference between amended PTEs 2020-02 and 84-24, as discussed below, is that the Department amended PTE 84-24 to provide a pathway to compliance with the prohibited transaction rules for Independent Producers who recommend the products of multiple Insurers to Retirement Investors, without requiring those Insurers to assume or acknowledge their fiduciary status under ERISA and the Code.

Applicability Date

This Final Amendment is applicable to transactions pursuant to investment advice provided on or after [INSERT DATE THAT IS 150 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER] (the "Applicability Date"). For transactions pursuant to investment advice provided before the Applicability Date, the prior version of PTE 84-24 will remain available for all insurance agents and insurance companies that currently rely on the exemption. [12] Also, no party would be held to the amended conditions in Sections VII, VIII, IX or XI for a transaction that occurred before the Applicability Date of the amended exemption.

Several commenters stated that the Proposed Amendment's Applicability Date, which was set for 60 days after publication, did not provide sufficient time for parties to fully comply with the new conditions for receipt of reasonable compensation for investment advice. In response to these comments, the Department is adding a new Section XI, which provides a phase-in period for the one-year period beginning [INSERT DATE THAT IS 150 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]. Thus, an Independent Producer may receive compensation under Section II(b) during the phase-in period if it complies with the Impartial Conduct Standards condition in Section VII(a) and the fiduciary acknowledgment condition under Section VII(b)(1). This one-

[12] To the extent a party receives ongoing compensation for a recommendation that was made before the Applicability Date, including through a systematic purchase payment or trailing commission, the amended PTE 84-24 would not apply unless and until new investment advice is provided.

year phase-in period is the same as the one-year compliance period the Department provided when it originally granted PTE 2020-02.

Excluding Investment Advice

The amended PTE 84-24 excludes sales and compensation received as a result of the provision of investment advice from relief for the transactions described in Section III(a) through (f) of the exemption. However, relief remains available under those provisions for non-advice transactions. Investment advice fiduciaries must comply with the conditions in Sections VI–VIII that are tailored specifically for investment advice transactions. For clarity, the Department has included this limitation in each subsection of Section III(a) through (f) by adding the phrase "if the sales commission is not received as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) (and the regulations issued thereunder)" to the end of each subsection in Section III(a) through (f). The Department also is revising the disclosure conditions in Section V to reflect that these sections are not available for the receipt of compensation as a result of the provision of fiduciary investment advice.

The Department notes that many types of fiduciaries are already excluded from the transactions in Sections III(a)–(d) of PTE 84-24. After the Applicability Date of the Final Amendment, the relief provided in these sections would remain available for non-fiduciaries and nondiscretionary trustees.[13]

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[13] Nondiscretionary trustees were added in 1984, in response to a request from the Investment Company Institute listing typical nondiscretionary or trustee services. In an April 21, 1980 letter, "ICI states nondiscretionary trustees and custodians:
(a) Open and maintain plan accounts and, in the case of defined contribution plans, individual participant accounts, pursuant to the employer's instructions that those providing investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) would be excluded under Section II(a).
(b) Receive contributions from the employer and credit them to individual participant accounts in accordance with the employer's instructions;

The relief for the transaction described in Section III(e) remains available for any insurance company that is a fiduciary or service provider (or both) with respect to the plan solely by reason of the sponsorship of a Pre-Approved Plan, if the purchase is not as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder. The relief for the transactions described in Section III(f) remains available for any insurance company, Principal Underwriter, or investment company adviser that is a fiduciary or service provider (or both) with respect to the plan solely by reason of: (1) the sponsorship of a Pre-Approved Plan; or (2) the provision of nondiscretionary trust services to the plan; or (3) both (1) and (2), if the purchase is not as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.[14]

(c) Invest contributions and other plan assets in shares of a mutual fund or funds or other products such as insurance or annuity contracts designated by the employer, plan trustee, or participants, and reinvest dividends and other distributions in such investments;
(d) Redeem, transfer, or exchange mutual fund shares or surrender insurance or annuity contracts as instructed by the employer, plan trustee, or participant;
(e) Provide or maintain "designation of beneficiary" forms and make distributions from the trust or custodial account to participants or beneficiaries in accordance with the instructions of the employer, plan trustee, participants, or beneficiaries;
(f) Deliver to participants or their employer all notices, prospectuses, and proxy statements, and vote proxies in accordance with the participants' instructions.
(g) Maintain records of all contributions, investments, distributions, and other transactions and report them to the employer and participants;
(h) Make necessary filings with the Internal Revenue Service and other government agencies;
(i) Keep custody of the plan's assets;
(j) Reply to and prepare correspondence, either directly or through the mutual fund distributor or adviser, regarding the investment account and the operation and interpretation of a master or prototype plan sponsored by the complex to which the nondiscretionary trustee or custodian belongs.
In some situations, the trustee or custodian is empowered to amend the master or prototype plan; in others, this power resides in the sponsor of the master or prototype plan. ICI further describes the duties of the nondiscretionary trustees as "ministerial" and indicates that such trustees possess no decisional authority with respect to a plan's funding medium or subsequent purchases or sales."

[14] The Department is not amending Section III(f) to remove the phrase "investment company adviser," but notes that this relief is not available if the purchase is a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

Description of Changes to Existing PTE 84-24

Section II of existing PTE 84-24 provides exemptive relief for the covered transactions described in Section III(a) through (f), which, as amended, does not include relief for the receipt of otherwise prohibited compensation in connection with the provision of investment advice. In the Proposed Amendment, the Department requested comments on whether parties will continue to use the relief in proposed section II(a) for the transactions outlined in Section III(a)-(f) and whether parties are currently relying on Section III(f) for Pre-Approved Plans. The Department received some comments indicating that Section III(f) is still relied on in the marketplace. Commenters described this relief as important for Pre-Approved Plan providers in connection with the purchase of mutual fund shares with plan assets when the principal underwriter of the mutual fund acts as the sponsor of the "Pre-Approved Plan" document that is utilized by the plan, or the pre-approved provider plan provides nondiscretionary trustee services to the plan. These commenters claim that the loss of Section III(f) relief would make it difficult to continue to offer these products to the marketplace and urge the Department to retain the provision. After consideration of these comments, the Department is retaining Section III(f) in the Final Amendment with a revision that changes references to a "master or prototype plan" to a "Pre-Approved Plan," which is consistent with a change in terminology the IRS adopted in IRS Rev. Proc. 2017-41.

The Department also received several comments on the terms Mutual Fund Commission and Insurance Sales Commission that the Department used in the Proposed Amendment. These commenters generally asserted that the proposed definition of Insurance Sales Commission was unduly narrow and should have included a broader range of compensation, as permitted under State insurance laws and, they argued, the Department's prior interpretations of PTE 84-24. These commenters argued that other forms of compensation were commonplace, and could be reasonable, beneficial to Retirement Investors, and fully disclosed.

Some commenters asserted that the Proposed Amendment's definition of Insurance Sales Commission would prohibit the use of services provided by independent marketing organizations in connection with annuity sales marketing support, lead generation, technological assistance, back office and compliance support, and practice building and that, in the absence of these services, many Independent Producers would not survive. Some other commenters claimed that various benefits subject to continuing production and service requirements, such as health and retirement plan coverage and contributions, office allowances, travel expense reimbursements, and other benefits customary in the industry may not be allowed given the narrowness of these definitions.

After consideration of the comments, the Department has removed the terms "Mutual Fund Commission" and "Insurance Sales Commission" from the exemption. To achieve consistency with existing PTE 84-24, the Department has reverted to using the term "sales commission" in Section III(a) through (f) of the Final Amendment, which is the same term that the Department used in PTE 84-24 before this amendment. Additionally, the Department clarifies the disclosures required by Section V(b)(1) for transactions under Section III(a) through (f) involving IRAs may be provided to the IRA owner instead of an unrelated fiduciary.

Finally, the Department is making minor editorial changes by capitalizing defined terms where they are used in the existing sections of PTE 84-24, and moving the definitions from existing Section VI to new Section X. As amended, Section III(a)-(f) reads:

> (a) The receipt, directly or indirectly, by an insurance agent or broker or a pension consultant of a sales commission from an insurance company in connection with the purchase, with plan assets, of an insurance or annuity contract, if the sales commission is not received as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.
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> (b) The receipt of a sales commission by a Principal Underwriter for an investment company registered under the Investment Company Act of 1940 (hereinafter referred to as an investment company) in connection with the purchase, with plan assets, of securities issued by an investment company if the sales commission is not received as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.
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> (c) 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 if the purchase is not as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.
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> (d) The purchase, with plan assets, of an insurance or annuity contract from an insurance company if the purchase is not as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.
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> (e) 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 Pre-Approved Plan if the purchase is not as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.
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> (f) 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 such 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: (1) the sponsorship of a Pre-Approved Plan; or (2) the provision of Nondiscretionary Trust Services to the plan; or (3) both (1) and (2); and the purchase is not as a

result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

The Department notes that references to “plan assets” in Section III(a)-(f) include IRA assets and are not limited to “Plans” as defined in ERISA section 3(3) and described in Code section 4975(e)(1)(A).

Recordkeeping

The Department proposed revising all the recordkeeping provisions for PTE 84-24 by adding a new Section IX that would have required additional parties to be able to access the records. Many commenters expressed concern that the amended recordkeeping provisions would create unnecessary burden for Independent Producers. In response to these comments, the Department has scaled back the amended recordkeeping conditions in the exemption in a similar manner to changes the Department made to PTE 2020-02. In this Final Amendment, the Department is retaining the existing recordkeeping language in Section V(e) for transactions that do not involve the provision of fiduciary investment advice. The Department also is making minor editorial changes to this section for clarity, but generally is keeping the substantive requirements the same.

In a new Section IX, the Department is adding recordkeeping language for Independent Producers providing fiduciary investment advice. Under this provision, the Independent Producer must maintain for a period of six years records demonstrating that it has complied with the conditions of this exemption and make such records available, to the extent permitted by law, to any authorized employee of the Department or the Department of the Treasury, which includes the Internal Revenue Service (IRS). This condition is consistent with the recordkeeping requirement in amended PTE 2020-02.

Fiduciary Investment Advice Exemption

The Department is finalizing its Proposed Amendment for investment advice fiduciaries who are independent insurance agents, with certain changes discussed below, based on the comments. The conditions for investment advice are similar to those in PTE 2020-02, but take into account the unique compliance challenges faced in the independent agent distribution channel, while promoting a level playing field for all investment advice professionals.

Several commenters criticized the Department's emphasis on uniformity. One commenter in particular stated that the Department was creating disadvantages for the insurance industry by amending PTE 84-24. Several commenters argued that because insurance companies and producers have been relying on PTE 84-24 for 40 years, they should be able to continue doing so. Some of these same commenters also questioned the Department's authority to regulate the business of insurance in this manner.

The Department disagrees with these commenters. Retirement Investors are no less in need of the protective conditions simply because the individual who is advising them relies on a different business model. Additionally, as discussed above, the Department has authority to regulate the business of insurance with respect to investment advice provided to Retirement Investors and has carefully tailored the conditions of this exemption to address the specific conflicts that can arise for Independent Producers that are compensated through commissions and other compensation when providing investment advice to Retirement Investors regarding the purchase of an annuity. Furthermore, the Department is providing additional time for insurance companies and producers that were relying on PTE 84-24 to come into compliance with the new conditions of this exemption or PTE 2020-02.

As required by ERISA section 408(a) and Code section 4975(c)(2), the Department may only issue an exemption if it is protective and in the interests of Retirement Investors. This Final Amendment ensures that Retirement Investors receive advice subject to the same core fiduciary obligations when the investments are insurance products recommended by Independent Producers, as when they receive advice about other competing investment alternatives. In the Department's view, Retirement Investors are best protected by a uniform standard assuring them that recommendations by fiduciaries are prudent, loyal, and free from misrepresentations or excessive compensation. Retirement Investors equally need these fiduciary protections and safeguards against dangerous conflicts of interest, whether the trusted Investment Professional is recommending an insurance product or a security. And there is no reason to believe that an insurance agent is any less susceptible to conflicts of interest than other categories of investment professionals.

The relief for fiduciary investment advice in Section II(b) for the covered transactions described in Section III(g) is generally similar to the relief provided in PTE 2020–02. Section VI provides conditions for transactions described in Section III(g) and requires the advice to be provided by an Independent Producer that is authorized to sell annuities from two or more unrelated Insurers. However, while PTE 2020-02 is available for almost any fiduciary investment advice provider, the conditions in amended PTE 84-24 Sections VII-IX are tailored for investment advice that is provided to a Retirement Investor by an Independent Producer who works with multiple insurance companies to sell non-securities annuities or other insurance products that do not meet the definition of "security" under Federal securities laws.

Some commenters questioned the administrative feasibility of the exemption pursuant to ERISA Section 408(a)(1) and Code section 4975(c)(2), taking issue with the added or expanded conditions of proposed PTE 84-24. One commenter stated that the PTE's conditions would force covered entities to instead seek relief via individual exemptions and noted that the Department has been issuing fewer administrative exemptions in recent years.

The Department disagrees with these assertions. The core conditions of PTE 84-24, including all the Impartial Conduct Standards, reflect core fiduciary obligations that have been in ERISA since its passage nearly fifty years ago. The Department is confident that Independent Producers, who satisfy the fiduciary definition, can recommend covered insurance products in accordance with basic standards of care and loyalty, and without overcharging or misleading retirement investors.

As described in detail below, the disclosure and conduct obligations imposed on Independent Producers are measured and achievable, and Insurers' oversight obligations are flexible, principles-based, and build on existing oversight responsibilities under State law. The Department has narrowed the scope of many of the amended PTE 84-24's conditions, also easing administration. These updates are discussed in detail in the sections to follow. The Department does not believe Independent Producers or Insurers will be unable to comply with PTE 84-24 or driven to seek individual exemptions. The amended PTE is not intended to push covered entities to apply for individual exemptions but is instead intended to require Independent Producers who provide investment advice for a fee to abide by a series of conditions uniquely crafted to mitigate conflicts of interest and protect Retirement Investor interests in these types of transactions.

Moreover, the Department has accommodated Insurers that rely upon independent agents by providing that the supervising Insurer does not have to assume fiduciary responsibility for investment recommendations by Independent Producers. Also, PTE 2020-02 remains available both to Independent Producers and Insurers for transactions that fall outside the scope of PTE 84-24, or to the extent the Insurer takes on fiduciary responsibility.

Retirement Investors

The Department is revising the definition of Retirement Investor in Section X(n) to be consistent with the definition in the final Regulation defining fiduciary investment advice. As revised, both the final Regulation and Final Amendment define Retirement Investor to mean a Plan, Plan participant or beneficiary, IRA, IRA owner or beneficiary, Plan fiduciary within the meaning of ERISA section (3)(21)(A)(i) or (iii) and Code section 4975(e)(3)(A) or (C) with respect to the Plan, or IRA fiduciary within the meaning of Code section 4975(e)(3)(A) or (C) with respect to the IRA. The preamble to the final Regulation includes additional discussion of "Retirement Investor," which is defined in the same terms in this Final Amendment to ensure its broad availability to investment advice fiduciaries.

Related Entity

The Department is clarifying the definition of "Related Entity" in Section X(m). Related Entity includes two components: (i) a party that has an interest in an Investment Professional or Financial Institution; and (ii) a party in which an Investment Professional or Financial Institution has an interest, in either case when that interest may affect the fiduciary's best judgment as a fiduciary. The Department has also made ministerial changes, such as changing "described" to "defined" in referencing ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B).

Independent Producers

The term "Independent Producer" is defined in Section X(d) as a person or entity that is licensed under the laws of a State to sell, solicit or negotiate insurance contracts, including annuities, and that sells to Retirement Investors products of multiple unaffiliated insurance companies and (1) is not an employee of an insurance company (including a statutory employee under Code section 3121(d)(3)); or (2) is a statutory employee of an insurance company that has no financial interest in the covered transaction. The Department is revising the definition of Independent Producer to clarify that the exemption is available only when the Independent Producer is not an employee of an insurance company (including a statutory employee under Code section 3121(d)(3)) or the Independent Producer is a statutory employee of an insurance company that has no financial interest in the covered transaction. Accordingly, the statutory employee would be treated as an Independent Producer, for purposes of this exemption, with respect to the recommended sale of an insurance product in which the statutory employer has no financial interest. To the extent, however, the statutory employee recommends products in which the employing insurance company has a financial interest, both the insurance company and the statutory employee would have to rely on PTE 2020-02 for relief from any resulting prohibited transactions.

The Proposed Amendment would have limited the definition to exclude statutory employees entirely, but the Department is revising the definition in response to comments. Many commenters expressed concern that the proposed definition was too limited, and several commenters specifically requested that the Department make PTE 84-24 available for statutory employees of insurance companies. Some of these commenters sought broad relief for all recommendations by statutory employees, including recommendations in which their employing insurance company had a financial interest. These commenters described the relationship that an insurance company has with its statutory employees as the equivalent of the relationship between insurance companies and wholly independent producers who are not statutory employees. These commenters argued that a statutory employer cannot supervise statutory employees under PTE 2020-02. The Department also received comments, however, arguing for a narrower clarification permitting statutory employees to rely upon PTE 84-24 as Independent Producers only to the extent they were recommending the products of other insurance companies that did not employ them as statutory employees.

In response to these comments, the Department has revised this definition to permit statutory employees to rely upon PTE 84-24 when they are recommending transactions in which the statutory employer does not have a financial interest. In such cases, the statutory employer is similarly situated to insurance companies that are working with wholly independent agents. The Final Amendment does not, however, allow statutory employees to rely on PTE 84-24 when they are recommending transactions with the insurance company that acts as their statutory employer. As reflected in the Treasury's implementing regulations,[15] the statutory employee's principal

[15] 26 CFR § 31.3121(d)-1(d)(3)(ii) Full-time life insurance salesman. An individual whose entire or principal business activity is devoted to the solicitation of life insurance or annuity contracts, or both, primarily for one life insurance company is a full-time life insurance salesman. Such a salesman ordinarily uses the office space provided by the company or its general agent, and stenographic assistance, telephone facilities, forms, rate books, and advertising materials are usually made available to him without cost. An

business activity involves the solicitation of contracts for that one insurance company which ordinarily provides facilities and support to the statutory employee for that purpose, and these statutory employees often receive health and other benefits from the "employing" insurance companies. Accordingly, the employing insurance company has a degree of potential control and influence over the conduct of the statutory employee, and the statutory employee has a corresponding commitment to that company that is not necessarily the same as in a relationship between a wholly independent agent and other Insurers.

Given these differences, the Department has concluded that PTE 84-24 is insufficiently protective of Retirement Investors with respect to recommendations of products in which the statutory employer has a financial interest. In such cases, both the employing insurance company and the statutory employee must rely on PTE 2020-02 for relief for prohibited transactions, just as similarly situated Financial Institutions rely on PTE 2020-02 with respect to recommendations of their proprietary products. Accordingly, statutory employees and the insurance companies would need to meet all the protective conditions of PTE 2020-02, including the requirement that the insurance company, acting as the supervising financial institution, acknowledge its fiduciary status with respect to the recommendation. However, when a statutory employee recommends transactions with an unrelated and unaffiliated insurance company, the statutory employee can rely on PTE 84-24 and make the fiduciary acknowledgment as an

individual who is engaged in the general insurance business under a contract or contracts of service which do not contemplate that the individual's principal business activity will be the solicitation of life insurance or annuity contracts, or both, for one company, or any individual who devotes only part time to the solicitation of life insurance contracts, including annuity contracts, and is principally engaged in other endeavors, is not a full-time life insurance salesman.

Independent Producer. Consistent with the conditions of PTE 84-24, those transactions would be subject to the supervision of the unrelated insurance company. To the extent that statutory employers or other insurance companies believe that neither PTE 2020-02 nor PTE 84-24 is appropriate for their particular circumstances, they can also apply to the Department for an individual or class exemption, which may be subject to different or additional protective conditions.

Insurers

The term “Insurer” as defined in Section X(f) is similar to the term “Financial Institution” defined in PTE 2020-02, except it would be limited to insurance companies. Even though amended PTE 84-24 does not require Insurers to be fiduciaries, an Independent Producer cannot rely on the exemption unless it is subject to oversight by an Insurer that satisfies the conditions set out in this Final Amendment. As under the NAIC Model Regulation and discussed in the policies and procedures section below, the Independent Producer must be subject to oversight by the Insurer whose products it recommends to the Retirement Investor, if the Independent Producer wants to rely on the exemption. As stated in Section VI(b), the Insurer will not necessarily become a fiduciary under ERISA or the Code merely by complying with this exemption’s conditions. However, the Department cautions that Insurers selling insurance and annuity products through Independent Producers could become investment advice fiduciaries under ERISA and/or the Code through other actions they take. If the Insurers are fiduciaries, they could not rely on amended PTE 84-24 and would need to rely on a different prohibited transaction exemption, such as PTE 2020-02, for relief from ERISA section

406(b) and Code section 4975. The investment advice provisions of PTE 84-24 are solely available to the Independent Producer.

To facilitate compliance with the amended exemption, Independent Producers and Insurers may rely on factual representations from each other, as long as they are reasonable in doing so. For example, an Independent Producer may generally rely on an Insurer's written report generated as part of its retrospective review required by Section VII(d), unless the Independent Producer knows (or should know) that the report is inaccurate or incomplete.

Although the Department is creating a pathway for compliance for Independent Producers that permits insurance companies to oversee the conduct of Independent Producers under this Final Amendment without assuming fiduciary status, the Department remains concerned that without fiduciary status, insurance companies may not take the same measures to ensure that recommendations are sound and untainted by the Insurer's conflicts of interest. Accordingly, the Final Amendment does not provide prohibited transaction relief for the Insurer. If the Insurer itself is an investment advice fiduciary, it would instead have to rely on PTE 2020-02. In such a situation, the Independent Producer would still be able to receive compensation in connection with fiduciary investment advice related to the products of other Insurers, as long as those other Insurers complied with all conditions of amended PTE 84-24.

Exclusions

The advice provisions of PTE 84-24 have exclusions that are similar to those in PTE 2020-02. Under Section VI(c)(1), relief under PTE 84-24 is not available if the Plan is covered by Title I of ERISA and the Independent Producer, Insurer, or any Affiliate is

(A) the employer of employees covered by the Plan, or (B) the Plan's named fiduciary or administrator. For example, an Independent Producer that sponsors a plan for its employees and provides investment advice to the Plan can only receive direct expenses and not reasonable compensation for the advice. However, there is an exception from this restriction in Section VI(c)(1)(B) that applies when the Plan's named fiduciary or administrator is selected by an independent fiduciary to provide investment advice to the Plan. Unlike PTE 2020-02, there is no specific exclusion for pooled employer plans in PTE 84-24, because the Department does not expect that pooled employer plans will need to rely on the limited relief provided in this exemption.

Section VI(c)(2) excludes from Section III(g) transactions when the Independent Producer is serving in a fiduciary capacity other than as an investment advice fiduciary within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) (and the regulations issued thereunder).

Impartial Conduct Standards of Amended PTE 84-24

Similar to the final amendment to PTE 2020-02, amended PTE 84-24 requires Independent Producers to comply with the Impartial Conduct Standards, which include the Care Obligation, Loyalty Obligation, and obligations to receive no more than reasonable compensation and not make misleading statements to Retirement Investors. These standards form the core protections of both exemptions that are available to investment advice fiduciaries.

Care Obligation and Loyalty Obligation

The Department is adopting the substance of the Proposed Amendment's Best Interest standard. However, as in PTE 2020-02, the Department is replacing the term

"Best Interest" with its two separate components: the Care Obligation and the Loyalty Obligation. Under the amended provision, investment advice must, at the time it is provided, satisfy the Care Obligation and Loyalty Obligation. The Final Amendment specifically refers to each obligation separately, although they are unchanged in substance. Both the Care Obligation and the Loyalty Obligation must be satisfied when investment advice is provided. As defined in Section X(b), to meet the Care Obligation, an advice must reflect the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor. As defined in Section X(g), to meet the Loyalty Obligation, the Independent Producer must not place the financial or other interests of the Independent Producer, Insurer, or any Affiliate, Related Entity, or another party ahead of the interests of the Retirement Investor or subordinate the Retirement Investor's interests to those of the Independent Producer, Insurer, or any Affiliate, Related Entity, or another party. For example, in choosing between annuity products offered by Insurers whose products the Independent Producer is authorized to sell, the Independent Producer may not recommend a product that is worse for the Retirement Investor but better or more profitable for the Independent Producer or Insurer.

As discussed in the preamble to the final amendment to PTE 2020-02, the Department is changing the way it refers to these two obligations in response to comments that the phrase "best interest" was used in many contexts throughout this rulemaking and by various regulators with possibly different shades of meaning. For example, in paragraph (c)(1)(i) of the Regulation, fiduciary status is based, in part, on whether a recommendation is made under circumstances that would indicate to a reasonable investor in like circumstances that the recommendation "may be relied upon by the retirement investor as intended to advance the retirement investor's best interest." In the context of the Regulation, however, "best interest" is not meant to refer back to the elements of the precise regulatory or statutory definitions of prudence or loyalty, but rather to refer more colloquially to circumstances in which a reasonable investor would believe the advice provider is looking out for them and working to promote their interests.

Several commenters stated that the Department does not have the authority to include the Impartial Conduct Standards in either PTE 84-24 or PTE 2020-02 because doing so would improperly expand Title I fiduciary standards to entities solely covered by Title II. The Department disagrees with these commenters. As previously stated in this grant notice as well as the grant notice for PTE 2020-02 published elsewhere in today's issue of the *Federal Register*, Congress expressly permits the Department to issue exemptions to prohibited transactions as per ERISA Section 408(a) and, pursuant to the Reorganization Plan No. 4 of 1978, Code section 4975(c)(2).[16] For a more detailed description of the comments received regarding the Department's authority to include the Impartial Conduct Standards in these prohibited transaction exemptions, please see the grant notice for PTE 2020-02 published elsewhere in today's issue of the *Federal Register*.

[16] Under the Reorganization Plan No. 4 of 1978, which Congress subsequently ratified in 1984, Sec. 1, Pub. L. 98-532, 98 Stat. 2705 (Oct. 19, 1984), Congress generally granted the Department authority to interpret the fiduciary definition and issue administrative exemptions from the prohibited transaction provisions in Code section 4975. 5 U.S.C. App. (2018).

In addition to the general comments discussed in the preamble to the final amendment to PTE 2020-02, some commenters questioned the specific ability of Independent Producers to meet the proposed standards, and thus argued that the amendments to PTE 84-24 failed to meet the requirements laid out in ERISA section 408(a) and Code section 4975(c)(2). Many of these same commenters stated that the NAIC standard was sufficiently protective and should be relied upon rather than the standards in PTE 84-24. Some commenters also raised objections to the Department imposing these standards on IRAs. Other commenters expressed support for the proposed standards, and one commenter argued that the Department's Proposed Amendment was necessary because the NAIC Model Regulation imposes a "best interest" standard in name only.

The Department has considered these comments and determined that it is essential for Independent Producers to comply with the Care Obligation and Loyalty Obligation. The Department notes that these obligations are similar to the standard imposed by New York State in a rule issued by the New York Department of Financial Services entitled "Suitability and Best Interest in Life Insurance and Annuity Transactions" (referred to as Rule 187). Section 242.4(b) of Rule 187 provides that "[t]he producer, or insurer where no producer is involved, acts in the best interest of the consumer when: (1) the producer's or insurer's recommendation to the consumer is based on an evaluation of the relevant suitability information of the consumer and reflects the care, skill, prudence, and diligence that a prudent person acting in a like capacity and familiar with such matters would use under the circumstances then prevailing. Only the interests of the consumer shall be considered in making the recommendation." Although Rule 187 has not been in force for a long time, the Department has not found any evidence suggesting that insurance producers, including Independent Producers, cannot comply with this standard. Nor is the Department aware of any evidence suggesting that this standard has inappropriately limited or restricted access to advice or insurance products in New York.

The Department is confident that Independent Producers can comply with the Section VII(a) of amended PTE 84-24 and rejects any suggestion that Independent Producers cannot compete under the same framework of Impartial Conduct Standards that apply to other investment professionals and financial institutions under PTE 2020-02, including commission-based broker-dealers. Certainly, the Department believes that insurance products and annuities are often sound and valuable investments for Retirement Investors. There is nothing intrinsic to annuities or inherent in the Independent Producer distribution channel that suggests that Independent Producers cannot recommend annuities consistent with the Care Obligation and Loyalty Obligation, or that they cannot comply with the obligation to avoid overcharging or misleading Retirement Investors. To the contrary, Retirement Investors are best served by having recommendations governed by a common standard, applicable to all fiduciary investment advisers irrespective of investment product, that is focused on adherence to these basic obligations. By ensuring that fiduciary investment advice providers compete on a level playing field subject to a uniform standard, the Regulation and exemptions ensure that Retirement Investors' legitimate expectations of trust and confidence are honored, irrespective of the particular type of product recommended. Fiduciary recommendations to Retirement Investors should be uniformly driven by the investors' interests, rather than differences in regulatory stringency that give one class of investment professionals the unique ability to depart from basic standards of care and loyalty. Reasonable Compensation

The Department is revising the reasonable compensation standard in Section VII(a)(2). The Proposed Amendment would have limited the compensation that an Independent Producer could receive to an "Insurance Sales Commission," defined to mean a sales commission paid by the Insurance Company or an Affiliate to the Independent Producer for the service of recommending and/or effecting the purchase or sale of an insurance or annuity contract, including renewal fees and trailing fees, but excluding revenue sharing payments, administrative fees or marketing payments, payments from parties other than the Insurance Company or its Affiliates, or any other similar fees.

The Department received several comments supporting this proposed limitation. One commenter noted the "particularly acute conflicts of interest" associated with sales of non-security annuities and supported not only limiting the compensation that could be paid, but also supported enhanced disclosure so that the Retirement Investors can understand the amount of money that the Independent Producer will make on the transaction. Another commenter similarly supported the Department's tailored approach that addresses the unique circumstances and challenges presented by these "lightly regulated salespeople" when they provide investment recommendations to Retirement Investors. The same commenter noted that limiting PTE 84-24 in this way would also further ensure a level playing field because any producer receiving other types of compensation would rely on PTE 2020-02. Yet another commenter criticized the NAIC Model Regulation's approach because it does not require insurers and producers to mitigate their compensation-related conflicts of interest that often lead to consumers buying annuities that are not suitable for them.

Many insurance industry commenters described this definition as overly narrow, noting that State insurance law does not limit compensation to commissions. Some commenters pointed to the NAIC Model Regulation, which specifically permits assistance with marketing, office support, retirement benefits, or other reasonable compensation, and other non-cash compensation. One commenter described the impact of the proposed limitation as contrary to the NAIC's work to develop a best interest standard, suggesting that it would reduce the investor choice that the NAIC had intended to preserve.

Many commenters also objected to the limited compensation covered when compared to the broad relief provided in PTE 2020-02. These commenters asserted that it would be arbitrary for the Department to prohibit Independent Producers from receiving legal and disclosed compensation that would be permissible for a financial institution or investment professional to receive under PTE 2020-02. One specifically stated that this limitation was contrary to the Department's stated intent of creating a level playing field, arguing that with similar conditions in both exemptions, there was no valid reason for the Department to prohibit legal and disclosed compensation when received by independent insurance professionals, but not when it is received by other types of financial professionals.

Some commenters argued that the limited definition was inconsistent with the Department's statement in footnote 10 of the Proposed Amendment's preamble that third party intermediary marketing organizations (IMOs) could compensate Independent

Producers, presumably with compensation other than insurance commissions, as narrowly defined. In response to this comment, the Department confirms that all compensation under PTE 84-24 may be paid directly to IMOs or field market organizations (FMOs) which then compensate the individual Independent Producer who has provided investment advice. The Department also notes that ERISA section 408(b)(2) and Code section 4975(d)(2) are available for intermediaries providing non-fiduciary services.

Another commenter stated that the proposed limitations on the types of compensation available for exemptive relief under PTE 84-24 would be so disruptive that it would call the continued availability of fixed annuity product distribution channels into question. This commenter stated that the compensation limits imposed by the Proposed Amendment would deprive investors of access to fixed annuities as a source of protection against the risks associated with market volatility and outliving one's assets. The commenter went on to state that, while the preamble language to the Proposed Amendment acknowledges the presence and vital role served by IMOs and FMOs in the training and support of Independent Producers, the Proposed Amendment would have provided no relief for any compensation received in connection with the sale of a recommended product other than so-called "simple" insurance commissions, directly paid by or on behalf of the insurance company.

According to this same commenter, IMOs and FMOs support Independent Producer success and productivity through a variety of cash and non-cash compensation structures, including revenue sharing and marketing allowances. This same commenter stated that non-cash compensation frequently includes the provision of value-added support including website construction and maintenance, sales leads, various forms of commercial advertising and computer software. According to this commenter, eligibility to receive such compensation is calibrated—at least to some extent—on Independent Producer productivity and on that basis is likely to be deemed by the Department under its new fiduciary definition as compensation received by an Independent Producer in connection with covered recommendations, necessitating prohibited transaction exemptive relief, but no such relief would be available under PTE 84-24 as it was proposed to be amended.

After consideration of the public comments on limiting covered compensation to Insurance Sales Commissions, the Department has removed the proposed limitation to Insurance Sales Commissions and expanded the scope of the exemption to cover compensation as broadly as PTE 2020-02, including cash and non-cash compensation. In the Department's view, the Impartial Conduct Standards and other conditions of the exemption should adequately safeguard Retirement Investors from abuse, irrespective of the specific type of compensation. At the same time, the Department emphasizes that all compensation the Independent Producer receives in connection with a transaction pursuant to PTE 84-24 must be reasonable within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2), and consistent with stringent policies and procedures designed to ensure Insurance Producers make recommendations to Retirement Investors that are consistent with the exemption's Care Obligation and Loyalty Obligation.

No Materially Misleading Statements

Section VII(a)(3) provides the same prohibition on misleading statements that is part of PTE 2020-02. The Department is also clarifying that the prohibition against misleading statements applies to both written and oral statements. This provision requires that an Independent Producer's statements to the Retirement Investor (whether written or oral) about the recommended transaction and other relevant matters must not be materially misleading at the time the statements are made. For purposes of this condition, the term "materially misleading" includes the omission of information that is needed to prevent the statement from being misleading to the Retirement Investors under the circumstances.

To the extent the Independent Producer provides materials, including marketing materials that are prepared and provided by the Insurer, this condition also would require such materials not to be materially misleading to the Independent Producer's knowledge.

Disclosure

The Department is generally finalizing the disclosure conditions with some modifications to the Proposed Amendment that are discussed below. As discussed in the preamble to the final amendment to PTE 2020-02, while many commenters raised concerns about the burden imposed on financial institutions if the Department required additional disclosure, others expressed support for the Department imposing additional disclosure obligations. It is important that Retirement Investors have a clear understanding of the compensation, services, and conflicts of interest associated with recommendations so that they have sufficient information to make fully informed investment decisions. Additionally, clear and accurate disclosures can deter fiduciary investment advice providers from engaging in otherwise abusive practices that they would prefer not to expose to the light of day. Likewise, requiring a clear disclosure of otherwise hidden fees and conflicts involved in the sale of insurance products may serve to dissuade certain Insurers and Independent Producers from engaging in abusive sales practices, resulting in lower overall costs to consumers.[17]

In the preamble to the Proposed Amendment, the Department requested comments regarding whether Insurers or Independent Producers should be required to provide additional disclosures on third-party compensation to Retirement Investors on a publicly available website. One potential benefit of such disclosure would be to provide information about conflicts of interest that could be used, not only by Retirement Investors, but by consultants and intermediaries who could, in turn, use the information to rate and evaluate various advice providers in ways that would assist Retirement Investors. Industry commenters generally opposed the condition, stating that it would impose significant costs to continuously maintain such a website without a commensurate benefit to the Retirement Investors.

After review of these comments, the Department has determined not to include a website disclosure requirement as an exemption condition at this time. While the Department may reconsider this decision at some future date based on its experience with the Regulation and related exemptions, any such future amendments would be subject to public notice and comment through a rulemaking process. Consistent with the Recordkeeping conditions in Section IX, the Department intends, however, to regularly request that Independent Producers provide their investor disclosures to the Department

[17] See, e.g., Santosh Anagol, Shawn Cole & Shayak Sarkar, *Understanding the Advice of Commissions-Motivated Agents: Evidence from the Indian Life Insurance Market*, 99(1) The Review of Economics and Statistics 1-15, (2015), https://doi.org/10.1162/REST_a_00625.

to ensure that they are providing sufficient information in a manner that the Retirement Investor can understand, and that the disclosures are serving their intended purpose.

Fiduciary Acknowledgment

The disclosures in PTE 84-24 are similar to those in PTE 2020-02. This ensures that all Retirement Investors receiving fiduciary investment advice have the same information before engaging in a transaction, irrespective of product type. PTE 84-24 requires Independent Producers to provide certain disclosures at or before the time an investment advice transaction occurs. Section VII(b)(1) requires a fiduciary acknowledgement, but unlike PTE 2020-02, only the Independent Producer (and not the Insurer) must acknowledge in writing that it is a fiduciary providing investment advice to the Retirement Investor under Title I or II of ERISA or both.[18] Section VII(b)(2) requires the Independent Producer to provide the Retirement Investor with a written statement of the Care Obligation and Loyalty Obligation that the Independent Producer owes to the Retirement Investor. For purposes of the disclosures required by Section II(b)(1)-(4), the Independent Producer is deemed to engage in a covered transaction on the later of (A) the date the recommendation is made or (B) the date the Independent Producer becomes entitled to compensation (whether now or in the future) by reason of making the recommendation.

The fiduciary acknowledgment requirement is intended to make it unambiguously clear that the Independent Producer is making a recommendation to the Retirement Investor in a fiduciary capacity under ERISA or the Code. It would not be sufficient, for example, to have an acknowledgement say that "I acknowledge fiduciary status under

[18] The Department cautions that an Insurer cannot insulate itself from fiduciary status merely by not making this acknowledgment. As noted above, an Insurer may become a fiduciary based on its actions.

ERISA with respect the recommendation to the extent the recommendation is treated by ERISA or Department of Labor regulations as a fiduciary recommendation," because that statement does not inform the investor whether the Independent Producer is making the recommendation as a fiduciary. The point of the acknowledgment is to ensure that both the fiduciary and the Retirement Investor are clear that the particular recommendation is in fact made in a fiduciary capacity under ERISA or the Code, so that there is no doubt as to the nature of the relationship or the associated compliance obligations. Anything short of definitive fiduciary acknowledgment would fail the exemption condition. It is not enough to alert the Retirement Investor to the fact that there may or may not be fiduciary obligations in connection with a particular recommendation, without stating that, in fact, the Independent Producer is making the recommendation in the requisite fiduciary capacity.

As described in the preamble to PTE 2020-02, many commenters argued that the fiduciary acknowledgment requirement imposes contractual or warranty requirement on Independent Producers. Several other commenters noted, however, that neither PTE 84-24 nor PTE 2020-02 impose any contract or warranty requirements on fiduciary investment advice providers. Instead, the requirement simply ensures up-front clarity about the nature of the relationship and services being provided. The Department agrees with these commenters that this up-front clarity is important and does not impose any contract or warranty requirement. The fiduciary acknowledgment condition stands in marked contrast to the Department's 2016 rulemaking on fiduciary advice; the Department has imposed no obligation on fiduciary advice providers to enter into enforceable contracts with or to provide enforceable warranties to their customers. The only remedies for violations of the exemption's conditions, and engaging in a non-exempt prohibited transaction, are those provided by Title I of ERISA, which specifically provides a cause of action for fiduciary violations with respect to ERISA-covered Plans, and Title II of ERISA, which provides for imposition of the excise tax. Nothing in the exemption compels Independent Producers to make contractually enforceable commitments, and as far as the exemption provides, they could expressly disclaim any enforcement rights other than those specifically provided by Title I of ERISA or the Code, without violating any of the exemption's conditions.

For that reason, arguments that the fiduciary acknowledgment requirement is inconsistent with the Fifth Circuit's opinion in *Chamber of Commerce v. United States Department of Labor*, 885 F.3d 360, 384-85 (5th Cir. 2018) (*Chamber*) are unsupported. In that case, the Fifth Circuit faulted the Department for having effectively created a private cause of action that Congress had not provided for violations of the exemptions' terms. Under this Final Amendment, the Department does not create new causes of actions, mandate enforceable contractual commitments, or expand upon the remedial provisions of ERISA or the Code. Requiring clarity as to the nature of the services and relationship between Independent Producers and Retirement Investors is a far cry from the creation of a whole new cause of action or remedial scheme.

Rather than compel fiduciary status or create new causes of action, the Department merely conditions the availability of the exemption, which is only necessary for plan fiduciaries to receive otherwise prohibited compensation, on clarity that the transaction involves a fiduciary relationship. In addition, the Department does not purport to bind State or other Federal regulators in any way or to condition relief on the availability of remedies under other laws. It no more creates a new cause of action than any other exemption condition or regulatory requirement that requires full and fair disclosures of services and fees. Moreover, the requirement promotes and supports Retirement Investor choice by requiring clarity as to the precise nature of the relationship that the firm or advice professional is undertaking.

The Department additionally notes that conditions requiring entities to acknowledge their fiduciary status have become commonplace in recent exemptions the Department has granted over the past two years. For example, in 2022 and 2023, the Department granted over a dozen exemptions to private parties in which an entity was required to acknowledge its fiduciary status in writing as a requirement for exemptive relief.[19] Written acknowledgement of fiduciary status was first required by the Department as early as 1984, when the Department published PTE 84-14, requiring an entity acting as a "qualified professional asset manager" (a QPAM) to have "acknowledged in a written management agreement that it is a fiduciary with respect to each plan that has retained the QPAM."[20]

[19] *See, e.g.*, PTE 2023-03, Blue Cross and Blue Shield Association Located in Chicago, Illinois (88 FR 11676, Feb. 23, 2023); PTE 2023-04, Blue Cross and Blue Shield of Arizona, Inc., Located in Phoenix, Arizona (88 FR 11679, Feb. 23, 2023); PTE 2023-05, Blue Cross and Blue Shield of Vermont Located in Berlin, Vermont (88 FR 11681, Feb. 23, 2023); PTE 2023-06, Hawaii Medical Service Association Located in Honolulu, Hawaii (FR 88 11684, Feb. 23, 2023); PTE 2023-07, BCS Financial Corporation Located in Oakbrook Terrace, Illinois (88 FR 11686, Feb. 23, 2023); PTE 2023-08, Blue Cross and Blue Shield of Mississippi, A Mutual Insurance Company Located in Flowood, Mississippi (88 FR 11689, Feb. 23, 2023); PTE 2023-09, Blue Cross and Blue Shield of Nebraska, Inc. Located in Omaha, Nebraska (88 FR 11691, Feb. 23, 2023); PTE 2023-10, BlueCross BlueShield of Tennessee, Inc. Located in Chattanooga, Tennessee (88 FR 11694, Feb. 23, 2023); PTE 2023-11, Midlands Management Corporation 401(k) Plan Oklahoma City, OK (88 FR 11696, Feb. 23, 2023); PTE 2023-16, Unit Corporation Employees' Thrift Plan, Located in Tulsa, Oklahoma (88 FR 45928, July 18, 2023); PTE 2022-02, Phillips 66 Company Located in Houston, TX (87 FR 23245, Apr. 19, 2022); PTE 2022-03, Comcast Corporation Located in Philadelphia, PA (87 FR 54264, Sept. 2, 2022); PTE 2022-04, Children's Hospital of Philadelphia Pension Plan for Union-Represented Employees Located in Philadelphia, PA. (87 FR 71358, Nov. 22, 2022).
[20] PTE 84-14, Part V, Section (a), (49 FR 9494, March 13, 1984).

One commenter additionally opined that the fiduciary acknowledgement condition constitutes “compelled” and “viewpoint-based” speech in violation of the First Amendment and warrants application of a ‘strict scrutiny’ standard of review. As discussed in greater detail in the preamble to the Regulation published elsewhere in today’s *Federal Register*, neither the Regulation nor the final PTE amendments prohibit speech based on content or viewpoint in any capacity. Instead, the Regulation and PTEs simply impose fiduciary duties on covered parties, and insist on adherence to Impartial Conduct Standards.

Model Disclosure

To assist Independent Producers in complying with these conditions of the exemption, the Department confirms that the following model language will satisfy Section VII(b)(1) and (2).

> We are making investment recommendations to you regarding your retirement plan account or individual retirement account as fiduciaries within the meaning of Title I of the Employee Retirement Income Security Act and/or the Internal Revenue Code, as applicable, which are laws governing retirement accounts. The way we make money or otherwise are compensated creates some conflicts with your financial interests, so we operate under a special rule that requires us to act in your best interest and not put our interest ahead of yours.
>
> Under this special rule’s provisions, we must:
>
> - Meet a professional standard of care when making investment recommendations (give prudent advice) to you;

- Never put our financial interests ahead of yours when making recommendations (give loyal advice);
- Avoid misleading statements to you about conflicts of interest, fees, and investments;
- Follow policies and procedures designed to ensure that we give advice that is in your best interest;
- Charge you no more than what is reasonable for our services; and
- Give you basic information about our conflicts of interest.

This model language generally applies to the Independent Producer's recommendations, however, the Independent Producer could also tailor the acknowledgment to limit it to an individual recommendation or subset of recommendations for which the Independent Producer is seeking prohibited transaction relief. However, Independent Producers can only rely on this exemption with respect to particular recommendations to the extent they have acknowledged their fiduciary status to Retirement Investors with respect to those recommendations.

While some commenters requested additional model language, the Department is not providing model language for the specific material facts relating to the scope and terms of the relationship, conflict of interest, and basis for determination to recommend the annuity disclosures in Section VII(b)(3), (4), and (5), because those disclosures will need to be tailored to the specific business model.

Relationship and Conflict of Interest Disclosure

Under Section VII(b)(3), the Independent Producer must disclose in writing all material facts relating to the scope and terms of the relationship with the Retirement

Investor. This includes the material fees and costs that apply to the Retirement Investor's transactions, holdings, and accounts. The Independent Producer must also disclose the type and scope of services provided to the Retirement Investor, including any material limitations on the recommendations that may be made to the Retirement Investor. This description must include the products the Independent Producer is licensed and authorized to sell, inform the Retirement Investor in writing of any limits on the range of insurance products recommended, and identify the specific Insurers and specific insurance products available to the Independent Producer for recommendation to the Retirement Investor. Further, under Section VII(b)(4), the Independent Producer must also disclose all material facts relating to Conflicts of Interest that are associated with the recommendation.

One difference from PTE 2020-02 is that Independent Producers must also provide a notice describing the Retirement Investor's right to request additional information regarding cash compensation. If the Retirement Investor makes that request, the Independent Producer must give the investor a reasonable estimate of the amount of cash compensation to be received by the Independent Producer, which may be stated as a range of amounts or percentages; and whether the cash compensation will be provided through a one-time payment or through multiple payments, the frequency and amount of the payments, which may also be stated as a range of amounts or percentages. Although this is an additional obligation in PTE 84-24 that is not in PTE 2020-02, the Department notes this disclosure requirement closely parallels the obligations of an Independent

Producer under Section 6.A.2.a.v and 6.A.2.b of the NAIC Model Regulation[21] and is similar to, but more limited than, the standard imposed by New York State in Section 30.3 of a rule issued by the New York Department of Financial Services entitled "Producer Compensation Transparency" (referred to as Rule 194).[22]

The Department thinks that this additional transparency is especially important in the context of PTE 84-24 because, in contrast to PTE 2020-02, the Insurer has not assumed fiduciary responsibility with respect to the recommendation or its compensation and incentive practices, and because of the importance of these financial incentives in driving investment recommendations. As noted above, it is important that Retirement Investors have a clear understanding of the compensation, services, and conflicts of interest associated with recommendations so that they have sufficient information to make fully informed investment decisions. Additionally, clear and accurate disclosures can deter Independent Producers and Insurers from engaging in otherwise abusive practices that they would prefer not to expose to the light of day. Likewise, requiring a clear disclosure of otherwise hidden fees and conflicts involved in the sale of insurance

[21] NAIC Model Regulation Section 6.A.2.a.v. provides that "[p]rior to the recommendation or sale of an annuity, the producer shall prominently disclose to the consumer. . . (v) A notice of the consumer's right to request additional information regarding cash compensation described in Subparagraph (b) of this paragraph." Section 6.A.2.b states that "[u]pon request of the consumer or the consumer's designated representative, the producer shall disclose: (i) A reasonable estimate of the amount of cash compensation to be received by the producer, which may be stated as a range of amounts or percentages; and (ii) Whether the cash compensation is a one-time or multiple occurrence amount, and if a multiple occurrence amount, the frequency and amount of the occurrence, which may be stated as a range of amounts or percentages."

[22] Section 30.3(a)(4) of Rule 194 provides that "an insurance producer selling an insurance contract shall disclose the following information to the purchaser: . . . (4) that the purchaser may obtain information about the compensation expected to be received by the producer based in whole or in part on the sale, and the compensation expected to be received based in whole or in part on any alternative quotes presented by the producer, by requesting such information from the producer." If such a request is made, Section 30.3(b) requires the producer to provide the following information: "(1) a description of the nature, amount, and source of any compensation to be received . . . ; (2) a description of any alternative quotes presented by the producer . . . ; (3) a description of any material ownership interest the insurance producer . . . has in the insurer . . . ; (4) a description of any material ownership interest the insurer . . . has in the insurance producer . . . ; and (5) a statement whether the insurance producer is prohibited by law from altering the amount of compensation received from the insurer based in whole or in part on the sale."

products may serve to dissuade Insurers and Independent Producers from making imprudent recommendations that are driven by outsized financial incentives, rather than the Retirement Investor's best interests, resulting in lower overall costs to consumers.[23]

Best Interest Documentation and Rollover Disclosure

Section VII(b)(5) additionally requires Independent Producers to consider and document their basis for the determination to recommend an annuity product to the Retirement Investor before the recommended annuity is sold. The Independent Producer must also provide this documentation to both the Retirement Investor and to the Insurer. The Department notes that the NAIC Model Regulation also requires producers to make a written record of any recommendation and document the basis for the recommendation.[24]

Consistent with the changes the Department is making to PTE 2020-02, Section VII(b)(6) of the Final Amendment requires that, before engaging in or recommending that a Retirement Investor engage in a rollover from a Plan that is covered by Title I of ERISA or making a recommendation to a Plan participant or beneficiary as to the post-rollover investment of assets currently held in a Plan that is covered by Title I of ERISA the Independent Producer must consider and document the bases for its recommendation that the Retirement Investor engage in the rollover transaction and must provide that documentation to both the Retirement Investor and the Insurer. Relevant factors the Independent Producer must consider include, to the extent applicable but not limited to (A) the alternatives to a rollover, including leaving the money in the Plan, if applicable; (B) the fees and expenses associated with the Plan and the recommended investment; (C)

[23] See, e.g., Santosh Anagol, Shawn Cole & Shayak Sarkar, *Understanding the Advice of Commissions-Motivated Agents: Evidence from the Indian Life Insurance Market*, 99(1) The Review of Economics and Statistics 1-15, (2015), https://doi.org/10.1162/REST_a_00625.
[24] Section 6.A.4

whether an employer or other party pays for some or all of the Plan's administrative expenses under the Plan; and (D) the different levels of fiduciary protection, services, and investments available.

The Department received many comments on this condition. As discussed in the preamble to the final amendment to PTE 2020-02, the Department received support for the rollover disclosure provision. For example, one commenter highlighted the significance of a rollover decision and said that a "careful analysis" is needed, along with information about fees, expenses, and other investment options, in order to provide Retirement Investors with a "well-supported" recommendation. Some commenters supporting the condition noted the conflicts of interest inherent with respect to many annuity sales and that annuity transactions can be extremely difficult and costly to reverse. The written documentation requirement ensures that Independent Producers undertake a careful analysis and document their reasoning for recommending these transactions, which will help ensure that their recommendations are well-supported and comply with the Impartial Conduct Standards.

Other commenters expressed concern with the required rollover disclosure. For example, one commenter stated that it is unclear how an Independent Producer could compare fees and expenses of employer plans without an annuity option with a recommended annuity. According to this commenter, comparing annuities to other investment options are "an apples-to-oranges comparison that would likely confuse a participant more than help." Another commenter characterized the condition as potentially requiring Independent Producers to violate the law, because as described by the commenter Federal securities laws prohibit individuals from recommending or providing detailed information or advice about securities unless they have a securities license. Thus, according to the commenter, Independent Producers who do not have a securities license (as most do not) would be forced to either break the law to comply with this condition or undertake the expense and burden of obtaining the appropriate securities licenses.

The Department disagrees with this characterization of the exemption condition. While Independent Producers are required to consider alternatives to the rollover from the Title I Plan into an annuity, they are not required to recommend or provide detailed information or advice about securities. Nothing in the exemption requires or suggests that Independent Producers are obligated to make advice recommendations as to investment products they are not qualified or legally permitted to recommend. The Department notes that nothing in the exemption or the Impartial Conduct Standards prohibits investment advice by "insurance-only" agents or requires such insurance specialists to render advice with respect to other categories of assets outside their specialty or expertise. There may be circumstances when the best advice an Independent Producer can give an investor is to bring in or work with another Investment Professional who can make a recommendation that is consistent with the Impartial Conduct Standards. A rollover recommendation should not be based solely on the Retirement Investor's existing investment allocation without any consideration of other investment options in the Retirement Investor's Title I Plan. The Independent Producer must carefully consider the options available to the investor, including options other than the Retirement Investor's existing Plan investments, before recommending that the participant roll assets out of the Title I Plan. Similarly, if an Independent Producer limits its recommendations to annuities or to a limited menu of annuities provided by specific insurers, it could not justify a recommendation that was imprudent on the basis that it was the most appropriate alternative from the Independent Producer's range of available investment alternatives. If none of the available annuity options could be recommended, without violating the Independent Producer's Care Obligation or Loyalty Obligation, it would need to refrain from recommending any of the offerings, even though it would mean turning away business.

Other commenters expressed concern about the level of detail required and suggested that when enforcing this condition, the Department should take into account that fact that many Independent Producers are small businesses with minimal resources. Another commenter suggested that the Department should rely instead on language from the NAIC Model Regulation or the SEC's Regulation Best Interest.

While the Department acknowledges these comments, it has determined to retain the rollover disclosure in amended PTE 84-24. As identified by some commenters, this disclosure provides important protections and information to Retirement Investors. This condition, which also matches Section II(b)(5) of the final amendment to PTE 2020-02, reflects the clear importance of sound advice with respect to rollovers. Recommendations to roll assets out of an ERISA-covered Plan often involve a Retirement Investor's lifetime savings and are critical to the investor's retirement security. For many Retirement Investors, the recommendation to roll their savings out of the Plan and invest those savings in an annuity expected to provide income for the rest of their life is the single most important recommendation they will ever receive.

The importance of the rollover documentation and disclosure requirement is proportional to the importance of the advice, and rightly focuses the Independent Producer's attention on reasonable alternatives to the rollover and annuity purchase, comparative fees and expenses, and different levels of fiduciary protections, services, and investments available before and after the roll-over. Documenting the bases for the recommendations also enables the Insurer to verify compliance with its policies and procedures, and ensure they are adequate.

As discussed in the preamble to amended PTE 2020-02, the Department is making a significant change to the disclosure provisions in the final amendments to both PTE 2020-02 and PTE 84-24 in response to comments. The Proposed Amendment specified that the rollover documentation and disclosure requirement would have extended to recommended rollovers from a Plan to another Plan or IRA as defined in Code section 4975(e)(1)(B) or (C), from an IRA as defined in Code section 4975(e)(1)(B) or (C) to a Plan, from an IRA to another IRA, or from one type of account to another (e.g., from a commission-based account to a fee-based account). In response to comments, the Department is narrowing the required rollover disclosure in the Final Amendment so that it only applies to rollovers from Title I Plans. Under amended PTE 84-24, Independent Producers are not required to document and disclose recommendations to roll assets over from one Title I Plan to another Title I Plan, from one IRA to another IRA or to change account types. Of course, these types of transactions may require Independent Producers' special attention, and as discussed further below, Insurers may wish to specify in their policies and procedures how they will manage these types of transactions.

Good Faith and Exception for Disclosures Prohibited by Law

The Department is adding clarifications in Section VII(b)(7) of the Final Amendment that an Independent Producer will not fail to satisfy the disclosure conditions in Section VII(b) solely because they make an error or omission in disclosing the required information while acting in good faith and with reasonable diligence, provided that the Independent Producer discloses the correct information as soon as practicable, but not later than 30 days after the date on which it discovers or reasonably should have discovered the error or omission. Similarly, Section VII(b)(8) allows Independent Producers to rely in good faith on information and assurances from each other and from other entities that are not Affiliates as long as they do not know or have reason to know that such information is incomplete or inaccurate. Additionally, under Section VII(b)(9), the Independent Producer is not required to disclose information pursuant to Section VII(b) if such disclosure is otherwise prohibited by law. These provisions are consistent with PTE 2020-02. The Department did not receive substantive comments on these provisions and is finalizing them as proposed.

Policies and Procedures

While Independent Producers are free to recommend a variety of Insurers' products, they do not operate outside the control and influence of the Insurers whose products they recommend. To the contrary, these Insurers set the Independent Producers' compensation and incentives, provide training, oversee compliance with State law obligations and the Insurer's policies and procedures, and substantially determine how and whether an Independent Producer will be able to recommend the Insurers' products. Because of their authority over the sale of their products and over the conduct of

Independent Producers, the Insurer's actions and the financial incentives they create can promote or undermine participant interests.

Despite the central and obvious importance of the Insurers themselves to the Independent Producer distribution channel, the Department has decided not to condition relief under this exemption on Insurers' acknowledgment of fiduciary status with respect to Independent Producers' recommendations. This decision takes into account many Insurers' strong concerns about being held accountable as fiduciaries for the actions of Independent Producers who are not subject to their control in the same way that, for example, common law employees are subject to their employer's control. However, the Department's ability to structure the exemption to cover Independent Producers and protect the interests of Retirement Investors importantly depends on the Independent Producers' ability to make recommendations that are subject to careful compliance-oriented institutional oversight by Insurers that is focused on Retirement Investors' best interests, and on the mitigation and avoidance of conflicts of interest.

It is critically important to the success of this exemption that the Insurers, whose products Independent Producers recommend as fiduciaries, pay careful attention to any conflicts associated with Independent Producers' recommendations of their products, appropriately manage those conflicts of interest, and adopt and implement appropriate supervisory oversight mechanisms, as set forth below. Without these protections, the Department would be unable to conclude that this exemption is sufficiently protective of Retirement Investors and their interests and would have to consider imposing more stringent protective conditions or simply require Independent Producers and Insurers to rely on PTE 2020-02, which is broadly available to them even in the absence of this exemption.[25]

Accordingly, Section VII(c)(1) conditions relief on the actions of the Insurer to establish, maintain, and enforce written policies and procedures for the review of each recommendation made by an Independent Producer before an annuity is issued to a Retirement Investor pursuant to an Independent Producer's recommendation. The policies and procedures must be prudently designed to ensure compliance with the Impartial Conduct Standards and other exemption conditions. The Insurer must prudently review the Independent Producer's recommendations of its products, and this review must be made without regard to the Insurer's own interests.

Section VII(c)(2) further conditions relief on a requirement that the Insurer's policies and procedures mitigate Conflicts of Interest to the extent that a reasonable person reviewing the policies and procedures and incentive practices as a whole would conclude that they do not create an incentive for the Independent Producer to place its interests, or those of the Insurer, or any Affiliate or Related Entity, ahead of the Retirement Investor's interest. In this regard, the Insurer must not use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives in a manner that is intended, or that a reasonable person would conclude are likely, to result in recommendations that do not meet the Care Obligation or Loyalty Obligation to the Retirement Investor.

[25] While this exemption does not require Insurers to acknowledge fiduciary status, Insurers can.by their own conduct, effectively make recommendations and assume fiduciary responsibility for those recommendations. When they do so, they should rely upon PTE 2020-02 for relief, inasmuch as this exemption provides relief only to the Independent Producers. The Department believes that the relief provided by this exemption is appropriately tailored to the Independent Producer distribution channel, but it will monitor performance under the exemption closely to ensure that it meets its protective purposes.

As further explained below, this condition applies an objective standard focused on whether a reasonable person would conclude that the Insurer's actions or incentives were likely to result in recommendations that do not meet the Care Obligation or Loyalty Obligation. Insurers and Independent Producers must avoid and mitigate conflicts of interest to the extent possible and rely on oversight structures that prevent those conflicts of interest from driving investment recommendations, rather than the financial interests of Retirement Investors.

Under Section VII(c)(3), the Insurer's policies and procedures must also include a prudent process for determining whether to authorize an Independent Producer to sell the Insurer's annuity contracts to Retirement Investors. Specifically, the Insurer must have a prudent process for identifying Independent Producers who have failed to adhere to the Impartial Conduct Standards, or who lack the necessary education, training, or skill to provide investment advice to Retirement Investors. A prudent process includes careful review of objective material, such as customer complaints, disciplinary history, and regulatory actions concerning the Independent Producer, as well as the Insurer's review of the Independent Producer's training, education, and conduct with respect to the Insurer's own products. The Insurer must document the basis for its initial determination that it can rely on the Independent Producer to adhere to the Impartial Conduct Standards and must review that determination at least annually as part of the retrospective review set forth in subsection (d) below.

Discussion of Comments

The Department has made minor edits to the Policies and Procedures requirement in Section II(c) in response to commenters. To ensure Retirement Investors receive the same protections, whether they receive advice under PTE 2020-02 or PTE 84-24, the Department has made the policies and procedures conditions substantively identical, with a few specific obligations tailored to the insurance industry.

Obligation on Insurers

Many commenters expressed concern that the Policies and Procedures requirement would be too difficult to meet for Insurers, who are not fiduciaries under the exemption. Some commenters argued the Policies and Procedures requirement was in conflict with State law. One commenter contrasted the Department's conditions with the NAIC requirements, which the commenter described as specific, actionable, and proportional to the relationship between insurer and agent. Another commenter described the proposed policies and procedures conditions as unworkable and objected to their departure from less demanding State laws, which the commenter said would not require the insurer to directly supervise each Independent Producer. A few commenters urged the Department to adopt the NAIC Model Regulation as a safe harbor.

Other comments focused on practical challenges associated with some interpretations of the exemption's requirements. For example, one commenter argued that use of the term "ensure" was unacceptable because Insurers do not control Independent Producers and therefore cannot guarantee their compliance. Another commenter stated that requiring an insurer to review the recommendations of third-party products is an impossible task because they do not know those products and the products are not and cannot be in their system for review. This commenter further questioned how an insurer can determine whether the recommendation is in the best interest of the Retirement Investor as compared to other products the Independent Producer is authorized to sell, if the Insurer is not required to supervise an Independent Producer's recommendations of other Insurers' products. This same commenter urged the Department to specify in the operative text that supervision does not include an obligation to consider and compare other companies' products. Another commenter also characterized the exemption as requiring Insurers to review all conduct of Independent Producers and stressed the fact that Insurers are not able to control all the actions of Independent Producers to the same degree as, for example, broker-dealers can regulate the conduct of their registered representatives.

Other commenters supported the obligation imposed on Insurers. One commenter pointed to the greater risk that a recommendation in the independent channel will be tainted by conflicts of interest because there is no single institution overseeing each recommendation. To address these conflicts without imposing fiduciary status on all Insurers, each Insurer must exercise oversight over Independent Producers to the extent the Independent Producer is selling the Insurer's own products. To do this, the Insurer must have reasonably designed policies and procedures and must not encourage or reward producers for violating the Impartial Conduct Standards. Another commenter expressed significant concerns with the NAIC Model Regulation. Under the NAIC Model Regulation, insurers and producers are not required to mitigate the compensation-related conflicts of interest that are often responsible when consumers are given bad advice and end up buying annuities that are not suitable for them.

The Department has considered these comments and continues to believe that the policies and procedures requirement is essential to the exemption. The Department is similarly not adopting the NAIC Model Regulation as a safe harbor. If trusted

Independent Producers are to recommend insurance products to Retirement Investors, it is important that they are subject to proper oversight by the Insurer whose products they are recommending, and that those Insurers pay careful attention to financial incentives they create or administer that are misaligned with Retirement Investors' interests. Insurers choosing to rely on Independent Producers for distribution of their products should be able to comply with the protective and workable oversight obligations set out in Section VII(c). Moreover, while there are important differences between the requirements in Section VII(c) and the NAIC Model Regulation, as discussed below, the NAIC Model Regulation itself requires a significant level of supervision demonstrating that Insurers can (and already must) supervise producers. The NAIC Model Regulation specifically says, "An insurer shall establish and maintain a supervision system that is reasonably designed to achieve the insurer's and its producers' compliance with this regulation."[26]

Even if Insurers were not already required to supervise Independent Producers under State law, the conditions in Section VII(c) do not place an excessive burden on Insurers. Section VII(c)(1) specifies that the policies and procedures must be prudently designed to ensure compliance with the Impartial Conduct Standards and other exemption conditions. The "prudently designed" standard does not require perfection with respect to every recommendation by every Independent Producer overseen by the

[26] Section 6.C(2). Similarly, Rule 187 Section 224.6 requires "An insurer shall establish, maintain, and audit a system of supervision that is reasonably designed to achieve the insurer's and producers' compliance." While Rule 187 imposes a higher standard of care than the NAIC Model Regulation and contains other provisions that are more protective of consumers than the NAIC Model Regulation, the Department has not identified statements from industry participants or other publicly available information indicating that carriers or distributors are withdrawing from the New York annuity market as a result of Rule 187.

Insurer. The Department recognizes that, even prudent oversight structures will not prevent every instance of inappropriate advice, and use of the word "ensure" was not intended to suggest otherwise. When an Independent Producer violates the terms of this exemption, notwithstanding the Insurer's adoption and implementation of a prudent oversight structure, the consequence is that the Independent Producer is responsible for the resulting prohibited transaction, not that the Insurer is disqualified from continuing to act as a supervisory Insurer under the exemption. On the other hand, if the Insurer fails to implement policies and procedures and conflict-management measures consistent with this exemption, Independent Producers could not rely on this exemption for relief from ERISA's prohibited transaction rules.

In response to comments, the Department also confirms that Insurers are not required to police Independent Producers' recommendations of competitors' products. As specified in Section VII(c)(1), "[a]n Insurer is not required to supervise an Independent Producer's recommendations to Retirement Investors of products other than annuities offered by the Insurer." Furthermore, Insurers could choose to comply with the policies and procedures requirement by creating oversight and compliance systems through contracts with insurance intermediaries such as IMOs, FMOs or brokerage general agencies (BGAs). Such intermediaries, for example, could eliminate compensation incentives across all the Insurers that work with the intermediary, review Independent Producers' documentations, and/or use of third-party industry comparisons available in the marketplace to help independent insurance agents recommend products that are prudent for their Retirement Investor customers.

The Department acknowledges, however, that this exemption's policies and procedures requirement is significantly more stringent than the standards imposed by the NAIC Model Regulation. This reflects the difference in ERISA's regulatory structure, which is profoundly concerned about the dangers posed by conflicts of interest as expressed in the prohibited transaction provisions of Title I and Title II of ERISA. Under ERISA Section 408(a) and Code section 4975(c)(2), the Department can grant an exemption only if the exemption is in the interest of plans and their participants and beneficiaries and protective of the rights of participants and beneficiaries. The more stringent requirements of this exemption's policies and procedures are necessary for the Department to make these findings, and to ensure uniform protection of Retirement Investors.

In contrast to ERISA's stringent approach to conflicts of interest, the NAIC Model Regulation's requirements regarding mitigation of material conflicts of interest is not as protective as either the Department's approach under ERISA or the SEC's approach under Regulation Best Interest. This is made clear in the NAIC Model Regulation's definition of a "material conflict of interest" which expressly carves out all "cash compensation or non-cash compensation" from treatment as sources of conflicts of interest.[27] "Cash compensation" that is excluded from the definition of a material conflict of interest is broadly defined to include "any discount, concession, fee, service fee, commission, sales charge, loan, override, or cash benefit received by a producer in connection with the recommendation or sale of an annuity from an insurer, intermediary, or directly from the consumer," and "non-cash compensation" is also broadly defined to

[27] NAIC Model Regulation at section 5.I.(2).

include "any form of compensation that is not cash compensation, including, but not limited to, health insurance, office rent, office support and retirement benefits."[28] The NAIC also expressly disclaimed that its standard creates fiduciary obligations, and the obligations in its NAIC Model Regulation differ in significant respects from those applicable to broker-dealers in the SEC's Regulation Best Interest or to investment advisers pursuant to the Advisers Act's fiduciary duty.[29] For example, in addition to disregarding all forms of compensation as a source of material conflicts of interest, the NAIC Model Regulation's "best interest" standard is treated as satisfied if four component obligations are met – the care, disclosure, conflict of interest, and documentation obligations — but these components do not repeat the NAIC Model Regulation's best interest obligation not to put the producer's or insurer's interests before the customer's interest. Instead, they include a requirement "to have a reasonable basis to believe the recommended option effectively addresses the consumer's financial situation, insurance needs, and financial objectives . . . ."

Obligation on Independent Producers

Other commenters expressed concern that the obligation for Insurers to establish, maintain and enforce policies and procedures is too much of a burden for the Independent Producers who must comply with those policies and procedures. One commenter asserted that, from a practical perspective, it would be impossible for an Independent Producer to set up a system requiring the producer to follow different policies and procedures from different insurers, stating that it would inevitably lead to the producer's failure to meet

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[28] *Id.* at section 5.B. and J.

[29] Section 6.A.(1)(d) of the NAIC Model Regulation provides, "[t]he requirements under this subsection do not create a fiduciary obligation or relationship and only create a regulatory obligation as established in this regulation."

the requirements of the Proposed Amendment. Another commenter stated that the obligation to figure out how to operate within different policies and procedures developed by different Insurers would drive many Independent Producers to reduce the number of Insurers for whom they sell and the number of different products they recommend. The commenter warned that this reduction could harm Retirement Investors because it would be based on the Independent Producer's own compliance burden, rather than the needs of Retirement Investors.

The Department acknowledges that there may be variations in the requirements that Insurers impose on Independent Producers or intermediaries as a result of the requirements of this Final Amendment. However, Independent Producers already have the obligation to comport their conduct to the varying contractual arrangements and policies of different Insurers. As a practical matter, Independent Producers, either directly, or indirectly through their relationship with an IMO or other intermediary, must already conform their conduct to the requirements of the potentially varying policies and procedures of the different Insurers whose products they recommend. Similarly, as Independent Producers, they necessarily have to master the intricacies of varying—and often quite complex—annuity products, compensation policies and structures, and contractual requirements provided by multiple insurance companies. The additional burden, if any, of complying with some additional variation in these same Insurers' policies and procedures, all of which are aimed at promoting the uniform goal of ensuring compliance with the Impartial Conduct Standards, is amply justified by Retirement Investors' interest in receiving sound advice from trusted Investment Professionals that is prudent, loyal, and free from misleading statements and excessive compensation.

Incentives

Commenters expressed particular concern about the requirement that Insurers may not use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives that are intended, or that a reasonable person would conclude are likely, to result in recommendations that do not meet the Care Obligation or Loyalty Obligation. As noted in the preamble to PTE 2020-02, which contains essentially the same obligation, some commenters incorrectly read the Proposed Amendment as conditioning reliance on the exemption on elimination of all differentials in compensation. Other commenters viewed the exemption as prohibiting or limiting the use of Insurer-funded training and educational conferences and programs. For example, some commenters expressed concern that, under the exemption's terms, Insurers would not be able to exclude Independent Producers from training conferences even though they did not make significant sales of the Insurer's products. Several commenters additionally suggested that the Department's approach to conflicts of interest is inconsistent with that of other regulators. These commenters described the preamble to the Proposed Amendment as reflecting a judgment call by the Department that such conflicts cannot be sufficiently mitigated and therefore must be eliminated, and one challenged the Department's authority to impose such anti-conflict policies on Insurers who had not acknowledged fiduciary status or undertaken to act in a fiduciary capacity to the extent the policies exceeded the requirements of State law. One commenter described the Department's requirements as conflicting with the NAIC Model Regulation, which the commenter said only prohibits incentives that are based on sales of specific annuities within a limited period of time.[30]

However, as noted in the preamble to the final amendment to PTE 2020-02, which contains essentially the same requirement as this exemption, the exemption provision neither categorically bans differential compensation, nor prohibits Insurers from funding educational meetings. The exemption merely requires reasonable guardrails for conferences, especially if they involve travel. The exemption applies an objective standard focused on whether a reasonable person would conclude that the Insurer's actions or incentives were likely to result in recommendations that do not meet the Care Obligation or Loyalty Obligation. The Department recognizes that it is impossible to eliminate all conflicts of interest with respect to the commission-based sale of insurance products, and the Department is not demanding the impossible. Instead, the Department is requiring Insurers and Independent Producers to avoid and mitigate conflicts of interest to the extent possible and to rely on oversight structures that prevent those conflicts of interest from driving investment recommendations, rather than the financial interests of Retirement Investors. The Department further confirms that an Independent Producer may receive reasonable and customary deferred compensation or subsidized health or pension benefit arrangements such as typically provided to a statutory "employee" as defined in Code section 3121(d)(3) without, in and of itself, violating the conditions of this exemption. However, Insurers working with these statutory employees must ensure that their policies and procedures and incentive practices are reasonably and prudently designed as required by Section VII(c).

[30] NAIC Model Regulation section 6.C(2)(h).

While the Department acknowledges that the exemption imposes more stringent standards on Independent Producers than many State laws and the NAIC Model Rule, the exemption is fully consistent with the Department's authority and responsibilities under ERISA. The Department has conditioned relief from ERISA's prohibited transaction provisions on compliance with the exemption conditions based on its separate authority under Federal law, which governs Plan and IRA investments and fiduciary investment recommendations, irrespective of the type of investment product recommended, including insurance products and non-insurance products alike.

ERISA imposes an obligation on the Department to safeguard Retirement Investors from conflicts of interest. Under ERISA, in contrast to most State insurance laws, fiduciary advice providers are categorically prohibited from making investment recommendations that result in their receipt of variable compensation, unless permitted by a special exemption granted by statute or the Department. The Department can only grant exemptions that it finds are in the interest of and protective of Retirement Investors.[31]

Moreover, the conflicts of interest that give rise to prohibited transactions under Titles I and II of ERISA, include conflicts of interest associated with compensation, such as commissions and fees that the NAIC Model Regulation expressly excludes from treatment as material conflicts of interest. Specifically, the NAIC Model Regulation's definition of a "material conflict of interest" expressly carves out all "cash compensation or non-cash compensation" from treatment as sources of material conflicts of interest.[32] This "cash compensation," which is excluded from the definition of a material conflict of

[31] ERISA section 408(a)(2), (3); 29 U.S.C. 1108(a)(2), (3); Code section 4975(c)(2)(B), (C).
[32] NAIC Model Regulation at section 5.I.

interest, is broadly defined to include “any discount, concession, fee, service fee, commission, sales charge, loan, override, or cash benefit received by a producer in connection with the recommendation or sale of an annuity from an insurer, intermediary, or directly from the consumer.[33] “Non-cash compensation” is also broadly defined to include "any form of compensation that is not cash compensation, including but not limited to, health insurance, office rent, office support and retirement benefits.”[34]

In contrast, the SEC, like the Department of Labor, recognizes that such compensation creates significant conflicts of interest, as recognized in its Regulation Best Interest and under the fiduciary duty of the Investment Advisers Act of 1940. In an FAQ regarding this regulation, SEC staff provided examples of common sources of conflicts of interest for broker-dealers, investment advisers, or financial professionals, and specifically included “compensation, revenue or other benefits (financial or otherwise).”[35]

This Final Amendment appropriately follows Federal law, as expressed in ERISA, to protect Plan and IRA investors. The more stringent Federal protections adopted here with respect to Federally regulated retirement investments fully accord with ERISA’s requirements and the authority conferred by Congress to the Department in ERISA section 408(a) and Code section 4975(c)(2) to protect Retirement Investors from harmful conflicts of interest.

The Department has specifically granted this Final Amendment to permit Independent Producers to receive compensation that may vary based on their specific

[33] NAIC Model Regulation at section 5.B.
[34] NAIC Model Regulation at section 5. J.
[35] See Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Conflicts of Interest, Q2, available at https://www.sec.gov/tm/iabd-staff-bulletin-conflicts-interest

investment recommendations, such as sales commissions, that otherwise would be prohibited by ERISA's broad categorical prohibitions on the receipt of such conflicted compensation by fiduciaries. However, in order to receive such compensation when acting as fiduciaries, Independent Producers must recommend products only from Insurers that pay attention to the conflicts that are inherent in their compensation models and take special care to avoid creating or implementing compensation practices that are intended, or that a reasonable person would conclude are likely, to result in recommendations that do not meet the Care Obligation or Loyalty Obligation of this Final Amendment.

However, as discussed above, because of Insurer concerns about being held responsible as fiduciaries for the conduct of Independent Producers whom they do not hire or control as common law employees, the Department has not conditioned relief on the Insurer's acknowledgement of fiduciary status with respect to the Independent Producer's recommendation of its insurance products. Instead, it simply requires that Independent Producers that receive otherwise prohibited compensation subject to appropriate oversight and incentive structures. Under the Final Amendment, the oversight is conducted by the same Insurers who create the incentive structures for the products in the first place and generally already have oversight responsibility over Independent Producers under State law.

The Department understands that Insurers significantly rely on educational conferences for Independent Producers, as commenters indicated, and that such conferences and training can promote Retirement Investors' interests. Accordingly, the Department stresses that it is not prohibiting such conferences. However, participation in and reimbursement for these conferences must be structured in a manner to ensure they are not likely to cause Independent Producers to make recommendations that violate this exemption's Care Obligation or Loyalty Obligation. In addition, the Department notes that properly designed incentives that are simply aimed at increasing the overall amount of retirement saving and investing, without promoting specific products, would not violate the policies and procedures requirement.

As noted in the preamble to the Final Amendment to PTE 2020-02, the Department also recognizes that it can be proper to tie attendance at conferences to appropriate sales thresholds in certain circumstances (for example, insurance companies could not reasonably be expected to provide training for independent agents who are not recommending their products). On the other hand, parties must take special care to ensure that training conferences held in vacation destinations are not designed to incentivize recommendations that run counter to Retirement Investor interests. Firms should structure training events to ensure that they are consistent with the Care and Loyalty Obligations. Recommendations to Retirement Investors should be driven by the interests of the investor in a secure retirement. Certainly, parties should avoid creating situations where the training is merely incidental to the event, and an imprudent recommendation to a Retirement Investor is the only thing standing between an Investment Professional and a luxury getaway vacation.

Reviewing Independent Producers

Some commenters raised specific concerns with the requirement in Section VII(c)(3), which provides that the Insurer whose product is recommended has a prudent process for determining whether to authorize an Independent Producer to sell the

Insurer's annuity contracts and to protect the Retirement Investor from Independent Producers who have failed to adhere to the Impartial Conduct Standards or who lack the necessary education, training, or skill. A prudent process would include review of such objective materials as customer complaints, disciplinary history, and regulatory actions concerning the Independent Producer, as well as the Insurer's review of the Independent Producer's training, education, and conduct with respect to the Insurer's own products. Section VII(d)(1) specifies that Insurers may rely in part on sampling to conduct their retrospective reviews, as long as any sampling or other method is designed to identify potential violations, problems, and deficiencies that need to be addressed.

Some commenters objected to provisions in this proposed requirement that would have required a prudent process "for taking action to protect Retirement Investors from Independent Producers who are likely to fail to adhere to the Impartial Conduct Standards," and several commenters said they do not know how to predict in advance the likelihood that a producer is "likely to fail" in the future. One commenter additionally asked the Department to state that these requirements could be limited to objective criteria such as a criminal background check, license verification, credit history check, and similar data readily available to the Insurer.

In response to these commenters, the Department has not included the phrase "or are likely to fail" after "who have failed" in the Final Amendment, because it may have been read to require predictive powers, which the Department did not intend. The Department also agrees that a prudent process for reviewing Independent Producers must include a careful review of "objective material," but the Department does not agree that a prudent process can be fully specified in advance by reference to a tightly limited set of objective materials and therefore has not adopted changes requested by commenters to further narrow the requirements of Section VII(c)(3).

Providing Policies and Procedures to the Department

Proposed Section VII(c)(4) would have required Insurers to provide their complete policies and procedures to the Department upon request within 10 business days of the request. The provision is also part of the Policies and Procedures condition in PTE 2020-02 and was subject to comments in connection with that exemption. As described in the preamble to the final amendment to PTE 2020-02, one commenter expressed support, noting that this condition would provide a meaningful incentive for Financial Institutions to ensure that policies and procedures are reasonably designed. Another commenter strongly urged the Department to eliminate this condition and instead rely on its subpoena authority, if necessary. Another comment requested more time to provide the certification to the Department. In response to this comment, although the Department expects that the policies and procedures should be easily located, the Department also recognizes the possibility of inadvertent non-compliance because of the tight timeline. After considering these comments, the Department has retained Section VII(c)(4) but extended the time for Insurers to provide their complete policies and procedures to the Department from within 10 business days as proposed to within 30 days of request.

Retrospective Review

Under Section VII(d), the Insurer whose product the Independent Producer recommends must have a process for conducting a retrospective review of each Independent Producer at least annually that is reasonably designed to detect and prevent violations of, and achieve compliance with, the exemption's conditions. The retrospective review also includes a review of Independent Producers' documentation of rollover recommendations and required rollover disclosure. As part of this review, the Insurer is expected to prudently determine whether to continue to permit individual Independent Producers to sell the Insurer's annuity contracts to Retirement Investors. Additionally, the Insurer must update its policies and procedures as business, regulatory, and legislative changes and events dictate, and ensure that its policies and procedures remain prudently designed, effective, and compliant with Section VII(c). To ensure Retirement Investors receive the same protections, whether they receive advice under PTE 2020-02 or PTE 84-24, the Department has made the retrospective review conditions substantively identical, with a few specific obligations tailored to the insurance industry. In addition, under the Proposed Amendment, the Insurer was expected to give the Independent Producer the methodology and results of the retrospective review, including a description of any non-exempt prohibited transaction the Independent Producer engaged in with respect to investment advice defined under Code section 4975(e)(3)(B), and instruct the Independent Producer to correct those prohibited transactions, report the transactions to the IRS on Form 5330, pay the resulting excise taxes imposed by Code section 4975, and provide the Insurer with a certification that the Independent Producer has filed the Form 5330 within 30 days after the form is due (including extensions).

Under the Proposed Amendment, the methodology and results of the retrospective review had to be reduced to a written report that is provided to a Senior Executive Officer of the Insurer. As proposed, that Senior Executive Officer also had to certify, annually, that:

(A) The officer has reviewed the retrospective review report;

(B) The Insurer has provided Independent Producers with the information required under (d)(2) and has received a certification that the Independent Producer has filed Form 5330 within 30 days after the form is due (including extensions);

(C) The Insurer has established policies and procedures prudently designed to ensure that Independent Producers achieve compliance with the conditions of this exemption, and has updated and modified the policies and procedures as appropriate after consideration of the findings in the retrospective review report; and

(D) The Insurer has in place a prudent process to modify such policies and procedures as set forth in Section VII(d)(1).

The review, report, and certification was proposed to be completed no later than six months following the end of the period covered by the retrospective review. The Proposed Amendment would have required the Insurer to retain the report, certification, and supporting data for a period of six years and make the report, certification, and supporting data available to the Department within 10 business days of request.

Some commenters supported the retrospective review condition and supported having Insurers undertake a regular process to ensure that their policies and procedures are reasonably designed to detect and prevent violations of, and achieve compliance with, the conditions of the exemption. However, other commenters raised concerns, viewing the condition as excessive and inefficient. Commenters asserted that it is both impractical and unnecessary for Insurers to review each recommendation and expressed concern about the volume of recommendations. One commenter requested confirmation that testing done as part of the retrospective review could rely on standard sampling and testing techniques. Another commenter pointed to the language in the preamble to the

Proposed Amendment acknowledging that insurance companies working with Independent Producers have less direct control over the conduct and compensation of Independent Producers than over their employees. As a result, they stated that Insurers would not have access to the information they would need to effectively ensure that Independent Producers fully complied with the Impartial Conduct Standards and the other exemption conditions. One commenter expressed concern that under the exemption, Independent Producers are not required to provide Insurers with sufficient information for them to be able to conduct the retrospective review. Some commenters argued that the Department should instead rely on the NAIC Model Regulation's written report to senior management which details a review, with appropriate testing, reasonably designed to determine the effectiveness of the insurer's supervision system, the exceptions found, and corrective action taken or recommended, if any.

Some commenters also raised specific concerns with the Senior Executive Officer certification requirement. They noted that other regulators typically require that certifications provide assurance that company systems or procedures are "reasonably designed to achieve compliance," a standard that they asserted was lower than what is required for Independent Producers to achieve compliance with impartial conduct standards. Other commenters stated that the retrospective review should not consider the filing of the IRS Form 5330, arguing this is beyond the Department's regulatory authority. A few commenters raised specific concerns that Insurers were not the appropriate party to file Form 5330 under the Code. Others argued that requiring Insurers to file Form 5300 interfered with State regulation of insurance.

One commenter requested more time to provide the certification to the Department. In response to this comment, although the Department expects that these reports should already be completed at the time of the request and easily located, it recognizes the possibility of inadvertent non-compliance because of the tight timeline and has modified the requirement to give Insurers 30 days to provide the certification.

The Department is finalizing the retrospective review requirement because of the fundamental importance of a regular review process to ensure that the Policies and Procedures are working and that Independent Producers are complying with the Impartial Conduct Standards. In response to commenters, the Department has added to Section (d)(1) a clarification that Insurers may rely in part on sampling of each Independent Producer's transactions to conduct their retrospective reviews, as long as any sampling or other method is designed to identify potential violations, problems, and deficiencies that need to be addressed.

The Department is also making several other changes to specifics of the retrospective review provision. To address concerns from some commenters about having the Insurer file Form 5330, the Department is revising the filing obligation to be the responsibility of the Independent Producer, which is a fiduciary, and thus a "disqualified person liable for the tax under Code section 4975 for participating in a prohibited transaction."[36] However, the Insurer is expected to instruct the Independent Producer to correct those prohibited transactions, report the transactions to the IRS on Form 5330, pay the resulting excise taxes imposed by Code section 4975, and provide the Insurer with a certification that it has filed Form 5330 within 30 days after the form is due

[36] IRS Form 5330 instructions https://www.irs.gov/pub/irs-pdf/i5330.pdf

(including extensions). The Department is also revising Section VII(d)(3) for consistency with amended PTE 2020-02. The methodology and results of the retrospective review must be reduced to a written report that is provided to a Senior Executive Officer of the Insurer. This is essential for Insurers to know that their Independent Producers are actually correcting prohibited transactions.

The Department is also revising the Senior Executive Officer certification to incorporate the amended provisions regarding Form 5330. Under the Final Amendment, the required certification states that the officer has reviewed the retrospective review report, the Insurer has provided Independent Producers with the information required under (d)(2), and the Insurer has received a certification that affected Independent Producers have filed Form 5330 within 30 days after the form is due (including extensions).

Self-correction

Section VII(e) allows the Independent Producer to correct violations to avoid a non-exempt prohibited transaction in certain circumstances. Self-correction is allowed in cases when either (1) the Independent Producer has refunded any charge to the Retirement Investor; or (2) the Insurer has rescinded a mis-sold annuity, canceled the contract, and waived the surrender charges. The correction must occur no later than 90 days after the Independent Producer learned of the violation or reasonably should have learned of the violation; the Independent Producer must notify the person(s) at the Insurer responsible for conducting the retrospective review during the applicable review cycle; and the violation and correction must be specifically set forth in the written report of the retrospective review required under Section VII(d)(2).

The appropriate remedy for a non-exempt prohibited transaction involving an annuity purchase is rescission, which requires the insurer to cancel the contract and waive surrender charges. The correction must occur no later than 90 days after the Independent Producer learned, or reasonably should have learned, of the violation. Lastly, the Independent Producer must notify the person(s) at the Insurer responsible for conducting the retrospective review during the applicable review cycle and the violation and correction must specifically be set forth in the written retrospective review report.

One commenter stated that it is unclear what is exactly meant by a “mis-sold” annuity and what is supposed to happen if an agent and Insurer disagree in that regard. Thus, according to this commenter, it is unclear how the agent or Insurer in the case of retrospective review would even discover any non-exempt prohibited transaction. This same commenter also questioned whether all non-exempt prohibited transactions require rescission or whether there is a materiality threshold. This commenter also stated that the Proposed Amendment did not address the common situation where an Insurer rescinds an annuity as a matter of customer service without determining or admitting any violation of laws or, in this case, noncompliance with impartial conduct standards. Finally, this commenter asked how situations would be handled where agents and Insurers disagree on the need for correction under PTE 84-24.

As discussed in the preamble to PTE 2020-02 in response to comments, the Department notes that no one is required to use the self-correction provision. Furthermore, not all violations of the exemption can be corrected under the self-correction provision. In addition, minor disclosure failures can be corrected under Section VII(b)((7), which provides that the Independent Producer will not fail to satisfy the disclosure conditions solely because it makes an error or omission in disclosing the required information while acting in good faith and with reasonable diligence. To avoid a violation of the exemption, the Independent Producer must disclose the correct information as soon as practicable, but not later than 30 days after the date on which it discovers or reasonably should have discovered the error or omission. Lastly, the Department notes that merely rescinding an annuity as a matter of customer service is not self-correcting if there was no violation to correct.

While the Insurer may discover violations eligible for self-correction as part of its retrospective review under Section VII(d), it is the Independent Producer's obligation to self-correct under Section VII(e) to avoid the resulting prohibited transaction and imposition of an excise tax. If there is disagreement, the Independent Producer ultimately has the responsibility as a fiduciary to decide whether to take action. Based on what the Insurer learns through the review process, and the specific facts and circumstances, a reasonable Insurer may conclude that it is imprudent to continue authorizing that Independent Producer to sell its annuity contracts and act accordingly. To the extent that the Independent Producer does not or cannot correct the violation, the consequence is that a prohibited transaction has occurred with attendant liability for the excise tax.

As discussed in the proposal to PTE 2020-02, some commenters raised concerns about the lack of a materiality threshold, and the requirement that all mistakes be reported and remediated, no matter how minor or inadvertent. However, the self-correction provisions are measured and proportional to the nature of the injury. They simply require timely correction of the violation of the law and notice to the person responsible for retrospective review of the violation, so that the significance and materiality of the violation can be assessed by the appropriate person responsible for assessing the effectiveness of the firm's compliance oversight. In addition, to address the commenters' concern about the burden associated with the self-correction provision, the Department has deleted the requirement to report each correction to the Department in this Final Amendment. This change should ease the compliance burden. Furthermore, to the extent parties are wary of utilizing the self-correction provision because they would have to report each self-correction to the Department, they should feel more comfortable correcting each violation they find that is eligible for self-correction after this modification. The Department notes that it may request Independent Producers to provide evidence of self-corrections through the recordkeeping provisions in Section IX.

Eligibility

The Proposed Amendment added Section VIII which identifies circumstances under which an Independent Producer would have become ineligible to rely on the exemption for 10 years, and also circumstances when an entity would not have been permitted to serve as an Insurer under this exemption for 10 years. The proposed eligibility provisions were similar to the provisions of Section III of PTE 2020-02 and are intended to promote compliance with the exemption conditions. The Department continues to believe that the eligibility provisions are important to ensure that Independent Producers comply with the obligations of the exemption, subject to oversight by Insurers that take compliance with the exemption's conditions seriously. Therefore, after consideration of the comments, the Department has determined to retain the eligibility provision of Section VIII, but it has made several important modifications that are discussed below.

Under the Final Amendment, an Independent Producer or Insurer can become ineligible as a result of a conviction by: (A) a U.S. Federal or State court as a result of any felony involving abuse or misuse of such person's employee benefit Plan position or employment, or position or employment with a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary; income tax evasion; any felony involving larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element; or a crime that is identified or described in ERISA section 411; or (B) a foreign court of competent jurisdiction as a result of any crime, however denominated by the laws of the relevant foreign or state government, that is substantially equivalent to an offense described in (A) above (excluding convictions that occur within a foreign country that is included on the Department of Commerce's list of "foreign adversaries" that is codified in 15 CFR 7.4 as amended).

Independent Producers and Insurers also lose eligibility if they are found or determined in a final judgment or court-approved settlement in a Federal or State criminal or civil court proceeding brought by the Department, the Department of the Treasury, the Internal Revenue Service, the Department of Justice, a State insurance regulator, or State attorney general, to have participated in one or more of the following categories of misconduct irrespective of whether the court specifically considers this exemption or its terms: (A) engaging in a systematic pattern or practice of violating the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; (B) intentionally engaging in conduct that violates the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; or (C) providing materially misleading information to the Department, the Department of the Treasury, the Internal Revenue Service, the Department of Justice, a State insurance regulator, or State attorney general in connection with the conditions of the exemption.

In addition, Independent Producers (but not Insurers) will become ineligible if they are found or determined in a final judgment or court-approved settlement in a Federal or State criminal or civil court proceeding brought by the Department, the Department of the Treasury, the Internal Revenue Service, the Department of Justice, a State insurance regulator, or State attorney general, to have engaged in a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330, or pay the resulting excise taxes imposed by Code section 4975 in connection with non-exempt prohibited transactions involving investment advice under Code section 4975(e)(3)(B).

The Final Amendment specifies that an Insurer or Independent Producer that is ineligible to rely on this exemption may rely on an existing statutory or separate class prohibited transaction exemption if one is available or may apply for an individual prohibited transaction exemption from the Department.

Most of the comments the Department received on eligibility were combined with the comments submitted under PTE 2020-02 and were essentially the same. Those comments directly submitted under PTE 84-24 are also very similar to the comments under PTE 2020-02 regarding eligibility. For additional discussion of the comments received regarding eligibility please see the grant notice for PTE 2020-02 published elsewhere in today's issue of the *Federal Register*. Many commenters variously asserted that the proposed addition of the eligibility provisions to the exemptions exceeded the Department's authority; undermined parties' ability to rely on the exemptions; unduly broadened the conditions for eligibility; and would result in reduced choice and access to advice for Retirement Investors. Generally, these commenters requested that the Department not include the proposed ineligibility sections in the Final Amendment and requested that, if the Department does move forward with these sections, that it apply the provisions prospectively.

Scope of Ineligibility

One commenter claims that the Proposed Amendment would impose unreasonably harsh sets of conditions on both Independent Producers and on Insurers, under which both would be under constant threat of loss of the exemption for a 10-year period and, in the case of Insurers, loss of the exemption could be triggered by events involving other parties over whom the Insurer has no direct involvement. Another commenter expressed concern that the proposed ineligibility provisions applied too broadly to insurance producers, insurance carriers and their foreign and domestic affiliates.

Some commenters objected to the breadth of the provisions' application to "Affiliates" and requested that the Final Amendment instead use the term "controlled group," which has a clear and well-defined meaning. Some commenters similarly objected to the scope of conduct treated as disqualifying and asserted that disqualification should not extend to criminal conduct that does not involve the management of retirement assets.

In response to the commenters, the Department has decided to use the term "Controlled Group" for purposes of ineligibility of Insurers under Section VIII(b) of the exemption and has revised that Section accordingly. The Final Amendment also adds Section VIII(b)(3), which defines Controlled Group. Under this definition, an entity is in the same Controlled Group as an Insurer if the entity (including any predecessor or successor to the entity) would be considered to be in the same "controlled group of corporations" as the Insurer or "under common control" with the Insurer as those terms are defined in Code section 414(b) and (c) (and any regulations issued thereunder). The Department declines, however, to narrow the Final Amendments' definition of crimes to only those crimes that arise out of the provision of investment advice or the management of plan assets. The enumerated crimes in Section VIII reflect egregious misconduct, typically in a financial context, that is clearly relevant to the parties' willingness and commitment to comply with important legal obligations. There is little basis for concluding that Retirement Investors should be sanguine or that the Department should be confident of compliance when the Independent Producer or Insurer engages in serious crimes, such as embezzlement or financial fraud, but the specific victims were non-Retirement Investors. However, to the extent Independent Producers or Insurers have continued need for an exemption notwithstanding such a conviction, they can apply with the Department for an individual prohibited transaction exemption that would include appropriate protective conditions based on the Department's assessment of the particular facts and circumstances, and the remedial actions the parties have taken to ensure a prospective culture of compliance.

Foreign Convictions

Several commenters claimed that the Department has no basis for expanding the ineligibility provisions to include “substantially equivalent” foreign crimes committed by foreign affiliates and that the inclusion of foreign affiliates is overbroad and will create unintended consequences, especially when the conduct does not need to relate directly to the provision of investment advice. These commenters stated that such inclusion will result in ineligibility for conduct that is unrelated to the provision of fiduciary investment advice and for conduct in which the fiduciary has not participated and about which it has no knowledge. Another commenter stated ineligibility could be triggered by events involving other parties over which the insurer has no direct involvement, such as the conviction of an affiliate company of any of the specified crimes under the laws of a foreign country.

Several comments regarding PTEs 2020-02 and 84-24 stated that the proposed ineligibility provisions raised serious questions of fairness, national security, and U.S. sovereignty. These commenters claimed that ineligibility could result from the conviction of an affiliate in a foreign court for a violation of foreign law without due process protections or without the same level of due process afforded in the United States. Some commenters state that it is not clear that the Department is equipped to make the “substantially equivalent” determination and doing so could result in inconsistency and unfairness. One commenter agreed that investment transactions that include retirement assets are increasingly likely to involve entities that may reside or operate in jurisdictions outside the U.S. and that reliance on the exemptions therefore must appropriately be tailored to address criminal activity, whether occurring in the U.S. or in a foreign jurisdiction, but noted their concerns with the potential lack of due process in foreign jurisdictions.

Other commenters were concerned that some foreign courts could be vehicles for hostile governments to achieve political ends as opposed to dispensing justice and for interference in the retirement marketplace for supposed wrongdoing that is wholly unrelated to managing retirement assets. They further noted concerns that these governments could potentially assert political influence over fiduciary advice providers looking to avoid a foreign criminal conviction.

After considering these comments, the Department is retaining the inclusion of foreign convictions in the Final Amendment. Retirement assets are often involved in transactions that take place in entities that operate in foreign jurisdictions therefore making the criminal conduct of foreign entities relevant to eligibility under PTE 84-24. An ineligibility provision that is limited to U.S. Federal and State convictions would ignore these realities and provide insufficient protection for Retirement Investors. Moreover, foreign crimes call into question an Insurer's and Independent Producer's culture of compliance just as much as domestic crimes, whether prosecuted domestically or in foreign jurisdictions.

The Department does not expect that questions regarding "substantially equivalent" will arise frequently, especially given the Final Amendment's use of the term "Controlled Group" instead of "Affiliate," as discussed above. But, when these questions do arise, those impacted may contact the Office of Exemption Determinations for guidance, as they have done for many years.[37] As discussed in more detail below, the one-year Transition Period that has been added to the exemption and the ability to apply for an individual exemption, give parties both the time and the opportunity to address any issues about the relevance of any specific foreign conviction and its applicability to ongoing relief pursuant to PTE 84-24. Insurers and Independent Producers should interpret the scope of the eligibility provision broadly with respect to foreign convictions and consistent with the Department's statutorily mandated focus on the protection of Plans in ERISA section 408(a) and Code section 4975(c)(2). In situations where a crime raises particularly unique issues related to the substantial equivalence of the foreign criminal conviction, the Insurers and Independent Producers may seek the Department's views regarding whether the foreign crime, conviction, or misconduct is substantially equivalent to a U.S. Federal or State crime. However, any Insurer or Independent Producer submitting a request for review should do so promptly, and whenever possible, before a judgment is entered in a foreign conviction.

The exemption for Qualified Professional Asset Managers (QPAMs), PTE 84-14, has a similar disqualification provision and the Department is not aware that any foreign convictions have occurred in foreign nations with respect to the QPAM exemption that are intended to harm U.S.-based financial institutions and believes there is a small likelihood of such occurrences. Further, the types of foreign crimes of which the

[37] PTE 84-14 contains a similar eligibility provision which has long been understood to include foreign convictions. Impacted parties have successfully sought OED guidance regarding this eligibility provision whenever individualized questions or concerns arise. *See*, *e.g.,* Prohibited Transaction Exemption (PTE) 2023-15, 88 FR 42953 (July 5, 2023); 2023-14, 88 FR 36337 (June 2, 2023); 2023-13, 88 FR 26336 (Apr. 28, 2023); 2023-02, 88 FR 4023 (Jan. 23, 2023); 2023-01, 88 FR 1418 (Jan. 10, 2023); 2022-01, 87 FR 23249 (Apr. 19, 2022); 2021-01, 86 FR 20410 (Apr. 19, 2021); 2020–01, 85 FR 8020 (Feb. 12, 2020); PTE 2019–01, 84 FR 6163 (Feb. 26, 2019); PTE 2016–11, 81 FR 75150 (Oct. 28, 2016); PTE 2016–10, 81 FR 75147 (Oct. 28, 2016); PTE 2012–08, 77 FR 19344 (March 30, 2012); PTE 2004–13, 69 FR 54812 (Sept. 10, 2004).

Department is aware from its experience processing recent PTE 84-14 QPAM individual exemption requests for relief from convictions have consistently related to the subject institution's management of financial transactions and/or culture of compliance. For example, the underlying foreign crimes in those individual exemption requests have included: aiding and abetting tax fraud in France (PTE 2016-10, 81 FR 75147 (October 28, 2016) corrected at 88 FR 85931 (December 11, 2023), and PTE 2016-11, 81 FR 75150 (October 28, 2016) corrected at 89 FR 23612 (April 4, 2024)); attempting to peg, fix, or stabilize the price of an equity in anticipation of a block offering in Japan (PTE 2023-13, 88 FR 26336 (April 28, 2023)); illicit solicitation and money laundering for the purposes aiding tax evasion in France (PTE 2019-01, 84 FR 6163 (February 26, 2019)); and spot/futures-linked market price manipulation in South Korea (PTE 2015-15, 80 FR 53574 (September 4, 2015)).[38]

However, to address the concern expressed in the public comments that convictions have occurred in foreign nations that are intended to harm U.S.-based financial institutions, the Department has revised Section VIII(a)(1)(B) and VIII(b)(1)(B) in the Final Amendment to exclude foreign convictions that occur within foreign jurisdictions that are included on the Department of Commerce's list of "foreign adversaries."[39] Therefore, the Department will not consider foreign convictions that

[38] On December 12, 2018, Korea's Seoul High Court for the 7th Criminal Division (the Seoul High Court) reversed the Korean Court's decision and declared the defendants not guilty; subsequently, Korean prosecutors appealed the Seoul High Court's decision to the Supreme Court of Korea, On December 21, 2023, the Supreme Court of Korea affirmed the reversal of the Korean Conviction, and it dismissed all judicial proceedings against DSK.

[39] 15 CFR 7.4. The list of foreign adversaries currently includes the following foreign governments and non-government persons: The People's Republic of China, including the Hong Kong Special Administrative Region (China); the Republic of Cuba (Cuba); the Islamic Republic of Iran (Iran); the Democratic People's Republic of Korea (North Korea); the Russian Federation (Russia); and Venezuelan politician Nicolás Maduro (Maduro Regime). The Secretary of Commerce's determination is based on

occur under the jurisdiction of the listed "foreign adversaries" as an ineligibility event and has added the phrase "excluding convictions and imprisonment that occur within foreign countries that are included on the Department of Commerce's list of "foreign adversaries" that is codified in 15 CFR 7.4.

Due Process

The Department also received several comments regarding the proposed ineligibility notice process. The Proposed Amendment would have provided that the Department could issue a written ineligibility notice for (A) engaging in a systematic pattern or practice of violating the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; (B) intentionally violating, or knowingly participating in violations of, the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; (C) engaging in a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330, and pay the resulting excise taxes imposed by Code section 4975 in connection with non-exempt prohibited transactions involving investment advice under Code section 4975(e)(3)(B); or (D) providing materially misleading information to the Department in connection with the conditions of the exemption.

Generally, these comments reflected the view that the Department had inappropriately asserted authority to determine ineligibility without external review and

multiple sources, including the National Security Strategy of the United States, the Office of the Director of National Intelligence's 2016–2019 Worldwide Threat Assessments of the U.S. Intelligence Community, and the 2018 National Cyber Strategy of the United States of America, as well as other reports and assessments from the U.S. Intelligence Community, the U.S. Departments of Justice, State and Homeland Security, and other relevant sources. The Secretary of Commerce periodically reviews this list in consultation with appropriate agency heads and may add to, subtract from, supplement, or otherwise amend the list. Sections VIII(a)(1)(B) and VIII(b)(1)(B) of the Final Amendment will automatically adjust to reflect amendments the Secretary of Commerce makes to the list.

without appropriate due process protections. Commenters stressed that disqualification effectively imposed a 10-year ban, and many expressed the view that more procedural protections were necessary for such a significant consequence and that disqualification should be more tightly linked to failure to meet the conditions of the exemption. Some commenters contended that, by leaving too much discretion to the Department, the process would create uncertainty and adversely affect the ability of Retirement Investors to get sound advice. Some commenters expressed concern that the Department's ineligibility process was insufficient because it did not provide a chance for a hearing before an impartial administrative judge or Article III judge, an express right of appeal, and formal procedures for the presentation of evidence.

Some commenters on both PTEs 2020-02 and 84-24 also stated that while the six-month period provided in the exemption may be adequate time to send a notice to Retirement Investors, it is insufficient time for a financial institution to determine an alternative means of complying with ERISA in order to continue to provide advice to Retirement Investors. These commenters requested the Department to revise the exemption to provide for at least 12 months to make the transition away from reliance on PTE 84-24 or to find an alternative means of complying with ERISA following a finding of ineligibility.

After consideration of the comments and to address the due process concerns, the Department has determined to modify Sections VIII(a)(2) and VIII(b)(2) of the ineligibility provisions. While maintaining the types of conduct that can lead to ineligibility, amended Section VIII(a)(2) and VIII(b)(2) of the Final Amendment removes the discretion of the Department from making the determination of whether the conduct has occurred and limits disqualification to court-supervised determinations.

Under the provision as amended, ineligibility under Section VIII(a)(2) will occur as a result of an Independent Producer being found or determined in a final judgment or court-approved settlement in a Federal or State criminal or civil court proceeding brought by the Department, the Department of the Treasury, the IRS, the Department of Justice, a State insurance regulator, or a State attorney general to have participated in one or more of the following categories of conduct irrespective of whether the court specifically considers this exemption or its terms: (A) engaging in a systematic pattern or practice of conduct that violates the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; (B) intentionally engaging in conduct that violates the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; (C) engaging in a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330, or pay the resulting excise taxes imposed by Code section 4975 in connection with non-exempt prohibited transactions involving investment advice under Code section 4975(e)(3)(B); or (D) providing materially misleading information to the Department, the Department of the Treasury, the Internal Revenue Service, the Department of Justice, a State insurance regulator, or State attorney general in connection with the conditions of this exemption.

Likewise, ineligibility under Section VIII(b)(2) will occur as a result of an Insurer being found or determined in a final judgment or court-approved settlement in a Federal or State criminal or civil court proceeding brought by the Department, the Department of the Treasury, the IRS, the Department of Justice, a State insurance regulator, or a State attorney general to have participated in one or more of the following categories of conduct irrespective of whether the court specifically considers this exemption or its terms: (A) engaging in a systematic pattern or practice of violating the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; (B) intentionally engaging in conduct that violates the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; or (C) providing materially misleading information to the Department, the Department of the Treasury, the Internal Revenue Service, the Department of Justice, a State insurance regulator, or State attorney general in connection with the conditions of this exemption.

Ineligibility under Section VIII(a)(2) and (b)(2) will therefore operate in the same manner as ineligibility for a criminal conviction defined in Section VIII(a)(1) and (b)(1), subject to the timing and scope provisions in Section VIII(c). An Insurer or Independent Producer will become ineligible only after a court has found or determined in a final judgment or approved settlement that the conduct listed in Section VIII(a)(2) or (b)(2) has occurred. In response to concerns raised by commenters, the Department has made changes so that any ineligibility occurs only after a conviction, a court's final judgment, or a court approved settlement.

Thus, ineligibility will follow a determination in civil or criminal court proceedings subject to the full array of procedural protections associated with legal proceedings overseen by courts and will include the normal judicial oversight associated with convictions, final judgments, and court approved settlements. In addition to providing sufficient due process, this revised ineligibility provision (i.e., having ineligibility occur only after a conviction, a court's final judgment, or a court approved settlement) gives those facing ineligibility ample notice and time to prepare for ineligibility and the resulting One-Year Transition Period discussed below. An ineligible Insurer or Independent Producer would become eligible to rely on this exemption again if there is a subsequent judgment reversing the conviction or final judgement.

Timing of Ineligibility and One-Year Transition Period

Several commenters to both PTE 2020-02 and PTE 84-24 expressed concern that the eligibility provisions would apply retrospectively and urged the Department to confirm that ineligibility under the exemption would occur only on a prospective basis after finalization of the amendment to the exemption. Additionally, some commenters asserted that the six-month period provided in the Proposed Amendment following ineligibility would be insufficient for Insurers and Independent Producers to prepare for any inability to provide retirement investment advice for a fee, determine an alternative means of complying with ERISA, and to prepare and submit an individual exemption. Another commenter stated that providing a longer 12-month period would enable Insurers and Independent Producers to find alternative compliant means to help retirement investors and would enable retirement investors to continue to receive investment recommendations in their best interest.

One commenter claimed that the sudden real or impending loss of significant numbers of providers, or even a handful of the largest among them, as the result of their disqualification would cause significant disruption as Plans would have no more than six months to find suitable replacements and would impose harm on Retirement Investors who have hired a disqualified firm.

The Department confirms that ineligibility under Section VIII will be prospective such that only convictions, final judgments, or court-approved settlements occurring after the Applicability Date of this Final Amendment will cause ineligibility. In addition, the six-month lag period for eligibility has been replaced with the One-Year Transition Period in Section VIII(c)(2). Accordingly, while Section VIII(c) now provides that a party becomes ineligible upon the date of conviction, final judgment, or court-approved settlement that occurs after the Applicability Date of the exemption, the One-Year Transition period provides Insurers and Independent Producers ample time in which to prepare for the loss of the exemptive relief under PTE 84-24, determine alternative means for compliance, prepare and protect Retirement Investors, and apply for an individual exemption.

The Final Amendment indicates that relief under the exemption during the Transition Period is available for a maximum period of one year after the Ineligibility Date if the Insurers or Independent Producer, as applicable, submits a notice to the Department at PTE84-24@dol.gov within 30 days after ineligibility begins under Section VIII(c). No relief will be available for any transactions (including past transactions) effected during the One-Year Transition Period unless the Insurer or Independent Producer complies with all the conditions of the exemption during such one-year period. The Department notes that it included the One-Year Transition Period in the Final Amendment to reduce the costs and burdens associated with the possibility of ineligibility, and to give Insurers or Independent Producers an opportunity to apply to the Department for individual prohibited transaction exemptions with appropriate protective conditions.

The One-Year Transition Period begins on the date of the conviction, the final judgment (regardless of whether that judgment remains under appeal), or court approved settlement. Insurers or Independent Producers that become ineligible to rely on this exemption may rely on a statutory prohibited transaction exemption, such as ERISA section 408(b)(14) and Code section 4975(d)(17), or separate administrative prohibited transaction exemption if one is available, or may seek an individual prohibited transaction exemption from the Department. In circumstances where the Insurers or Independent Producers become ineligible, the Department believes the interests of Retirement Investors are best protected by the procedural protections, public record, and notice and comment process associated with the individual exemption applications process. When processing individual exemption applications, the Department has unique authority to efficiently gather evidence, consider the issues, and craft protective conditions that meet the statutory standard. If the Department concludes, consistent with the statutory standards set forth in ERISA section 408(a) and Code section 4975(c)(2), that an individual exemption is appropriate, Retirement Investors can make their own independent determinations whether to engage in otherwise prohibited transactions with the Insurers or Independent Producers.

The Department encourages any Insurers or Independent Producers facing allegations that could result in ineligibility to begin the individual exemption application process as soon as possible. If the applicant becomes ineligible and the Department has not granted a final individual exemption, the Department will consider granting retroactive relief, consistent with its policy as set forth in 29 CFR 2570.35(d); the

Department cautions that retroactive exemptions may require additional prospective compliance.

Form 5330

The Department received comments that expressed concern over the imposition of ineligibility based on the Independent Producers' failure to make the required Code section 4975 excise tax filing and to comply with IRS Form 5330 filing requirements and excise tax payment obligations. Several commenters stated this provision is unreasonable and that the Department has no statutory or regulatory enforcement authority to base ineligibility on these Code provisions and claimed this was overreach by the Department. These commenters urged the Department to remove this provision from the exemption.

The Department is retaining ineligibility based on failure to correct prohibited transactions, report those transactions to the IRS on Form 5330 or pay the resulting excise taxes imposed by Code section 4975 in connection with non-exempt prohibited transactions involving investment advice as defined under Code section 4975(e)(3)(B). The excise tax is the Congressionally imposed sanction for engaging in a non-exempt prohibited transaction and provides a powerful incentive for compliance with the participant-protective terms of this exemption. Insisting on compliance with the statutory obligation to pay the excise tax provides an important safeguard for compliance with the tax obligation when violations occur and focuses the institution's attention on instances where the conditions of this exemption have been violated, resulting in a non-exempt prohibited transaction. Moreover, the failure to satisfy this condition calls into question the Independent Producer's commitment to regulatory compliance, as is critical to ensuring adherence to the conditions of this exemption including the Impartial Conduct Standards.

By including this provision in the Final Amendment, the Department does not claim authority to impose taxes under the Code, and leaves responsibility for collecting the excise tax and managing related filings to the IRS. Since an obligation already exists to file Form 5330 when parties engage in non-exempt prohibited transactions, the Department is merely conditioning relief in the exemption on their compliance with existing law. The condition provides important protections to Retirement Investors by enhancing the existing protections of PTE 84-24.

Moreover, as discussed above, ineligibility under Section VIII(a)(2)(C) would only occur following a court finding that an Independent Producer engaged in a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330 or pay the resulting excise taxes imposed by Code section 4975. Imposing ineligibility only after such determinations in connection with court proceedings removes the Department from the determination process and provides ample due process.

Alternative Exemptions

An Insurer or Independent Producer that is ineligible to rely on this exemption may rely on a statutory or separate administrative prohibited transaction exemption if one is available or may request an individual prohibited transaction exemption from the Department. To the extent an applicant requests retroactive relief in connection with an individual exemption application, the Department will consider the application in accordance with its retroactive exemption policy as set forth in 29 CFR 2570.35(d). The

Department may require additional prospective compliance conditions as a condition of providing retroactive relief. A few commenters also expressed concern that the Alternative Exemptions process was not sufficient. One commenter in particular expressed concern with the length and expense of seeking to obtain an individual exemption, claiming this would result in harm to Plans.

As discussed above, the violations that would trigger ineligibility are serious, call into question the parties' willingness or ability to comply with the obligations of the exemption, and have been determined in court supervised proceedings. In such circumstances, it is important that the parties seek individual relief from the Department if they would like to continue to have the benefit of an exemption that permits them to engage in conduct that would otherwise be illegal. As part of such an on the record process, they can present evidence and arguments on the scope of the compliance issues, the additional conditions necessary to safeguard Retirement Investor interests, and their ability and commitment to comply with protective conditions designed to ensure prudent advice and avoid the harmful impact of dangerous conflicts of interest.

One commenter also speculated that the loss of the exemption based on ineligibility would effectively require the Insurer to acknowledge fiduciary status in connection with any request for an individual exemption. The Department notes, however, that it would base any decisions on whether to grant such an exemption and the possible conditions it would include in such exemption, including the need for a fiduciary acknowledgment, on the particular facts and circumstances that were presented by an applicant.

Recordkeeping

Section IX provides that Independent Producers and Insurers must maintain for a period of six years from the date of the covered transaction records demonstrating compliance with this exemption and make such records available to the extent permitted by law, including 12 U.S.C. 484, to any authorized employee of the Department or the Department of the Treasury, including such employees of the Internal Revenue Service. While the Department had proposed a broader recordkeeping condition affording greater public access to the records, the Department has determined that the recordkeeping provisions for advice under PTE 84-24 should be narrowed consistent with those in PTE 2020-02.

Although the proposed broader recordkeeping condition was consistent with other exemptions, the Department understands commenters' concerns about broader access to the documents and has concern that broad access to the documents could have a counterproductive impact on the formulation and documentation of appropriate firm oversight and control of recommendations by Independent Producers. Therefore, the Department has determined this narrower recordkeeping language satisfies ERISA section 408(a) and Code section 4975(c)(2). However, the Department intends to monitor compliance with the exemption closely and may, in the future, expand the recordkeeping requirement if appropriate. Any future amendments would be preceded by notice and an opportunity for public comment.

Executive Order 12866 and 13563 Statement

Executive Orders 12866[40] and 13563[41] direct agencies to assess all costs and benefits of available regulatory alternatives. If regulation is necessary, agencies must

[40] 58 FR 51735 (Oct. 4, 1993).
[41] 76 FR 3821 (Jan. 21, 2011).

choose a regulatory approach that maximizes net benefits, including potential economic, environmental, public health and safety effects; distributive impacts; and equity. Executive Order 13563 emphasizes the importance of quantifying costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

Under Executive Order 12866, "significant" regulatory actions are subject to review by the Office of Management and Budget (OMB). As amended by Executive Order 14094,[42] entitled "Modernizing Regulatory Review," section 3(f) of Executive Order 12866 defines a "significant regulatory action" as any regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of $200 million or more (adjusted every three years by the Administrator of the Office of Information and Regulatory Affairs (OIRA) for changes in gross domestic product); or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, Territorial, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in the Executive order, as specifically authorized in a timely manner by the Administrator of OIRA in each case. It has been determined that this amendment is significant within the meaning of section 3(f)(1) of the Executive Order. Therefore, the Department has provided an

[42] 88 FR 21879 (Apr. 6, 2023).

assessment of the amendment's costs, benefits, and transfers, and OMB has reviewed the rulemaking.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), the Department solicited comments concerning the information collection requirements (ICRs) included in the proposed rulemaking. The Department received comments that addressed the burden estimates used in the analysis of the proposed rulemaking. The Department reviewed these public comments in developing the paperwork burden analysis and subsequently revised the burden estimates in the amendments to the PTEs discussed below.

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

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

The OMB will consider all written comments that they receive within 30 days of publication of this notice. Written comments and recommendations for the information collection should be sent to https://www.reginfo.gov/public/do/PRAMain. Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

As discussed in detail above, PTE 84-24, as amended, will exclude compensation received as a result of the provision of investment advice from the existing relief provided in Section II, which will be redesignated as Section II(a) and add new Sections VI and -XI and redesignate the definitions as Section X, which will provide relief for investment advice limited to the narrow category of transactions in which an independent, insurance-only agent, or Independent Producer, provides investment advice to a Retirement Investor regarding an annuity or insurance contract. Additionally, as amended, the exemption requires the Independent Producers engaging in these transactions to adhere to certain Impartial Conduct Standards, including acting in the best interest of the Plans and IRAs when providing advice.

Financial institutions and investment professionals that engage in all other investment advice transactions, including those involving captive or career insurance agents, will rely on PTE 2020-02 to receive exemptive relief for investment advice transactions. PTE 84-24 will require certain new disclosures, annual retrospective reviews, and compliance with policy and procedure requirements. These requirements are ICRs subject to the PRA. Readers should note that the burden discussed below conforms to the requirements of the PRA and is not the incremental burden of the changes.[43]

1.1 Preliminary Assumptions

In the analysis discussed below, a combination of personnel will perform the tasks

[43] For a more detailed discussion of the marginal costs associated with the Amendments to PTE 84-24, refer to the Regulatory Impact Analysis (RIA) in the Notice of Proposed Rulemaking published elsewhere in today’s edition of the *Federal Register*.

associated with the ICRs at an hourly wage rate of $165.29 for an Independent Producer, $65.99 for clerical personnel, and $165.71 for a legal professional, and $133.24 for a senior executive.[44]

The Department does not have information on how many Retirement Investors, including Plan beneficiaries and participants and IRA owners, receive disclosures electronically from investment advice fiduciaries. For the purposes of this analysis in the Proposed Amendment, the Department assumed that the percent of Retirement Investors receiving disclosures electronically would be similar to the percent of Plan participants receiving disclosures electronically under the Department's 2002 and 2020 electronic disclosure rules, which was 3.9 percent at the time.[45] The Department received comment regarding this assumption presenting anecdotal evidence that the rate would be substantially lower, presumably due to the different characteristics of IRA and annuity consumers compared with actively working Plan participants. Accordingly, the Department revisited and revised the estimate to 71.8 percent of the disclosures sent to Retirement Investors being sent electronically, and the remaining 28.2 percent sent by mail.[46] Furthermore, the Department estimates that communications between businesses

[44] Internal Department calculation based on 2023 labor cost data. For a description of the Department's methodology for calculating wage rates, see https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf.

[45] The Department estimates that 58.3 percent of Retirement Investors receive electronic disclosures under the 2002 electronic disclosure safe harbor and that an additional 37.8 percent of Retirement Investors receive electronic disclosures under the 2020 electronic disclosure safe harbor. In total, the Department estimates 96.1 percent (58.3 percent + 37.8 percent) of Retirement Investors receive disclosures electronically.

[46] The Department used information from a Greenwald & Associates survey which reported that 84 percent of retirement plan participants find electronic delivery acceptable, and data from the National Telecommunications and Information Administration Internet Use Survey which indicated that 85.5 percent of adults 65 and over use e-mail on a regular basis, which is used as a proxy for internet fluency and usage. Therefore, the assumption is calculated as: (84% find electronic delivery acceptable) x (85.5% are internet fluent) = 71.8% are internet fluent and find electronic delivery acceptable.

(such as disclosures sent from one financial institution to another) will be 100 percent electronic.

The Department assumes any documents sent by mail would be sent by First Class Mail, incurring a postage cost of $0.68 for each piece of mail.[47] Additionally, the Department assumes that documents sent by mail would incur a material cost of $0.05 for each page.

1.2 Costs Associated with Satisfying Conditions for Transactions Described in Section III(a)-(f)

Insurance agents and brokers, pension consultants, insurance companies, and investment company principal underwriters are expected to continue to take advantage of the exemption for transactions described in Section III(a)-(f). The Department estimates that 3,030 insurance agents and brokers, pension consultants, and insurance companies will continue to take advantage of the exemption for transactions described in Section III(a)-(f). This estimate is based on the following assumptions:

- According to the Insurance Information Institute, in 2022, there were 3,328 captive agents, which are insurance agents who work for only one insurance company.[48] The Insurance Information Institute also found that life and annuity insurers accounted for 47.4 percent of all net premiums for the insurance industry

[47] United States Post Service, *First-Class Mail*, (2023), https://www.usps.com/ship/first-class-mail.htm.
[48] Insurance Information Institute, *A Firm Foundation: How Insurance Supports the Economy - Captives by State, 2021-2022*, https://www.iii.org/publications/a-firm-foundation-how-insurance-supports-the-economy/a-50-state-commitment/captives-by-state (last visited August 25, 2023).

in 2022.[49] Thus, the Department estimates there are 1,577 insurance agents and brokers relying on the existing provisions.[50]

- The Department expects that pension consultants would continue to rely on the existing PTE 84-24. Based on 2021 Form 5500 data, the Department estimates that 1,011 pension consultants serve the retirement market.[51]

In the Department's 2016 Regulatory Impact Analysis, it estimated that 398 insurance companies wrote annuities.[52] The Department requested information on how the number of insurance companies underwriting annuities has changed since then but received no meaningful insight. The Department revisited the estimate and settled on a revised approach to bring the estimate more current. To form a basis for its assumption of insurance companies affected by the rule, the Department looked at the estimate of 398 insurance companies writing annuities used in the 2016 RIA. This assumption was based on data of insurance companies that reported receiving either individual or group annuity considerations in 2014.[53] Comparatively, there were 710 firms in the direct life insurance

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[49] Insurance Information Institute, *Facts + Statistics: Industry Overview- Insurance Industry at-a-Glance*, https://www.iii.org/fact-statistic/facts-statistics-industry-overview.

[50] The number of captive insurance agents is estimated as: 3,328 captive agents x 47.4% = 1,577 captive insurance agents serving the annuity market.

[51] Internal Department of Labor calculations based on the number of unique service providers listed as pension consultants on the 2021 Form 5500 Schedule C.

[52] This estimate is based on 2014 data from SNL Financial on life insurance companies that reported receiving either individual or group annuity considerations. (*See* Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest - Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, (April 2016), https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.)

[53] Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest - Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, pp. 108-109 & 136-137, (April 2016), https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.

carrier industry in 2014.[54] By these measures, in 2014, insurance companies writing annuities accounted for 56 percent of the direct life insurance carrier industry.

To gain more insight into annuity underwriting, as it pertains to the life insurance industry, the Department looked to the evolution of premiums. In 2014, annuity premiums accounted for 55 percent of life and annuity insurance premiums.[55] By 2020, annuities had fallen to 48 percent of life and annuity insurance premiums. Between 2020 and 2022, the percentage remained constant around 48 percent.[56]

- While premiums are not directly related to the number of firms, the Department thinks it is reasonable to assume that the percent of life insurance companies underwriting annuities may have declined slightly since 2014. For the purposes of this analysis, the Department assumed that approximately half of life insurance companies underwrite annuities. According to the 2021 Statistics of U.S. Businesses release, the most recent data available, there were 883 firms in the direct life insurance carrier industry.[57] The Department estimates that 442 life insurance companies underwrite annuities and will be affected by the amendments.

In addition, investment company principal underwriters may rely on the exemption. In the Department's experience, investment company principal underwriters

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[54] United States Census Bureau, *2014 SUSB Annual Data Tables by Establishment Industry*, (December 2016).
[55] Insurance Information Institute, *Life/Annuity Insurance Income Statement, 2014-2018*, https://www.iii.org/table-archive/222464/file.
[56] Insurance Information Institute, *Facts + Statistics: Life Insurance,* (2024), https://www.iii.org/fact-statistic/facts-statistics-life-insurance#Direct%20Premiums%20Written%20By%20Line,%20Life/Annuity%20Insurance,%202020-2022.
[57] United States Census Bureau, *2021 SUSB Annual Data Tables by Establishment Industry*, (December 2023).

almost never use PTE 84-24. Therefore, the Department assumes that 20 investment company principal underwriters will engage in one transaction annually under PTE 84-24, 10 of which are assumed to service Title I Plans and 10 are assumed to service IRAs.

Further, the Department estimates that there are approximately 765,124 ERISA covered pension Plans[58] and approximately 67.8 million IRAs.[59] The Department estimates that 7.5 percent of Plans are new accounts or new financial advice relationships[60] and that 3 percent of Plans will use the exemption for covered transactions.[61] Based on these assumptions, the Department estimates that 1,727 Plans would be affected by the Final Amendments to PTE 84-24.[62]

The Department requested, but did not receive, comments on the assumptions used in the Proposed Amendment regarding annuity contracts affected by the rulemaking. However, in conjunction with updating its estimate of the number of Independent Producers the Department has revised its estimate of annual annuity transactions affected by the amendments to PTE 84-24, increasing the estimate from 52,449 to 500,000.

While there are several sources of information regarding total sales or size of the annuity market that are generally consistent, the same is not true for transaction activity, which can vary dramatically across quarters and between sources. To improve its estimate of annual annuity transactions affected by the amendments to PTE 84-24, the

[58] Employee Benefits Security Administration, United States Department of Labor, *Private Pension Plan Bulletin: Abstract of 2021 Form 5500 Annual Reports*, Table A1 (2023; forthcoming).
[59] Cerulli Associates, *2023 Retirement-End Investor*, Exhibit 5.12. The Cerulli Report, (2023).
[60] EBSA identified 57,575 new plans in its 2021 Form 5500 filings, or 7.5 percent of all Form 5500 pension plan filings.
[61] In 2020, 7 percent of traditional IRAs were held by insurance companies. (*See* Investment Company Institute, *The Role of IRAs in US Households' Saving for Retirement, 2020*, 27(1) ICI Research Perspective (2021), https://www.ici.org/system/files/attachments/pdf/per27-01.pdf.) This number has been adjusted downward to 3 percent to account for the fact that some transactions are not covered by this exemption.
[62] 765,124 plans x 7.525 percent of plans are new x 3 percent of plans with relationships with insurance agents or pension consultants ≈ 1,727 plans.

Department tried two approaches which both relied on LIMRA total fixed annuity sales data. 2023 LIMRA data indicates that 34 percent of fixed annuity sales were fixed-indexed annuities.[63] Assuming sales are proportionate to transactions and using data from the Retirement Income Journal which reported roughly 109,863 fixed-indexed annuity products were sold in the fourth quarter of 2021,[64] annualizing this number to 439,452 the Department estimates that roughly 838,000 additional fixed-rate annuities (other than fixed-indexed) were sold over the same period, for a total of 1.3 million fixed annuity transactions in 2021 using this approach.

The Department considered an alternative approach which estimated the number of annual transactions by dividing the total sales data from LIMRA described above by the average contract size as reported by the Retirement Income Journal, which is $147,860. Using the same proportional methodology described above, this approach yields an estimate of roughly 1.9 million transactions.

Using this average of these estimates, the Department then applied the following assumptions to arrive at its final estimate. Using McKinsey data on annuity distribution channels, the Department assumes that third-party distribution channels account for 81 percent of the annuity sales volume.[65] The Department further assumes that 80 percent of these annuities are held in ERISA covered accounts or purchased with ERISA Plan

[63] LIMRA, Preliminary U.S. Individual Annuity Sales Survey, Fourth Quarter 2023, (2023), https://www.limra.com/siteassets/newsroom/fact-tank/sales-data/2023/q4/4q-annuity-sales.pdf.
[64] Pechter, K., Moore, S., Fixed Indexed Annuities: What's Changed (or Not) in Ten Years, (June, 2022), https://retirementincomejournal.com/article/fixed-indexed-annuities-a-retrospective/.
[65] McKinsey & Company, Redefining the future of life insurance and annuities distribution, (January, 2024), https://www.mckinsey.com/industries/financial-services/our-insights/redefining-the-future-of-life-insurance-and-annuities-distribution.

assets[66] and that 49 percent of transactions will rely on investment advice.[67] This results in an estimate of roughly 500,000 ERISA covered fixed annuity transactions involving an Independent Producers providing advice to an investor.[68]

The Final Amendment excludes some entities currently relying on the exemption to receive compensation in connection with the provision of investment advice. As such, the Department acknowledges that the estimates discussed above may overestimate the entities able to rely on the exemption for relief for the transactions described in Section III(a)-(f).

1.2.1 Written Authorization from the Independent Plan Fiduciary

Based on the estimates discussed above, the Department estimates that authorizing fiduciaries for 1,727 Plans and authorizing fiduciaries for 500,000 IRA transactions will be required to send an advance written authorization to the 3,040 financial institutions for IRAs[69] for exemptive relief for the transactions described in Section III(a)-(f).

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[66] The Department recognized that not all annuities sold are covered by this rulemaking, however data is not available to estimate what portion are covered with any sense of precision. Examples of non-covered transactions include use of non-retirement account funds to purchase an annuity and noncovered public sector plans being rolled into an annuity. The Department views 80% as a reasonable assumption as it includes most transactions while acknowledging that not all transactions are covered under this rulemaking. As a point of reference, each percentage point this assumption is changed results in a 1.25 percentage point change in the resulting estimate of ERISA covered transactions involving an Independent Producer providing advice to an investor.

[67] U.S. Retirement-End Investor 2023: Personalizing the 401(k) Investor Experience Fostering Comprehensive Relationships," The Cerulli Report, Exhibit 6.04.

[68] The final estimate is the rounded average of the two approaches described above. The calculations are as follows: [{[(109,863 fixed-indexed contracts written x 4 quarters) ÷ 34% as the percentage of fixed-indexed to all fixed-rate contracts] x 81% sold by Independent Producers x 49% sold using investment advice x 80% ERISA covered transactions} + {[(148,860 avg. contract size ÷95.6 billion in annual fixed-indexed sales) ÷34% as the percentage of fixed-indexed to all fixed-rate contracts] x 81% sold by Independent Producers x 49% sold using investment advice x 80% ERISA covered transactions} ÷2] ≈ 501,013, rounded to 500,000.

[69] This includes 3,030 insurance agents and brokers, pension consultants, and insurance companies and 10 investment company underwriters servicing IRAs.

In the Plan universe, it is assumed that a legal professional will spend five hours per Plan reviewing the disclosures and preparing an authorization form. In the IRA universe, it is assumed that a legal professional working on behalf of the financial institution for IRAs will spend three hours drafting an authorization form for IRA holders to sign. This results in an hour burden of 17,756 hours with an equivalent cost of $2.9 million.[70]

The Department expects that Plans and IRAs will send the written authorization through already established electronic means, and thus, the Department does not expect plans to incur any cost to send the authorization.

In total, as presented in the table below, the written authorization requirement, under the new conditions of relief, is expected to result in an annual total hour burden of 17,756 hours with an equivalent cost of $2,942,374.

Table 1: Hour Burden and Equivalent Cost Associated with the Written Authorization				
	Year 1		Subsequent Years	
Activity	**Burden Hours**	**Equivalent Burden Cost**	**Burden Hours**	**Equivalent Burden Cost**
Legal	17,756	$2,942,374	17,756	$2,942,374
Total	**17,756**	**$2,942,374**	**17,756**	**$2,942,374**

1.2.2 Disclosure

Based on the estimates discussed above, the Department estimates that approximately 3,050 financial institutions[71] will continue to utilize the exemption for

[70] The burden is estimated as: (1,727 plans x 5 hours) + (3,040 financial institutions x 3 hours) ≈ 17,756 hours. A labor rate of approximately $165.71 is used for a legal professional. The labor rate is applied in the following calculation: [(1,727 plans x 5 hours) + (3,040 financial institutions x 3 hours)] x $165.71 per hour ≈ $2,942,374.

[71] This includes 3,030 insurance agents and brokers, pension consultants, and insurance companies and 20 investment company underwriters servicing plans and IRAs.

exemptive relief for the transactions described in Section III(a)-(f) for each plan and IRA. In total, the Department estimates that 3,040 entities will prepare disclosures for plans and 3,040 entities would prepare disclosures for IRAs. The Department assumes that an in-house attorney will spend one hour of legal staff time drafting the disclosure for plans and one hour of legal staff time drafting the disclosure for IRAs. This results in an hour burden of approximately 6,080 hours with an equivalent cost of $1,007,508.[72]

The Department expects that the disclosures for Plans will be distributed through already established electronic means, and thus, the Department does not expect plans to incur any cost to send the disclosures. The Department lacks information on the proportion of the IRA contracts that will occur via Plan rollovers and therefore assumes all disclosures will be sent directly to the IRA customer. As previously stated, the Department estimates that 71.8 percent of disclosures for IRAs will be sent electronically at no additional burden. The remaining 28.2 percent of authorizations will be mailed. For paper copies, a clerical staff member is assumed to require two minutes to prepare and mail the required information to the IRA customer. This information will be sent to the 122,318 IRA customers plus the 10 investment company principal underwriters for IRAs entering into an agreement with an insurance agent, pension consultant, or mutual fund principal underwriter, and based on the above, the Department estimates that this

[72] The burden is estimated as: 3,040 financial institutions x (1 hour for plans + 1 hour for IRAs) ≈ 6,080 hours. A labor rate of approximately $165.71 is used for a legal professional. The labor rate is applied in the following calculation: [3,040 financial institutions x (1 hour for plans + 1 hour for IRAs)] x $165.71 per hour ≈ $1,007,508.

requirement results in an hour burden of 1,150 hours with an equivalent cost of $75,881.[73]

In total, as presented in the table below, providing the pre-authorization materials is expected to impose an annual total hour burden of 7,230 hours with an equivalent cost of $1,083,388.

Table 2: Hour Burden and Equivalent Cost Associated with the Disclosure				
	Year 1		**Subsequent Years**	
Activity	**Burden Hours**	**Equivalent Burden Cost**	**Burden Hours**	**Equivalent Burden Cost**
Legal	6,080	$1,007,508	6,080	$1,007,508
Clerical	1,150	$75,881	1,150	$75,881
Total	**7,230**	**$1,083,388**	**7,230**	**$1,083,388**

The Department assumes that this information will include seven pages with 71.8 percent of disclosures distributed electronically through traditional electronic methods at no additional burden, and the remaining 28.2 percent of disclosures will be mailed. Accordingly, the Department estimates an annual cost burden of approximately $35,531.[74]

Table 3: Material and Postage Cost Associated with the Disclosure				
	Year 1		**Subsequent Years**	
	Pages	**Equivalent Burden Cost**	**Pages**	**Equivalent Burden Cost**
Material and Postage Cost	7	$35,531	7	$35,531
Total	**7**	**$35,531**	**7**	**$35,531**

[73] The burden is estimated as: [(122,318 IRAs + 10 investment company principal underwriters for IRAs x 28.2 percent paper) x (2 minutes ÷ 60 minutes)] ≈ 1,150 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: [(122,318 IRAs + 10 investment company principal underwriters for IRAs x 28.2 percent paper) x (2 minutes ÷ 60 minutes)] x $65.99 ≈ $75,881.
[74] The material cost is estimated as: [(122,318 IRA authorizations + 10 investment company principal underwriters for IRAs) x 28.2 percent paper] x [$0.68 + ($0.05 x 7 pages)] = $35,531.

1.3 Costs Associated with Satisfying Conditions for Transactions Described in Section III(g)

The amendment provides relief for Independent Producers that provide fiduciary investment advice and engage in the following transactions, including as part of a rollover, as a result of providing investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder: (1) The receipt, directly or indirectly, by an Independent Producer of reasonable compensation; and (2) the sale of a non-security annuity contract or other insurance product that does not meet the definition of “security” under Federal securities laws. The Department expects that the Insurers covered by this Final Amendment will be insurance companies that directly write annuities.

The amendments outline conditions pertaining to disclosure, policies and procedures, and retrospective reviews that need to be satisfied to rely on the exemption. These conditions are tailored to protect Retirement Investors from the specific conflicts that arise for Independent Producers when providing investment advice to Retirement Investors regarding the purchase of an annuity. The Department received several comments suggesting that its estimate for the number of Independent Producers was too low. While commenters provided estimates that were substantially higher, the commenters did not provide any documentation or basis for their suggestions. In response, the Department analyzed employment data from the March 2023 Current Population Survey to identify the number of self-employed workers in the “Finance and Insurance” industry whose occupation was listed as “Insurance Sales Agents.” This identified 86,410 self-employed insurance sales agents in the Finance and Insurance industry.[75] While the Department assumes that not all of these independent producers will sell annuities, it utilizes this number while recognizing that it likely reflects an over-estimate.

Insurance companies are primarily regulated by states and no single regulator maintains a nationwide count of insurance companies. Although state regulators track insurance companies, the total number of insurance companies cannot be calculated by aggregating individual state totals, because individual insurance companies often operate in multiple states. As mentioned above, the Department has updated its estimate of the number of insurance companies writing annuities for the 398 presented in the 2016 Regulatory Impact Analysis, to 442 in this rulemaking.

Some of these insurance companies may not sell any annuity contracts to IRAs or plans. Because of these data limitations, the Department includes all 442 insurance companies in its cost estimate, though this likely represents an upper bound.

Insurance companies sell insurance products through (1) captive insurance agents that work for an insurance company as employees or as independent contractors who exclusively sell the insurance company's products and (2) independent agents who sell multiple insurance companies' products. Independent agents may contract directly with an insurance company or through an intermediary. In recent years, the market has seen a shift away from captive distribution toward independent distribution.[76]

[75] EBSA Tabulations based off the March 2023 Current Population Survey
[76] Ramnath Balasubramanian, Rajiv Dattani, Asheet Mehta, & Andrew Reich, *Unbundling Value: How Leading Insurers Identify Competitive Advantage*, McKinsey & Company, (June 2022), https://www.mckinsey.com/industries/financial-services/our-insights/unbundling-value-how-leading-insurers-identify-competitive-advantage; Sheryl Moore, *The Annuity Model Is Broken*, Wink Intel, (June 2022), https://www.winkintel.com/2022/06/the-annuity-model-is-broken-reprint/.

The Department does not have strong data on the number of insurance companies using captive agents or Independent Producers. In the Proposed Amendment, the Department assumed that the number of companies selling annuities through captive or independent distribution channels would be proportionate to the sales completed by each respective channel. The Department requested comments on this assumption but did not receive any directly addressing it. In the Proposed Amendment, the Department based its estimate on the percent of sales completed by independent agents and career agents in the individual annuities distribution channel. This resulted in an estimate that approximately 46 percent of sales are done through captive distribution channels and 54 percent of sales are done through independent distribution channels.

One source stated that 81 percent of individual annuities sales are conducted by non-captive, or independent, agents.[77] The Department assumes that the percent of companies selling annuities through an independent distribution channel is proportionate to the percent of sales conducted through an independent distribution channel. The Department recognizes that the distribution of sales by distribution channel is likely different from the distribution of insurance companies by distribution channel.

Also, the Department recognizes that some insurance companies use multiple distribution channels, though the Department did not receive any comment on how common the use of multiple distribution channels is. Looking at the 10 insurance companies with highest annuity sales in 2022, one relied on captive distribution channels,

[77] This study considers sales by independent agents, independent broker-dealers, national broker-dealers, and banks to be sales in the independent distribution channel, while sales by career agents and direct means are considered to be in the captive distribution channel. (*See* Ramnath Balasubramanian, Christian Boldan, Matt Leo, David Schiff, & Yves Vontobel, *Redefining the Future of Life Insurance and Annuities Distribution*, McKinsey & Company (January 2024), https://www.mckinsey.com/industries/financial-services/our-insights/redefining-the-future-of-life-insurance-and-annuities-distribution.)

seven relied on independent distribution channels, and two relied on both.[78] Accordingly, most insurance companies appear to primarily use either captive distribution or independent distribution. However, any entity using a captive insurance channel, or using both captive and independent channels, likely has already incurred most of the costs of this rulemaking under PTE 2020-02. Costs are estimated by assuming that entities using a third-party distribution system, even if they also use captive agents, will incur costs for the first time under amended PTE 84-24. This assumption leads to an overestimation of the cost incurred by insurance companies.

Following from this assumption, the Department estimates that 84 insurance companies distribute annuities through captive channels and will rely on PTE 2020-02 for transactions involving investment advice. Further, the Department estimates that 358 insurance companies distribute annuities through independent channels and will rely on PTE 84-24 for transactions involving investment advice.[79]

The Department estimates that 70 of the 442 insurance companies are large entities.[80] In the Proposed Amendment, the Department requested data on how distribution channels differed by size of insurance company but did not receive any comments. In the absence of data relating to the distribution channel differences by firm size, the Department uses the aggregate rate in its estimates. That is, the Department assumes that 19 percent of large insurance companies (13 insurance companies) sell

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[78] Annuity sales are based on LIMRA, *U.S. Individual Fixed Annuity Sales Breakouts, 2022*, https://www.limra.com/siteassets/newsroom/fact-tank/sales-data/2022/q4/2022-ye--fixed-breakout-results.pdf. Information on distribution channels is based on review of insurance company websites, SEC filings of publicly held firms, and other publicly available sources.

[79] The number of insurance companies using captive distribution channels is estimated as 442 x 81% ≈ 358 insurance companies. The number of insurance companies using independent distribution channels is estimated as 442-358 ≈ 84 insurance companies.

[80] LIMRA estimates that, in 2016, 70 insurers had more than $38.5 million in sales. *See* LIMRA Secure Retirement Institute, *U.S. Individual Annuity Yearbook: 2016 Data*, (2017).

annuities through captive distribution channels, while the remaining 71 of the 84 insurance companies distributing annuities through captive channels are assumed to be small.[81] Additionally, 81 percent of large insurance companies (57 insurance companies) sell annuities through independent distribution channels, while the remaining 301 of the 358 insurance companies selling annuities through independent distribution channels are assumed to be small.[82]

1.3.1 Disclosures

As discussed above, the Department assumes that 86,410 Independent Producers service the retirement market, selling the products of 358 insurance companies. For more generalized disclosures, the Department assumes that insurance companies will prepare and provide disclosures to Independent Producers selling their products. However, some of the disclosures are tailored specifically to the Independent Producer and-or the transaction. The Department assumes that these disclosures will need to be prepared by the Independent Producer themselves. The Department recognizes that some may rely on intermediaries in the distribution channel to prepare more specific disclosures; however, the Department expects that the costs associated with the preparation would be covered by commissions retained by the intermediary for its services. The costs for the intermediary to prepare the disclosure may result in an increase in commission. The

[81] The number of large insurance companies using a captive distribution channel is estimate as: 70 large insurance companies x 19% ≈ 13 insurance companies. The number of small insurance companies using a captive distribution channel is estimated as: 84 insurance companies – 13 large insurance companies ≈ 71 small insurance companies.
[82] The number of large insurance companies using an independent distribution channel is estimate as: 70 large insurance companies x 81% ≈ 57 insurance companies. The number of small insurance companies using a captive distribution channel is estimated as: 358 insurance companies – 57 large insurance companies ≈ 301 small insurance companies.

Department expects that this increase in commission will not exceed the cost of preparing the disclosure in house.

1.3.1.1 Written Acknowledgement that the Independent Producer is a Fiduciary by the Independent Producer

The Department is including a model statement in the preamble to PTE 84-24 that details what should be included in a fiduciary acknowledgment for Independent Producers.[83] The Department assumes that the time associated with preparing the disclosures will be minimal. Further, these disclosures are expected to be uniform in nature. Accordingly, the Department estimates that these disclosures will not take a significant amount of time to prepare.

Due to the nature of Independent Producers, the Department assumes that most Insurers will make draft disclosures available to Independent Producers pertaining to their fiduciary status. However, the Department expects that a small percentage of Independent Producers may draft their own disclosures. The Department assumes that a legal professional for all 358 Insurers and an insurance sales agent for 5 percent of Independent Producers, or 4,320 Independent Producers, will spend 30 minutes to produce a written acknowledgement in the first year. This results in an estimated burden of approximately 2,339 hours with an equivalent cost of $386,657 in the first year.[84]

[83] 85 FR 82798, 82827 (Dec. 18, 2020). The model statement was also included in Frequently Asked Questions in April 2021, New Fiduciary Advice Exemption: PTE 2020-02 Improving Investment Advice for Workers & Retirees Frequently Asked Questions, Q13, (April 2021), https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/faqs/new-fiduciary-advice-exemption.pdf.

[84] The burden is estimated as: [(358 Insurers + 4,320 Independent Producers) x (30 minutes ÷ 60 minutes)] ≈ 2,339 hours. A labor rate of approximately $165.71 is used for a legal professional and $165.29 is used for an independent producer. The labor rates are applied in the following calculation: [(358 Insurers x (30 minutes ÷ 60 minutes)) x $165.71] + [(4,320 Independent Producers x (30 minutes ÷ 60 minutes)) x $165.71] ≈ $386,657.

Table 4: Hour Burden and Equivalent Cost Associated with the Fiduciary Acknowledgement				
	Year 1		Subsequent Years	
Activity	Burden Hours	Equivalent Burden Cost	Burden Hours	Equivalent Burden Cost
Legal	179	$29,630	0	$0
Insurance Sales Agent	2,160	$357,026	0	$0
Total	**2,339**	**$386,657**	**0**	**$0**

1.3.1.2 Written Statement of the Care Obligation and Loyalty Obligation

As discussed above, the Department assumes that 86,410 Independent Producers service the retirement market, selling the products of 358 Insurers. Due to the nature of Independent Producers, the Department assumes that most Insurers will make draft disclosures available to Independent Producers, pertaining to the annuities they offer. The Department assumes that an in-house attorney for all 358 Insurers and an insurance sales agent for 5 percent of Independent Producers, or 4,320 Independent Producers, will spend 60 minutes to prepare the statement in the first year. This results in a burden of 4,678 hours with an equivalent cost of $773,313 in the first year.[85]

Table 5: Hour Burden and Equivalent Cost Associated with the Written Statement of the Best Interest Standard of Care Owed				
	Year 1		Subsequent Years	
Activity	Burden Hours	Equivalent Burden Cost	Burden Hours	Equivalent Burden Cost
Legal	358	$59,260	0	$0
Insurance Sales Agent	4,320	$714,053	0	$0
Total	**4,678**	**$773,313**	**0**	**$0**

1.3.1.3. Written Description of All Material Facts

[85] The burden is estimated as: (358 Insurers + 4,320 Independent Producers) x 1 hour ≈ 4,678 hours. A labor rate of approximately $165.71 is used for a legal professional and $165.29 for an independent producer. The labor rates are applied in the following calculation: [(358 Insurers x 1 hour x $165.71) + (4,320 Independent Producers x 1 hour x $165.29)] = $773,313.

As discussed above, the Department assumes that 86,410 Independent Producers service the retirement market, selling the products of 358 insurance companies. For disclosures tailored more specifically to an individual Independent Producer, the Department assumes that the disclosure will need to be prepared by the Independent Producer. The Department recognizes that many Independent Producers may not have the internal resources to prepare such disclosure. The Department expects that some may rely on intermediaries in the distribution channel to prepare the disclosures and some may seek external legal support. However, the Department expects that the costs associated with the preparation will be covered by commission retained by the intermediary for its services or by the fee paid to external legal support. As such, the Department still attributes this cost back to the Independent Producer.

Accordingly, the Department assumes that all 86,410 Independent Producers in this analysis would need to prepare the disclosure. The Department assumes that, for each of these Independent Producers, an attorney will spend three hours and five hours of legal staff time drafting the written description for small and large entities, respectively. This results in an hour burden of 260,967 hours with an equivalent cost of $43,244,858 in the first year.[86]

Table 6: Hour Burden and Equivalent Cost Associated with the All Material Facts				
	Year 1		**Subsequent Years**	
Activity	**Burden Hours**	**Equivalent Burden Cost**	**Burden Hours**	**Equivalent Burden Cost**
Legal	260,967	$**43,244,858**	0	$0
Total	**260,967**	**$43,244,858**	**0**	**$0**

[86] The burden is estimated as: [(85,451 small independent producers x 3 hours) + (869 large independent producers x 5 hours)] ≈ 260,967 burden hours. Applying the labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: [(85,451 small independent producers x 3 hours) + (869 large independent producers x 5 hours)] x $165.71 = $43,244,858.

1.3.1.4 Before Recommending an Annuity, Engaging in a Rollover, or Making a Recommendation to a Plan Participant as to the Post-Rollover Investment of Assets Currently Held in a Plan, the Independent Producer Must Document Its Conclusions as to Whether the recommendation Is in the Investor's Best Interest

The amendment requires an Independent Producer to provide a disclosure to investors that documents their consideration as to whether a recommended annuity or rollover is in the Retirement Investor's best interest. Due to the nature of this disclosure, the Department assumes that the content of the disclosure will need to be prepared by the Independent Producer for each transaction. The Department recognizes that some may rely on intermediaries in the distribution channel, and some may seek external legal support to assist with drafting the disclosures. However, the Department expects that most Independent Producers will prepare the disclosure themselves.

For the purposes of this analysis, and as developed in a preceding section, the Department estimates that 500,000 Retirement Investors will receive documentation on whether the recommended annuity is in their best interest each year.

The Department assumes that, for each of these Retirement Investors, an Independent Producer will spend 30 minutes of their time drafting the documentation. This results in an estimated hour burden of 250,000 hours with an equivalent cost of $41.3 million annually.[87]

[87] The burden is estimated as: 500,000 rollovers x (30 minutes ÷ 60 minutes) = 250,000 hours. A labor rate of approximately $165.29 is used for an Independent Producer. The labor rate is applied in the following calculation: [500,000 rollovers x (30 minutes ÷ 60 minutes)] x $165.29 = $41,322,500.

Table 7: Hour Burden and Equivalent Cost Associated with the Rollover Documentation				
	Year 1		Subsequent Years	
Activity	**Burden Hours**	**Equivalent Burden Cost**	**Burden Hours**	**Equivalent Burden Cost**
Insurance Sales Agent	250,000	$41,322,500	250,000	$41,322,500
Total	**250,000**	**$41,322,500**	**250,000**	**$41,322,500**

1.3.1.5 Mailing Cost for Disclosures Sent from Independent Producers to Retirement Investors

As discussed at the beginning of the cost section, the Department assumes that 28.2 percent of disclosures would be mailed. Accordingly, of the estimated 500,000 affected Retirement Investors, 141,000 Retirement Investors are estimated to receive paper disclosures.[88] The Department further estimates that 10% of these Retirement Investors, or 14,100, will request a second, more comprehensive disclosure related to the Independent Producer's compensation. For paper copies, the Independent Producer is assumed to require two minutes to prepare and mail the primary disclosure packet to the Retirement Investors, and 10 minutes to prepare and mail the second compensation disclosure, upon request. This requirement results in an estimated hour burden of 13,503 hours with an equivalent cost of $2,231,966.[89]

Table 8: Hour Burden and Equivalent Cost Associated with Preparing the Disclosures				
	Year 1		Subsequent Years	
Activity	**Burden Hours**	**Equivalent Burden Cost**	**Burden Hours**	**Equivalent Burden Cost**
Insurance Sales Agent	13,503	$2,231,966	13,503	$2,231,966
Total	**13,503**	**$2,231,966**	**13,503**	**$2,231,966**

[88] This is estimated as: (500,000 Retirement Investors x 28.2%) = 141,000 paper disclosures.
[89] This is estimated as: [141,000 paper disclosures x (2 minutes ÷ 60 minutes)] + [14,100 paper disclosures x (10 minutes) ÷ 60 minutes)] = 13,503 hours. A labor rate of $165.29 is used for an Independent Producer. The labor rate is applied in the following calculation: [141,000 paper disclosures x (2 minutes ÷ 60 minutes)] + [14,100 paper disclosures x (10 minutes ÷ 60 minutes)] x $165.29= $2,231,966.

The Department assumes that this information will include seven pages, and that a second, optional compensation disclosure will be two pages, resulting in an annual cost burden for material and paper costs of $156,228.[90]

Table 9: Material Cost Associated with the General Disclosures				
	Year 1		Subsequent Years	
Activity	**Pages**	**Equivalent Burden Cost**	**Pages**	**Equivalent Burden Cost**
General Disclosures	7	$145,230	7	$145,230
Compensation Disclosure	2	$10,998	2	$10,998
Total	**9**	**$156,228**	**9**	**$156,228**

Additionally, Independent Producers will be required to send the documentation to the Insurer. The Department expects that such documentation will be sent electronically and result in a de minimis burden.

1.3.2 Policies and Procedures

1.3.2.1 Insurers Must Establish, Maintain, and Enforce Written Policies and Procedures for the Review of Each Recommendation Before an Annuity is Issued to a Retirement Investor, and the Insurer Review its Policies and Procedures at Least Annually.

As discussed above, the Department estimates that 358 Insurers will need to meet this requirement, of which 301 are estimated to be small and 57 are estimated to be large.[91] The Department assumes that, for each large insurance company, an in-house

[90] This is estimated as: {141,000 rollovers resulting in a paper disclosure x [$0.68 postage + ($0.05 per page x 7 pages)]} + {14,100 secondary disclosures x [$0.68 postage + ($0.05 per page x 2 pages)]} = $156,228.

[91] The number of large insurance companies using an independent distribution channel is estimated as: (70 large insurance companies x 81%) ≈ 57 insurance companies. The number of small insurance companies using an independent distribution channel is estimated as: (358 insurance companies – 57 large insurance companies) ≈ 301 small insurance companies.

attorney will spend 40 hours of legal staff time drafting the written description, and for each small insurance company, an in-house attorney will spend 20 hours of legal staff time. This results in an hour burden of 8,286 hours with an equivalent cost of $1,373,123 in the first year.[92]

In the following years, the Department assumes for each insurance company, an in-house attorney will spend five hours of legal staff time reviewing the policies and procedures. This results in an hour burden of 1,788 hours with an equivalent cost of $296,302 in subsequent years.[93]

The Final Amendment also requires Insurers to provide their complete policies and procedures to the Department upon request. Based upon prior experience, the Department estimates that it will request three policies and procedures in the first year and one in subsequent years for entities relying on PTE 84-24.[94] The resulting cost is estimated at $49 in the first year, and $17 in subsequent years for a clerical worker to prepare and fulfil the request.[95]

Insurers will also be required to review each of the Independent Producer's recommendations before an annuity is issued to a Retirement Investor to ensure

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[92] This is estimated as: [(301 small insurance companies x 20 hours) + (57 large insurance companies x 40 hours)] ≈ 8,286 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: [(301 small insurance companies x 20 hours) + (57 large insurance companies x 40 hours)] x $165.71 ≈ $1,373,123.

[93] This is estimated as: 358 insurance companies x 5 hours ≈ 1,788 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: (358 insurance companies x 5 hours) x $165.71 ≈ $296,302.

[94] The number of requests in the first year is estimated as: 358 Insurers x (165 requests in PTE 2020-02 ÷18,632 Financial Institutions in PTE 2020-02) ≈ 3 requests. The number of requests in subsequent years is estimated as: 358 insurance companies x (50 requests in PTE 2020-02 ÷18,632 Financial Institutions in PTE 2020-02) ≈ 1 request.

[95] The burden in the first year is estimated as: 3 requests x (15 minutes ÷ 60 minutes) = 0.75 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: 3 requests x (15 minutes ÷ 60 minutes) x $65.99 = $49.49. The burden in subsequent years is estimated as: 1 request x (15 minutes ÷ 60 minutes) = 0.25 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: 1 request x (15 minutes ÷ 60 minutes) x $65.99 = $16.50.

compliance with the Impartial Conduct Standards and other conditions of this exemption. This requirement is consistent with the language in NAIC's 2010 model regulation 275, Suitability in Annuity Transactions,[96] and the 2020 revisions to NAIC Model Regulation 275, which expanded the suitability standard to a best interest standard.[97] Most states have adopted some form of the NAIC Model Regulation 275.[98] Accordingly, the Department expects that Insurers will be prepared to undergo this review and approval process. The Department assumes that it will take a financial manager, with a labor rate of $198.25, an average of 30 minutes to review and provide a decision to the Independent Producer on rollover recommendations. Therefore, the Department estimates that this will have an equivalent cost of $49.6 million annually.[99] The combined estimated burden associated with policies and procedures is presented below in Table 10.

Table 10: Hour Burden and Equivalent Cost Associated with Policies and Procedures

	Year 1		**Subsequent Years**	
Activity	**Burden Hours**	**Equivalent Burden Cost**	**Burden Hours**	**Equivalent Burden Cost**
Legal	8,286	$1,373,123	1,788	$296,302
Clerical	0.75	$49	0.25	$17
Financial Manager	250,000	$49,562,500	250,000	$49,562,500
Total	**258,287**	**$50,935,672**	**251,788**	**$49,858,818**

[96] NAIC Model Suitability Regulations, § 6(F)(1)(d) (2010), https://naic.soutronglobal.net/Portal/Public/en-GB/RecordView/Index/25201.
[97] NAIC Model Suitability Regulations, § 6(C)(1)(d) (2020), https://content.naic.org/sites/default/files/inline-files/MDL-275.pdf.
[98] As of October of 2021, only three states had not adopted some form of NAIC Model Regulation 275. (*See* A.D. Banker & Company, *Annuity Best Interest State Map and FAQs*, (October 2021), https://blog.adbanker.com/annuity-best-interest-state-map-and-faqs).
[99] The burden is calculated as: 500,000 transactions x (30 minutes ÷ 60 minutes) ≈ 250,000 hours. A labor rate of $198.25 is used for a financial manager. The labor rate is applied in the following calculation: [500,000 transactions x (30 minutes ÷ 60 minutes)] x $198.25 ≈ $49,562,500.

1.3.3 Retrospective Review

The Final Amendment requires Insurers to conduct a retrospective review at least annually. The review will be required to be reasonably designed to prevent violations of and achieve compliance with (1) the Impartial Conduct Standards, (2) the terms of this exemption, and (3) the policies and procedures governing compliance with the exemption. The review will be required to evaluate the effectiveness of the supervision system, any noncompliance discovered in connection with the review, and corrective actions taken or recommended, if any. Insurers will also be required to provide the Independent Producer with the underlying methodology and results of the retrospective review. For the Final Amendment, the Department has stated that Insurers may use sampling in their review of an Independent Producer's transactions so long as any sampling or other method is designed to identify potential violations, problems, and deficiencies that need to be addressed.

1.3.3.1 The Insurance Company Must Conduct a Retrospective Review, at Least Annually, for Each Independent Producer that Sells the Insurance Company's Annuity Contracts

The Department estimates that 358 Insurers will need to meet this requirement. For this requirement the information collection is documenting the findings of the retrospective review. The Department lacks data on, for a given insurance company, how many Independent Producers, on average, sell their annuities. For the purposes of this analysis, the Department assumes that, on average, each Independent Producer sells the products of three Insurers. From each of these Insurers, they may sell multiple products. As such, the Department assumes that each year, insurance companies would need to prepare a total of 259,230 retrospective reviews,[100] or on average, each insurance company will need to prepare approximately 725 retrospective reviews.[101] The Department assumes that, for each Independent Producer selling an insurance company's products, a legal professional at the insurance company would spend one hour time, on average, drafting the retrospective review. This results in an estimated hour burden of 259,230 hours with an equivalent cost of $43.0 million.[102]

Table 11: Hour Burden and Equivalent Cost Associated with the Retrospective Review				
	Year 1		Subsequent Years	
Activity	**Burden Hours**	**Equivalent Burden Cost**	**Burden Hours**	**Equivalent Burden Cost**
Legal	259,230	$42,957,003	259,230	$42,957,003
Total	**259,230**	**$42,957,003**	**259,230**	**$42,957,003**

1.3.3.2 Certification by the Senior Executive Officer of the Insurance Company

The Department assumes it will take a Senior Executive Officer four hours to review and certify a report which details the retrospective review. This results in an annual hour burden of 1,430 hours with an equivalent cost of $190,594.[103]

[100] This is estimated as: 86,410 Independent Producers x 3 insurance companies covered ≈ 259,230 retrospective reviews.
[101] This is estimated as: 259,230 retrospective reviews ÷ 358 entities ≈ 725 retrospective reviews, on average.
[102] This is estimated as: 259,230 retrospective reviews x 1 hour ≈ 259,230 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: (259,230 retrospective reviews x 1 hour) x $165.71 ≈ $42,957,003.
[103] This is estimated as: 358 insurance companies x 4 hours ≈ 1,430 hours. A labor rate of $133.24 is used for a Senior Executive Officer. The labor rate is applied in the following calculation: (358 insurance companies x 4 hours) x $133.24 ≈ $190,594.

Table 12: Hour Burden and Equivalent Cost Associated with the Certification by the Senior Executive Officer				
	Year 1		Subsequent Years	
Activity	Burden Hours	Equivalent Burden Cost	Burden Hours	Equivalent Burden Cost
Senior Executive Officer	1,430	$190,594	1,430	$190,594
Total	**1,430**	**$190,594**	**1,430**	**$190,594**

1.3.3.3 The Insurance Company Provides to the Independent Producer the Methodology and Results of the Retrospective Review

The Department assumes that the insurance company would provide the methodology and results electronically. The Department estimates that it would take clerical staff five minutes to prepare and send each of the estimated 259,230 retrospective reviews. This results in an annual hour burden of approximately 21,603 hours with an equivalent cost of $1,425,549.[104] The Department expects that the results would be provided electronically and thus does not expect there to be any material costs with providing Independent Producers with the retrospective review.

Table 13: Hour Burden and Equivalent Cost Associated with the Provision of the Results of the Retrospective Review				
	Year 1		Subsequent Years	
Activity	Burden Hours	Equivalent Burden Cost	Burden Hours	Equivalent Burden Cost
Clerical	21,603	$1,425,549	21,603	$1,425,549
Total	**21,603**	**$1,425,549**	**21,603**	**$1,425,549**

[104]This is estimated as: 259,230 retrospective reviews x (5 minutes ÷ 60 minutes) ≈ 21,603 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: [259,230 retrospective reviews x (5 minutes ÷ 60 minutes)] x $65.99 ≈ $1,425,549.

1.3.4 Self-Correction

The amendment requires an Independent Producer that chooses to use the self-correction provision of the exemption to notify the Insurer of any corrective actions taken. As discussed above, the Insurer must discuss corrective actions in the retrospective review. The Department does not have sufficient information to estimate how often violations will occur, or on how often Independent Producers will choose to use the self-correction provisions of the amendment. However, the Department expects that such violations and corrections will be rare. For illustration, the Department assumes that one percent of transactions will result in self-correction, this would result in 5,000 notifications of self-correction being sent by Independent Producers to Insurers. The Department estimates that it will take an Independent Producer 30 minutes, on average, to draft and send a notification to the Insurer, resulting in an estimated burden of 2,500 hours and an annual cost of $413,225.[105]

The self-correction provisions of this rulemaking allow entities to correct violations of the exemption in certain circumstances, when either (1) the Independent Producer has refunded any charge to the Retirement Investor or (2) the Insurer has rescinded a mis-sold annuity, canceled the contract, and waived the surrender charges. Without the self-correction provisions, an Independent Producer would be required to report those transactions to the IRS on Form 5330 and pay the resulting excise taxes imposed by Code section 4975 in connection with non-exempt prohibited transactions involving investment advice under Code section 4975(e)(3)(B).

[105] The burden is estimated as: [500,000 transaction x 1% of transactions resulting in self-correction x (30 minutes ÷ 60 minutes)] ≈ 2,500 hours. A labor rate of $165.29 is used for an Independent Producer. The labor rate is applied in the following calculation: [500,000 transaction x 1% of transactions resulting in self-correction x (30 minutes ÷ 60 minutes)] x $165.29 ≈ $413,225.

Table 14: Hour Burden and Equivalent Cost Associated with Self-Correction				
	Year 1		Subsequent Years	
Activity	**Burden Hours**	**Equivalent Burden Cost**	**Burden Hours**	**Equivalent Burden Cost**
Clerical	2,500	$413,225	2,500	$413,225
Total	**2,500**	**$413,225**	**2,500**	**$413,225**

1.3.5 Recordkeeping Requirement

The Final Amendment incorporates a new provision in PTE 84-24 that is similar to the recordkeeping provision in PTE 2020-02. In the Proposed Amendment, the Department proposed a broader recordkeeping requirement.

For this analysis, the Department considers the cost for Insurers and Independent Producers complying with the recordkeeping requirements. The Department estimates that the additional time needed to maintain records to be consistent with the exemption would take two hours for an Independent Producer and two hours for a legal professional at an insurer, resulting in an hour burden of 173,535 hours and an equivalent cost of $28.7 million.[106]

Table 14: Hour Burden and Equivalent Cost Associated with the Recordkeeping Requirement				
	Year 1		Subsequent Years	
Activity	**Burden Hours**	**Equivalent Burden Cost**	**Burden Hours**	**Equivalent Burden Cost**
Legal	173,535	$28,683,939	173,535	$28,683,939
Total	**173,535**	**$28,683,939**	**173,535**	**$28,683,939**

1.4 Overall Summary

These paperwork burden estimates are summarized as follows:

[106] This is estimated as: (86,410 Independent Producers + 358 insurance companies) x 2 hours ≈ 173,535 hours. A labor rate of $165.29 is used for an Independent Producer and a rate of $165.71 for an insurance company legal professional. The labor rate is applied in the following calculation: [(86,410 Independent Producers x 2 hours x $165.29) + (358 insurance companies x 2 hours x $165.71)] ≈ $28,683,939.

Type of Review: Revision of an Existing Collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Title: 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: 1210-0158.

Affected Public: Businesses or other for-profits; not for profit institutions.

Estimated Number of Respondents: 89,818.

Estimated Number of Annual Responses: 1,498,615.

Frequency of Response: Initially, annually, when engaging in exempted transaction.

Estimated Total Annual Burden Hours: 1,093,403 hours.

Estimated Total Annual Burden Cost: $191,759.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)[107] imposes certain requirements on rules subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act or any other law.[108] Under section 604 of the RFA, agencies must submit a final regulatory flexibility analysis (FRFA) of a final rulemaking that is likely to have a significant economic impact on a substantial number of small entities, such as small businesses, organizations, and governmental jurisdictions. This amended exemption, along with related amended exemptions and a rule amendment published elsewhere in this issue of the *Federal Register*, is part of a rulemaking regarding the definition of fiduciary investment advice, which the Department has determined likely will have a

[107] 5 U.S.C. 601 *et seq.*
[108] 5 U.S.C. 601(2), 603(a); *see* 5 U.S.C. 551.

significant economic impact on a substantial number of small entities. The impact of this amendment on small entities is included in the FRFA for the entire project, which can be found in the related notice of rulemaking found elsewhere in this edition of the *Federal Register*.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995[109] requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a final rule that may result in an expenditure of $100 million or more (adjusted annually for inflation with the base year 1995) in any 1 year by state, local, and tribal governments, in the aggregate, or by the private sector. For purposes of the Unfunded Mandates Reform Act, as well as Executive Order 12875, this amended exemption does not include any Federal mandate that will result in such expenditures.

Federalism Statement

Executive Order 13132 outlines fundamental principles of federalism. It also requires Federal agencies to adhere to specific criteria in formulating and implementing 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. Federal agencies promulgating regulations that have these federalism implications must consult with State and local officials and describe the extent of their consultation and the nature of the concerns of State and local officials in the preamble to the final regulation. Notwithstanding this, Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of

[109] Pub. L. 104-4, 109 Stat. 48 (Mar. 22, 1995).

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 Department has carefully considered the regulatory landscape in the states and worked to ensure that its regulations would not impose obligations on impacted industries that are inconsistent with their responsibilities under state law, including the obligations imposed in states that based their laws on the NAIC Model Regulation. Nor would these regulations impose obligations or costs on the state regulators. As discussed more fully in the final Regulation and previously in this preamble,[110] there is a long history of shared regulation of insurance between the States and the Federal government. The Supreme Court addressed this issue and held that "ERISA leaves room for complementary or dual federal or state regulation" of insurance.[111] The Department designed the final Regulation and exemptions to complement State insurance laws.[112]

The Department does not intend this exemption to change the scope or effect of ERISA section 514, including the savings clause in ERISA section 514(b)(2)(A) for State regulation of securities, banking, or insurance laws. Ultimately, the Department does not believe this class exemption has federalism implications because it has no substantial direct effect on the States, on the relationship between the National government and the

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[110] *See* "The Department's Role Related to the Sale of Insurance Products to Retirement Investors," supra.
[111] *See John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank,* 510 U.S. 86, 98 (1993).
[112] *See BancOklahoma Mortg. Corp.* v. *Capital Title Co., Inc.,* 194 F.3d 1089 (10th Cir. 1999) (stating that McCarran-Ferguson Act bars the application of a Federal statute only if (1) the Federal statute does not specifically relate to the business of insurance; (2) a State statute has been enacted for the purpose of regulating the business of insurance; and (3) the Federal statute would invalidate, impair, or supersede the State statute); *Prescott Architects, Inc.* v. *Lexington Ins. Co.,* 638 F. Supp. 2d 1317 (N.D. Fla. 2009); *see also U.S.* v. *Rhode Island Insurers' Insolvency Fund,* 80 F.3d 616 (1st Cir. 1996). The Supreme Court has held that to "impair" a State law is to hinder its operation or "frustrate [a] goal of that law." *Humana Inc. V. Forsyth*, 525 U.S. 299, 308 (1999).

States, or on the distribution of power and responsibilities among the various levels of government.

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

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

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

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

transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

The Department is granting the following amendments to the class exemption on its own motion, pursuant to its authority under ERISA section 408(a) and Code section 4975(c)(2) and in accordance with procedures set forth in 29 CFR part 2570, Subpart B (76 FR 66637 (October 27, 2011)).[113]

Amendment to PTE 84-24

Section I—Retroactive Application

The restrictions of ERISA sections 406(a)(1)(A) through (D) and 406(b) and the taxes imposed by Code section 4975 do not apply to any of the transactions described in section III of this exemption in connection with purchases made before November 1, 1977, if the conditions set forth in section IV are met.

Section II—Prospective Application

(a) Except for the receipt of reasonable compensation and/or the sale of any property as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder, the restrictions of ERISA sections 406(a)(1)(A) through (D) and 406(b) and the taxes imposed by Code section 4975 do not apply to any of the transactions described in section III(a)-(f) of this exemption in connection with purchases made after October 31, 1977, if the conditions set forth in sections IV and V are met.

[113] Reorganization Plan No. 4 of 1978 (5 U.S.C. App. 1 (2018)) generally transferred the authority of the Secretary of the Treasury to grant administrative exemptions under Code section 4975 to the Secretary of Labor. Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications were amended effective April 8, 2024 (29 CFR part 2570, Subpart B (89 FR 4662 (January 24, 2024)).

(b) Effective on the date that is [INSERT DATE THAT IS 150 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER], the restrictions of ERISA sections 406(a)(1)(A), (D) and 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(A), (D), (E) and (F) do not apply to Independent Producers that provide fiduciary investment advice and engage in the transactions described in Section III(g), in accordance with the conditions set forth in Sections VI, VII, are satisfied, and the Independent Producer and Insurer are not ineligible under Section VIII, and subject to the definitional terms and recordkeeping requirements in Sections IX and X.

Section III—Transactions

(a) The receipt, directly or indirectly, by an insurance agent or broker or a pension consultant of a sales commission from an insurance company in connection with the purchase, with plan assets, of an insurance or annuity contract, if the sales commission is not received as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

(b) The receipt of a sales commission by a Principal Underwriter for an investment company registered under the Investment Company Act of 1940 (hereinafter referred to as an investment company) in connection with the purchase, with plan assets, of securities issued by an investment company if the sales commission is not received as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

(c) 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 if the purchase is not as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

(d) The purchase, with plan assets, of an insurance or annuity contract from an insurance company if the purchase is not as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

(e) 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 Pre-approved Plan if the purchase is not as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

(f) 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 such 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: (1) the sponsorship of a Pre-approved plan; or (2) the provision of Nondiscretionary Trust Services to the plan; or (3) both (1) and (2); and the purchase is not as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

(g) An Independent Producer may engage in the following transactions, including as part of a rollover, as a result of providing investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder:

(1) The receipt, directly or indirectly, by an Independent Producer of reasonable compensation; and

(2) the sale of a non-security annuity contract or other insurance product that does not meet the definition of “security” under Federal securities laws.

Section IV—Conditions With Respect to Transactions Described in Section III(a)-(f)

The following conditions apply to a transaction described in Section III(a)-(f):

(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 as an arm's-length transaction with an unrelated party would be.

(c) The combined total of all fees, 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; 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 section 408(b)(2) and 408(c)(2) of ERISA and section 4975(d)(2) and 4975(d)(10) of the Code. If such total is in excess of “reasonable compensation,” the “amount involved” for purposes of the civil penalties of section 502(i) of ERISA and the

excise taxes imposed by section 4975(a) and (b) of the Code is the amount of compensation in excess of "reasonable compensation."

Section V—Conditions for Transactions Described in Section III (a) Through (d)

The following conditions apply to a transaction described in subsections (a), (b), (c) or (d) of section III:

(a) The insurance agent or broker, pension consultant, insurance company, or investment company Principal Underwriter is not:

(1) a trustee of the plan (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 section 3(16)(A) of ERISA and section 414(g) of the Code),

(3) a fiduciary who is authorized to manage, acquire, or dispose of the plan's assets on a discretionary basis, or

(4) for transactions described in sections III (a) through (d) entered into after December 31, 1978, 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(b)) with respect to a plan may engage in a transaction described in section III(a) through (d) of this exemption on behalf of the plan if such trustee or investment manager has no discretionary authority or control over the plan assets involved in the transaction other than as a Nondiscretionary Trustee.

(b)(1) With respect to a transaction involving the purchase with plan assets of an insurance or annuity contract or the receipt of a sales commission thereon, the insurance agent or broker or pension consultant provides to an independent fiduciary or IRA owner 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 agent, broker, or consultant is an affiliate of the insurance company, or if the ability of such agent, broker or consultant is limited by any agreement with such insurance company, the nature of such affiliation, limitation, or relationship;

(B) The sales 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 contract; and

(C) For purchases made after June 30, 1979, a description of any charges, fees, discounts, penalties or adjustments which may be imposed under the contract in connection with the purchase, holding, exchange, termination or sale of such contract.

(2) Following the receipt of the information required to be disclosed in subsection (b)(1), and prior to the execution of the transaction, the independent fiduciary or IRA owner acknowledges in writing receipt of such information and approves the transaction on behalf of the plan. Such 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. Such 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 sales commission thereon by an investment company Principal Underwriter, the investment company Principal Underwriter provides to an Independent fiduciary or IRA owner 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) the nature of the relationship between the Principal Underwriter and the investment company issuing the securities and any limitation placed upon the Principal Underwriter by the investment company;

(B) The sales 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 securities issued by the investment company; and

(C) For purchases made after December 31, 1978, a description of any charges, fees, discounts, penalties, or adjustments which may be imposed under the securities in connection with the purchase, holding, exchange, termination or sale of such securities.

(2) Following the receipt of the information required to be disclosed in subsection (c)(1), and prior to the execution of the transaction, the independent fiduciary or IRA owner approves the transaction on behalf of the plan. Unless facts or circumstances would indicate the contrary, such approval may be presumed if the fiduciary or IRA owner permits the transaction to proceed after receipt of the written disclosure. Such fiduciary may be an employer of employees covered by the plan, but may not be a

Principal Underwriter involved in the transaction. Such 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 subsections (b) and (c) of this section V need not be repeated, unless—

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

(2) The contract or security being purchased or the commission with respect thereto is materially different from that for which the approval described in subsections (b) and (c) of this section was obtained.

(e)(1) In the case of any transaction described in Section III(a), (b), or (c) of this exemption, the insurance agent or broker (or the insurance company whose contract is being described if designated by the agent or broker), pension consultant or investment company Principal Underwriter must retain or cause to be retained for a period of six years from the date of such transaction, the following:

(A) The information disclosed pursuant to paragraphs (b), (c), and (d) of this section V;

(B) Any additional information or documents provided to the fiduciary described in paragraphs (b) and (c) of this section V with respect to such transaction; and

(C) The written acknowledgement described in paragraph (b) of this section.

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

(3) Notwithstanding anything to the contrary in ERISA section 504(a)(2) and (b), such records must be made unconditionally available for examination during normal business hours by duly authorized employees or representatives of the Department of Labor, the Internal Revenue Service, plan participants and beneficiaries, any employer of plan participants and beneficiaries, and any employee organization whose members are covered by the plan.

Section VI--Conditions for Transactions Described in Section III(g)

The following conditions apply to transactions described in Section III(g):

(a) The Independent Producer is authorized to sell annuities from two or more unrelated Insurers.

(b) The Independent Producer and the Insurer satisfy the applicable conditions in Sections VII and IX and are not ineligible under Section VIII. The Insurer will not necessarily become a fiduciary under ERISA or the Code merely by complying with this exemption's conditions.

(c) Exclusions. The relief in Section III(g) is not available if:

(1) The Plan is covered by Title I of ERISA and the Independent Producer, Insurer, or any Affiliate is:

(A) the employer of employees covered by the Plan, or

(B) the Plan's named fiduciary or administrator; provided however that a named fiduciary or administrator or their Affiliate may rely on the exemption if it is selected to provide investment advice by a fiduciary who:

(i) is not the Insurer, Independent Producer, or an Affiliate;

(ii) does not have a relationship to or an interest in the Insurer, Independent Producer, or any Affiliate that might affect the exercise of the fiduciary's best judgment in connection with transactions covered by the exemption;

(iii) does not receive and is not projected to receive within its current Federal income tax year, compensation or other consideration for their own account from the Insurer, Independent Producer, or an Affiliate in excess of two (2) percent of the fiduciary's annual revenues based upon its prior income tax year; or

(iv) is not the IRA owner or beneficiary; or

(2) The transaction involves the Independent Producer acting in a fiduciary capacity other than as an investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

Section VII--Investment Advice Arrangement

Section VII(a) requires Independent Producers to comply with Impartial Conduct Standards, including a Care Obligation and Loyalty Obligation, when providing fiduciary investment advice to Retirement Investors. Section VII(b) requires Independent Producers to acknowledge fiduciary status under Title I of ERISA and/or the Code, and provide Retirement Investors with a written statement of the Care Obligation and Loyalty Obligation, a written description of the services they will provide and the products they are licensed and authorized to sell, and all material facts relating to Conflicts of Interest that are associated with their recommendations. In addition, before the sale of a recommended annuity, Independent Producers must consider and document their conclusions as to whether the recommended annuity meets the Care Obligation and Loyalty Obligation. Independent Producers recommending a rollover must also provide additional disclosure as set forth in subsection (b) below. Section VII(c) requires Insurers to adopt policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards and other conditions of this exemption. Section VII(d) requires the Insurer to conduct a retrospective review, at least annually, that is reasonably designed to detect and prevent violations of, and achieve compliance with, the Impartial Conduct Standards and the terms of this exemption. Section VII(e) allows Independent Producers to correct certain violations of the exemption conditions and continue to rely on the exemption for relief. In complying with this Section VII, the Independent Producer may reasonably rely on factual representations from the Insurer, and Insurers may rely on factual representations from the Independent Producer, as long as they do not have knowledge that such factual representations are incomplete or inaccurate.

(a) Impartial Conduct Standards

The Independent Producer must comply with the following "Impartial Conduct Standards":

(1) Investment advice must, at the time it is provided, satisfy the Care Obligation and Loyalty Obligation. As defined in Section X(b), to meet the Care Obligation, advice must reflect the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the

Retirement Investor. As defined in Section X(g), to meet the Loyalty Obligation, the advice must not place the financial or other interests of the Independent Producer, Insurer or any Affiliate, Related Entity, or other party ahead of the Retirement Investor's interests, or subordinate the Retirement Investor's interests to those of the Independent Producer, Insurer or any Affiliate, Related Entity, or other party. For example, in choosing between annuity products offered by Insurers, whose products the Independent Producer is authorized to sell on a commission basis, it is not permissible for the Independent Producer to recommend a product that is worse for the Retirement Investor, but better or more profitable for the Independent Producer or the Insurer;

(2) The compensation received, directly or indirectly, by the Independent Producer does not exceed reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2); and

(3) The Independent Producer's statements to the Retirement Investor (whether written or oral) about the recommended transaction and other relevant matters must not be materially misleading at the time statements are made. For purposes of this paragraph, the term "materially misleading" includes omitting information that is needed to prevent the statement from being misleading to the Retirement Investor under the circumstances.

(b) Disclosure

At or before the time a transaction described in Section III(g) occurs, the Independent Producer provides, in writing, the disclosures set forth in paragraphs (1)-(5) below to the Retirement Investor. For purposes of the disclosures required by Section VII(b)(1)-(4), the Independent Producer is deemed to engage in a covered transaction on the later of (A) the date the recommendation is made or (B) the date the Independent

Producer becomes entitled to compensation (whether now or in the future) by reason of making the recommendation.

(1) A written acknowledgment that the Independent Producer is providing fiduciary investment advice to the Retirement Investor and is a fiduciary under Title I of ERISA, Title II of ERISA, or both with respect to the recommendation;

(2) A written statement of the Care Obligation and Loyalty Obligation, described in Section VII(a) that is owed by the Independent Producer to the Retirement Investor;

(3) All material facts relating to the scope and terms of the relationship with the Retirement Investor, including:

(A) (i) The material fees and costs that apply to the Retirement Investor's transactions, holdings, and accounts,

(ii) A notice of the Retirement Investor's right to request additional information regarding cash compensation;

(iii) Upon request of the Retirement Investor in Section VII(b)(3)(A)(ii), the Independent Producer shall disclose: (I) A reasonable estimate of the amount of cash compensation to be received by the Independent Producer, which may be stated as a range of amounts or percentages; and (II) Whether the cash compensation will be provided through a one-time payment or through multiple payments, the frequency and amount of the payments, which may also be stated as a range of amounts or percentages.

(B) The type and scope of services provided to the Retirement Investor, including any material limitations on the recommendations that may be made to the Retirement Investor; this description must include the products the Independent Producer is licensed and authorized to sell, inform the Retirement Investor in writing of any limits on the range of insurance products recommended, and identify the specific Insurers and specific insurance products available to Independent Producer for recommendation to the Retirement Investor; and

(4) All material facts relating to Conflicts of Interest that are associated with the recommendation.

(5) Before the sale of a recommended annuity, the Independent Producer considers and documents the basis for the determination to recommend the annuity to the Retirement Investor and provides that documentation to both the Retirement Investor and to the Insurer;

(6) *Rollover disclosure.* Before engaging in or recommending that a Retirement Investor engage in a rollover from a Plan that is covered by Title I of ERISA or making a recommendation to a Plan participant or beneficiary as to the post-rollover investment of assets currently held in a Plan that is covered by Title I of ERISA, the Independent Producer must consider and document the bases for its recommendation to engage in the rollover, and must provide that documentation to both the Retirement Investor and to the Insurer. Relevant factors to consider must include to the extent applicable, but in any event are not limited to:

(A) the alternatives to a rollover, including leaving the money in the Plan, if applicable;

(B) the fees and expenses associated with the Plan and the recommended investment;

(C) whether an employer or other party pays for some or all of the Plan's administrative expenses; and

(D) the different levels of fiduciary protection, services, and investments available.

(7) The Independent Producer will not fail to satisfy the conditions in Section VII(b) solely because it makes an error or omission in disclosing the required information while acting in good faith and with reasonable diligence, provided that the Independent Producer discloses the correct information as soon as practicable, but not later than 30 days after the date on which it discovers or reasonably should have discovered the error or omission.

(8) Independent Producers and Insurers may rely in good faith on information and assurances from each other and from other entities that are not Affiliates as long as they do not know or have a reason to know that such information is incomplete or inaccurate.

(9) The Independent Producer is not required to disclose information pursuant to this Section VII(b) if such disclosure is otherwise prohibited by law.

(c) Policies and Procedures

(1) The Insurer establishes, maintains, and enforces written policies and procedures for the review of each recommendation, before an annuity is issued to a Retirement Investor pursuant to an Independent Producer's recommendation, that are prudently designed to ensure compliance with the Impartial Conduct Standards and other exemption conditions. The Insurer's prudent review of the Independent Producer's specific recommendations must be made without regard to the Insurer's own interests. An Insurer is not required to supervise an Independent Producer's recommendations to Retirement Investors of products other than annuities offered by the Insurer.

(2) The Insurer's policies and procedures mitigate Conflicts of Interest to the extent that a reasonable person reviewing the policies and procedures and incentive practices as a whole would conclude that they do not create an incentive for the Independent Producer to place its interests, or those of the Insurer, or any Affiliate or Related Entity, ahead of the interests of the Retirement Investor. The Insurer may not use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives in a manner that is intended, or that a reasonable person would conclude are likely, to result in recommendations that do not meet the Care Obligation or Loyalty Obligation.

(3) The Insurer's policies and procedures include a prudent process for determining whether to authorize an Independent Producer to sell the Insurer's annuity contracts to Retirement Investors, and for taking action to protect Retirement Investors from Independent Producers who have failed to adhere to the Impartial Conduct Standards, or who lack the necessary education, training, or skill. A prudent process includes careful review of objective material, such as customer complaints, disciplinary history, and regulatory actions concerning the Independent Producer, as well as the Insurer's review of the Independent Producer's training, education, and conduct with respect to the Insurer's own products. The Insurer must document the basis for its initial determination that it can rely on the Independent Producer to adhere to the Impartial Conduct Standards, and must review that determination at least annually as part of the retrospective review set forth in subsection (d) below.

(4) Insurers must provide their complete policies and procedures to the Department upon request within 30 days of request.

(d) Retrospective Review

(1) The Insurer conducts a retrospective review of each Independent Producer, at least annually, that is reasonably designed to detect and prevent violations of, and achieve compliance with the conditions of this exemption, including the Impartial Conduct Standards, and the policies and procedures governing compliance with the exemption, including the effectiveness of the supervision system, the exceptions found, and corrective action taken or recommended, if any. The retrospective review also includes a review of Independent Producers' rollover recommendations and the required rollover disclosure. As part of this review, the Insurer prudently determines whether to continue to permit individual Independent Producers to sell the Insurer's annuity contracts to Retirement Investors. Additionally, the Insurer updates the policies and procedures as business, regulatory, and legislative changes and events dictate, to ensure that the policies and procedures remain prudently designed, effective, and compliant with Section VII(c). Insurers may rely in part on sampling of each Independent Producer's transactions to conduct their retrospective reviews, as long as any sampling or other method is designed to identify potential violations, problems, and deficiencies that need to be addressed.

(2) The Insurer provides to each Independent Producer the methodology and results of the retrospective review, including a description of any non-exempt prohibited transaction the Independent Producer engaged in with respect to investment advice defined under Code section 4975(e)(3)(B), and instructs the Independent Producer to:

(A) correct those prohibited transactions;

(B) report the transactions to the IRS on Form 5330;

(C) pay the resulting excise taxes imposed by Code section 4975; and,

(D) provide the Insurer with a copy of filed Form 5330 within 30 days after the form is due (including extensions);

(3) The methodology and results of the retrospective review are reduced to a written report that is provided to a Senior Executive Officer of the Insurer.

(4) The Senior Executive Officer must certify, annually, that:

(A) The Senior Executive Officer has reviewed the report of the retrospective review report;

(B) The Insurer has provided Independent Producers with the information required under (d)(2) and has received a certification that the Independent Producer has filed Form 5330 within 30 days after the form is due (including extensions);

(C) The Insurer has established written policies and procedures that meet the requirements of Section VII(c)(1); and

(D) The Insurer has a prudent process in place to modify such policies and procedures as set forth in Section II(d)(1).

(5) The review, report, and certification are completed no later than six months following the end of the period covered by the review.

(6) The Insurer retains the report, certification, and supporting data for a period of six years and makes the report, certification, and supporting data available to the Department, within 30 days of request, to the extent permitted by law.

(e) Self-Correction

A non-exempt prohibited transaction will not occur due to a violation of the exemption's conditions with respect to a transaction, provided:

(1) Either the Independent Producer has refunded any charge to the Retirement Investor or the Insurer has rescinded a mis-sold annuity, cancelled the contract and waived the surrender charges;

(2) The correction occurs no later than 90 days after the Independent Producer learned of the violation or reasonably should have learned of the violation; and

(3) The Independent Producer notifies the person(s) at the Insurer responsible for conducting the retrospective review during the applicable review cycle and the violation and correction is specifically set forth in the written report of the retrospective review required under Section VII(d)(3).

Section VIII—Eligibility

(a) Independent Producer

Subject to the timing and scope of ineligibility provisions set forth in subsection (c), an Independent Producer will become ineligible to rely on the relief for transactions described in Section III(g), if, on or after [INSERT DATE THAT IS 150 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER], the Independent Producer has been:

(1) Convicted by either:

(A) a U.S. Federal or State court as a result of any felony involving abuse or misuse of such person's employee benefit plan position or employment, or position or employment with a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary; income tax evasion; any felony involving larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element; or a crime that is identified or described in ERISA section 411; or

(B) a foreign court of competent jurisdiction as a result of any crime, however denominated by the laws of the relevant foreign or state government, that is substantially equivalent to an offense described in (A) above (excluding convictions that occur within a foreign country that is included on the Department of Commerce's list of "foreign adversaries" that is codified in 15 CFR 7.4 as amended); or

(2) Found or determined in a final judgment or court-approved settlement in a Federal or State criminal or civil court proceeding brought by the Department, the Department of the Treasury, the Internal Revenue Service, the Department of Justice, a State insurance regulator, or State attorney general, to have participated in one or more of the following categories of conduct irrespective of whether the court specifically considers this exemption or its terms:

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

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

(C) engaging in a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330 or pay the resulting excise taxes imposed by Code section 4975 in connection with non-exempt prohibited transactions involving investment advice under Code section 4975(e)(3)(B); or

(D) providing materially misleading information to the Department, the

Department of the Treasury, the Internal Revenue Service, the Department of Justice, a State insurance regulator, or State attorney general in connection with the conditions of the exemption.

(b) Insurers

Subject to the timing and scope of ineligibility provisions set forth in subsection (c), an entity will be ineligible to serve as an Insurer if, on or after [INSERT DATE THAT IS 150 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER], the Insurer or an entity in the same Controlled Group as the Insurer has been:

(1) Convicted by either:

(A) a U.S. Federal or State court of any felony involving abuse or misuse of such person's employee benefit plan position or employment, or position or employment with a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary; income tax evasion; any felony involving the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element; or a crime that is identified or described in ERISA section 411; or

(B) a foreign court of competent jurisdiction as a result of any crime, however denominated by the laws of the relevant foreign or state government, that is substantially equivalent to an offense described in (A) above (excluding convictions that occur within a foreign country that is included on the Department of Commerce's list of "foreign adversaries" that is codified in 15 CFR 7.4 as amended); or

(2) Found or determined in a final judgment or court-approved settlement in a Federal or State criminal or civil court proceeding brought by the Department, the Department of the Treasury, the Internal Revenue Service, the Department of Justice, a State insurance regulator, or State attorney general to have participated in in one or more of the following categories of conduct irrespective of whether the court specifically considers this exemption or its terms:

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

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

(C) providing materially misleading information to the Department, the Department of the Treasury, the Internal Revenue Service, the Department of Justice, a State insurance regulator, or State attorney general in connection with the conditions of the exemption.

(3) Controlled Group. An entity is in the same Controlled Group as an Insurer if the entity (including any predecessor or successor to the entity) would be considered to be in the same "controlled group of corporations" as the Insurer or "under common control" with the Insurer as those terms are defined in Code section 414(b) and (c) (and any regulations issued thereunder),

(c) Timing and Scope of Ineligibility

(1) Ineligibility shall begin upon either:

(A) the date of conviction, which shall be the date of conviction by a U.S. Federal or State trial court described in Section VIII(a)(1) or VIII(b)(1) (or the date of the conviction of any trial court in a foreign jurisdiction that is the equivalent of a U.S. Federal or State trial court) that occurs on or after [INSERT DATE THAT IS 150 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER] regardless of whether the conviction remains under appeal; or

(B) the date of a final judgment (regardless of whether the judgment remains under appeal) or a court-approved settlement described in Section VIII(a)(2) or VIII(b)(2) that occurs on or after [INSERT DATE THAT IS 150 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

(2) One-Year Transition Period. An Independent Producer or Insurer that becomes ineligible under subsection VIII(a) or VIII(b) may continue to rely on this exemption or serve as an Insurer for up to 12 months after its ineligibility begins as determined under subsection (c)(1) if the Independent Producer or Insurer, as applicable, provides notice to the Department at PTE84-24@dol.gov within 30 days after ineligibility begins.

(3) An Independent Producer will become eligible to rely on this exemption and an Insurer will become eligible to serve as an Insurer again only upon the earliest of the following occurs:

(A) the date of a subsequent judgment reversing such person's conviction or other court decision described in Section VIII(a) or VIII(b);

(B) 10 years after the person became ineligible as determined under subsection (c)(1) or if later, 10 years after the person was released from imprisonment as a result of a crime described in Section VIII(a)(1) or Section VIII(b)(1); or

(C) the effective date an individual exemption granted by the Department, (under which the Department may impose additional conditions) permitting the person to continue its reliance on this exemption.

(d) Alternative Exemptions

An Insurer or Independent Producer that is ineligible to rely on this exemption may rely on a statutory or separate administrative prohibited transaction exemption if one is available or may request an individual prohibited transaction exemption from the Department. To the extent an applicant requests retroactive relief in connection with an individual exemption application, the Department will consider the application in accordance with its retroactive exemption policy as set forth in 29 CFR 2570.35(d). The Department may require additional prospective compliance conditions as a condition of providing retroactive relief.

Section IX—Recordkeeping

The Independent Producer and Insurer must maintain for a period of six years records demonstrating compliance with this exemption and makes such records available, to the extent permitted by law, to any authorized employee of the Department or the Department of the Treasury, which includes the Internal Revenue Service.

Section X—Definitions

For purposes of this exemption, the terms "insurance agent or broker," "pension consultant," "insurance company," "investment company," and "Principal Underwriter" mean such persons and any Affiliates thereof. In addition, for purposes of this exemption:

(a) "**Affiliate**" means:

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the person (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, partner, employee, or relative (as defined in ERISA section 3(15)), of the person; and

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

(b) Advice meets the "**Care Obligation**" if, with respect to the Retirement Investor, such advice reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor.

(c) A "**Conflict of Interest**" is an interest that might incline an Independent Producer—consciously or unconsciously—to make a recommendation that is not disinterested.

(d) "**Independent Producer**" means a person or entity that is licensed under the laws of a State to sell, solicit or negotiate insurance contracts, including annuities, and that sells to Retirement Investors products of multiple unaffiliated insurance companies, and

(1) is not an employee of an insurance company (including a statutory employee as defined under Code section 3121(d)(3)); or

(2) is a statutory employee of an insurance company that has no financial interest in the covered transaction.

(e) "**Individual Retirement Account**" or "**IRA**" means any plan that is an account or annuity described in Code section 4975(e)(1)(B) through (F).

(f) "**Insurer**" means an insurance company qualified to do business under the laws of a State, that: (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 five years, (C) is domiciled in a State whose law requires that an actuarial review of reserves be conducted annually and reported to the appropriate regulatory authority; (D) is not disqualified or barred from making investment recommendations by any insurance, banking, or securities law or regulatory authority (including any self-regulatory organization and the Department under Section VIII of this exemption), that retains the Independent Producer as an independent contractor, agent or registered representative.

(g) Advice meets the "**Loyalty Obligation**" if, with respect to the Retirement Investor, such advice does not place the financial or other interests of the Independent Producer, Insurer, or any Affiliate, Related Entity, or other party ahead of the interests of the Retirement Investor or subordinate the Retirement Investor's interests to those of the Independent Producer, Insurer, or any Affiliate, Related Entity, or other party.

(h) 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).

(i) The term “**Nondiscretionary Trustee**” of a plan 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 Pre-Approved Plan, the power to amend such plan.

(j) “**Plan**” means any employee benefit plan described in ERISA section 3(3) and any plan described in Code section 4975(e)(1)(A).

(k) The term “**Pre-Approved Plan**” means a plan which is approved by the Internal Revenue Service pursuant to the procedure described in Rev. Proc. 2017-41, 2017-29 I.R.B. 92, or its successors.

(l) A “**Principal Underwriter**” means a principal underwriter 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)).

(m) A “**Related Entity**” means any party that is not an Affiliate, and (i) has an interest in an Independent Producer that may affect the exercise of the fiduciary’s best judgment as a fiduciary, or (ii) in which the Independent Producer has an interest that may affect the exercise of the fiduciary’s best judgment as a fiduciary.

(n) “**Retirement Investor**” means a Plan, Plan participant or beneficiary, IRA,

IRA owner or beneficiary, Plan fiduciary within the meaning of ERISA section (3)(21)(A)(i) or (iii) and Code section 4975(e)(3)(A) or (C) with respect to the Plan, or IRA fiduciary within the meaning of Code section 4975(e)(3)(A) or (C) with respect to the IRA.

(o) A "**Senior Executive Officer**" is any of the following: the chief compliance officer, the chief executive officer, president, chief financial officer, or one of the three most senior officers of the Insurer.

Section XI—Phase-In Period

During the one-year period beginning [INSERT DATE THAT IS 150 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER], Independent Producers may receive compensation under Section II(b) of this exemption if the Independent Producer complies with the Impartial Conduct Standards set forth in Section VII(a) and the fiduciary acknowledgment set forth in Section VII(b)(1).

Signed at Washington, DC, this 10th day of April, 2024.

Lisa M. Gomez,

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

4510-29-P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

[Application No. D-12057]

ZRIN 1210-ZA32

Amendment to Prohibited Transaction Exemption 2020-02

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

ACTION: Amendment to Class Exemption PTE 2020-02.

SUMMARY: This document contains a notice of amendment to class prohibited transaction exemption (PTE) 2020-02, which provides relief for investment advice fiduciaries to receive certain compensation that otherwise would be prohibited. The amendment affects participants and beneficiaries of employee benefit plans, individual retirement account (IRA) owners, and fiduciaries with respect to such plans and IRAs.

DATES: The amendment is effective [INSERT DATE THAT IS 150 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

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

SUPPLEMENTARY INFORMATION:

Background

The Employee Retirement Income Security Act of 1974 (ERISA) provides, in relevant part, that a person is a fiduciary with respect to a plan to the extent they render investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or have any authority or responsibility to do so. [1] Title I of ERISA (referred to herein as Title I) imposes duties and restrictions on persons who are "fiduciaries" with respect to employee benefit plans. ERISA section 404 provides that Title I plan fiduciaries must act with the "care, skill, prudence, and diligence under the circumstances then prevailing that a prudent [person] acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims," and that they also must discharge their duties with respect to a plan "solely in the interest of the participants and beneficiaries."[2]

In addition to fiduciary obligations, ERISA has prohibited transaction rules that "categorically bar[]" plan fiduciaries from engaging in transactions deemed "likely to injure the pension plan."[3] These prohibitions broadly forbid a fiduciary from "deal[ing] with the assets of the plan in his own interest or for his own account," and "receiv[ing] any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan."[4] Congress gave the Department of Labor (the Department) broad authority to grant conditional administrative exemptions from the prohibited transaction

[1] Section 3(21)(A)(ii) is codified at 29 U.S.C. 1002(3)(21)(A)(ii). The provision is in Title I of the ERISA (referred to herein as Title I), which is codified in Title 29 of the U.S. Code. This preamble refers to the codified provisions in Title I by reference to sections of ERISA, as amended, and not by their numbering in Section 29 of the U.S. Code.
[2] ERISA section 404(a).
[3] *Harris Trust Sav. Bank* v. *Salomon Smith Barney Inc.,* 530 U.S. 238, 241–42 (2000) (citation and quotation marks omitted).
[4] ERISA section 406(b)(1), (3), 29 U.S.C. 1106(b)(1), (3).

provisions, but only if the Department finds that the exemption is (1) administratively feasible for the Department, (2) in the interests of the plan and of its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries of such plan.[5]

ERISA's Title II (also referred to herein as the Code), includes a parallel provision in section 4975(e)(3)(B), which defines a fiduciary of a tax-qualified plan, including individual retirement accounts (IRAs). Title II governs the conduct of fiduciaries to plans defined in Code section 4975(e)(1), which includes IRAs.[6] Some plans defined in Code section 4975(e)(1) are also covered by Title I of ERISA, but the definitions of such plans are not identical. Although Title II does not directly impose specific duties of prudence and loyalty on fiduciaries as Title I does in ERISA section 404(a), it prohibits fiduciaries from engaging in conflicted transactions on many of the same terms as Title I.[7] Under the Reorganization Plan No. 4 of 1978, which Congress subsequently ratified in 1984,[8] Congress generally granted the Department authority to interpret the fiduciary definition and issue administrative exemptions from the prohibited transaction provisions in Code section 4975.[9]

On December 18, 2020, the Department exercised this authority and adopted PTE 2020-02, a prohibited transaction exemption for investment advice fiduciaries with respect to employee benefit plans and IRAs. This exemption ensured that those saving for retirement could have access to high quality advice by requiring fiduciary advice providers to render advice that is

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[5] ERISA section 408(a), 29 U.S.C. 1108(a).
[6] For purposes of the final rule, the term "IRA" is defined as any account or annuity described in Code section 4975(e)(1)(B) – (F), and includes individual retirement accounts, individual retirement annuities, health savings accounts, and certain other tax-advantaged trusts and plans.
[7] 26 U.S.C. 4975(c)(1); *cf. id.* at 4975(f)(5), which defines "correction" with respect to prohibited transactions as placing a plan or an IRA in a financial position not worse than it would have been in if the person had acted "under the highest fiduciary standards."
[8] Sec. 1, Pub. L. 98-532, 98 Stat. 2705 (Oct. 19, 1984).
[9] 5 U.S.C. App. 752 (2018).

in their plan and IRA customers' best interest in order to receive any compensation that would otherwise be prohibited by ERISA and the Code.

On October 31, 2023, the Department released the proposed Retirement Security Rule: Definition of an Investment Advice Fiduciary (the Proposed Rule), along with proposed amendments to administrative prohibited transaction exemptions available to investment advice fiduciaries.[10] The Department designed the Proposed Rule to ensure that the protections established by Titles I and II of ERISA would uniformly apply to all investment advice that is provided to "Retirement Investors"[11]), concerning the investment of their retirement assets, and that Retirement Investors' reasonable expectations are honored when they receive investment advice from financial professionals who hold themselves out as trusted advice providers.

At the same time the Department published the Proposed Rule, it also released the proposed amendment to PTE 2020-02 (the Proposed Amendment), proposed amendments to PTEs 75-1, 77-4, 80-83, 83-1, and 86-128 that apply to the provision of investment advice (the Mass Amendment), and proposed amendments to PTE 84-24 and invited all interested persons to submit written comments on each.[12]

The Department received written comments on the Proposed Amendment, and on December 12 and 13, 2023, it held a virtual public hearing where witnesses provided commentary on the Proposed Amendment. After carefully considering the comments it received

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[10] The proposals were released on the Department's website on October 31, 2023. They were published in the *Federal Register* on November 3, 2023, at 88 FR 75890, 88 FR 75979, 88 FR 76004, and 88 FR 76032.

[11] As defined in Section V(l), Retirement Investor means a Plan, Plan participant or beneficiary, IRA, IRA owner or beneficiary, Plan fiduciary within the meaning of ERISA section (3)(21)(A)(i) or (iii) and Code section 4975(e)(3)(A) or (C) with respect to the Plan, or IRA fiduciary within the meaning of Code section 4975(e)(3)(A) or (C) with respect to the IRA.

[12] The Proposed Amendment was released on October 31, 2023, and was published in the *Federal Register* on November 3, 2023. 88 FR 75979.

and the testimony presented at the hearing, the Department is granting the final amendment to PTE 2020-02 that is discussed herein (the Final Amendment) on its own motion pursuant to its authority under ERISA section 408(a) and Code section 4975(c)(2) and in accordance with its exemption procedures set forth in 29 CFR part 2570, Subpart B (76 FR 66637 (October 27, 2011)).[13]

Elsewhere in this edition of the *Federal Register*, the Department is finalizing (1) the Proposed Rule defining when a person renders "investment advice for a fee or other compensation, direct or indirect" with respect to any moneys or other property of an employee benefit plan for purposes of the definition of a "fiduciary" in ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) (the "Regulation"), (2) the Mass Amendment, and (3) the amendment to PTE 84-24.

Comments and Description of the Amendment to PTE 2020-02.

As discussed below, the Department is broadening PTE 2020-02 to cover more transactions and revising some of the exemption's conditions to emphasize the core standards underlying the exemption. Consistent with the Proposed Amendment and PTE 2020-02 as it was originally granted in December 2020, this Final Amendment ensures that trusted advisers adhere to fundamental standards of fiduciary conduct when they receive compensation that otherwise is prohibited by ERISA and the Code as a result of recommending investment products and services to Retirement Investors.[14]

[13] Reorganization Plan No. 4 of 1978 (5 U.S.C. App. 1 (2018)) generally transferred the authority of the Secretary of the Treasury to grant administrative exemptions under Code section 4975 to the Secretary of Labor. Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications were amended effective April 8, 2024 (29 CFR part 2570, Subpart B (89 FR 4662 (January 24, 2024)).

[14] When using the term "adviser," the Department does not refer only to investment advisers registered under the Investment Advisers Act of 1940 or under state law, but rather to any person rendering fiduciary investment advice

Under these core standards, Financial Institutions[15] and the "Investment Professionals"[16] who work for them must:

- acknowledge their fiduciary status[17] in writing to the Retirement Investor;
- disclose their services and material conflicts of interest to the Retirement Investor;
- adhere to Impartial Conduct Standards requiring them to:
    - investigate and evaluate investments, provide advice, and exercise sound judgment in the same way that knowledgeable and impartial professionals would in similar circumstances (the Care Obligation);
    - never place their own interests ahead of the Retirement Investor's interest, or subordinate the Retirement Investor's interests to their own (the Loyalty Obligation);
    - charge no more than reasonable compensation and, if applicable, comply with Federal securities laws regarding "best execution"; and
    - avoid making misleading statements about investment transactions and other relevant matters;

under the Regulation. For example, as used herein, an adviser can be an individual who is, among other things, a representative of a registered investment adviser, a bank or similar financial institution, an insurance company, or a broker-dealer.

[15] As defined in Section V(d) and including registered investment advisers, banks or similar institutions, insurance companies, broker-dealers and non-bank trustees.

[16] As defined in Section V(g)).

[17] For purposes of this disclosure, and throughout the exemption, the term "fiduciary status" is limited to fiduciary status under Title I of ERISA, the Code, or both. While this exemption uses some of the same terms that are used in the SEC's Regulation Best Interest and/or in the Investment Advisers Act and related interpretive materials issued by the SEC or its staff, the Department retains interpretive authority with respect to satisfaction of this exemption.

- adopt firm-level policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards and mitigate conflicts of interest that could otherwise cause violations of those standards;
- document and disclose the specific reasons for any rollover recommendations; and
- conduct an annual retrospective compliance review.

This Final Amendment builds on the existing conditions and:

- expands the exemption's scope to include recommendations of any investment product, regardless of whether the product is sold on a principal or agency basis;
- adds non-bank Health Savings Account (HSA) trustees and custodians to the definition of Financial Institution with respect to HSAs;
- revises the disclosure requirements in the Final Amendment to more closely track other regulators' disclosure requirements with respect to the provision of investment advice;
- limits 10-year disqualification to serious misconduct that has been determined in a court proceeding;
- provides new streamlined exemption provisions for Financial Institutions that give fiduciary advice in connection with a Request for Proposal (RFP) to provide investment management services as an ERISA section 3(38) investment manager; and
- makes certain other minor revisions to, and clarifications of, existing provisions of the exemption.

In addition, although the Department proposed to expand the recordkeeping requirement in the exemption, the Final Amendment maintains the recordkeeping provisions already in PTE 2020-02 without change.

The Final Amendment, which is described in more detail below, is part of the Department's broader package of changes to the definition of fiduciary advice and associated exemptions published elsewhere in today's *Federal Register*. The Department has worked to ensure that each separate regulatory action being finalized today, while capable of operating independently, works together within ERISA's existing framework. Together, these changes reduce the gap in protections that previously existed with respect to ERISA-covered investments and level the playing field for all investment advice fiduciaries. Still, the amended Regulation and each of the PTEs operate independently and should continue to do so if any component of the rulemaking is invalidated.

The Department notes the views of some commenters that it should have delayed making changes so that Financial Institutions, Investment Professionals, and the Department could have gained more experience with PTE 2020-02, as currently written, or that it should even have foregone making any changes at all in light of new standards of care imposed on broker-dealers by the Securities and Exchange Commission (SEC), and on insurance companies and insurance agents by State insurance regulators. In making changes to PTE 2020-02, however, the Department has paid close attention to the work of other regulators, and sought to build upon and complement, rather than disrupt, their compliance structures. For example, the Department has designed the Final Amendment in manner that should place Financial Institutions that have already built robust compliance structures in compliance with the SEC's Regulation Best Interest: the Broker-Dealer Standard of Conduct (Regulation Best Interest)[18] in a strong position to comply with the closely aligned revised conditions of PTE 2020-02.

[18] 17 CFR § 240.15l–1.

The Final Amendment also reflects the Department's ongoing review of issues of fact, law, and policy related to PTE 2020-02, and more generally, its regulation of fiduciary investment advice.[19] Moreover, the changes described herein reflect the Department's experience facilitating compliance with PTE 2020-02, consideration of the input it received from meetings with stakeholders since the exemption originally was finalized in 2020, and the comments received, and testimony provided, at the virtual hearing in response to the Proposed Amendment and the proposed regulation.

As discussed in greater detail below, the Department has concluded that, as amended, the exemption is flexible, workable, and provides a sound and uniform framework for Financial Institutions and Investment Professionals to provide high quality investment advice to Retirement Investors. The amended exemption also is broadly available to be relied on by Financial Institutions and Investment Professionals, without regard to their business model, fee structure, or type of product recommended, subject to their compliance with fundamental standards that protect Retirement Investors. To the extent that Financial Institutions and Investment Professionals honor terms of the amended exemption, Retirement Investors will benefit from the application of a common standard to all fiduciary investment advice

[19] See Emp. Benefits Sec. Admin. (EBSA), U.S. Dep't of Lab., New Fiduciary Advice Exemption: PTE 2020-02 Improving Investment Advice for Workers & Retirees Frequently Asked Questions (Apr. 2021), ("2021 FAQs"), *available at* https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/faqs/new-fiduciary-advice-exemption.pdf. "Q5. Will the Department take more actions relating to the regulation of fiduciary investment advice?: The Department is reviewing issues of fact, law, and policy related to PTE 2020-02, and more generally, its regulation of fiduciary investment advice. The Department anticipates taking further regulatory and sub-regulatory actions, as appropriate, including amending the investment advice fiduciary regulation, amending PTE 2020-02, and amending or revoking some of the other existing class exemptions available to investment advice fiduciaries. Regulatory actions will be preceded by notice and an opportunity for public comment. Additionally, although future actions are under consideration to improve the exemption, the Department believes that core components of PTE 2020-02, including the Impartial Conduct Standards and the requirement for strong policies and procedures, are fundamental investor protections which should not be delayed while the Department considers additional protections or clarifications."

recommendations to Retirement Investors that ensures they will receive prudent and loyal investment recommendations from Financial Institutions and Investment Professionals competing on a level playing field that is protective of Retirement Investors' interests.

Applicability Date

The Final Amendment is applicable to transactions pursuant to investment advice provided on or after [INSERT DATE THAT IS 150 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER] (the "Applicability Date"). For transactions engaged in pursuant to investment advice recommendations that were provided before the Final Amendment's Applicability Date, the prior version of PTE 2020-02 will remain available for all parties that are currently relying on the exemption.[20]

Several commenters stated that the Proposed Amendment's Applicability Date (60-days after publication in the *Federal Register*) did not provide sufficient time for Financial Institutions and Investment Professionals to fully comply with the amended conditions. In response to these comments, the Department is adding a new Section VI, which provides a phase-in period for the one-year period beginning [INSERT DATE THAT IS 150 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]. Thus, Financial Institutions and Investment Professionals may receive reasonable compensation under Section I of the amended exemption during this phase-in period if they comply with the Impartial Conduct Standards in Section II(a) and the fiduciary acknowledgment requirement under Section II(b)(1). This one-year phase-in period is the same as the one-year compliance period the Department provided when it originally granted PTE 2020-02.

[20] To the extent a party receives ongoing compensation for a recommendation that was made before the Applicability Date, including through a systematic purchase payment or trailing commission, the amended PTE 2020-02 would not apply unless and until new investment advice is provided.

The Department confirms that if a transaction occurred before the Applicability Date or pursuant to a systematic purchase program established before the Applicability Date, the restrictions of ERISA section 406(a)(1)(A), 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)(A), (D), (E) and (F), will not apply to: (1) the receipt, directly or indirectly, of reasonable compensation by a Financial Institution, Investment Professional, or any Affiliate and Related Entity, as such terms are defined in Section V, in connection with investment advice; or (2) the purchase or sale of an asset in a principal transaction, and the receipt of a mark-up, mark-down, or other payment, in either case as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder. Also, no party would be required to comply with the amended conditions for a transaction that occurred before the Applicability Date.

Expanded Exemption Scope

The Department is expanding the scope of PTE 2020–02 in the Final Amendment to make it more broadly available, as requested by industry commenters. As amended, the exemption is available for Financial Institutions and Investment Professionals to receive reasonable compensation for recommending a broad range of investment products to Retirement Investors, including insurance and annuity products. Both the existing exemption and the Proposed Amendment provided narrower relief. Specifically, Section I(b) of the Proposed Amendment stated:

> This exemption permits Financial Institutions and Investment Professionals, and their Affiliates and Related Entities, to engage in the following transactions, including as part of a rollover from a Plan to an IRA as defined in Code section 4975(e)(1)(B) or (C), as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B):

(1) The receipt of reasonable compensation; and

(2) The purchase or sale of an asset in a riskless principal transaction or a Covered Principal Transaction, and the receipt of a mark-up, mark-down, or other payment.

Some commenters expressed concern that the scope of covered transactions in the Proposed Amendment was unduly limited. As support, some commenters pointed to the Department's proposed simultaneous repeal of other exemptions covering investment advice and expressed concern that they would need to rely on PTE 2020-02 or PTE 84-24 for any compensation for providing investment advice. One commenter noted that some investment advice fiduciaries that formerly could rely on the same exemption (*e.g.*, PTE 77-4) for both advice and for other transactions, such as asset management, would now have to rely on multiple exemptions. Another commenter suggested that PTE 2020-02 was not a good substitute for PTE 77-4 because it was more burdensome.

However, as the Department discussed in the preamble to the proposed Mass Amendment,[21] the Department is seeking to provide a single standard of care that would apply universally to all fiduciary investment advice, regardless of the specific type of product or advice provider. This uniform regulatory structure for investment advice will provide greater protection for Retirement Investors and create a level playing field among investment advice providers by ensuring that advice transactions are subject to a common set of standards that are specifically designed to protect Retirement Investors from the inherent dangers posed by conflicts of interest and to ensure prudent advice. These common standards, which are included in both this exemption and the amended PTE 84-24, importantly include the Impartial Conduct Standards,

[21] 88 FR 76032.

the policies and procedures requirement, and the obligation to conduct annual retrospective reviews, each of which is further described below. In the Department's judgment, the advice transactions that were formerly covered by PTE 77-4 and the other exemptions affected by the Mass Amendment are just as deserving of these core protections as other advice transactions, and the need for protection is just as great.

Several commenters emphasized the need for a universal standard covering investment advice provided to Retirement Investors. These commenters described Retirement Investors who reasonably expect their relationship with an investment advice provider to be one in which they can – and should – place trust and confidence in the advice provider's recommendations. In light of the asymmetry of information and knowledge between a Retirement Investor and an advice provider, commenters noted that the Retirement Investor is at increased risk that the advice provider will prioritize its own compensation at the expense of the Retirement Investor's savings.

To ensure that there is a common standard that Retirement Investors can rely on for all products and for all tax-advantaged retirement accounts, the Department is broadening this exemption to make it available for recommendations of all types of products by all fiduciary investment advice providers as defined in ERISA, the Code, and the final Regulation that the Department is issuing today.

Transactions With Parties In Interest

In this Final Amendment, the Department is expanding the scope of the PTE 2020-02 to permit Financial Institutions, Investment Professionals, and their Affiliates and Related Entities, to receive reasonable compensation (including commissions, fees, mark ups, mark downs, and other payments) that would otherwise be prohibited under ERISA and the Code as a result of providing investment advice within the meaning of ERISA section 3(21)(A)(ii), Code section

4975(e)(3)(B), and the final Regulation to Retirement Investors, including as part of a rollover from an employee benefit plan to an IRA. This is a change from the Proposed Amendment, and from the exemption that was finalized in 2020, which granted limited relief for "covered principal transactions" and "riskless principal transactions," as those terms were defined in the Proposed Amendment. The Final Amendment provides exemptive relief for all transactions—regardless of whether they are executed on a principal or agent basis. This expansion in the scope of the exemption responds to many commenters' concerns that the Proposed Amendment unduly narrowed the availability of the exemption, including the concerns of those who argued that the language in Section I of the exemption did not sufficiently clarify whether recommendations involving insurance and annuity products were covered transactions.

This expansion in scope also responds to many industry commenters who expressed particular concern that the Proposed Amendment of PTE 2020-02 and the proposed Mass Amendment would leave certain principal transactions that previously were covered by a class exemption without exemptive relief. Many of these commenters urged the Department to expand the scope of covered principal transactions in PTE 2020-02, including to provide relief for closed-end funds that are traded on a principal basis upon their inception. Some commenters asserted more generally that the Department was inappropriately substituting its own judgment for that of Retirement Investors and their fiduciary investment advice providers and effectively preventing Retirement Investors from purchasing a wide range of securities that are recommended.

However, other commenters disagreed. Some commenters urged the Department to further narrow the scope of Covered Principal Transactions. For example, one commenter encouraged the Department to add the limitation "for cash" to the definition of Covered Principal

Transaction, which would prevent in-kind transactions from being treated as covered principal transactions. This commenter asserted that such a change would reduce the complexity and the conflicts of interest that otherwise would be associated with such transactions. Other commenters generally supported the Department's Proposed Amendment with its limited coverage for principal transactions.

Although the Department is expanding the scope of the exemption, the Department continues to be concerned about the heightened conflicts of interest inherent in principal transactions. Principal transactions involve the purchase from, or sale to, a Plan or an IRA of an investment 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. Because an investment advice fiduciary engaging in a principal transaction is involved with both sides of the transaction, a Financial Institution or Investment Professional providing fiduciary investment advice in a principal transaction has a clear and direct conflict of interest.

In addition, the securities that are typically traded in principal transactions often lack pre-trade price transparency and can be illiquid. As a result, Retirement Investors may find it especially challenging to evaluate the reasonableness of recommended principal transactions. Because of these challenges, there is a danger that Financial Institutions and Investment Professionals will favor their own interests by selling unwanted investments from their inventory to unwitting investors, overcharge investors, or otherwise take advantage of investors and put their interests ahead of the investors' interests. Historically, the Department has provided relief for principal transactions that is limited in scope and subject to additional protective conditions because of these concerns.

After careful consideration of the comments, the Department is expanding the types of transactions that are covered by the exemption to ensure that Financial Institutions and Investment Professionals can recommend a wide variety of investment products to Retirement Investors. To the extent Financial Institutions and Investment Professionals comply with the stringent standards of care imposed by the Final Amendment and take seriously the exemption's requirements relating to policies and procedures, conflict mitigation, and retrospective review, the Department finds that the Final Amendment is both protective and flexible enough to accommodate a wide range of products, including relatively complex and risky investments. However, the Department cautions that, in order to comply with the exemptions' policies and procedures requirements, Financial Institutions selling products on a principal basis must carefully address how they will mitigate the inherent conflicts of interest associated with recommending these products to Retirement Investors.

More generally, Financial Institutions and Investment Professionals must take special care to protect the interests of Retirement Investors and to avoid favoring their own financial interests at the expense of Retirement Investors' interests. The greater the dangers posed by conflicts of interest, complexity, or risk, the greater the care Investment Professionals and Financial Institutions must take to ensure that their investment recommendations are prudent, loyal, and unaffected by either the Financial Institutions' or the Investment Professionals' conflicts of interest.

Financial Institutions and Investment Professionals

The amended exemption is broadly available for Financial Institutions and Investment Professionals, and their Affiliates and Related Entities, including (but not limited to) independent marketing organizations (IMOs), field marketing organization (FMOs), brokerage general agencies (BGAs) and others providing administrative support.

In this Final Amendment, the Department has made some ministerial changes to the existing definitions of Investment Professionals, Affiliates and Related Entities for clarity. In particular, the Department has clarified that the definition of "Related Entity" includes two components: (i) a party that has an interest in an Investment Professional or Financial Institution; and (ii) a party in which an Investment Professional or Financial Institution has an interest, in either case when that interest may affect the fiduciary's best judgment as a fiduciary. The Department has also made ministerial changes, such as changing "described" to "defined" in referencing ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B). Some commenters also suggested other changes in nomenclature, but the Department has concluded that the terms, as defined in the Final Amendment, are appropriately clear and consistent.

The Final Amendment also broadens the definition of the term Financial Institution to include non-bank trustees or custodians that are approved to serve in these capacities under Treasury Regulation 26 CFR §1.408-2(e) (as amended), but only to the extent they are serving as non-bank trustees or custodians with respect to HSAs. Several commenters requested the Department to expand the definition of Financial Institution under the exemption to include these non-bank trustees or custodians. As explained by some commenters, IRS-approved non-bank trustees and custodians are permitted to administer HSAs and are subject to numerous requirements under regulations and guidance issued by the Department of the Treasury.[22] Some

[22] According to the commenter, in order for a non-bank trustee or custodian to receive this certification, the entity must submit a written application to the Commissioner of the IRS demonstrating, generally, its ability to act within the accepted rules of fiduciary conduct, its capacity to account for large numbers of accountholders, its fitness to handle funds normally associated with the handling of retirement funds, sufficient net worth, and that its procedures

commenters stated that these non-bank trustees service a meaningful portion of the HSA market, and argued that without eligibility to use PTE 2020-02, they may be forced to exit the market. According to these commenters, with reduced competition and fewer choices, costs to HSA plan sponsors and participants could increase. One commenter further stated that the failure to include IRS-approved non-bank HSA trustees and custodians in the definition would be inconsistent with the intent of Congress to regulate such entities similarly to other Financial Institutions under ERISA and the Code.

After consideration of these comments, which were limited to concerns regarding HSAs, the Department is expanding the definition of Financial Institution in the Final Amendment to include non-bank trustees and non-bank custodians that are approved under Treasury Regulation 26 CFR 1.408-2(e) (as amended), but only to the extent they are serving in these capacities with respect to HSAs. The Department agrees with commenters that the initial and continuing requirements to remain certified by the Department of the Treasury as a non-bank trustee or custodian provide sufficient regulatory oversight of these entities to include them within the scope of this exemption as applied to HSAs. As amended, these non-bank trustees and custodians will be permitted to serve as Financial Institutions under Section V(d)(5). To implement this change, the Department is redesignating former Section V(e)(5) to (d)(6), which covers other entities that may become Financial Institutions under future individual exemptions.

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adhere to established rules of fiduciary conduct (including that all employees taking part in the performance of the entity's fiduciary duties are required to be bonded in an amount of at least $250,000). The entity is also required to undergo an annual audit of its books and records by a qualified public accountant to determine, among other things, whether the HSA accounts have been administered in accordance with applicable law. *See* Treasury Regulation 26 CFR 1.408-2(e) (as amended).

Retirement Investors

The Department is revising the definition of Retirement Investor in Section V(l) to be consistent with the definition in the final Regulation defining fiduciary investment advice. As revised, both the final Regulation and this Final Amendment define Retirement Investor to mean a Plan, Plan participant or beneficiary, IRA, IRA owner or beneficiary, Plan fiduciary within the meaning of ERISA section (3)(21)(A)(i) or (iii) and Code section 4975(e)(3)(A) or (C) with respect to the Plan, or IRA fiduciary within the meaning of Code section 4975(e)(3)(A) or (C) with respect to the IRA. The preamble to the final Regulation includes additional discussion of the term "Retirement Investor," which the Department is defining similarly in the Final Amendment to ensure its broad availability to investment advice fiduciaries.

These revisions should alleviate some commenters' concerns that advice providers may provide advisory tools and assistance to fiduciaries who, in turn, render investment advice to Retirement Investors. As revised, neither the final Regulation nor this Final Amendment treats investment advice fiduciaries under section 3(21)(A)(ii) of ERISA or Code section 4975(e)(3)(B) as Retirement Investors.

Exclusions

The Department is also finalizing its amendment to Section I(c) of the exemption, which limits the availability of PTE 2020-02 in certain circumstances. Specifically, section I(c)(1) excludes from the exemption relief provided to Title I Plans if the Investment Professional, Financial Institution, or any Affiliate providing the investment advice is: (A) the employer whose employees are covered by the Plan; or (B) the Plan's named fiduciary or administrator. However, a named fiduciary or administrator or their Affiliate (including a Pooled Plan Provider (PPP) registered with the Department of Labor under 29 CFR 2510.3-44) may rely on the exemption if it is selected to provide investment advice by a fiduciary who is Independent[23] of the Financial Institution, Investment Professional, and their Affiliates. The Department received several comments opposed to this exclusion, arguing that Financial Institutions should be able to charge fees for advice to their own employees under the conditions of the exemption. The Department, however, is not modifying this provision, because its position continues to be that employers generally should not use their employees' retirement benefits as a potential source of revenue or profit, without additional safeguards. Employers can always render advice and receive reimbursement for their direct expenses incurred in transactions involving their employees without the need for the exemptive relief provided in this exemption.[24]

The Department also has determined that it is inappropriate for PTE 2020-02 to be used by a Financial Institution or Investment Professional (or an affiliate thereof) that is the named fiduciary or plan administrator of a Title I Plan to receive additional compensation for providing investment advice to Retirement Investors who are participants in the Financial Institution's own Plan unless the Financial Institution or Investment Professional is selected to serve as an investment advice provider by a fiduciary that is Independent of them. Named fiduciaries and plan administrators have significant authority over plan operations and accordingly, it is imperative for the Financial Institution or Investment Professional to be selected by an

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[23] As defined in Section V(e), For purposes of subsection I(c)(1), a fiduciary is "**Independent**" of the Financial Institution and Investment Professional if:
(1) the fiduciary is not the Financial Institution, Investment Professional, or an Affiliate;
(2) the fiduciary does not have a relationship to or an interest in the Financial Institution, Investment Professional, or any Affiliate that might affect the exercise of the fiduciary's best judgment in connection with transactions covered by this exemption; and
(3) the fiduciary does not receive and is not projected to receive within its current Federal income tax year, compensation or other consideration for its own account from the Financial Institution, Investment Professional, or an Affiliate, in excess of two (2) percent of the fiduciary's annual revenues based upon its prior income tax year.

[24] A few existing prohibited transaction exemptions apply to employers. *See, e.g.,* ERISA section 408(b)(5) (statutory exemption that provides relief for the purchase of life insurance, health insurance, or annuities, from an employer with respect to a Plan or a wholly owned subsidiary of the employer).

Independent fiduciary who will monitor and hold them accountable for their performance as a provider of investment advice services to Retirement Investors covered by the Financial Institution's own Plan.

Pooled Employer Plans and Pooled Plan Providers

The Proposed Amendment would have been available for advice to Pooled Employer Plans (PEPs). Amended Section I(c) of the exemption would have permitted Pooled Plan Providers (PPPs), as defined in Section V(j), and their Affiliates to rely upon the exemption to provide investment advice if they are Financial Institutions within the meaning of the exemption, notwithstanding their status as named fiduciaries or plan administrators. The preamble to the Proposed Amendment stated that a PPP can provide investment advice to a PEP within the framework of the exemption and would allow PEPs to receive investment advice in the same manner as other ERISA plans.[25] While the Proposed Amendment would have created a separate category for PPPs, the Final Amendment clarifies that PPPs can rely on PTE 2020-02 when the PPP is selected by an Independent fiduciary. The change ensures that PPPs are treated in the same manner as any other Financial Institution.[26]

Commenters were generally supportive of the proposed approach, but some expressed concern about fiduciary and prohibited transaction issues related to a PPP's decision to hire affiliated parties or employer decisions to participate in a PEP. These issues are outside the scope of this exemption, because they are dependent on the particular facts and circumstances of a specific case. Accordingly, such issues would be better addressed outside the context of the relief

[25] 88 FR at 75982

[26] Under ERISA section 3(43)(B)(iii) employers retain fiduciary responsibility for the selection and monitoring of the PPP and any other named fiduciary of the plan, and an employer would be able to make this independent selection.

provide in this Final Amendment, which is focused on the receipt of reasonable compensation as a result of providing investment advice.

Robo-Advice

PTE 2020-02 initially excluded investment advice generated solely by an interactive website in which computer software-based models or applications provide investment advice based on investor-supplied personal information without any personal interaction with or advice from an Investment Professional (robo-advice). The Proposed Amendment included robo-advice within the scope of PTE 2020-02. While a few commenters expressed concern that the Department was favoring robo-advice, most commenters supported the Department's proposed inclusion. The commenters asserted that the inclusion would simplify compliance for Financial Institutions and Investment Professionals and expand access to investment advice at a lower cost for Retirement Investors. One commenter argued that by allowing some robo-advice, the Department was making the exemption available for certain instances of discretionary investment management, as long as it was not provided by a human. However, the Department confirms that the exclusion in Section I(c)(2) limits the exemption to fiduciary investment advice.

After considering these comments, the Department is finalizing this amendment as proposed to expand the scope of the exemption by removing Section I(c)(2), which excluded robo-advice from the exemption. As discussed in the preamble to the Proposed Amendment, the Department understands that Financial Institutions may use a combination of computer models and individual Investment Professionals to provide investment advice and implement a single set of policies and procedures that governs all investment recommendations. Like any other investment advice arrangement, Financial Institutions relying on computer models must satisfy the exemption's Impartial Conduct Standards and other protective conditions in order to receive exemptive relief. As stated above, the amended exemption is sufficiently protective and flexible to accommodate a wide range of investment advice arrangements, including robo-advice.

Therefore, after reviewing the comments, the Department has not been presented with any evidence that would lead it to conclude that robo-advice arrangements cannot comply with the same conditions that are applicable to other investment advice arrangements. Additionally, the failure to include such arrangements in the amended exemption could reduce access to an important and cost-effective means of delivering investment advice to many participants and beneficiaries. The Department does not agree with the suggestion of a few commenters that the inclusion of robo-advice in the exemption would give such arrangements an unfair competitive advantage, inasmuch as they are subject to the same conditions as other advisory arrangements under the terms of the exemption.

Investment Discretion

The Proposed Amendment would have redesignated Section I(c)(3) of PTE 2020-02 as Section I(c)(2) to exclude from the exemption investment advice that is provided to a Retirement Investor by a Financial Institution or Investment Professional when such Financial Institution or Investment Professional is serving in a fiduciary capacity other than as an investment advice fiduciary within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) (and the regulations issued thereunder). The Department is finalizing this provision as proposed. As discussed in the preamble to the Proposed Amendment, the Department does not intend to change the substance of this exclusion and is clarifying that Financial Institutions and Investment Professionals cannot rely on the exemption when they act in a fiduciary capacity other than as an investment advice fiduciary. The Department notes that other exemptions exist for other types of transactions, such as discretionary asset management.

Impartial Conduct Standards

Care Obligation and Loyalty Obligation

The Department is retaining the substance of the exemption's requirement for Financial Institutions and Investment Professionals to act in the Retirement Investor's "Best Interest" and finalizing proposed clarifications. However, the Department is replacing the term "Best Interest" in the Final Amendment with its two separate components: the Care Obligation and the Loyalty Obligation. The Final Amendment specifically refers to each obligation separately, although they are unchanged in substance from the previous version of PTE 2020-02 and the Proposed Amendment. Both the Care Obligation and the Loyalty Obligation must be satisfied when investment advice is provided. As defined in amended Section V(b), to meet the Care Obligation, advice must reflect the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor. As defined in amended Section V(h), to meet the Loyalty Obligation, the Financial Institution and Investment Professional must not place the financial or other interests of the Investment Professional, Financial Institution or any Affiliate, Related Entity, or other party ahead of the interests of the Retirement Investor or subordinate the Retirement Investor's interests to those of the Investment Professional, Financial Institution or any Affiliate, Related Entity.

The Department is changing its nomenclature for these two obligations in response to comments that the phrase "best interest" was used in many contexts throughout this rulemaking and by various regulators with possibly different shades of meaning. For example, in paragraph (c)(1)(i) of the final Regulation, fiduciary status is based, in part, on whether a recommendation is made under circumstances that would indicate to a reasonable investor in like circumstances that the recommendation "may be relied upon by the retirement investor as intended to advance the retirement investor's best interest." In the context of the final Regulation, however, "best interest" is not meant to refer to the specific requirements of the "Best Interest" standard used in PTE 2020-02, which incorporated ERISA's standards of prudence and loyalty, but rather to refer more colloquially to circumstances in which a reasonable investor would believe the advice provider is looking out for them and working to promote their interests. As discussed in the preamble to the proposed Amendment, the Department is also adding an example from the prior PTE 2020-02 preamble to the operative text of Section II(a)(1) specifying that it is impermissible for the Investment Professional to recommend a product that is worse for the Retirement Investor because it is better for the Investment Professional's or the Financial Institution's bottom line.

Similarly, in recommending whether a Retirement Investor should pursue a particular investment strategy through a brokerage or advisory account, the Investment Professional must base the recommendation on the Retirement Investor's financial interests, rather than any competing financial interests of the Investment Professional. For example, in order for an Investment Professional to recommend that a Retirement Investor enter into an arrangement requiring the Retirement Investor to pay an ongoing advisory fee to the Investment Professional, the Professional must prudently conclude that the Retirement Investor's interests would be better served by this arrangement than the payment of a one-time commission to buy and hold a long-term investment. In making recommendations as to account type, it is important for the Investment Professional to ensure that the recommendation carefully considers the reasonably expected total costs over time to the Retirement Investor, and that the Investment Professional base its recommendations on the financial interests of the Retirement Investor and avoid subordinating those interests to the Investment Professional's competing financial interests.

It bears emphasis, that this standard should not be read as somehow foreclosing the Investment Professional and Financial Institution from being paid on a transactional basis or ongoing basis, nor does it foreclose investment advice on proprietary products or investments that generate third-party payments,[27] or advice based on investment menus that are limited to such products, in part or whole. Financial Institutions and Investment Professionals are entitled to receive reasonable compensation that is fairly disclosed for their work. As further described below, Financial Institutions that offer a restricted menu of proprietary products or products that generate third-party payments must ensure their policies and procedures satisfy the conditions of Section II(c).

The Department received many comments on the Impartial Conduct Standards. Several commenters supported the principles-based approach, which they asserted provide fundamental investor protections that are necessary to ensure the advice is in the interest of the Retirement Investors. Some commenters noted how many investment advice professionals already hold themselves to similar professional standards of conduct. One commenter, in particular, stated that these high standards have not resulted in less access to advice.

[27] The Department considers "third-party payments" to include such payments as sales charges when not paid directly to the Financial Institution, Investment Professional, or an Affiliate or Related Entity by a Retirement Investor; gross dealer concessions; revenue sharing payments; 12b-1 fees; distribution, solicitation or referral fees; volume-based fees; fees for seminars and educational programs; and any other compensation, consideration, or financial benefit provided to the Financial Institution, Investment Professional or an Affiliate or Related Entity by a third party as a result of a transaction covered by this exemption involving a Retirement Investor.

Other commenters objected to the Impartial Conduct Standards. Some commenters argued that the Department does not have authority to include these conditions in a prohibited transaction exemption. According to these commenters, because the Care Obligation and Loyalty Obligation are based on ERISA's prudence and loyalty requirements in Title I, the Department cannot require these standards to apply when advice is provided to an IRA or other Title II Plan. Some commenters suggested the Department instead rely on the standards finalized by the SEC or the National Association of Insurance Commissioners (NAIC). One commenter stated that the Department is deliberately extending ERISA Title I statutory duties of prudence and loyalty to brokers and insurance representatives who sell to IRA plans, although Title II has no such requirements.

The Department disagrees with these commenters. ERISA section 408(a) and Code section 4975(c)(2) expressly permit the Department (through the Reorganization Plan No. 4 of 1978) to grant "a conditional or unconditional exemption" as long as the exemption is "(A) administratively feasible, (B) in the interests of the plan and of its participants and beneficiaries, and (C) protective of the rights of participants and beneficiaries of the plan."[28] Nothing in these provisions forbids the Department from drawing on the same common law standards of prudence and loyalty that have been used in analogous contexts for hundreds of years, requires the Department to limit conditions to novel provisions that Congress did not include anywhere else in ERISA's text, or expresses a preference for including standards taken from other State or Federal regulatory structures while disregarding those set forth in ERISA. These standards are an essential part of ensuring the advice is in the interest of and protective of Retirement Investors

[28] ERISA section 408(a), Code section 4975(c)(2).

and are also administratively feasible and have been central to PTE 2020-02 since it was originally granted. In finalizing the Impartial Conduct Standards in 2020, the Department explained that this condition "merely recognizes that fiduciaries of IRAs, if they seek to use this exemption for relief from prohibited transactions, should adhere to a best interest standard consistent with their fiduciary status and a special relationship of trust and confidence."[29] Additionally, while Title I imposes a duty of care and a duty of loyalty on fiduciaries in all situations, the concept of care and loyalty are not unique to Title I or even to ERISA but are rather foundational principles of trust and agency law. The SEC imposes duties of care and loyalty on investment advisers and broker-dealers. The 2020 NAIC Suitability In Annuity Transactions Model Regulation 275 (the "NAIC Model Regulation") also relies on underlying principles of care and loyalty. These core requirements are not singularly reserved for Title I of ERISA and the Department disagrees that it is inappropriate to apply these requirements to investment advice fiduciaries to Title II plans who want to engage in otherwise statutorily prohibited transactions.

The Department received several comments on how this standard applies to insurance sales. A few commenters argued that the proposed revisions to PTE 2020-02 should take a different approach to recognize the unique aspects of its application to the insurance industry. Commenters pointed out differences between the NAIC Model Regulation standard and the exemption's Impartial Conduct Standards. One commenter accused the Department of "entrapping insurance agents" by holding them to the fiduciary standard based on their actions. However, a different commenter specifically supported the Department's proposal, stating that

[29] 85 FR 82822

NAIC Model Regulation does not require producers to act in the "best interest of their customers," and called out the need for a clear uniform standard.

A few commenters specifically raised questions about the continued applicability of Question 18 from the 2021 FAQs.[30] Question 18 asked, "[h]ow can insurance industry financial institutions comply with the exemption?" In response, the Department confirmed that PTE 2020-02 is available for insurance products, particularly for independent producers that work with multiple insurance companies. The Department confirms that the Department's reasoning in the response to FAQ 18 remains true for PTE 2020-02 as amended by the Final Amendment.

The Department is aware that insurance companies often sell insurance products and fixed (including indexed) annuities through different distribution channels. While some insurance agents are employees of an insurance company, other insurance agents are independent, and work with multiple insurance companies. PTE 2020-02 applies to all of these business models. In addition to PTE 2020-02, the Department is also simultaneously publishing amendments to PTE 84-24 elsewhere in this edition of the *Federal Register* which provide a pathway to compliance for insurance companies that market their products through independent insurance agents, without requiring the companies to assume or acknowledge fiduciary status.

However, insurance companies and agents may also rely upon PTE 2020-02 to the same extent as other Financial Institutions and Investment Professionals to receive relief for the receipt of otherwise prohibited compensation as a result of investment recommendations, including commissions. To the extent an insurance company that markets its products through independent agents chooses to rely on PTE 2020-02, the independent insurance agent and the financial

[30] See *supra* at note 19.

institution (i.e., the insurance company) must satisfy the exemption's conditions, including the fiduciary acknowledgement and the Impartial Conduct Standards with respect to that recommendation. In such cases, the insurance company must adopt policies and procedures to ensure it complies with the Impartial Conduct Standards and avoid incentives that place the insurance company's or the independent agent's interests ahead of the Retirement Investor's interest.

While independent producers may recommend products issued by a variety of insurance companies, PTE 2020-02 does not require insurance companies to exercise supervisory responsibility with respect to independent producers' sales of the products of unrelated and unaffiliated insurance companies for which the insurance company does not receive any compensation or have any financial interest.[31] When an insurance company is the supervisory financial institution for purposes of the exemption with respect to such an independent producer, its obligation is simply to ensure that the insurer, its affiliates, and related entities meet the exemption's terms with respect to the insurance company's annuity which is the subject of the transaction.

Under the exemption, the insurance company must:

- adopt and implement prudent supervisory and review mechanisms to safeguard the agent's compliance with the Impartial Conduct Standards when recommending the insurance company's products;

[31] As defined in PTE 84-24, an Independent Producer is "a person or entity that is licensed under the laws of a State to sell, solicit or negotiate insurance contracts, including annuities, and that sells to Retirement Investors products of multiple unaffiliated insurance companies, and (1) is not an employee of an insurance company (including a statutory employee as defined under Code section 3121(d)(e)); or (2) is a statutory employee of an insurance company which has no financial interest int the covered transaction."

- avoid improper incentives to preferentially recommend the products, riders, and annuity features that are most lucrative for the insurance company at the customer's expense;
- ensure that the agent receives no more than reasonable compensation for its services in connection with the transaction (e.g., by monitoring market prices and benchmarks for the insurance company's products, services, and agent compensation); and
- adhere to the disclosure and other conditions set forth in the exemption.

Under the exemption, the obligation of the insurance company with respect to independent producers is to oversee the recommendation and sale of its products by the independent producer, not the recommendations and sales by the independent producer involving another insurance company's products. Insurance companies could also comply with the exemption by creating oversight and compliance systems through contracts with insurance intermediaries such as IMOs, FMOs or BGAs. As one possible approach, an insurance intermediary could eliminate compensation incentives across all the insurance companies that work with the insurance intermediary, assisting each of the insurance companies with their independent obligations under the exemption. This might involve the insurance intermediary's review of documentation prepared by insurance agents to comply with the exemption, as may be required by the insurance company, or the use of third-party industry comparisons available in the marketplace to help independent insurance agents recommend products that are prudent for their retirement investor customers.

Finally, commenters raised an issue relating to administrative feasibility of PTE 2020-02 and its core conditions, arguing that it is too early to determine whether PTE 2020-02, as currently constituted, is administrable under ERISA section 408(a) and Code section 4975(c)(2), and that the Department has not provided evidence to evaluate whether it is administrable. Other commenters questioned the administrative feasibility of both PTE 84-24 and PTE 2020-02 more generally and took issue with the added or expanded conditions of both exemptions.

The Department notes, however, that the core conditions of both PTE 2020-02 and PTE 84-24, including all the Impartial Conduct Standards, reflect core fiduciary obligations that have been present in ERISA since its passage nearly fifty years ago, and that the duties of care and loyalty are rooted in trust law obligations that long predate ERISA. The Department and the financial services industry have decades of experience with the administration of these requirements and the Department is confident that Financial Institutions, Insurers and investment professionals can adopt supervisory structures and make investment recommendations that meet basic standards of prudence and loyalty, and that do not involve overcharging or misleading Retirement Investors.

Moreover, the changes to the exemptions accompany the Regulation, which makes significant changes to the prior rule on fiduciary investment advice, and those changes also reflect decades of experience with the prior rule and its shortcomings in the modern advice marketplace, as discussed in the preamble to the Regulation. In making revisions to PTE 2020-02, the Department has been careful to ensure that parties who are currently relying upon the exemption will be able to continue to do so, without undue additional burden or needless change, and many of the changes simply expand the scope of relief available. In addition, PTE 2020-02 and PTE 84-24 give firms considerable flexibility in adopting oversight structures to manage conflicts of interest and promote compliance. The Final Rule and the exemptions cover many transactions that would not have been treated as fiduciary advice prior to this rulemaking. Taken together, they fill gaps in the regulatory structure that were not effectively addressed by the 1975 rule or PTE 2020-02.

Based on its long experience with the advice rule, the existing exemption structure, and the core Impartial Conduct Standards, the Department has concluded that the proposed changes are necessary, administrable and consistent with the protective standards of ERISA section 408 and Code section 4975(c)(2). The Department also notes that similar regulatory efforts have been initiated and successfully administered by other State and Federal regulators. These regulatory efforts and structures include New York's Rule 187,[32] the NAIC Model Regulation, the SEC's Regulation Best Interest, and the regulation of advisers under the Investment Advisers Act.

Reasonable Compensation

The Department is retaining in the Final Amendment the reasonable compensation and best execution standards from PTE 2020-02 as proposed. Section II(a)(2)(A) provides that the compensation received, directly or indirectly, by the Financial Institution, Investment Professional, their Affiliates and Related Entities for their fiduciary investment advice services provided to the Retirement Investor must not exceed reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2). In addition, Section II(a)(2)(B) provides that the Financial Institution and Investment Professional must seek to obtain the best execution of the recommended investment transaction that is reasonably available under the circumstances as required by the Federal securities laws.

The Department received some comments objecting to the reasonable compensation standard. Some commenters stated that this standard is not specific enough and could chill an

[32] Suitability and Best Interest in Life Insurance and Annuity Transactions, 11 NYCRR 224

Investment Professional's willingness to recommend certain products that carry high commissions. Other commenters argued that this practice would ultimately limit the range of products available to Retirement Investors.

The Department is finalizing the reasonable compensation standard as proposed. The obligation to pay no more than reasonable compensation to service providers has been part of ERISA since its passage.[33] For example, the ERISA section 408(b)(2) and Code section 4975(d)(2) statutory exemptions expressly require that all types of services arrangements involving Plans and IRAs result in the service provider receiving no more than reasonable compensation. When acting as service providers to Plans or IRAs, Investment Professionals and Financial Institutions have long been subject to this requirement, regardless of their fiduciary status.

The reasonable compensation standard requires that compensation received by Financial Institutions and Investment Professionals not be excessive, as measured by the market value of the particular services, rights, and benefits the Investment Professional and Financial Institution are delivering to the Retirement Investor. Given the conflicts of interest associated with the commissions and other payments that are covered by the exemption and the potential for self-dealing, it is particularly important for the Department to require Investment Professionals' and Financial Institutions' adherence to these statutory standards, which are rooted in common-law principles.

[33] The default rule under common law likewise requires that a trustee's compensation be reasonable. *E.g.*, *Nat'l Assoc. for Fixed Annuities v. Perez*, 217 F. Supp. 3d 1, 43-44 (D.D.C. 2016) ("[C]ommon law includes requirements of 'reasonable compensation' for trustees . . . ." (citations omitted)); Restatement (Third) of Trusts § 38(1) (2003) ("A trustee is entitled to reasonable compensation out of the trust estate for services as trustee . . . .").

The reasonable compensation standard applies to all covered transactions under the exemption, including those involving investment products that bundle services and investment guarantees or other benefits, such as annuity products. In assessing the reasonableness of compensation in connection with covered transactions involving these products, it is appropriate to consider the value of the guarantees and benefits as well as the value of the services. When assessing the reasonableness of compensation, Financial Institutions and Investment Professionals generally must consider the value of all the services and benefits provided to Retirement Investors for the compensation, not just some of the services and benefits. If Financial Institutions and Investment Professionals need additional guidance in this respect, they should refer to the Department's regulatory interpretations under ERISA section 408(b)(2) and Code section 4975(d)(2).[34]

No Materially Misleading Statements

The Department is also retaining the requirement in Section II(a)(3) of PTE 2020-02 that prohibits Financial Institutions and Investment Professionals from making materially misleading statements to Retirement Investors. The Department is also clarifying that the prohibition against misleading statements applies to both written and oral statements. In particular, the Department is also clarifying that this condition is not satisfied if a Financial Institution or Investment Professional omits information that is needed to make the statement not misleading in light of the circumstances under which it was made.

The Department received a comment expressing concern that this condition is too vague. The Department disagrees. As the Department explained when it granted PTE 2020-02,

[34] *See* 29 CFR 2550.408b-2.

"materially misleading statements are properly interpreted to include statements that omit a material fact necessary in order to make the statements, in light of the circumstances under which they were made, not misleading. Retirement Investors are clearly best served by statements and representations that are free from material misstatements and omissions."[35] The Final Amendment merely adds clarity by incorporating this understanding into the exemption's operative text. Numerous courts have similarly recognized that statements can be misleading by virtue of material omissions, as well as by affirmative misstatements.[36] This is not a unique or new concept for Financial Institutions. For example, in adopting Regulation Best Interest, the SEC reminded broker-dealers of their obligations under the anti-fraud provisions of Federal Securities laws for failure to disclose material information to their customers when they have a duty to make such disclosure.[37] Financial Institutions and Investment Professionals best promote the interests of Retirement Investors by ensuring that their communications with their customers are not materially misleading.

Accordingly, the Department is finalizing the provisions in the exemption related to materially misleading statements as proposed, with minor ministerial changes to the wording, such as moving the phrases "to the Retirement Investor" and "materially misleading" for clarity.

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[35] 85 FR 82826.

[36] *E.g.*, *Vest v. Resolute FP US Inc.*, 905 F.3d 985, 990 (6th Cir. 2018) ("[A] material omission qualifies as misleading information."); *Kalda v. Sioux Valley Physician Partners, Inc.*, 481 F.3d 639, 644 (8th Cir. 2007) ("Additionally, a fiduciary has a duty to inform when it knows that silence may be harmful and cannot remain silent if it knows or should know that the beneficiary is laboring under a material misunderstanding of plan benefits." (internal citations omitted)); *Krohn v. Huron Mem'l Hosp.*, 173 F.3d 542, 547 (6th Cir. 1999) ("[A] fiduciary breaches its duties by materially misleading plan participants, regardless of whether the fiduciary's statements *or omissions* were made negligently or intentionally.") (emphasis added); *see Mathews v. Chevron Corp.*, 362 F.3d 1172, 1183 (9th Cir. 2004).

[37] 84 FR 33348, note 303. The Department observes that this requirement is also consistent with, for example, the requirement under section 206 of the Advisers Act, which bars an investment adviser from making materially false or misleading statements *or omissions* to any client or prospective client. *See In the Matter of S Squared Tech. Corp.*, Release No. 1575 (S.E.C. Release No. Aug. 7, 1996). The SEC's Rule 10b-5 under the Exchange Act imposes a similar requirement. 17 CFR 240.10b-5(b). *See also SEC v. Cap. Gains Rsch. Bureau, Inc.*, 375 U.S. 180, 200 (1963) ("Failure to disclose material facts must be deemed fraud or deceit within its intended meaning").

Disclosure

The Department is generally finalizing the disclosure conditions with some modifications to the Proposed Amendment, as discussed below. While many commenters raised concerns about the burden that would be imposed on Financial Institutions if the Department required additional disclosure, others expressed support for the Department to impose additional disclosure obligations. It is important that Retirement Investors have a clear understanding of the compensation, services, and conflicts of interest associated with recommendations if they are to make fully informed decisions. Additionally, clear and accurate disclosures can deter Financial Institutions and Investment Professionals from engaging in otherwise abusive practices that they would prefer not to expose.

One commenter suggested revising the disclosure condition to provide that it is sufficient for the Retirement Investor to have received the disclosure, without necessarily placing the responsibility squarely on the Financial Institution and Investment Professional to make the required disclosures. The Department declines to change the exemption from the proposal in this manner. The Department notes that, while Financial Institutions can coordinate the transmittal of required disclosures with others and rely upon vendors and others to ensure transmittal, ultimately the responsibility to make required disclosures, including the fiduciary acknowledgement, rests with the Financial Institution and Investment Professionals as set out in the exemption. In the Department's view, the proper exercise of this responsibility is critical to ensuring that Retirement Investors receive important, accurate, and timely information, and to ensuring that Financial Institutions and Investment Professionals manage their fiduciary obligations with the seriousness they deserve.

In the preamble to the Proposed Amendment, the Department requested comments regarding whether Financial Institutions should be required to provide additional disclosures on third-party compensation to Retirement Investors on a publicly available website. One potential benefit of such disclosure would be to provide information about conflicts of interest that could be used, not only by Retirement Investors, but by consultants and intermediaries who could, in turn, use the information to rate and evaluate various advice providers in ways that would assist Retirement Investors. Industry commenters generally opposed the condition, stating that it would impose significant costs to continuously maintain such a website without a commensurate benefit to the Retirement Investors.

Based on these comments, the Department has determined not to include a website disclosure requirement as an exemption condition at this time. While the Department may reconsider this decision at some future date based on its experience with the Regulation and related exemptions, any such future amendments would be subject to public notice and comment through a formal rulemaking process. Consistent with the Recordkeeping conditions in Section IV, the Department intends, however, to regularly request that Financial Institutions provide their investor disclosures to the Department to ensure that they are providing sufficient information in a manner that the Retirement Investor can understand, and that the disclosures are serving their intended purpose.

Fiduciary Acknowledgment

The Department is retaining the requirement in PTE 2020-02 for Financial Institutions to provide a written acknowledgment of fiduciary status to the Retirement Investor. At or before the time a covered transaction (as defined in Section I(b) of the Final Amendment) occurs, the Financial Institution must provide a written acknowledgment that the Financial Institution and its

Investment Professionals are providing fiduciary investment advice to the Retirement Investor and are fiduciaries under Title I of ERISA, Title II of ERISA, or both with respect to the investment recommendation. Section II(b)(2) also requires the Financial Institution to provide a written statement of the Care Obligation and Loyalty Obligation owed by the Investment Professional and Financial Institution to the Retirement Investor. This disclosure must also be provided at or before the Financial Institution engages in the transaction.

The Department received many comments on this requirement. Some commenters supported clarifications that the acknowledgement must make clear that the recommendation is rendered in a fiduciary capacity, though some argued that the acknowledgment should be limited to specific transactions. For example, one commenter urged the Department to provide that the fiduciary acknowledgment must be an "unconditional" acknowledgment of fiduciary status in order to effectively address artful drafting by a Financial Institution that is intended to evade actual fiduciary status. Another commenter provided examples of disclosures that Financial Institutions have in place that are misleading to Retirement Investors. Many of these misleading disclosures state that the Financial Institution has fiduciary status, but then note there are exceptions or limitations to when the Financial Institution is acting as a fiduciary, without clearly taking a position on the Financial Institution's fiduciary status with respect to the particular recommendation. At best, this drafting may leave the Retirement Investor with many questions about when they are receiving fiduciary advice. At worst, it may leave the Retirement Investor with the mistaken impression that all recommendations it receives are provided in a fiduciary capacity when only some recommendations are subject to the protective conditions of this exemption. The Department agrees with these concerns, which provide further evidence of the need for the Final Amendment to include an unambiguous written acknowledgement requirement. Similarly, the requirement for a written statement of the Care Obligation and Loyalty Obligation is necessary to provide Retirement Investors with a clear statement of the duties Financial Institutions owe them.

Several commenters pointed to the history of Financial Institutions including fine print disclaimers of their fiduciary status. Disclosures have been used to undermine investors' reasonable expectations and the purpose of the fiduciary acknowledgment in Section II(b)(1) is to match the facts to the reasonable expectations of the Retirement Investor. Under the Final Amendment, Financial Institutions cannot acknowledge fiduciary status with respect to a recommendation, only to disclaim it in the fine print. The Final Amendment requires the Financial Institutions and Investment Professionals to acknowledge their fiduciary status with respect to *the* investment recommendation. This change prevents Financial Institutions from making the fiduciary acknowledgment and then including exclusions in fine print.

The Department believes that the requirement, as finalized, makes it unambiguously clear that the recommendation must be acknowledged as made in a fiduciary capacity under ERISA or the Code. It would not be sufficient, for example, to have an acknowledgement provide that "Firm A acknowledges fiduciary status under ERISA with respect to the recommendation to the extent the recommendation is treated by ERISA or Department of Labor regulations as fiduciary" because that statement does not explain when a recommendation would be treated as falling under the fiduciary requirements of ERISA and the Code. In contrast, the Department's model language below says, "We are making investment recommendations to you regarding your retirement plan account or individual retirement account as fiduciaries within the meaning of Title I of the Employee Retirement Income Security Act and/or the Internal Revenue Code, as applicable, which are laws governing retirement accounts."

A few commenters noted that neither Regulation Best Interest nor the NAIC Model Regulation requires a fiduciary acknowledgment. The Department recognizes that this is a difference between the requirements of this exemption and other sources of law. The point of the acknowledgment under PTE 2020-02 is to ensure that both the fiduciary and the Retirement Investor are clear that the particular recommendation is in fact made in a fiduciary capacity under ERISA or the Code, as defined under the regulation. The Retirement Investor should have no doubt as to the nature of the relationship or the associated compliance obligations. Anything short of that clear acknowledgment fails the exemption condition. It is not enough to alert the Retirement Investor to the fact that there may or may not be fiduciary obligations in connection with a particular recommendation, without stating that, in fact, the recommendation is made in the requisite fiduciary capacity.

Some commenters expressed concern with the timing of the acknowledgment. These commenters stated that Financial Institutions and Investment Professionals might have to acknowledge fiduciary status before they actually receive compensation and know that they are fiduciaries. Some commenters asked whether this acknowledgment might itself be a misleading statement that would be impermissible under Section II(a)(3) of the exemption. To address this concern, the Department has revised the language in Section II(b)(1) of the Final Amendment to further clarify that the disclosure must be provided "[a]t or before the time a covered transaction occurs, as defined in Section I(b)." In response to a specific comment, the Department is further clarifying that, "[f]or purposes of the disclosures required by Section II(b)(1)-(4), the Financial Institution or Investment Professional is deemed to engage in a covered transaction on the later of (A) the date the recommendation is made or (B) the date the Financial Institution or Investment Professional becomes entitled to compensation (whether now or in the future) by reason of making the recommendation." This is revised from the Proposed Amendment, which would have required the disclosure to acknowledge fiduciary status "when making an investment recommendation."

The Department is making these clarifications to confirm that the Financial Institution does not have to provide a fiduciary acknowledgment at its first meeting with the Retirement Investor. Instead, the fiduciary acknowledgment must be made at or before the time the covered transaction occurs.

One commenter opined that the fiduciary acknowledgement condition constitutes "compelled" and "viewpoint-based" speech in violation of the First Amendment and warrants application of a 'strict scrutiny' standard of review. As discussed in greater detail in the Regulation, neither the Regulation nor the Final Amendment prohibits speech based on content or viewpoint in any capacity. Instead, the Department simply imposes fiduciary duties on covered parties, and insists on adherence to Impartial Conduct Standards.

The Department also received many comments regarding whether the proposed fiduciary acknowledgment and statement of Best Interest standard amounted to an enforceable contract with the Retirement Investor to adhere to the requirements of PTE 2020-02. As several commenters noted, however, PTE 2020-02 does not impose any contract or warranty requirements on Financial Institutions or Investment Professionals. Instead, it simply requires up-front clarity about the nature of the relationship and services being provided. In marked contrast to the 2016 rulemaking, the Department has imposed no obligation on Financial Institutions or Investment Professionals to enter into enforceable contracts with or to provide enforceable warranties to their customers. The only remedies for violations of the exemption's conditions, and for engaging in a non-exempt prohibited transaction, are those provided by Title

I of ERISA, which specifically provides a right of action for fiduciary violations with respect to ERISA-covered plans, and Title II of ERISA, which provides for imposition of the excise tax under Code section 4975. Nothing in the exemption compels Financial Institutions to make contractually enforceable commitments, and as far as the exemption provides, they could expressly disclaim any enforcement rights other than those specifically provided by Title I of ERISA or the Code, without violating any of the exemption's conditions.

For that reason, arguments that the fiduciary acknowledgment requirement is inconsistent with the Fifth Circuit's opinion in *Chamber of Commerce v. United States Department of Labor*, 885 F.3d 360, 384-85 (5th Cir. 2018) (*Chamber*) are unsupported. In that case, the Fifth Circuit faulted the Department for having effectively created a private cause of action that Congress had not provided.[38] Under this exemption the Department does not create new causes of actions, mandate enforceable contractual commitments, or expand upon the remedial provisions of ERISA or the Code. Requiring clarity as to the nature of the services and relationship is a far cry from the creation of a whole new cause of action or remedial scheme. The Department does not compel fiduciary status or create new causes of action. It merely conditions the availability of the exemption, which is only necessary for plan fiduciaries to receive otherwise prohibited compensation, on Financial Institutions and Investment Professionals providing clarity that the transaction, in fact, involves a fiduciary relationship. In addition, the Department does not purport to bind other State or Federal regulators in any way or to condition relief on the availability of remedies under other laws. It no more creates a new cause of action than any other

[38] *Id.* at 384-85. *But see Nat'l Ass'n for Fixed Annuities v. Perez*, 217 F. Supp. 3d 1, 37 (D.D.C. 2016) (upholding the challenged provision and noting that "courts . . . have permitted IRA participants and beneficiaries to bring state law claims for breach of contract" (citing *Grund v. Del. Charter Guar. & Tr. Co.*, 788 F. Supp. 2d 226, 243-44 (S.D.N.Y. 2011))).

exemption condition or regulatory requirement that requires full and fair disclosures of services and fees. Moreover, the requirement promotes compliance and supports investor choice by requiring clarity as to the fiduciary nature of the relationship that the Financial Institution or Investment Professional is undertaking with the Retirement Investor.

The Department has a statutory obligation to ensure that any exemptions from the prohibited transaction provisions are "administratively feasible," "in the interests of," and "protective" of the "rights" of Retirement Investors. The fiduciary acknowledgment provides critical support to the Department's ability to make these findings. The Department notes that conditions requiring entities to acknowledge their fiduciary status have become commonplace in recently granted exemptions over the past two years. In this regard, in 2022 and 2023, the Department granted over a dozen exemptions to private parties in which an entity was required to acknowledge its fiduciary status in writing as a requirement for exemptive relief.[39] Written acknowledgement of fiduciary status was required by the Department as early as 1984, when the Department published PTE 84-14,[40] requiring an entity acting as a "qualified professional asset manager" (a QPAM) to have "acknowledged in a written management agreement that it is a

[39] *See, e.g.*, PTE 2023-03, Blue Cross and Blue Shield Association Located in Chicago, Illinois (88 FR 11676, Feb. 23, 2023); PTE 2023-04, Blue Cross and Blue Shield of Arizona, Inc., Located in Phoenix, Arizona (88 FR 11679, Feb. 23, 2023); PTE 2023-05, Blue Cross and Blue Shield of Vermont Located in Berlin, Vermont (88 FR 11681, Feb. 23, 2023); PTE 2023-06, Hawaii Medical Service Association Located in Honolulu, Hawaii (FR 88 11684, Feb. 23, 2023); PTE 2023-07, BCS Financial Corporation Located in Oakbrook Terrace, Illinois (88 FR 11686, Feb. 23, 2023); PTE 2023-08, Blue Cross and Blue Shield of Mississippi, A Mutual Insurance Company Located in Flowood, Mississippi (88 FR 11689, Feb. 23, 2023); PTE 2023-09, Blue Cross and Blue Shield of Nebraska, Inc. Located in Omaha, Nebraska (88 FR 11691, Feb. 23, 2023); PTE 2023-10, BlueCross BlueShield of Tennessee, Inc. Located in Chattanooga, Tennessee (88 FR 11694, Feb. 23, 2023); PTE 2023-11, Midlands Management Corporation 401(k) Plan Oklahoma City, OK (88 FR 11696, Feb. 23, 2023); PTE 2023-16, Unit Corporation Employees' Thrift Plan, Located in Tulsa, Oklahoma (88 FR 45928, July 18, 2023); PTE 2022-02, Phillips 66 Company Located in Houston, TX (87 FR 23245, Apr. 19, 2022); PTE 2022-03, Comcast Corporation Located in Philadelphia, PA (87 FR 54264, Sept. 2, 2022); PTE 2022-04, Children's Hospital of Philadelphia Pension Plan for Union-Represented Employees Located in Philadelphia, PA. (87 FR 71358, Nov. 22, 2022).

[40] 49 FR 9494 (March 13, 1984).

fiduciary with respect to each plan that has retained the QPAM."[41] Fiduciary investment advice providers to IRAs have always been subject to suit in State courts on State-law theories of liability, and this rulemaking does not alter this reality. This rulemaking does not alter the existing framework for bringing suits under State law against IRA fiduciaries and does not aim to do so. State regulators remain free to structure legal relationships and liabilities as they see fit to the extent not inconsistent with Federal law.

Model Disclosure

To assist Financial Institutions and Investment Professionals in complying with these conditions of the exemption, the Department confirms the following model language will satisfy the disclosure requirement in Section II(b)(1) and (2):

> We are making investment recommendations to you regarding your retirement plan account or individual retirement account as fiduciaries within the meaning of Title I of the Employee Retirement Income Security Act and/or the Internal Revenue Code, as applicable, which are laws governing retirement accounts. The way we make money or otherwise are compensated creates some conflicts with your financial interests, so we operate under a special rule that requires us to act in your best interest and not put our interest ahead of yours.
>
> Under this special rule's provisions, we must:
>
> - Meet a professional standard of care when making investment recommendations (give prudent advice) to you;

[41] PTE 84-14, Part V, Section (a).

- Never put our financial interests ahead of yours when making recommendations (give loyal advice);
- Avoid misleading statements about conflicts of interest, fees, and investments;
- Follow policies and procedures designed to ensure that we give advice that is in your best interest;
- Charge no more than what is reasonable for our services; and
- Give you basic information about our conflicts of interest.

While some commenters requested additional model language, the Department is not providing a model for the specific disclosures in Section II(b)(3), (4), and (5) because those disclosures will need to be tailored to the specific Financial Institution's business model. Although the model language above broadly applies to all the advice provider's recommendations, nothing in the exemption would prohibit the advice provider from limiting its fiduciary acknowledgment to specific recommendations or classes of recommendations if it was not acting as a fiduciary in other contexts. The exemption, however, will only cover recommendations that were subject to such an acknowledgment.

Relationship and Conflict of Interest Disclosure

In response to comments, the Department is amending the disclosure requirements of PTE 2020-02. As finalized, Section II(b)(3)-(4) requires the Financial Institution to disclose in writing all material facts relating to the scope and terms of the relationship with the Retirement Investor, including:

(3)(A) The material fees and costs that apply to the Retirement Investor's transactions, holdings, and accounts;

(3)(B) The type and scope of services provided to the Retirement Investor, including any material limitations on the recommendations that may be made to them; and

(4) All material facts relating to Conflicts of Interest that are associated with the recommendation.

This final pre-transaction disclosure is based on the SEC's Regulation Best Interest disclosure requirements.[42] The Department received many comments on the proposed disclosure obligations that focused, in particular, on differences between the SEC's Regulation Best Interest disclosures and the Department's proposed PTE 2020-02 disclosures. Some commenters also asserted that the proposed disclosure requirements of PTE 2020-02 would have imposed a burden on Financial Institutions without providing sufficient incremental benefits to Retirement Investors, above and beyond those provided by Regulation Best Interest. In the view of many commenters, Regulation Best Interest and the SEC's client relationship summary (also called Form CRS) already provided sufficient disclosure in the context of securities recommendations and could serve as the model for a more uniform set of disclosure requirements applicable to Retirement Investors without as much additional cost and burden.

Other commenters expressed support for the Department's proposed amendments that would have clarified and tightened the existing PTE 2020-02 disclosure requirements. These commenters supported ensuring that investors have sufficient information to make informed decisions about the costs of an investment advice transaction and about the significance and

[42] Similar obligations exist for investment advisers. "Under its duty of loyalty, an investment adviser must eliminate or make full and fair disclosure of all conflicts of interest which might incline an investment adviser— consciously or unconsciously—to render advice which is not disinterested such that a client can provide informed consent to the conflict." 2019 Fiduciary Interpretation (84 FR 33671); *see also SEC v. Cap. Gains Rsch. Bureau, Inc.*, 375 U.S. at 200 ("the darkness and ignorance of commercial secrecy are the conditions upon which predatory practices best thrive").

severity of the investment advice fiduciary's conflicts of interest. Some commenters also supported the proposed requirement for the disclosures to be written in plain English.

The Department's determination to base the Final Amendment's disclosure obligations on the SEC's Regulation Best Interest disclosure obligations is intended to ensure that Retirement Investors receive critical information that they need to make informed investment decisions, while reducing compliance burdens by establishing disclosure requirements that are consistent with the SEC's requirements. This is also responsive to several comments the Department received that highlighted disclosure requirements that commenters argued were more burdensome than the SEC's Regulation Best Interest disclosure requirements. Although this condition does not specifically require the disclosure be in "plain English" the Department notes the importance of plain language principles to ensure the Retirement Investors understand the information they receive.[43]

Some commenters were particularly concerned about the proposed requirement that Retirement Investors have the "right to obtain specific information regarding costs, fees, and compensation, described in dollar amounts, percentages, formulas" upon request based on the potential burden of such disclosures. Others supported the requirement, including one commenter stating that such information is necessary for Retirement Investors to make an informed judgment as to the costs of a transaction. After consideration of the comments, the Department has determined that the requirements to disclose material fees, costs, conflicts of interest, and services should be sufficient to permit the Retirement Investor to assess both the

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[43] In finalizing Regulation Best Interest, the SEC encouraged broker-dealers to use plain English in preparing any disclosures they make. The SEC provided examples such as the use of short sentences and active voice, and avoidance of legal jargon, highly technical business terms, or multiple negatives, 84 FR 33368-69.

costs of transactions and the scope and severity of conflicts, without imposing an additional "upon request" disclosure obligation.

In finalizing these disclosures based on the Regulation Best Interest disclosure obligation, however, the Department intends to monitor the effectiveness and utility of the disclosures closely to ensure they serve their intended purpose and give Retirement Investors full and fair notice of services, costs, charges, and conflicts of interest. Based upon its ongoing review of compliance and efficacy, the Department may revisit the scope and content of the disclosure obligations as part of future notice and comment rulemaking. At this time, the Department has concluded the best course of action is to align the disclosure conditions with the requirements of Regulation Best Interest, in order to provide a uniform and cost-effective approach to disclosures, consistent with the Department's statutory obligation to protect the interests of Retirement Investors.

Rollover Disclosure

The Department has also decided to make revisions to the rollover disclosure requirements. Under Section II(b)(5), before engaging in or recommending that a Retirement Investor engage in a rollover from a Plan that is covered by Title I of ERISA, or making a recommendation to a Plan participant or beneficiary as to the post-rollover investment of assets currently held in a Plan that is covered by Title I, the Financial Institution and Investment Professional must consider and document the bases for their recommendation to engage in the rollover, and must provide that documentation to the Retirement Investor. Relevant factors to be considered must include, to the extent applicable, but in any event are not limited to: (A) the alternatives to a rollover, including leaving the money in the Plan, if applicable; (B) the fees and expenses associated with the Plan and the recommended investment or account; (C) whether an employer or other party pays for some or all of the Plan's administrative expenses; and (D) the different levels of services and investments available under the Plan and the recommended investment or account. The Proposed Amendment specified that this requirement extended to recommended rollovers from a Plan to another Plan or IRA as defined in Code section 4975(e)(1)(B) or (C), from an IRA as defined in Code section 4975(e)(1)(B) or (C) to a Plan, from an IRA to another IRA, or from one type of account to another (e.g., from a commission-based account to a fee-based account).

In support of the rollover disclosure provision under the Proposed Amendment, one commenter highlighted the significance of a rollover decision and said that a "careful analysis" is needed, along with information about fees, expenses, and other investment options, in order to provide Retirement Investors with a "well-supported" recommendation. Another commenter suggested that the Department add consideration of a Retirement Investor's Social Security benefits.

Several commenters expressed concerns over the burden of the rollover documentation and disclosure requirements. Some suggested that the requirements should be limited to the rollovers from Title I Plans to IRAs, rather than including IRA-to-IRA or account-to-account transactions. These commenters argued that the additional requirement would be of limited value to the Retirement Investors while imposing significant costs on the Financial Institutions. Commenters requested that certain types of transactions be excluded, such as those involving a "required minimum distribution" (RMD), an inherited IRA or 401(k) account, investment education, or IRA-to-IRA transfers. Commenters suggested Retirement Investors already receive enough information, and asked if the requirements of this disclosure would be relevant.

The Department continues to believe that the information required to be included in the rollover disclosure is relevant to Retirement Investors. A Retirement Investor should understand what they are giving up in their employer's plan, as well as what they may gain from rolling over their retirement savings to an IRA. While the Department is not specifically adding a blanket requirement to document consideration of a Retirement Investor's Social Security benefit, it also agrees that the Retirement Investor's Social Security benefit may be an important component of the overall analysis to ensure any recommendation will meet the Care Obligation and Loyalty Obligation.

In response to comments about the challenges posed by the documentation requirements outside the plan context, the Department is narrowing the required rollover disclosure requirement in Section II(b)(5) so that it only applies to recommendations to rollovers from Title I Plans. Under the Final Amendment, PTE 2020-02 no longer will require disclosures regarding advice for a Retirement Investor to roll over its account from one IRA to another IRA or to change account type. The Department is also clarifying the language to confirm that the disclosure only applies to advice to engage in a rollover recommendation to a Plan participant or beneficiary as to the post-rollover investment of assets currently held in a Plan that is covered by Title I. The rollover disclosure requirement does not apply when a Financial Institution or Investment Professional does not make a recommendation, even if it does provide investment education.

The Department received comments expressing concern that the information required for the rollover disclosure will not be available to Financial Institutions. A few commenters urged the Department to address this by requiring plans covered by Title I of ERISA to make more information publicly available on their Forms 5500. Other commenters simply stated that

Investment Professionals and Financial Institutions would not be able to comply. As the Department explained in the preamble to the Proposed Amendment, however, Investment Professionals and Financial Institutions should make diligent and prudent efforts to obtain information about the fees, expenses, and investment options offered in the Retirement Investor's Plan account to comply with the amended rollover documentation and disclosure requirement of Section II(b)(5).

As the Department also explained in the preamble to the Proposed Amendment, the necessary information should be readily available to the Retirement Investor as a result of Department regulations mandating disclosure of plan-related information to the Plan's participants and beneficiaries that is found at 29 CFR 2550.404a-5. If the Retirement Investor refuses to provide such information, even after a full explanation of its significance, and the information is not otherwise readily available, the Financial Institution and Investment Professional should make a reasonable estimate of a Plan's expenses, asset values, risk, and returns based on publicly available information. The Financial Institution and Investment Professional should document and explain the assumptions used in the estimate and their limitations. In such cases, the Department confirms that the Financial Institution and Investment Professional could rely on alternative data sources, such as the Plan's most recent Form 5500 or reliable benchmarks on typical fees and expenses for the type and size of the Plan that holds the Retirement Investor's assets.

Moreover, while the Department is not imposing the same documentation and disclosure requirements on rollovers from IRA-to-IRA or from one account type to another, it is not relieving the fiduciary of its obligation under the Care Obligation and Loyalty Obligation to make prudent efforts to obtain information about the fees, expenses, and investment options offered in the different accounts or IRAs. It is hard to see how a fiduciary can make a prudent and loyal recommendation, without careful consideration of the financial merits of the alternative approaches. As the SEC has similarly observed with respect to Regulation Best Interest, although the Department has not imposed a specific documentation requirement comparable to the obligation for Plan to IRA rollovers, it is likely to be difficult for a firm to demonstrate compliance with its obligations, or to assess the adequacy of its policies and procedures, without documenting the basis for such recommendations.[44]

Good Faith and Disclosures Prohibited by Law Exceptions

The Department's Proposed Amendment would have added a new Section II(b)(6), which provides that Financial Institutions will not fail to satisfy their disclosure obligations under Section II(b) solely because they make an error or omission in disclosing the required information while acting in good faith and with reasonable diligence. The Financial Institution must disclose the correct information as soon as practicable, but not later than 30 days after the date on which it discovers or reasonably should have discovered the error or omission. Similarly, Section II(b)(7) allows Investment Professionals and Financial Institutions to rely in good faith on information and assurances from the other entities that are not Affiliates as long as they do not know or have reason to know that such information is incomplete or inaccurate. Under Section II(b)(8), the Financial Institution is not required to disclose information pursuant to Section II(b) if such disclosure is otherwise prohibited by law.

The Department did not receive substantive comments on these provisions and is finalizing these provisions as proposed.

[44] See Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Care Obligations, Q16, available at https://www.sec.gov/tm/iabd-staff-bulletin-conflicts-interest.

Policies and Procedures

Under Section II(c), Financial Institutions must establish, maintain, and enforce written policies and procedures prudently designed to ensure that the Financial Institution and its Investment Professionals comply with the Impartial Conduct Standards and other exemption conditions. The Financial Institution's policies and procedures must mitigate Conflicts of Interest to the extent that a reasonable person reviewing the policies and procedures and incentive practices as a whole would conclude that they do not create an incentive for a Financial Institution or Investment Professional to place their interests, or those of any Affiliate or Related Entity, ahead of the interests of the Retirement Investor. The Department proposed to amend section II(c) to provide that Financial Institutions may not use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives that are intended, or that a reasonable person would conclude are likely, to result in recommendations that do not meet the Care Obligation or Loyalty Obligation. In addition, the Proposed Amendment would require Financial Institutions to provide their complete policies and procedures to the Department upon request within 10 business days of request.

The Department received many comments on the proposed amendments to the policies and procedures. Some of these commenters expressed support for the Department's clarifications, emphasizing the risks inherent in conflicted compensation. The Department also received comments in favor of the proposed requirement that Financial Institutions furnish to the Department complete policies and procedures within 10 business days, asserting that such a requirement would be a meaningful incentive for reasonably designed policies and procedures. Others asserted that the conditions were unworkable. Some commenters were particularly concerned about the requirement that Financial Institutions may not use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives that are intended, or that a reasonable person would conclude are likely, to result in recommendations that do not meet the Care Obligation or Loyalty Obligation.

Some commenters read the Proposed Amendment as banning differential compensation. One commenter characterized it as an attack on educational meetings and asserted that it conflicted with Regulation Best Interest and Financial Industry Regulatory Authority (FINRA) rules. The Department disagrees with the commenters' characterizations. The provision neither bans differential compensation, nor prohibits educational meetings. Although ERISA prohibits conflicted transactions between a plan and a fiduciary, the Department has granted this exemption specifically to allow Financial Institutions to receive compensation that varies based on the products they sell and that otherwise would be prohibited under ERISA section 406(b) and Code section 4975(c)(1)(E) and (F). However, in order to do so, the Financial Institution must pay attention to the conflicts that are inherent in its compensation system and must take special care to ensure that it does not create or implement compensation practices that are intended, or that a reasonable person would conclude are likely, to result in recommendations that do not meet the Care Obligation or Loyalty Obligation. Based on the foregoing, the Department is finalizing Section II(c) as proposed with minor edits made for clarity.

Some commenters argued that the Department should rely on other regulators' policies and procedures requirements. Other commenters expressed concern that other regulators are not sufficiently protective in this area. For example, although the NAIC Model Regulation technically requires that producers manage material conflicts of interest, it excludes cash and non-cash compensation from the definition of material conflicts of interest. Thus, the following forms of cash compensation are excluded from the NAIC Model Regulation as sources of conflicts of interest: any discount, concession, fee, service fee, commission, sales charge, loan, override, or cash benefit received by a producer in connection with the recommendation or sale of an annuity from an insurer, intermediary, or directly from the consumer; and the following types of "non-cash compensation," are excluded: health insurance, office rent, office support and retirement benefits. In contrast, the SEC expressly requires investment advisers and broker-dealers to manage such conflicts, including commissions and other forms of compensation.[45] The Department believes that a more uniform approach is appropriate so that all Retirement Investors are protected from conflicts of interest, and to ensure that investment recommendations are driven by the best interest of the Retirement Investor and not the competing interests of the Investment Professional in conflicted compensation arrangements, irrespective of the type of investment product recommended to them (e.g., a fixed indexed annuity as opposed to a security).

Accordingly, the Department is maintaining the language largely as proposed. While the Department acknowledges that many firms have already built protective structures based on SEC's Regulation Best Interest, the Investment Advisers Act of 1940,[46] or PTE 2020-02, they

[45] Regulation Best Interest explicitly requires that broker-dealers establish, maintain, and enforce written policies and procedures reasonably designed to identify and mitigate conflicts of interest at the associated person level. *See generally* 84 FR 33318, 33388; *see* Exchange Act rule 15*l*-1(a)(2)(iii)(B). With regards to investment advisers, the SEC has stated that "an adviser must eliminate or at least expose through full and fair disclosure all conflicts of interest which might incline an investment adviser— consciously or unconsciously—to render advice which was not disinterested." Commission Interpretation Regarding Standard of Conduct for Investment Advisers, 84 FR 33669, 33671 (July 12, 2019). The SEC staff has also said, "[w]hile compensation practices for financial professionals are an important potential source of conflicts of interest, the staff reminds firms that mitigating conflicts associated with these practices is just one aspect of how firms satisfy their conflict obligations." See Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Conflicts of Interest, available at https://www.sec.gov/tm/iabd-staff-bulletin-conflicts-interest.

[46] 15 U.S.C. 80b-1 et seq.

should be able to build or rely upon existing systems of supervision and compliance to meet their obligations, rather than build whole new structures, as the SEC observed with respect to broker-dealers' implementation of Regulation Best Interest.[47] Like the SEC, in adopting the policies and procedures requirement for conflict management, the Department has deliberately chosen not to take a highly prescriptive and inflexible approach. Instead, the Final Amendment permits compliance with policies and procedures that accommodate a broad range of business models, so long as they meet the overarching goals of ensuring adherence to the Care and Loyalty Obligations. The Final Amendment's requirement for Financial Institutions' policies and procedures to mitigate Conflicts of Interest is essential for the Department to satisfy its obligations under ERISA section 408(a) and Code section 4975(c)(2). The policies and procedures condition provides Financial Institutions with the flexibility to have different business models based on their specific business needs, while still ensuring that the fiduciary investment advice they provide to Retirement Investors meets the Impartial Conduct Standards.

The Department believes that Retirement Investors will best be protected by the objective standard provided under PTE 2020-02, which provides a strong benchmark for assessing policies and procedures. The exemption's principles-based standard focuses on whether a reasonable person would conclude that the Financial Institution's policies and procedures are likely to result in recommendations that do not meet the Care Obligation or Loyalty Obligation. This standard is consistent with Regulation Best Interest and provides an appropriate yardstick for assessing compliance while lending additional clarity and rigor to the obligation to manage adverse

[47] See Regulation Best Interest: The Broker-Dealer Standard of Conduct, Exchange Act Release No. 86031, 84 FR 33318, 33327 (June 5, 2019) ("Reg BI Adopting Release"). (recognizing that "some broker-dealers may rely on existing policies and procedures that address conflicts through methods such as compliance and supervisory systems that are consistent with the Conflict of Interest Obligation" under Regulation Best Interest).

incentives. In addition, SEC-registered investment advisers are required to "adopt and implement written policies and procedures reasonably designed to prevent violations, by [the adviser] and [its] supervised persons, of the [Advisers] Act and the rules that the Commission has adopted under the [Advisers Act]."[48] The approach in PTE 2020-02 provides the flexibility necessary for Financial Institutions to insulate Investment Professionals from conflicts of interest under the wide array of business and compensation models followed in today's marketplace.

The Department understands that many Financial Institutions, particularly insurance companies, rely on educational conferences, and stresses that this provision does not prohibit them. The exemption merely requires reasonable guardrails for conferences, especially if they involve travel. These conferences must be structured in a manner that ensures they are not likely to lead Investment Professionals to make recommendations that do not meet the exemption's Care Obligation or Loyalty Obligation. In addition, the Department notes that properly designed incentives that are simply aimed at increasing the overall amount of retirement saving and investing, without promoting specific products, would not violate the policies and procedures requirement. Similarly, notwithstanding contrary language in the preamble to the Proposed Amendment, the Department recognizes that it can be appropriate to tie attendance at conferences to sales thresholds in certain circumstances (for example, insurance companies could not reasonably be expected to provide training for independent agents who are not recommending their products).

On the other hand, Financial Institutions must take special care to ensure that training conferences held in vacation destinations are not designed to incentivize recommendations that

[48] See Rule 206(4)-7 (17 CFR 275.206(4)-7)

run counter to Retirement Investor interests. Firms should structure training events to ensure that they are consistent with the Care and Loyalty Obligations. Recommendations to Retirement Investors should be driven by the interests of the investor in a secure retirement. Certainly, Financial Institutions should avoid creating situations where the training is merely incidental to the event, and an imprudent recommendation to a Retirement Investor is the only thing standing between an Investment Professional and a luxury getaway vacation.

Similarly, the Department does not require Financial Institutions to categorically eliminate all sales quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, sales contests, quotas, or bonuses. Rather, Financial Institutions are only required to eliminate such incentives that are "intended, or that a reasonable person would conclude are likely, to result in recommendations that do not meet the Care Obligation or Loyalty Obligation."

While the SEC limited its categorical prohibition on sales contests to time-limited contests, as one commenter observed, the SEC has emphasized that the limited prohibition in Regulation Best Interest should not be read as automatically permitting other activities. Instead, the SEC stressed that "prohibiting certain incentives does not mean that all other incentives are presumptively compliant with Regulation Best Interest."[49] The SEC noted that "other incentives and practices that are not explicitly prohibited are permitted *provided that the broker-dealer establishes reasonably designed policies and procedures to disclose and mitigate the incentives created, and the broker-dealer and its associated persons comply with the Care Obligation and the Disclosure Obligation*" (emphasis added).[50] In fact, the SEC recognized that if a "firm

[49] Reg BI Adopting Release at 33397
[50] *Id*. at 33327

determines that the conflicts associated with these practices are too difficult to disclose and mitigate, the firm should consider carefully assessing whether it is able to satisfy its best interest obligation in light of the identified conflict and in certain circumstances, may wish to avoid such practice entirely."[51]

The Department's conflict-mitigation language was not newly introduced in the Proposed Amendment; it has been part of the Department's interpretation of PTE 2020-02 since the Department issued the 2021 FAQs.[52] For example, in Q16 of the FAQs, the Department asked what Financial Institutions should do to satisfy the standard of mitigation so that a reasonable person reviewing their policies and procedures and incentive practices as a whole would conclude that they do been not create an incentive for a Financial Institution or Investment Professional to place their interests ahead of the interest of the Retirement Investor.

In the FAQ, the Department wrote that Financial Institutions must take special care in developing and monitoring compensation systems to ensure that their Investment Professionals satisfy the fundamental obligation to provide advice that is in the Retirement Investor's best interest. By carefully designing their compensation structures, Financial Institutions can avoid incentive structures that a reasonable person would view as creating incentives for Investment Professionals to place their interests ahead of the Retirement Investor's interests. Accordingly, Financial Institutions must be careful not to use quotas, bonuses, prizes, or performance standards as incentives that a reasonable person would conclude are likely to encourage Investment Professionals to make recommendations to Retirement Investors that do not meet the

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[51] *Id*. at 33397.
[52] See *supra* note 19.

Care Obligation and Loyalty Obligation of the Final Amendment. The Financial Institution should aim to eliminate such conflicts to the extent possible, not create them.

The FAQs went on to clarify that the Department recognizes firms cannot eliminate all conflicts of interest, however, and the exemption accordingly stresses the importance of mitigating such conflicts. For example, as one means of compliance, a firm could ensure level compensation for recommendations to invest in assets that fall within reasonably defined investment categories, and exercise heightened supervision as between investment categories to the extent that it is not possible for the institution to eliminate conflicts of interest between these categories. In this regard, the Department stresses that it is not imposing an obligation on firms to eliminate all differential compensation, but rather to manage any conflicts of interest caused by such differentials so that the interest of the Retirement Investor is paramount, rather than misaligned relative to the financial interests of the Investment Professional or Financial Institution. The Department also stresses that any transitional efforts to move to other compensation models or policies and procedures should be careful to avoid harm to existing investors' holdings. In making recommendations as to account type, it is important for the Investment Professional to ensure that the recommendation carefully considers the reasonably expected total costs over time to the Retirement Investor, and that the Investment Professional base its recommendations on the financial interests of the Retirement Investor and avoid subordinating those interests to the Investment Professional's competing financial interests. If, for example, a Retirement Investor had previously invested in front-end load shares, but the Financial Institution decided to move away from recommending such shares as part of its effort to better manage Conflicts of Interest, the Financial Institution and Investment Professional would need to pay close attention to the Care Obligation and Loyalty Obligation before advising the Retirement Investor to exchange or liquidate existing holdings in such shares after having already borne the front-end expense.

Similarly, the Department disagrees with the few commenters who suggested that the conflict-mitigation requirement would necessarily prevent Financial Institutions and Investment Professionals from recommending such specific investments as Class A share mutual fund investors. One commenter specifically expressed concern that Retirement Investors may want to pay up front for certain additional rights that Class A shares can include, such as rights of appreciation (ROA) and/or rights of exchange (ROE). While the Department is not endorsing any particular products, the Department confirms that the exemption does not preclude the recommendation of such shares when the recommendation satisfies the Care Obligation and Loyalty Obligation for a particular Retirement Investor.

More generally, Financial Institutions' policies and procedures must include supervisory oversight of investment recommendations, particularly in areas in which differential compensation remains. For example, Financial Institutions' policies and procedures could provide for increased monitoring of Investment Professional recommendations at or near compensation thresholds, recommendations at key liquidity events for investors (e.g., rollovers), and recommendations of investments that are particularly prone to conflicts of interest, such as proprietary products and principal-traded assets. However, in many circumstances, supervisory oversight is not an effective substitute for meaningful mitigation or elimination of dangerous compensation incentives. The Department continues to believe that its principles-based approach to conflict management is the right one. It properly focuses Financial Institutions on conflict mitigation, recognizes the practical impossibility of eliminating all conflicts, and stresses Financial Institutions' fundamental responsibility to ensure that their policies and procedures for managing conflicts of interest are such that a reasonable person would conclude that the Financial Institution is avoiding incentives that are likely to encourage Investment Professionals to make recommendations to Retirement Investors that do not meet the Final Amendment's Care Obligation and Loyalty Obligation. While PTE 2020-02 does not require eliminating all conflicts, it does require Financial Institutions to take special care when addressing the conflicts that are present.

Proprietary Products

In the Proposed Amendment, the Department requested comment on whether it should provide additional guidance regarding when a Financial Institution or Investment Professional, acting as a fiduciary, recommends its proprietary products to a Retirement Investor, and, if so, the type of guidance that would be most useful. A few commenters asserted that, despite the Department specifically stating that the exemption allows for investment advice on proprietary products or investments that generate third-party payments, the Department's additional guidance undermined that confirmation. One commenter took the opposite approach, and suggested the Department prohibit Financial Institutions and Investment Professionals from receiving third-party payments or require any third-party payments to be offset or rebated to the Retirement Investor.

The Department is not prohibiting any types of compensation, and once again confirms that PTE 2020-02 does not preclude Financial Institutions from providing fiduciary investment advice on proprietary products or investments that generate third-party payments, or advice based on investment menus that are limited to such products, in part or whole. The principles-based nature of the exemption is applicable to all transactions. The Department further disagrees with comments that stated the Department imposed additional conditions on proprietary products. Instead, the Department has provided an example of how Financial Institutions may choose to comply with the exemption when recommending such products. The standards established by the exemption are the same for all Financial Institutions and Investment Professionals, and firms are given substantial leeway in developing policies and procedures that suit their business model, provided that those policies and procedures are crafted in such a way that a reasonable person reviewing the policies and procedures and incentive practices as a whole would conclude that they do not create an incentive for a Financial Institution or Investment Professional to place their interests ahead of the interests of the Retirement Investor.

As described in the preamble to the Proposed Amendment, to the extent a recommendation of proprietary products is fiduciary investment advice under the Regulation, one way that a Financial Institution could meet the terms of the Proposed Amendment (and the Final Exemption) is by prudently doing the following:

- Document in writing its limitations on the universe of recommended investments, the Conflicts of Interest associated with any contract, agreement, or arrangement providing for its receipt of third-party payments or associated with the sale or promotion of proprietary products.
- Document any services it will provide to Retirement Investors in exchange for third-party payments, as well as any services or consideration it will furnish to any other party, including the payor, in exchange for the third-party payments.
- Reasonably conclude that the limitations on the universe of recommended investments and Conflicts of Interest will not cause the Financial Institution or its Investment Professionals to receive compensation in excess of reasonable compensation for Retirement Investors as set forth in Section II(a)(2).

- Reasonably conclude that these limitations and Conflicts of Interest will not cause the Financial Institution or its Investment Professionals to recommend imprudent investments; and document in writing the bases for its conclusions.
- Inform the Retirement Investor clearly and prominently in writing that the Financial Institution limits the types of products that it and its Investment Professionals recommend to proprietary products and/or products that generate third-party payments.
    - In this regard, the notice should not simply state that the Financial Institution or Investment Professional "may" limit investment recommendations based on whether the investments are proprietary products or generate third-party payments, without specific disclosure of the extent to which recommendations are, in fact, limited on that basis.
- Clearly explains its fees, compensation, and associated Conflicts of Interest to the Retirement Investor in plain language.
- Ensure that all recommendations are based on the Investment Professional's considerations of factors or interests such as investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor.
- Ensure that, at the time of the recommendation, the amount of compensation and other consideration reasonably anticipated to be paid, directly or indirectly, to the Investment Professional, Financial Institution, or their Affiliates or Related Entities for their services in connection with the recommended transaction is not in excess of reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2).

- Ensure that the Investment Professional's recommendation reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor; and the Investment Professional's recommendation is not based on the financial or other interests of the Investment Professional or the Investment Professional's consideration of any factors or interests other than the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor.

An SEC Staff Bulletin entitled *Standards of Conduct for Broker-Dealers and Investment Advisers Conflicts of Interest* additionally provides guidance on how to manage conflicts to ensure compliance with obligations of care and conflict management. The SEC staff Bulletin provides strong guidance on how firms and Investment Professionals can build policies and procedures properly aligned with the Care and Loyalty Obligations set forth in the Final Exemption.[53]

Providing Policies and Procedures to the Department

The Department proposed Section II(c)(3) would have required Financial Institutions to provide their complete policies and procedures to the Department within 10 business days of request. One commenter expressed support, noting that this condition would provide a meaningful incentive for Financial Institutions to ensure that policies and procedures are

[53] See *supra* note 44, Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Conflicts of Interest, available at https://www.sec.gov/tm/iabd-staff-bulletin-conflicts-interest.

reasonably designed. Another commenter strongly urged the Department to eliminate this condition and instead rely on its subpoena authority, if necessary. One comment requested more time to provide the certification to the Department. In response to these comments, although the Department expects that these reports should already be completed at the time of the request and easily located, it recognizes the possibility of inadvertent non-compliance because of the tight timeline and has modified the requirement in the Final Amendment to give Financial Institutions Insurers 30 days to provide the documentation.

Retrospective Review

The Department is finalizing the proposed retrospective review requirement, with some ministerial changes for clarity. Section II(d) requires the Financial Institution to conduct a retrospective review, at least annually, that is reasonably designed to detect and prevent violations of, and achieve compliance with, the conditions of this exemption's requirements, including adherence to the Impartial Conduct Standards and establishing and implementing policies and procedures that govern compliance with the exemption's conditions. The Financial Institution must update its policies and procedures as business, regulatory, and legislative changes and events dictate, to ensure that its policies and procedures remain prudently designed, effective, and compliant with Section II(c). The methodology and results of the retrospective review must be reduced to a written report that is provided to a Senior Executive Officer of the Financial Institution.

Under Section II(d)(3) the Senior Executive Officer must certify annually that the officer has reviewed the retrospective review report, that the Financial Institution has filed (or will file timely, including extensions) Form 5330 reporting any non-exempt prohibited transactions discovered by the Financial Institution in connection with investment advice covered under Code section 4975(e)(3)(B), corrected those transactions, and paid any resulting excise taxes owed under Code section 4975(a) or (b). The certification must also include that the Financial Institution has written policies and procedures that meet the requirements set forth in Section II(c), and that the Financial Institution has established a prudent process to modify such policies and procedures as required by Section II(d)(1).

Under Section II(d)(4), the review, report, and certification must be completed no later than six months after the end of the period covered by the review. Section II(d)(5) requires that the Financial Institution retain the report, certification, and supporting data for a period of six years and make the report, certification, and supporting data available to the Department within 30 days of request to the extent permitted by law (including 12 U.S.C. 484 regarding limitations on visitorial powers for national banks).

The Department received many comments on the retrospective review conditions. Some commenters supported the requirement for Financial Institutions to undertake a regular process to ensure that their policies and procedures are reasonably designed to detect and prevent violations of, and achieve compliance with, the conditions of the exemption.

Other commenters raised concern that the retrospective review requirement imposes significant burdens on Financial Institutions, while providing limited benefits to Retirement Investors. One commenter expressed specific concern that the Department's use of the terms "effective" and "compliant" are undefined, creating unwarranted uncertainty for firms.

This condition, as drafted, provides important protections for Retirement Investors. The obligation to periodically review the effectiveness of policies and procedures and to determine compliance is critical to ensuring that they achieve their intended protective purposes and are not mere window dressing. Without such periodic assessments, it would be hard for a Financial

Institution to have confidence that its oversight structures are working to ensure compliance with the Impartial Conduct Standards. By uniformly requiring retrospective review, the exemption promotes fiduciaries' uniform compliance with the Impartial Conduct Standards, which is an important aim of this rulemaking. Furthermore, the Department has provided guidance on how Financial Institutions can structure their policies and procedures, which should assist Senior Executive Officers in making the required certifications.

Several commenters specifically raised concerns with the proposed requirement that the Financial Institution has filed (or will file timely, including extensions) Form 5330 reporting any non-exempt prohibited transactions discovered by the Financial Institution in connection with investment advice covered under Code section 4975(e)(3)(B), corrected those transactions, and paid any resulting excise taxes owed under Code section 4975(a) or (b). Some commenters argued the Department is exceeding the scope of its regulatory authority by conditioning relief on compliance with certain Code requirements.

However, the Department notes that it is within its authority to ensure Financial Institutions engaging in otherwise prohibited transactions comply with the law, including by paying the excise taxes owed on non-exempt prohibited transactions. The amended Retrospective Review requirement is consistent with the Fifth Circuit's reasoning in *Chamber*. The Department is not creating new remedies or causes of action for violations of Title II of ERISA, but merely ensuring that parties comply with the excise taxes Congress specifically imposed on such violations. This approach is wholly consistent with the Fifth Circuit's observation that "ERISA

Title II only punishes violations of the 'prohibited transactions' provision by means of IRS audits and excise taxes."[54]

One commenter additionally argued this condition overstates the obligation to file Form 5330 because there is no obligation to file if a transaction is self-corrected and no excise tax is due. The commenter misreads the exemption, however. The Department is not imposing any additional requirements to file Form 5330; rather, it is merely requiring that transactions that are reportable to the IRS are in fact reported. The Department notes that while self-correction is permitted, such correction must be made in a permissible manner and within the allowable time frame.

One commenter expressed concern about including this obligation as part of the Senior Executive Officer's certification. The Department notes, however, that it is the Financial Institution's obligation to correct the prohibited transaction, file IRS Form 5330, and pay the prohibited transaction excise tax, and so it is appropriate for the Senior Executive Officer to include this in the certification. The Department is including the excise tax requirement in the Final Amendment as proposed. The excise tax is the congressionally imposed sanction for engaging in a non-exempt prohibited transaction and provides a powerful incentive for compliance. Requiring certification by the Senior Executive Officer reinforces the importance of compliance, provides an important safeguard for compliance with the tax obligation when violations occur, and focuses the Institution's attention on instances where the conditions of this exemption have been violated, resulting in a non-exempt prohibited transaction.

[54] *Chamber of Commerce* v. *U.S. Dep't of Labor,* 885 F.3d 360, 384 (5th Cir. 2018). For additional information regarding correcting prohibited transactions, see Voluntary Fiduciary Correction Program Under the Employee Retirement Income Security Act of 1974,71 FR 20262 (Apr. 19, 2006).

Another commenter suggested that the Department modify the conditions to expressly provide that these certifications and other obligations should be limited to an obligation of good faith and reasonable diligence in complying with the retrospective review required under Section II(d) of the Proposed Amendment and good faith calculation of any excise taxes payable with respect to such prohibited transactions. The Department is not making the commenter's requested specific text edits but notes that compliance with the Retrospective Review requirement of Section II(d) does not require perfection. For example, Section II(e) specifically allows Financial Institutions to correct violations that they find as part of their retrospective review.

Careful retrospective review of the effectiveness of a Financial Institution's policies and procedures is essential to ensuring compliance with the Impartial Conduct Standards, and necessary for the Department to make its statutory findings to grant this exemption. The review must occur at least annually and must be performed carefully enough that the Senior Executive Officer can make the required certification. In this connection, the Department notes that findings of violations, in litigation or otherwise, do not necessarily mean that the Financial Institution's policies and procedures are inadequate, or that its retrospective review was insufficient. While such findings mean that the specific transaction at issue failed to meet the terms of the exemption, violated the prohibited transaction rules, and would be subject to the excise taxes and any available remedies under ERISA, it does not follow that the Financial Institution's policies and procedures are necessarily deficient. Rather, such violations should be reviewed for lessons learned and to determine if broader corrections are necessary to avoid recurrence. Even strong policies and procedures cannot be perfectly effective in avoiding isolated violations. Another commenter expressed concern that the retrospective review is too focused on the review of the policies and procedures and rather than impose a new, separate requirement, the Department should rely on other regulators' retrospective review requirements, or even turn those requirements into safe harbors. However, such requirements are not universal, and to the extent other regulators at self-regulatory organizations, such as FINRA, require retrospective review, the Financial Institutions would not need to develop whole new systems, but rather could build upon their existing review system to the extent it did not already fully satisfy the requirements of this exemption. The purpose of retrospective review is to assess the compliance of Financial Institutions and Investment Professionals with the specific conditions of this exemption, ERISA, and the Code, as opposed to their compliance with different regulatory regimes, and to ensure corrective changes when necessary. These purposes would not be served by relying entirely on other regulators' review requirements, although the additional compliance burden should be minimal to the extent firms have built strong retrospective review procedures pursuant to such requirements.

Some commenters addressed the requirement that Financial Institutions provide the retrospective review report, certification, and supporting data to the Department within 10 business days of request. One commenter expressed support, noting that this condition would provide a meaningful incentive for Financial Institutions to ensure that policies and procedures are reasonably designed. Others expressed concern. One commenter suggested Financial Institutions should have 30 days to provide the report, certification, and supporting data, consistent with the requirement to provide the Department's policies and procedures upon request. Although the Department expects that these reports should already be completed at the time of the request and easily located, it recognizes the possibility of inadvertent non-compliance because of the tight timeline and has modified the requirement to give Financial Institutions 30 days to provide the documentations.

Self-correction

Section II(e) of the Final Amendment provides that a non-exempt prohibited transaction will not occur due to a violation of this exemption's conditions with respect to a covered transaction if the following requirements are met: (1) either the violation did not result in investment losses to the Retirement Investor or the Financial Institution made the Retirement Investor whole for any resulting losses; (2) the Financial Institution corrects the violation (3) the correction occurs no later than 90 days after the Financial Institution learned of the violation or reasonably should have learned of the violation; and (4) the Financial Institution notifies the person(s) responsible for conducting the retrospective review during the applicable review cycle and the violation and correction is specifically set forth in the written report of the retrospective review required under subsection II(d)(2). The Department is finalizing the self-correction provision as proposed, except, in response to several comments, the Department is removing the requirement to notify the Department of each violation.

Some commenters questioned the utility of this self-correction provision to advice providers seeking to comply. One commenter expressed specific concern that firms will be inclined to relax their approach to compliance based on the knowledge that, if violations occur and are detected, they can likely invoke the self-correction process and avoid sanctions. Another commenter requested clarification regarding how a Financial Institution would make a Retirement Investor whole for any resulting losses related to a violation of the conditions of the exemption. For example, if a condition has been violated and a rollover occurred, how would a Retirement Investor be made whole? In response to these comments, the Department notes that

Financial Institutions are not required to use the self-correction provision. However, if a Financial Institution chooses to self-correct, it must make the Retirement Investor whole for any and all resulting losses. If a rollover recommendation out of a Title I Plan cannot be undone, the Financial Institution should calculate the amount of resulting losses, including estimated investment and tax losses, and restore the Retirement Investor to the position they would have occupied but for the breach.

Some commenters raised concerns about the lack of a materiality threshold, and the requirement that all mistakes be reported and remediated, no matter how minor or inadvertent. In the Department's view, however, the self-correction provisions are measured and proportional to the nature of the injury. They simply require timely correction of the violation of the law and notice to the person responsible for retrospective review of the violation, so that the significance and materiality of the violation can be assessed by the appropriate person responsible for assessing the effectiveness of the firm's compliance oversight. In addition, to address commenters' concern about the burden associated with the self-correction provision, the Department deleted the requirement to report each correction to the Department in this Final Amendment. This change should ease the compliance burden. Furthermore, to the extent Financial Institutions would have been wary of utilizing the self-correction provision because they would have to report each self-correction to the Department, they should feel more comfortable correcting each violation they find that is eligible for self-correction after this modification. The Department notes, however, that it retains the authority to require Financial Institutions to provide evidence of self-corrections as part of its investigation program through the recordkeeping provisions in Section IV.

ERISA Section 3(38) Investment Managers

Several commenters requested broad exceptions to the exemption for investment advice that is provided to sophisticated investors or from advice providers that receive level compensation. The Department is not granting that sort of exception to the general conditions of PTE 2020-02. As discussed above, the amended exemption is broad and flexible and provides Financial Institutions with the flexibility to develop policies and procedures would allow a reasonable person reviewing its incentive practices as a whole to conclude that they do not create an incentive for a Financial Institution or Investment Professional to place their interests ahead of the Retirement Investors' interests. Financial Institutions that provide fiduciary investment advice can determine for themselves how they will comply with all the conditions of the exemption.

Several commenters asked the Department to clarify whether they would become fiduciaries when marketing their services, and specifically whether responding to a request for proposal (RFP) to provide ongoing services as a fiduciary under ERISA section 3(38) would count as providing fiduciary investment advice if the other provisions of the Regulation are satisfied. The Department discussed in the preamble to the Regulation that merely touting the quality of, and providing information about, one's own advisory or management services would not be a covered recommendation (as defined in paragraph (f)(10) of the Regulation) that could lead to fiduciary status. However, to the extent a covered recommendation is made as part of hiring communications, it would be evaluated under all the parts of the Regulation.

A few commenters on the Proposed Amendment expressed concern that if providing a covered recommendation in the context of an RFP could lead to fiduciary status, they might need to comply with PTE 2020-02 merely to get hired, which they believed was unduly burdensome.

In this regard, if a covered recommendation is made as part of an RFP process and all parts of the Regulation are satisfied, including the receipt of a "fee or other compensation, direct or indirect," as a result of the fiduciary investment advice provided in the context of the RFP, a prohibited transaction would occur.

In response to these comments, the Department added a new section II(f) to the Final Amendment. The provision states that to the extent a Financial Institution or Investment Professional provides fiduciary investment advice to a Retirement Investor as part of its response to an RFP to provide investment management services as an ERISA section 3(38) investment manager and subsequently is hired to act as an investment manager to the Retirement Investor, it may receive compensation as a result of the advice under this exemption if it complies solely with the Impartial Conduct Standards set forth in Section II(a).

ERISA Section 3(38) investment managers are fiduciaries because by definition they must have the power to manage, acquire, or dispose of a plan's assets, and they are required by statute to acknowledge their fiduciary status. To respond to the concern expressed by the commenters, the Department has determined that parties that are ultimately hired to provide investment management services pursuant to an RFP should be able to rely on this exemption for the provision of investment advice in the hiring process as long as they comply with the Impartial Conduct Standards. The Department notes that ERISA 3(38) investment managers have discretion with respect to the investment of plan assets; therefore, they could not rely on PTE 2020-02 for the ongoing provision of investment management services after they are hired. Section II(f) is limited to the prohibited transaction associated with providing fiduciary investment advice in connection with the hiring process and does not relieve the investment manager from its obligation to refrain from engaging in any non-exempt prohibited transactions in the ongoing performance of its activities as an investment manager.

Eligibility

The Department proposed to modify the eligibility provisions in Section III, which identify circumstances under which an Investment Professional or Financial Institution will become ineligible to rely on the exemption for a 10-year period. The Department proposed expanding ineligibility to include Financial Institutions that are Affiliates, rather than members of the more limited "Controlled Group" as defined in PTE 2020-02, and the Proposed Amendment also enumerated specific crimes (including foreign crimes) that could cause ineligibility in Section III(a). The Department also proposed to broaden the scope of the crimes that would have caused ineligibility by providing that a Financial Institution or Investment Professional becomes ineligible upon conviction of any of the specific enumerated crimes including foreign crimes, regardless of the underlying conduct, as opposed to only "crimes arising out of such person's provision of investment advice to Retirement Investors" as provided in PTE 2020-02.

In the Proposed Amendment, the Department also proposed to add new ineligibility triggers that would make a Financial Institution or Investment Professional ineligible to rely on the exemption due to a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330 and pay the resulting excise taxes imposed by Code section 4975 in connection with non-exempt prohibited transactions involving investment advice under Code section 4975(e)(3)(B).

The Department also proposed making clarifying changes to the timing of the ineligibility provision that is set forth in Section III(b). The Department proposed that all entities would have become ineligible six months after the conviction date, the date the Department issued a written determination regarding a foreign conviction, or the date the Department issued a written ineligibility notice regarding other misconduct. As proposed, this six-month period would have replaced the one-year winding down period (referred to as the Transition Period in this Final Amendment). Furthermore, the Department clarified in the Proposed Amendment that ineligibility remains in effect until the occurrence of the earliest of the following events: (A) a subsequent judgment reversing a person's conviction, (B) 10 years after the person became ineligible or is released from imprisonment, if later, or (C) the Department grants an individual exemption permitting reliance on this exemption, notwithstanding the conviction.

The Department also proposed changes to Section III(c), which provided an opportunity to be heard. These proposed changes would have removed the separate opportunity to be heard by the Department that would have been granted following conviction by a U.S. Federal or State court and proposed providing an opportunity to be heard when the conviction is by a foreign court pursuant to proposed Section III(c)(1).

Section III(c)(2) of the Proposed Amendment provided that the Department would have issued a written warning letter regarding the conduct and thereafter would have allowed Financial Institutions and Investment Professionals that have engaged in conduct described in proposed Section III(a)(2) to have had the opportunity to cure the behavior and to be heard in an evidentiary hearing by the Department. Following the proposed hearing, the Department would have decided whether to issue a written ineligibility notice for conduct described in proposed Section III(a)(2).

Lastly, the Department proposed adding the heading "Alternative exemptions" in Section III(d), which is now Section III(c) in this Final Amendment, that would have described how a

Financial Institution may continue business after becoming ineligible. The Final Amendment specifies that a Financial Institution or Investment Professional that is ineligible to rely on this exemption may rely on an existing statutory or separate class prohibited transaction exemption if one is available or may request an individual prohibited transaction exemption from the Department. Several commenters asserted that the proposed changes to the eligibility provisions of the exemption would have: greatly altered the ability of fiduciaries to reasonably rely on PTE 2020-02; substantially broadened the conditions under which a fiduciary would be ineligible for reliance on PTE 2020-02; resulted in reduced choice and access for Retirement Investors; caused market disruption; been punitive; and provided the Department with the sole ability, for which it lacks the authority, to make Financial Institutions and Investment Professionals ineligible from providing fiduciary investment advice. A few commenters pointed to the Department's experience with ineligibility under PTE 84-14 Section I(g), though some argued that the Department did not sufficiently analyze the difference between the parties affected by PTE 84-14 and retail investors receiving investment advice. A few commenters argued the ineligibility provisions exceeded the Department's authority. One commenter claimed that Congress did not intend for the Department to have this degree of power. Another claimed the Department was granting to itself the ability to impose a "death penalty" on Financial Institutions. Generally, commenters requested that the Department not finalize the proposed amendments to the ineligibility provision; alternatively, they requested that the Department apply the changes only prospectively if the Department moves forward with them.

As explained further below, the Department continues to believe these eligibility provisions ensure that Financial Institutions provide strong oversight of Investment Professionals and that both the Financial Institution and the Investment Professional can be expected to ensure compliance with the exemption. Because of its supervisory responsibilities, and its control over the design and implementation of the policies and procedures, the Financial Institution's commitment to compliance is critical to the success of this exemption. While an occasional violation of the exemption will not result in disqualification for 10 years, Section III helps ensure that the Financial Institutions and Investment Professionals are willing and able to comply with the conditions of this exemption and protect investors from misconduct.

As required by ERISA section 408(a) and Code section 4975(c)(2), the Department may only grant exemptions that are protective of and in the interests of plan participants and beneficiaries. As the Department explained when it originally granted PTE 2020-02, "[t]he Department has determined that limiting eligibility in this manner serves as an important safeguard in connection with this very broad grant of relief from the self-dealing prohibitions of ERISA and the Code in this exemption."[55] Therefore, after consideration of the comments the Department has determined to retain the eligibility provision of Section III with several important modifications discussed below.

Scope of Ineligibility

Several commenters claimed the Proposed Amendment's expansion of the conditions for ineligibility to encompass not only the fiduciary but also any affiliate regardless of that affiliate's relationship with the fiduciary or its activity is regulatory overreach by the Department that unnecessarily exposes every fiduciary to an additional compliance risk. Some commenters argued that the exemption's definition of the term "Affiliate" is overly broad and creates an unreasonably large network of persons, most of whom will have absolutely no connection to the

[55] 85 FR 82841

recommendations provided to Retirement Investors. These commenters were concerned that the actions of these Affiliates can cause ineligibility and drive financial services workers and companies out of business to the detriment of the Retirement Investors relying on their investment advice services. Other commenters stated that the proposed expansion of the scope of the ineligibility provisions is problematic and would have led to unintended consequences.

Some commenters additionally stated the ineligibility provisions lack a proper nexus between the circumstances of the offense and the fiduciary services performed for the affected plans and requested the Department to concentrate the determination for ineligibility exclusively on the activities of the fiduciary itself and on any entity that is controlled by the fiduciary. Some commenters requested that the Department use the term "Control Group" in the ineligibility provisions of the Final Amendment, because it is less confusing and more well-defined than the term "Affiliate." Another commenter recommended that the eligibility provisions focus on criminal conduct that involves the investment management of retirement assets and which exclusively involves (i) the fiduciary and (ii) any affiliate that the fiduciary controls or over which the fiduciary exercises a controlling influence. One commenter provided specific examples of how broadly "Affiliate" could be interpreted.

One commenter claimed that the Department has not expressed any justification for imposing ineligibility when an investment advice entity's affiliate is convicted of a crime unrelated to the transactions covered by the exemption. This commenter stated that ERISA section 411 does not impute convictions to affiliates or relatives and only provides for the disqualification of persons convicted of specified crimes from serving as a "fiduciary" or as a "consultant or adviser to an employee benefit plan, including but not limited to any entity whose activities are in whole or substantial part devoted to providing goods or services to any employee benefit plan."

After consideration of these comments, the Department has determined to return to the use of the term "Controlled Group" in the Final Amendment for purposes of determining ineligibility under the exemption and has revised Section III(a) accordingly. The Final Amendment also adds Section III(a)(3) to the exemption, which defines Controlled Group by stating that an entity is in the same Controlled Group as a Financial Institution if the entity (including any predecessor or successor to the entity) would be considered to be in the same "controlled group of corporations" as the Financial Institution or "under common control" with the Financial Institution as those terms are defined in Code section 414(b) and (c) (and any regulations issued thereunder).

However, the Department is retaining in the Final Amendment the proposed broader definition of crimes that cause ineligibility, because the Department remains concerned that the limitation of "arising out of . . . provision of investment advice" is too narrow. The crimes listed as disqualifying are extraordinarily serious. Implicit in some of the comments is the notion that the Department and Retirement Investors need not be concerned about serious crimes if they involved non-plan assets or non-advisory financial activities, such as asset management. In the Department's view, however, the commission of a serious crime, such as a felony involving embezzlement, price fixing, or criminal fraud, calls into question the parties' commitment to compliance with the law, loyalty to their customers, and insistence on appropriate oversight structures. In such circumstances, it would be imprudent for the Department to disregard the previous felonies on the basis that the crimes were aimed at another class of customers or parties. When Financial Institutions and Investment Professionals engage in such crimes, there is ample cause for concern, and little reason for either the Department or the Retirement Investor to be sanguine about future compliance with the terms of the exemption. In such circumstances, it is appropriate to insist that the parties seek an individual exemption at that point, which permits the Department to consider the specific facts of the crime, the possible need for additional exemption conditions, or the loss of the exemption, without grant of a new individual exemption.

Foreign Convictions

Several commenters claimed that the Department has no basis for expanding the ineligibility provisions to include conduct by foreign affiliates and that including foreign affiliates is overbroad and will create unintended consequences, especially because the conduct that could lead to ineligibility does not need to relate directly to the provision of investment advice. These commenters claimed that disqualification would occur even where the only connection between the investment advice entity and the entity convicted of a foreign crime is a small, indirect ownership interest. The commenters stated that ineligibility will occur for conduct that is completely unrelated to the provision of fiduciary investment advice and for conduct in which the fiduciary has not participated and about which it has no knowledge. One commenter asserted that a Financial Institution should not be disqualified for foreign activities unless such activities are convictions for disqualifying crimes under ERISA section 411.

Several commenters focused on the inclusion of foreign crimes and stated that the proposed changes to the ineligibility provisions raise serious questions of fairness, national security, and U.S. sovereignty. These commenters claimed that ineligibility could result from the conviction of an affiliate in a foreign court for violation of foreign law without due process protections or the same level of due process afforded in the United States. Some commenters expressed concern that the proposed change sets up a false equivalence between and among foreign jurisdictions and that it is not credible to assume that the judicial systems of certain countries will be impartial and have criminal procedures and due process safeguards as afforded in U.S. Federal and State courts. Some commenters stated that it is not clear that the Department is equipped to make the "substantially equivalent" determination and could result in inconsistency and unfairness as well as, in some cases, a lack of due process. One commenter agreed that investment transactions that include retirement assets are increasingly likely to involve entities that may reside or operate in jurisdictions outside the U.S. and that reliance on PTE 2020-02 therefore must appropriately be tailored to address criminal activity, whether occurring in the U.S. or in a foreign jurisdiction but this commenter nonetheless had concerns with the potential lack of due process in foreign jurisdictions.

Other commenters were concerned that some foreign courts could become vehicles for hostile governments to achieve political ends as opposed to dispensing justice and potentially hostile foreign governments could interfere in the retirement marketplace for supposed wrongdoing that is wholly unrelated to managing retirement assets and these governments could potentially assert political influence over fiduciary advice providers that want to avoid a criminal conviction. One commenter recommended that the Proposed Amendment's foreign crime "substantially equivalent" standard be amended so that ineligibility for a foreign criminal conviction applies only when the factual record of such conviction, when applied to United States Federal criminal law, would highly likely lead also to a criminal conviction in the U.S., as determined under appropriate regulatory authority by the Department's Office of the Solicitor.

The Department notes these commenters' concerns, and as noted above, has reduced the scope of any possible disqualification by limiting the provision to the Controlled Group. However, the Department is retaining the inclusion of foreign convictions in the Final

Amendment. Financial Institutions increasingly have a global reach, in their affiliations and in their investment transactions. Retirement assets are often involved in transactions that take place in entities that operate in foreign jurisdictions therefore making the criminal conduct of foreign entities relevant to eligibility under PTE 2020-02. An ineligibility provision that is limited to U.S. Federal and State convictions would ignore these realities and provide insufficient protection for Retirement Investors. Moreover, foreign crimes of the type enumerated in the exemption call into question a firm's culture of compliance just as much as domestic crimes and are signs of potential serious compliance and integrity failures, whether prosecuted domestically or in foreign jurisdictions.

The Department does not expect that questions regarding "substantially equivalent" will arise frequently, and even less so with the Final Amendment's use of the term "Controlled Group" instead of "Affiliate," as discussed above. But, when these questions do arise, impacted entities may contact the Office of Exemption Determinations for guidance, as they have done for many years in connection with the eligibility provisions under the QPAM Exemption, PTE 84-14.[56] As discussed in more detail below, the one-year Transition Period that has been added to the exemption and the ability to apply for an individual exemption provide affected parties with both the time and the opportunity to address with the Department any issues about the relevance of any specific foreign conviction and its applicability to ongoing relief pursuant to PTE 2020-

[56] PTE 84-14 contains a similar eligibility provision which has long been understood to include foreign convictions. Impacted parties have successfully sought OED guidance regarding this eligibility provision whenever individualized questions or concerns arise. *See*, *e.g.,* Prohibited Transaction Exemption (PTE) 2023-15, 88 FR 42953 (July 5, 2023); 2023-14, 88 FR 36337 (June 2, 2023); 2023-13, 88 FR 26336 (Apr. 28, 2023); 2023-02, 88 FR 4023 (Jan. 23, 2023); 2023-01, 88 FR 1418 (Jan. 10, 2023); 2022-01, 87 FR 23249 (Apr. 19, 2022); 2021-01, 86 FR 20410 (Apr. 19, 2021); 2020–01, 85 FR 8020 (Feb. 12, 2020); PTE 2019–01, 84 FR 6163 (Feb. 26, 2019); PTE 2016–11, 81 FR 75150 (Oct. 28, 2016); PTE 2016–10, 81 FR 75147 (Oct. 28, 2016); PTE 2012–08, 77 FR 19344 (March 30, 2012); PTE 2004–13, 69 FR 54812 (Sept. 10, 2004).

02. Financial Institutions and Investment Professionals should interpret the scope of the eligibility provision broadly with respect to foreign convictions and consistent with the Department's statutorily mandated focus on the protection of Plans in ERISA section 408(a) and Code section 4975(c)(2). In situations where a crime raises particularly unique issues related to the substantial equivalence of the foreign Criminal Conviction, the Financial Institutions and Investment Professionals may seek the Department's views regarding whether the foreign crime, conviction, or misconduct is substantially equivalent to a U.S. Federal or State crime. However, any Financial Institution and Investment Professional submitting a request for review should do so promptly, and whenever possible, before a judgment is entered in a foreign conviction.

In the context of the PTE 84-14 Qualified Professional Asset Manager (QPAM) exemption, which has similar disqualification provisions, the Department is not aware of any potentially disqualifying foreign convictions having occurred in foreign nations that are intended to harm U.S.-based Financial Institutions and believes the likelihood of such an occurrence is rare. Further, the types of foreign crimes of which the Department is aware from recent PTE 84-14 QPAM individual exemption requests for relief from convictions have consistently related to the subject Financial Institution's management of financial transactions and/or culture of compliance. The underlying foreign crimes in those individual exemption requests have included: aiding and abetting tax fraud in France (PTE 2016-10, 81 FR 75147 (October 28, 2016) corrected at 88 FR 85931 (December 11, 2023), and PTE 2016-11, 81 FR 75150 (October 28, 2016) corrected at 89 FR 23612 (April 4, 2024)); attempting to peg, fix, or stabilize the price of an equity in anticipation of a block offering in Japan (PTE 2023-13, 88 FR 26336 (April 28, 2023)); illicit solicitation and money laundering for the purposes of aiding tax evasion in France

(PTE 2019-01, 84 FR 6163 (February 26, 2019)); and spot/futures-linked market price manipulation in South Korea (PTE 2015-15, 80 FR 53574 (September 4, 2015)).[57]

However, to address the concern expressed in the public comments that convictions have occurred in foreign nations that are intended to harm U.S.-based Financial Institutions, the Department has revised Section III(a)(1)(B) in the Final Amendment to exclude foreign convictions that occur within foreign jurisdictions that are included on the Department of Commerce's list of "foreign adversaries."[58] Therefore, the Department will not consider foreign convictions that occur under the jurisdiction of the listed "foreign adversaries" as an ineligibility event. To reflect this change, the Department has added the phrase "excluding convictions and imprisonment that occur within foreign countries that are included on the Department of Commerce's list of 'foreign adversaries' that is codified in 15 CFR 7.4" to Section III(a)(1)(B).

Due Process

The Department received several comments regarding the conduct described in Section III(a)(2) as involving "engaging in a systematic pattern or practice" that can cause ineligibility and the ineligibility notice process. Generally, the comments argued that the Department had

[57] On December 12, 2018, Korea's Seoul High Court for the 7th Criminal Division (the Seoul High Court) reversed the Korean Court's decision and declared the defendants not guilty; subsequently, Korean prosecutors appealed the Seoul High Court's decision to the Supreme Court of Korea., On December 21, 2023, the Supreme Court of Korea affirmed the reversal of the Korean Conviction, and it dismissed all judicial proceedings against DSK.

[58] 15 CFR 7.4. The list of foreign adversaries currently includes the following foreign governments and non-government persons: The People's Republic of China, including the Hong Kong Special Administrative Region (China); the Republic of Cuba (Cuba); the Islamic Republic of Iran (Iran); the Democratic People's Republic of Korea (North Korea); the Russian Federation (Russia); and Venezuelan politician Nicolás Maduro (Maduro Regime). The Secretary of Commerce's determination is based on multiple sources, including the National Security Strategy of the United States, the Office of the Director of National Intelligence's 2016–2019 Worldwide Threat Assessments of the U.S. Intelligence Community, and the 2018 National Cyber Strategy of the United States of America, as well as other reports and assessments from the U.S. Intelligence Community, the U.S. Departments of Justice, State and Homeland Security, and other relevant sources. The Secretary of Commerce periodically reviews this list in consultation with appropriate agency heads and may add to, subtract from, supplement, or otherwise amend the list. Section III(a)(1)(B) of the Final Amendment will automatically adjust to reflect amendments the Secretary of Commerce makes to the list.

given itself too much authority to disqualify parties based on its own factual determinations without affording them sufficient due process protections and had also reserved for itself the sole authority to determine ineligibility without external review and without ensuring due process.

A few commenters claimed that the Proposed Amendment has a procedural due process flaw that renders it unconstitutional under Article III of the Constitution, the Due Process Clause of the Fifth Amendment, and the Seventh Amendment. These commenters assert that courts have found that the sanction of depriving an entity of its ability to engage in its business is analogous to a criminal penalty and that only after sufficient due process can an individual be barred from engaging in an otherwise legal practice. These commenters express doubts about the ability of an administrative agency, like the Department, to assert this power without substantial additional procedural protections. Other commenters contended that the proposed process would have resulted in disqualification without any judicial recourse and that, by leaving too much discretion to the Department, would create uncertainty and adversely affect the availability of Retirement Investors to get sound advice. Some commenters asserted that the Department's ineligibility process was insufficient because it did not provide a chance for a hearing before an impartial administrative judge or Article III judge, no express right of appeal, and no formal procedures to present evidence, and provided the Department the sole discretion to prohibit the Investment Professional or Financial Institution from relying on PTE 2020-02.

Some commenters also stated that while the six-month notice period provided in the Proposed Amendment may be adequate time to send a notice to Retirement Investors, it is insufficient time for a Financial Institution to determine an alternative means of complying with ERISA in order to continue to provide advice to Retirement Investors. These commenters requested that the Department modify the Proposed Amendment to provide for at least 12 months to wind-down advice or to find an alternative means of complying with ERISA following a finding of ineligibility. One commenter additionally claimed that it was problematic that the opportunity to be heard and to challenge a disqualification based upon a domestic conviction had been eliminated. Another commenter urged the Department to eliminate the opportunity to cure misconduct from the exemption. This commenter claimed that this provision undermines compliance and accountability by reassuring Investment Professionals and firms that, even if they engage in a "systemic pattern or practice" of violating the conditions of the exemption, or even provide materially misleading information to the Department related to their conduct under the exemption, they will have the opportunity to cure and continue to rely on the exemption. The commenter asserted that Investment Professionals and firms who have engaged in these types of conduct will not desist from such misconduct during the lengthy cure period and, as a result, this provision threatens to expose Retirement Investors to continued harm. The commenter also requested that the Department eliminate any provision allowing Investment Professionals who are found ineligible to rely on PTE 2020-02 to nevertheless rely on other prohibited transaction exemptions or seek an individual transaction exemption from the Department. The commenter claimed that these provisions conflict with a proper regulatory approach that should seek to protect the public and deter misconduct by foreclosing exemptive relief to those Investment Professionals and firms who are demonstrably unfit to enjoy it.

After consideration of the comments and to address commenters' due process concerns, the Department has determined to modify Section III(a)(2) of the ineligibility provisions. As amended, Section III(a)(2) of the Final Amendment describes disqualifying conduct, which will be subject to a one-year Transition Period, instead of the six-month period originally proposed. The changes to the disqualifying conduct provisions of the exemption will remove the discretion of the Department from the ineligibility determination process regarding the occurrence of the Prohibited Misconduct under Section III(a)(2) while adding protections to the exemption by conditioning disqualification on determinations in court proceedings. Ineligibility under amended Section III(a)(2) will result from a Financial Institution or an Investment Professional being found in a final judgment or court-approved settlement in a Federal or State criminal or civil court proceeding brought by the Department, the Department of the Treasury, the IRS, the SEC, the Department of Justice, the Federal Reserve, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Commodity Futures Trading Commission, a State insurance or securities regulator, or State attorney general to have participated in one or more of the following categories of conduct irrespective of whether the court specifically considers this exemption or its terms: (A) engaging in a systematic pattern or practice of conduct that violates the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; (B) intentionally engaging in conduct that violates the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; (C) engaging in a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330 or pay the resulting excise taxes imposed by Code section 4975 in connection with non-exempt prohibited transactions involving investment advice as defined under Code section 4975(e)(3)(B); or (D) providing materially misleading information to the Department, the Department of the Treasury, the Internal Revenue Service, the Securities and Exchange Commission, the Department of Justice, the Federal Reserve, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Commodity Futures Trading Commission, a State insurance or securities regulator, or State attorney general in connection with the conditions of this exemption.

In making this change to the Final Amendment, the Department has kept the same four triggers that it proposed in Section III(a)(2) of the Proposed Amendment. Rather than relying solely on the Department to determine whether a covered entity had engaged in one of these four triggers, however, the Department has determined that it is appropriate to limit eligibility to instances where a court has determined that a Financial Institution or Investment Professional has engaged in certain identified conduct. This underlying conduct is unchanged from the proposal. The Department agrees that relying on a determination from a court more appropriately balances the due process concerns raised by some comments. The Department also agrees with other commenters who emphasized that this identified conduct is a significant cause for concern, and that it is appropriate to condition ineligibility on a determination the Financial Institution or Investment Professional have engaged in this behavior.

Under this Final Amendment, ineligibility under Section III(a)(2) will operate in a similar manner to ineligibility for a criminal conviction defined in Section III(a)(1), as ineligibility will be immediate, subject to the timing and scope of the ineligibility provisions in Section III(b), including the One-Year Transition Period. Specifically, a Financial Institution or an Investment Professional will only become ineligible after it has been determined in a final judgment or a court-approved settlement that the conduct set forth in Section III(a)(2) has occurred. By removing the Opportunity to be Heard and Ineligibility Notice process and providing that ineligibility is triggered only after a conviction, a court’s final judgment, or a court-approved settlement, the Financial Institution, an entity in the same Controlled Group as the Financial Institution, or an Investment Professional will have the due process that is afforded in formal legal proceedings. Additionally, having ineligibility occur only after a conviction, court’s final judgment, or court-approved settlement provides those entities and persons confronting ineligibility with ample notice and time to prepare for their ineligibility and operations during the ensuing One-Year Transition Period discussed below. An ineligible Financial Institution or Investment Professional would again become eligible to rely on this exemption if there is a subsequent judgment reversing the conviction or final judgment.

Timing of Ineligibility and One-Year Transition Period

Several commenters expressed concern that the ineligibility provisions would apply retrospectively and urged the Department to confirm that ineligibility under the exemption would occur only on a prospective basis after finalization of the amended exemption. Additionally, some commenters asserted that the six-month period provided in the Proposed Amendment following ineligibility would be insufficient for Financial Institutions and Investment Professionals to prepare for any inability to provide retirement investment advice for a fee, determine an alternative means of complying with ERISA, and to prepare and submit an individual exemption application. One commenter argued that the change in the Proposed Amendment from a one-year transition period to six months was unduly punitive and contended that shortening the period would only mean that Retirement Investors would lose access to a trusted adviser sooner rather than later, generally for reasons entirely unrelated to the services provided to the Retirement Investor. Another commenter stated that providing a longer 12-month period would enable Financial Institutions to find alternative compliant means to help Retirement Investors and would enable Retirement Investors to continue to receive investment recommendations in their best interest.

One commenter claimed that the sudden real or impending loss of significant numbers of providers, or even a handful of the largest among them, as the result of their disqualification would cause chaos among plans, which would have no more than six months to find suitable replacements and impose harm on the Retirement Investors who had hired a disqualified firm. Another commenter argued that reducing the timing of ineligibility from one year to six months after a finding of ineligibility would make it more unlikely that the disqualified person could timely obtain an individual prohibited transaction exemption. The commenter stated that the result was especially significant because the Department was simultaneously proposing to eliminate alternative paths for exemptive relief for providing fiduciary investment advice under other class exemptions, making PTE 2020-02 the only available class exemption.

In response to these comments, the Department confirms that ineligibility under Section III will be prospective and only convictions, final judgments, or court-approved settlements occurring after the Applicability Date of the Final Amendment exemption will cause ineligibility. The proposed six-month period before ineligibility begins has been removed from the amended exemption and amended Section III(b) requires ineligibility for the Financial Institution or Investment Professional to begin immediately upon the date of conviction, final judgment, or court-approved settlement that occurs on or after the Applicability Date of the exemption. The Department has replaced the six-month lag period for beginning of ineligibility with a One-Year Transition Period in Section III(b)(2) to provide Financial Institutions and Investment Professionals ample time to prepare for loss of the exemptive relief of PTE 2020-02, determine alternative means for compliance, prepare and protect Retirement Investors, and apply to the Department for an individual exemption.

The Final Amendment provides that relief under the exemption during the One-Year Transition Period is available for a maximum period of one year after the Ineligibility Date if the Financial Institution and the Investment Professional provides notice to the Department at IIAWR@dol.gov within 30 days after ineligibility begins under Section III(b)(1). No relief will be available for any transactions (including past transactions) affected during the One-Year Transition Period unless the Financial Institution and the Investment Professional complies with all the conditions of the exemption during such one-year period. The Department notes that it included the One-Year Transition Period in the Final Amendment to reduce the costs and burdens associated with the possibility of ineligibility, and to give Financial Institutions and Investment Professionals ample opportunity to apply for individual exemptions with appropriate protective conditions.

Financial Institutions and Investment Professionals may continue to rely on the exemption, as long as they comply with all of the exemption's conditions during that year. The One-Year Transition Period begins on the date of the conviction, the final judgment (regardless of whether that judgment remains under appeal), or court approved settlement. Financial Institutions or Investment Professionals that become ineligible to rely on this exemption may rely on a statutory prohibited transaction exemption if one is available or may seek an individual prohibited transaction exemption from the Department. In circumstances where the Financial Institution or Investment Professional becomes ineligible, the Department believes the interests of Retirement Investors are best protected by the procedural protections, public record, and notice and comment process associated with individual exemption applications. Through the process of an individual exemption application, the Department has unique authority to efficiently gather evidence, consider the issues, and craft protective conditions that meet the statutory standard. If the Department concludes, consistent with the statutory standards set forth in ERISA section 408(a) and Code section 4975(c)(2), that an individual exemption is appropriate, Retirement Investors remain free to make their own independent determinations whether to engage in transactions with the Financial Institution or Investment Professional.

As provided under Section III(c), a Financial Institution or Investment Professional that is ineligible to rely on this exemption may request an individual prohibited transaction exemption from the Department. The Department encourages any Financial Institution or Investment Professional facing allegations that could result in ineligibility to begin the individual exemption application process as soon as possible. If the applicant becomes ineligible and the Department has not granted a final individual exemption, the Department will consider granting retroactive relief, consistent with its policy as set forth in 29 CFR 2570.35(d), which may require retroactive exemptions to include additional prospective conditions.

Form 5330

The Department received several comments arguing that the imposition of ineligibility under Section III(a)(2)(C) based on the Financial Institution's failure to timely report any non-exempt prohibited transaction on IRS Form 5330 filing requirements and paying the associated excise tax payment is unworkable. These commenters generally stated that the provision constituted overreach by the Department because it has no statutory or regulatory enforcement authority to base ineligibility on the IRS' Form 5330 filing requirements. Other commenters claimed that Congress did not intend to give this kind of authority to the Department when it gave the Department the authority to grant prohibited transaction exemptions. The commenters stated that the Department has no legitimate need for this information and if Congress intended to give the Department this authority, it would have done so directly. One commenter questioned whether it would be a violation of the exemption if a Financial Institution or Investment Professional did not file a Form 5330 based on advice of an accountant or attorney.

After considering these comments, the Department is retaining Section III(a)(2)(C)'s provisions for ineligibility based on the Financial Institution's or Investment Professional's engaging in a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330 or pay the resulting excise taxes imposed by Code section 4975 in connection with non-exempt prohibited transactions involving investment advice as defined under Code section 4975(e)(3)(B). The excise tax is the Congressionally imposed sanction for engaging in non-exempt prohibited transaction and provides a powerful incentive for compliance with the participant-protective terms of this exemption. Insisting on compliance with the statutory obligation to pay the excise tax provides an important safeguard for compliance with the tax obligation when violations occur and focuses the Institution's attention on instances where the conditions of this exemption have been violated, resulting in a non-exempt prohibited transaction. Moreover, the failure to satisfy this condition calls into question the Financial Institution's or Investment Professional's commitment to regulatory compliance, as is critical to ensuring adherence to the conditions of this exemption including the Impartial Conduct Standards.

By including this provision in the Final Amendment, the Department does not claim authority to impose taxes under the Code, and leaves responsibility for collecting the excise tax and managing related filings to the IRS. The Department merely asserts its clear authority to grant conditional or unconditional exemptions under ERISA section 408(a) and Code section 4975(c). Since an obligation already exists to file the Form 5330 when parties engage in non-exempt prohibited transactions, the Department is merely conditioning relief in the exemption on their compliance with existing law. The condition provides important protections to Retirement Investors by enhancing the existing protections of PTE 2020–02.

As discussed above, this Final Amendment provides that ineligibility under Section III(a)(2)(C) occurs following a court's finding or determination that Financial Institutions or

Investment Professionals engaged in a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330 or pay the resulting excise taxes imposed by Code section 4975. Triggering a Financial Institution or an Investment Professional's ineligibility only after a court has found the conduct occurred removes the Department from the determination process and provides the Financial Institution and Investment Professional with the due process protections inherent in the judicial process. Ineligibility grounded on failures under this condition call into question the Financial Institution or an Investment Professional's ability to provide advice for a fee that complies with the obligations of this exemption, including the Care Obligation and the Loyalty Obligation.

Alternative Exemptions

A Financial Institution or Investment Professional that is ineligible to rely on this exemption may rely on a statutory or separate administrative prohibited transaction exemption if one is available or may request an individual prohibited transaction exemption from the Department. To the extent an applicant requests retroactive relief in connection with an individual exemption application, the Department will consider the application in accordance with its retroactive exemption policy as set forth in 29 CFR 2570.35(d). The Department may require additional prospective compliance conditions as a condition of providing retroactive relief. A few commenters expressed concern that the Alternative Exemptions process was not sufficient. One commenter in particular expressed concern with the length and expense of seeking to obtain an individual exemption, claiming this would result in harm to Plans.

As discussed above, the violations that would trigger ineligibility are serious, call into question the parties' willingness or ability to comply with the obligations of the exemption, and have been determined in court supervised proceedings. In such circumstances, it is important that the parties seek individual relief from the Department if they would like to continue to have the benefit of an exemption that permits them to engage in conduct that would otherwise be illegal. As part of such an on the record process, they can present evidence and arguments on the scope of the compliance issues, the additional conditions necessary to safeguard Retirement Investor interests, and their ability and commitment to comply with protective conditions designed to ensure prudent advice and avoid the harmful impact of dangerous conflicts of interest.

Recordkeeping

Section IV provides that the Financial Institution must maintain for a period of six years following the covered transaction records demonstrating compliance with this exemption and make such records available to the extent permitted by law, including 12 U.S.C. 484, to any authorized employee of the Department or the Department of the Treasury, which includes the Internal Revenue Service.

While the Department proposed a broader recordkeeping condition in the Proposed Amendment, the Department has determined to maintain the recordkeeping condition as it is currently in PTE 2020-02. The Department is clarifying the language to confirm that records must be made available to authorized employees of the Internal Revenue Service as part of the Department of the Treasury. This clarification was in the preamble to the December 2020 grant of PTE 2020-02, and the Department is now adding it to the operative text.

Although the proposed broader recordkeeping condition is consistent with other exemptions, the Department understands commenters' concerns that broader access to the documents could have a counterproductive impact on the formulation and documentation of appropriate firm oversight and control of recommendations by Investment Professionals. Although the Final Amendment narrows the recordkeeping obligation, uses this narrower recordkeeping, the Department intends to monitor Financial Institutions' compliance with the exemption closely and may revisit this to expand the recordkeeping requirement as appropriate. Future amendments would be preceded by notice and an opportunity for public comment.

Executive Order 12866 and 13563 Statement

Executive Orders 12866[59] and 13563[60] direct agencies to assess all costs and benefits of available regulatory alternatives. If regulation is necessary, agencies must choose a regulatory approach that maximizes net benefits, including potential economic, environmental, public health and safety effects; distributive impacts; and equity. Executive Order 13563 emphasizes the importance of quantifying costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

Under Executive Order 12866, "significant" regulatory actions are subject to review by the Office of Management and Budget (OMB). As amended by Executive Order 14094,[61] entitled "Modernizing Regulatory Review," section 3(f) of Executive Order 12866 defines a "significant regulatory action" as any regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of $200 million or more (adjusted every three years by the Administrator of the Office of Information and Regulatory Affairs (OIRA) for changes in gross domestic product); or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, Territorial, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations

[59] 58 FR 51735 (Oct. 4, 1993).
[60] 76 FR 3821 (Jan. 21, 2011).
[61] 88 FR 21879 (Apr. 6, 2023).

of recipients thereof; or (4) raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in the Executive order, as specifically authorized in a timely manner by the Administrator of OIRA in each case.

It has been determined that this amendment is significant within the meaning of section 3(f)(1) of the Executive Order. Therefore, the Department has provided an assessment of the amendment's costs, benefits, and transfers, and OMB has reviewed the rulemaking.

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), the Department solicited comments concerning the information collection requirements (ICRs) included in the proposed rulemaking. The Department received comments that addressed the burden estimates used in the analysis of the proposed rulemaking. The Department reviewed these public comments in developing the paperwork burden analysis and subsequently revised the burden estimates in the amendments to the PTEs discussed below.

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

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

The Department is amending PTE 2020-02 to revise the required disclosures to Retirement Investors receiving advice and to provide more guidance for Financial Institutions and Investment Professionals complying with the Impartial Conduct Standards and implementing the policies and procedures. This rulemaking is intended to align with other regulators' rules and standards of conduct. These requirements are ICRs subject to the PRA. Readers should note that the burden discussed below conforms to the requirements of the PRA and is not the incremental burden of the changes.[62]

1.1 Preliminary Assumptions

In the analysis discussed below, a combination of personnel would perform the tasks associated with the ICRs at an hourly wage rate of $65.99 for clerical personnel, $165.71 for a legal professional, and $228.00 for a financial advisor.[63]

In the proposal, the Department received several comments on the Department's labor cost estimate, particularly the cost for legal support, remarking that it was too low. The Department assumes that tasks involving legal professionals will be completed by a combination of legal professionals, likely consisting of attorneys, legal support staff, and other professionals and in-house and out-sourced individuals. The labor cost associated with these tasks is estimated to be $165.71, which is the Department's estimated labor cost for an in-house attorney. The Department understands that some may feel this estimate is comparatively low to their experience, especially when hiring an outside ERISA legal expert. However, the Department has chosen this cost estimate understanding that it is meant to be an average, blended, or typical rate from a verifiable and repeatable source.

[62] For a more detailed discussion of the marginal costs associated with the amendments to PTE 2020-02, refer to the Regulatory Impact Analysis (RIA) in the Notice of Final Rulemaking published elsewhere in today's edition of the *Federal Register*.

[63] Internal Department calculation based on 2023 labor cost data and adjusted for inflation to reflect 2024 wages. For a description of the Department's methodology for calculating wage rates, see https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf.

For the purposes of this analysis, the Department assumes that the percent of Retirement Investors who are in employer-sponsored plans receiving electronic disclosures would be similar to the percent of plan participants receiving electronic disclosures under the Department's 2002 and 2020 electronic disclosure safe harbors.[64] Accordingly, the Department estimates that 96.1 percent of the disclosures sent to Retirement Investors will be sent electronically, and the remaining 3.9 percent will be sent by mail.[65]

One commenter suggested that this assumption overstates the use of electronic disclosures for IRA owners and that 60 percent would be more appropriate. The Department is not able to substantiate that suggestion but understands that IRA owners could be different than plan participants in regard to electronic delivery of documents. In response, the Department reevaluated its estimate. In this analysis, the Department assumes that approximately 71.8 percent of IRA owners will receive disclosures electronically, and the remaining 28.2 percent sent by mail.[66]

Furthermore, the Department estimates that communications between businesses (such as disclosures sent from one Financial Institution to another) will be 100 percent electronic.

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[64] 67 FR 17263 (Apr. 9, 2002); 85 FR 31884 (May 27, 2020).

[65] The Department estimates that 58.3 percent of Retirement Investors receive electronic disclosures under the 2002 electronic disclosure safe harbor and that an additional 37.8 percent of Retirement Investors receive electronic disclosures under the 2020 electronic disclosure safe harbor. In total, the Department estimates 96.1 percent (58.3 percent + 37.8 percent) of Retirement Investors receive disclosures electronically.

[66] The Department used information from a Greenwald & Associates survey which reported that 84 percent of retirement plan participants find electronic delivery acceptable, and data from the National Telecommunications and Information Administration Internet Use Survey which indicated that 85.5 percent of adults 65 and over use e-mail on a regular basis, which is used as a proxy for internet fluency and usage. Therefore, the assumption is calculated as: (84% find electronic delivery acceptable) x (85.5% are internet fluent) = 71.8% are internet fluent and find electronic delivery acceptable.

For disclosures sent by mail, the Department estimates that entities will incur a cost of $0.68[67] for postage and $0.05 per page for material and printing costs.

1.2 Affected Entities

The Department expects the same 18,632 entities that are affected by the existing PTE 2020-02 will be affected by the amendments to the PTE. The number of entities by type and size are summarized in the table below.[68]

Table 1: Affected Entities by Type and Size

	Small	Large	Total
Broker-Dealer	431	1,489	1,920
Retail	302	1,018	1,319
Non-Retail	129	471	600
Registered Investment Adviser	2,989	13,409	16,398
SEC	228	7,806	8,035
Retail	85	4,859	4,944
Non-Retail	144	2,947	3,091
State	2,760	5,603	8,363
Retail	2,192	4,450	6,642
Non-Retail	568	1,153	1,721
Insurer	71	13	84
Robo-Adviser	10	190	200
Non-Bank Trustee	31	0	31
Total	3,531	15,101	18,632

Note: Values displayed are rounded to whole numbers; therefore, parts may not sum.

In addition, the amendments may affect banks and credit unions selling non-deposit investment products. There are 4,614 federally insured depository institutions in the United States, consisting of 4,049 commercial banks and 565 savings institutions.[69] Additionally, there

[67] United States Postal Service, *First-Class Mail*, United States Postal Service (2023), https://www.usps.com/ship/first-class-mail.htm.
[68] For more information on how the number of each type and size of entity is estimated, refer to the Affected Entity section of the RIA in the Notice of Final Rulemaking published elsewhere in today's edition of the *Federal Register*.
[69] Federal Deposit Insurance Corporation, *Statistics at a Glance- as of September 30, 2023*, https://www.fdic.gov/analysis/quarterly-banking-profile/statistics-at-a-glance/2023mar/industry.pdf.

are 4,645 federally insured credit unions.[70] In 2017, the GAO estimated that approximately two percent of credit unions have private deposit insurance.[71] Based on this estimate, the Department estimates that there are approximately 95 credit unions with private deposit insurance and 4,740 credit unions in total.[72]

In the proposal, the Department estimated that no banks or credit unions would be impacted by the amendments to PTE 2020-02. The Department requested comment on what other types of activities banks or credit unions may engage in that would require reliance on PTE 2020-02. The Department did not receive any comments on this topic. However, the Department revisited a comment it received on PTE 2020-02 in 2020. This comment suggested that banks may be providing investment advice outside of networking arrangements, such as recommendations to roll over assets from a plan or IRA or advice to invest in deposit products.[73] The Department agrees that, if the recommendation meets the facts and circumstances test for individualized best interest advice, or the adviser acknowledges fiduciary status, such transactions will require banks to comply with PTE 2020-02. The Department notes that some banks may need to comply with PTE 2020-02. However, the Department believes that in such cases, the banks, or their separately identifiable department or division, would be registered investment advisers and already included in the estimate of affected entities.[74]

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[70] National Credit Union Administration, *Quarterly Credit Union Data Summary 2023 Q3,* https://ncua.gov/files/publications/analysis/quarterly-data-summary-2023-Q3.pdf.

[71] GAO, *Private Deposit Insurance: Credit Unions Largely Complied with Disclosure Rules, But Rules Should be Clarified,* (March 29, 2017), https://www.gao.gov/products/gao-17-259.

[72] The total number of credit unions is calculated as: 4,645 federally insured credit unions / (100%-2% of credit unions that are privately insured) = 4,740 total credit unions. The number of private credit unions is estimated as: 4,740 total credit unions – 4,645 federally insured credit unions = 95 credit unions with private deposit insurance.

[73] Comment letter received from the American Bankers Association on the *Notification of Proposed Class Exemption: Improving Advice for Workers & Retirees,* (August 2020).

[74] For more information on the Department's consideration of banks and credit unions, refer to the Affected Entity section of the RIA in the Notice of Final Rulemaking published elsewhere in today's edition of the *Federal Register*.

The Department recognizes that the rulemaking may change the number of Financial Institutions who choose to rely on PTE 2020-02. Consistent with its initial analysis in 2020, the proposal assumed that all entities eligible to rely on the existing PTE 2020-02 were relying on it. However, one commenter indicated that some entities eligible to use PTE 2020-02 had determined that their business practices did not trigger fiduciary status or modified their business practices to avoid relying upon it. The definitional changes in this rulemaking may now require these entities to now rely on PTE 2020-02. These entities will incur the full compliance costs of PTE 2020-02. In response to this concern, this analysis assumes that 30 percent of currently eligible entities would begin to rely on PTE 2020-02 in response to the rulemaking.[75]

1.3 Costs Associated with Disclosures for Investors, Production and Distribution

1.3.1 Costs Associated with Drafting and Modifying Relationship and Conflict of Interest Disclosure

Section II(b) currently requires Financial Institutions to provide certain disclosures to Retirement Investors before engaging in a transaction pursuant to the exemption. These disclosures include:

- a written acknowledgment that the Financial Institution and its Investment Professionals are fiduciaries;
- a written description of the services to be provided and any material conflicts of interest of the Investment Professional and Financial Institution; and

[75] The Department is not aware of any source to determine the percent of firms currently eligible, but not using PTE 2020-02, but which now need to use the exemption. In response to the lack of information the Department selected a meaningful percent of firms that would be in this category, in order to provide an estimate of the cost to comply with PTE 2020-02. As a point of reference, each percentage point change to this assumption results in a 0.28 percentage point change in the estimated total cost of compliance for PTE 2020-02.

- documentation of the Financial Institution and its Investment Professional's conclusions as to whether a rollover is in the Retirement Investor's best interest, before engaging in a rollover or offering recommendations on post-rollover investments.

The Department is finalizing the disclosure conditions from the proposal with some modifications. In the proposal, the Department proposed requiring a written statement informing the investor of their right to obtain a written description of the Financial Institution's written policies and procedures and information regarding costs, fees, and compensation. The Department received several comments regarding its estimate of the number of annual requests per firm, and the cost burdens associated with the Provision of Disclosures. After reviewing the comments and existing disclosures associated with the rulemaking, the Department has removed this requirement. The modifications to the disclosure requirements included in the final rulemaking are described below.

The following estimates reflect the ongoing paperwork burdens of the affected entities. Broker-dealers, registered investment advisers, and insurance companies that relied on the existing exemption were required to prepare certain disclosures under the existing PTE 2020-02. The estimates below reflect the paperwork burden these entities would incur to modify the current disclosures. This analysis does not include the transition costs already incurred for the existing PTE 2020-02 exemption.

Written Acknowledgement of Fiduciary Status

Of the 70 percent of the broker-dealers, registered investment advisers, and insurance companies assumed to be currently reliant on the existing exemption, the Department assumes that 10 percent will need to update their disclosures and that it will take a legal professional at a Financial Institution, on average, 10 minutes to update existing disclosures.

Robo-advisers, non-bank trustees, and newly reliant broker-dealers, registered investment advisers, and insurance companies will need to draft the acknowledgement. The Department estimates that it will take a legal professional at these entities, on average, 30 minutes to draft the acknowledgement. Updating and drafting the acknowledgement is estimated to result in an estimated hour burden of 3,090 hours with an equivalent cost of $512,106.[76]

Table 2: Hour Burden and Equivalent Cost Associated with the Fiduciary Acknowledgement				
	Year 1		**Subsequent Years**	
Activity	**Burden Hours**	**Equivalent Burden Cost**	**Burden Hours**	**Equivalent Burden Cost**
Create Disclosure (Legal)	2,876	$476,531	0	$0
Update Disclosure (Legal)	215	$35,575	0	$0
Total	**3,090**	**$512,106**	**0**	**$0**

Written Statement of the Care Obligation and Loyalty Obligation

As amended, PTE 2020-02 requires Financial Institutions to provide investors with a Written Statement of the Care Obligation and Loyalty Obligation disclosure. As presented in

[76] The number of Financial Institutions needing to update their written acknowledgement is estimated as: (1,920 broker-dealers x 10% x (100% - 30%)) + (8,035 SEC-registered investment advisers x 10% x (100% - 30%)) + (8,363 State-registered investment advisers x 10% x (100% - 30%)) + (84 insurers x 10% x (100% - 30%)) = 1,288 Financial Institutions updating existing disclosures. The number of Financial Institutions needing to draft their written acknowledgement is estimated as: 200 robo-advisers + 31 non-bank trustees + (1,920 broker-dealers x 30%) + (8,035 SEC-registered investment advisers x 30%) + (8,363 State-registered investment advisers x 30%) + (84 insurers x 30%) = 5,751 Financial Institutions drafting new disclosures. The burden is estimated as: (1,288 Financial Institutions x (10 minutes ÷ 60 minutes hours)) + (5,751 Financial Institutions x (30 minutes ÷ 60 minutes hours) = 3,090 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: 3,090 burden hours x $165.71 = $512,106. Note: Due to rounding, values may not sum.

more detail in the preamble, this disclosure defines the Care Obligation and Loyalty Obligation as related to the investor's relationship with the Investment Professional.

Most registered investment advisers and broker-dealers with retail investors already provide disclosures that the Department expects will satisfy these requirements.[77]

The Department expects that the written statement of Care Obligation and Loyalty Obligation will not take a significant amount of time to prepare and will be uniform across clients. The Department assumes that a legal professional employed by a broker-dealer or registered investment adviser, on average, will take 30 minutes to modify existing disclosures and that it will take insurers, robo-advisers, and non-bank trustees, on average, one hour to prepare the statement. This results in an hour burden of 9,474 hours with an equivalent cost of $1,569,868.[78]

Table 3: Hour Burden and Equivalent Cost Associated with the Statement of the Care and Loyalty Obligation				
	Year 1		Subsequent Years	
Activity	**Burden Hours**	**Equivalent Burden Cost**	**Burden Hours**	**Equivalent Burden Cost**
Legal	9,474	$1,569,868	0	$0
Total	**9,474**	**$1,569,868**	**0**	**$0**

Relationship and Conflict of Interest Disclosure

The rulemaking also revises on the existing requirement for a written description of the services provided to also require a statement on whether the Retirement Investor would pay for such services, directly or indirectly, including through third-party payments. This disclosure is

[77] Form CRS Relationship Summary; Amendments to Form ADV, 84 FR 33492 (July 12, 2019).

[78] The burden is estimated as: [(1,920 broker-dealers + 16,398 registered investment advisers) x (30 minutes ÷ 60 minutes hours)] + [(84 insurers + 200 robo-advisers + 31 non-bank trustees) x 1 hour] = 9,474 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: 9,474 burden hours x $165.71 = $1,569,868. Due to rounding values may not sum.

consistent with the disclosure requirements under Regulation Best Interest. Accordingly, the Department expects that retail broker-dealers will not incur a cost to satisfy this requirement.

For all other Financial Institutions which relied on the existing exemption (i.e. 70 percent of non-retail broker-dealers, registered investment advisers, and insurance companies), the Department assumes it will take a legal professional 30 minutes to update existing disclosures to include this information. Robo-advisers, non-bank trustees, and newly reliant non-retail broker-dealers, registered investment advisers, and insurance companies will need to draft the Relationship and Conflict of Interest disclosure, which the Department estimates will take a legal professional at a large institution five hours and a legal professional at a small institution one hour, on average, to prepare such a draft.[79] This results in an estimated hour burden of 28,738 hours with an equivalent cost of $4,762,239.[80]

Table 4: Hour Burden and Equivalent Cost Associated with the Relationship and Conflict of Interest **Disclosure**

	Year 1		**Subsequent Years**	
Activity	**Burden Hours**	**Equivalent Burden Cost**	**Burden Hours**	**Equivalent Burden Cost**
Legal	28,738	$4,762,239	0	$0
Total	**28,738**	**$4,762,239**	**0**	**$0**

1.3.2 Costs Associated with the Provision of Relationship and Conflict of Interest Disclosures

[79] The Department estimates that 10 robo-advisers and 31 non-bank trustees are considered small entities.

[80] The number of Financial Institutions needing to update their written description of services to comply with the Relationship and Conflict of Interest disclosure is estimated as: 84 insurers + ((16,398 registered investment advisers + 600 non-retail broker-dealers) x (100%-30%)) = 11,983 Financial Institutions updating existing disclosures. The number of Financial Institutions needing to draft their Relationship and Conflict of Interest disclosure is estimated as: (200 robo-advisers + 31 non-bank trustees) + ((600 non-retail broker-dealers + 16,398 registered investment advisers) x 30%) = 5,330 Financial Institutions drafting new disclosures. Of these entities, there are 976 small entities and 4,354 large entities. The hours burden is calculated as: ((11,563 entities updating x 30 minutes) + ((976small entities drafting x 1 hour) + (4,354 large entities drafting x 5 hours)) = 28,738 burden hours. The labor rate is applied as: 28,738 burden hours x $165.71 = $4,762,239. Due to rounding values may not sum.

As discussed above, the Department estimates that 96.1 percent of the disclosures sent to Retirement Investors will be sent electronically and that approximately 72 percent of IRA owners will receive disclosures electronically.

The Department estimates that approximately 44.6 million Plan participants and 67.8 million IRA owners will receive disclosures annually, of which, 20.9 million (1.7 million Retirement Investors and 19.1 million IRA owners) will receive paper disclosures.[81] The Department estimates that preparing and sending each disclosure would take a clerical worker, on average, five minutes, resulting in an hour burden of 1,737,781 hours with an equivalent cost of $114,676,201.[82]

Table 5: Hour Burden and Equivalent Cost Associated Preparing and Sending Disclosures				
	Year 1		Subsequent Years	
Activity	**Burden Hours**	**Equivalent Burden Cost**	**Burden Hours**	**Equivalent Burden Cost**
Clerical	1,737,781	$114,676,201	1,737,781	$114,676,201
Total	**1,737,781**	**$114,676,201**	**1,737,781**	**$114,676,201**

The Department assumes that the disclosures would require four pages in total, resulting in a material and postage cost of $18,350,973.[83]

Table 6: Material and Postage Cost Associated with Sending Disclosures				
	Year 1		Subsequent Years	
Activity	**Pages**	**Cost**	**Pages**	**Cost**
Material Cost	4	$18,350,973	4	$18,350,973
Total	**4**	**$18,350,973**	**4**	**$18,350,973**

[81] This is estimated as (44,593,228 x 3.9%) + (67,781,000 x 28.2%) = 20,853,378 paper disclosures. Due to rounding values may not sum.
[82] This burden is estimated as: [(20,853,378 disclosures x (5 minutes ÷ 60 minutes hours)] = 1,737,781 hours. The labor cost is estimated as: [(20,853,378 disclosures x (5 minutes ÷ 60 minutes hours)] x $65.99 = $114,676,201. Due to rounding values may not sum.
[83] The material and postage cost is estimated as: (20,853,378 disclosures x 4 pages x $0.05) + (20,853,378 disclosures x $0.68 postage) = $18,350,973. Due to rounding values may not sum.

1.3.3 Costs Associated with the Rollover Disclosures

The proposal proposed requiring disclosures for all rollovers, including those from plans to IRAs, from IRAs to other IRAs and from plans to plans. In the Final Amendment, the rollover disclosure will only be required for rollovers from a Plan that is covered by Title I, or recommendation to a Plan participant or beneficiary as to the post-rollover investment of assets currently held in a Plan that is covered by Title I. According to Cerulli Associates, in 2022, almost 4.5 million defined contribution (DC) plan accounts with $779 billion in assets were rolled over to an IRA.[84]

As a best practice, the SEC already encourages firms to record the basis for significant investment decisions, such as rollovers, although doing so is not required under Regulation Best Interest or the Advisers Act. In addition, some firms may voluntarily document significant investment decisions to demonstrate compliance with applicable law, even if not required. SIFMA commissioned Deloitte to conduct a survey of its member firms to learn how they expected to implement Regulation Best Interest. The survey was conducted by December 31, 2019, prior to Regulation Best Interest's effective date of June 30, 2020. Just over half (52 percent) of the broker-dealers surveyed indicated they will require their financial advisers to provide the rationale documentation for rollover recommendations.[85]

The Department estimates that documenting each rollover recommendation will require 30 minutes for a personal financial adviser whose firms currently do not require rollover

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[84] According to Cerulli, in 2022, there were 4,485,059 DC plan-to-IRA rollovers and 707,104 DC plan-to-DC plan rollovers. (*See* Cerulli Associates, *U.S. Retirement End-Investor 2023: Personalizing the 401(k) Investor Experience*, Exhibit 6.02. The Cerulli Report.) These account estimates may include health savings accounts, Archer medical savings accounts, or Coverdell education savings accounts.

[85] Deloitte, *Regulation Best Interest: How Wealth Management Firms are Implementing the Rule Package*, Deloitte, (Mar. 6, 2020).

documentations and five minutes for financial advisers whose firms already require them to do so. This results in a labor cost estimate of $142.0 million.[86]

Table 7: Hour Burden and Equivalent Cost Associated with the Rollover Documentation				
	Year 1		Subsequent Years	
Activity	**Burden Hours**	**Equivalent Burden Cost**	**Burden Hours**	**Equivalent Burden Cost**
Financial Adviser	622,676	$141,970,058	622,676	$141,970,058
Total	**622,676**	**$141,970,058**	**622,676**	**$141,970,058**

These rollover disclosures are expected to be two pages in length and accompany other documentation associated with the transactions at no additional postage cost. The materials cost is estimated as $0.05 per page, totaling $8,571 annually.[87]

Table 8: Material and Postage Cost Associated with the Rollover Disclosure				
	Year 1		Subsequent Years	
Activity	**Pages**	**Cost**	**Pages**	**Cost**
Material Cost	2	$8,571	2	$8,571
Total	**2**	**$8,571**	**2**	**$8,571**

1.4 Costs Associated with Annual Report of Retrospective Review

PTE 2020-02 currently requires Financial Institutions to conduct a retrospective review at least annually that is reasonably designed to prevent violations of, and achieve compliance with,

[86] The burden is estimated as: (4,485,059 rollovers x 48% x 49% x (30 minutes ÷ 60 minutes hours)) + (4,485,059 rollovers x 52% x 49% x (5 minutes ÷ 60 minutes hours)) = 622,676 hours. A labor rate of $228.00 is used for a personal financial adviser. The labor rate is applied in the following calculation: 622,676 burden hours x $228.00 = $141,970,058. Due to rounding values may not sum.
[87] The material and postage cost is estimated as: (4,485,059 rollovers x 49% involving advice x 3.9% disclosures mailed x $0.05 per page x 2 pages = $8,571. Note, the total values may not equal the sum of the parts due to rounding.

the conditions of this exemption, the Impartial Conduct Standards, and the policies and procedures governing compliance with the exemption. The retrospective review must include a discussion of any self-corrections of violations.

Many of the entities affected by PTE 2020-02 likely already have retrospective review requirements. Broker-dealers are subject to similar annual review and certification requirements under FINRA Rule 3110,[88] FINRA Rule 3120,[89] and FINRA Rule 3130;[90] SEC-registered investment advisers are already subject to retrospective review requirements under SEC Rule 206(4)-7; and insurance companies in many states are already subject to state insurance law based on the NAIC Model Regulation.[91] Accordingly, in this analysis, the Department assumes that these entities will incur minimal costs to meet this requirement.

In 2018, the Investment Adviser Association estimated that 92 percent of SEC-registered investment advisers voluntarily provide an annual compliance program review report to senior management.[92] The Department assumes that State-registered investment advisers exhibit similar retrospective review patterns as SEC-registered investment advisers. Accordingly, the Department estimates that eight percent, or 1,312 investment advisers advising retirement plans will incur costs associated with producing a retrospective review report.

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[88] *Rule 3110. Supervision,* FINRA Manual, https://www.finra.org/rules-guidance/rulebooks/finra-rules/3110

[89] *Rule 3120. Supervisory Control System,* FINRA Manual, https://www.finra.org/rules-guidance/rulebooks/finra-rules/3120.

[90] *Rule 3130. Annual Certification of Compliance and Supervisory Processes,* FINRA Manual, https://www.finra.org/rules-guidance/rulebooks/finra-rules/3130.

[91] NAIC Model Regulation, Section 6.C.(2)(i) (The same requirement is found in the NAIC Suitability in Annuity Transactions Model Regulation (2010), Section 6.F.(1)(f).)

[92] *2018 Investment Management Compliance Testing Survey,* Investment Adviser Association (Jun. 14, 2018), https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/publications/2018-Investment-Management_Compliance-Testing-Survey-Results-Webcast_pptx.pdf.

The Department assumes that only 0.8 percent of registered investment advisers and ten percent of all other Financial Institutions will incur the total costs of producing the retrospective review report. This is estimated to take a legal professional five hours for small firms and 10 hours for large firms. This results in an annual hour burden of 3,156 hours and an equivalent cost burden of $522,907.[93]

Financial Institutions that already produce retrospective review reports voluntarily or in accordance with other regulators' rules likely will spend additional time to fully comply with this exemption condition such as revising their current retrospective review reports. This is estimated to take a financial professional one hour for small firms and two hours for large firms. This results in an annual hour burden of 33,103 hours and an equivalent cost burden of $5,485,436.[94]

In addition to conducting the audit and producing a report, Financial Institutions also will need to review the report and certify the exemption. This is estimated to take the certifying officer two hours for small firms and four hours for large firms. This results in an hour burden of 67,467 and an equivalent cost burden of $13,375,426.[95]

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[93] The burden is estimated as: [(431 small broker-dealers + (2,989 small registered-investment advisers x 8%) + 71 small insurers + 10 small robo-advisers + 30 small non-bank trustees) x 10% x 5 hours] + [(1,489 large broker-dealers + (13,409 large registered-investment advisers x 8%) + 13 large insurers + 190 large robo-advisers + 1 large non-bank trustee) x 10% x 10 hours] = 3,156 hours. The equivalent cost is estimated as: {[(431 small broker-dealers + (2,989 small registered-investment advisers x 8%) + 71 small insurers + 10 small robo-advisers + 30 small non-bank trustees) x 10% x 5 hours] + [(1,489 large broker-dealers + (13,409 large registered-investment advisers x 8%) + 13 large insurers + 190 large robo-advisers + 1 large non-bank trustee) x 10% x 10 hours]} x $165.71 = $522,907.

[94] The burden is estimated as: [(431 small broker-dealers + (2,989 small registered-investment advisers x 8%) + 71 small insurers + 10 small robo-advisers + 30 small non-bank trustees) x 90% x 2 hours] + [(1,489 large broker-dealers + (13,409 large registered-investment advisers x 8%) + 13 large insurers + 190 large robo-advisers + 1 large non-bank trustee)) x 90% x 4 hours] = 33,103 hours. The equivalent cost is estimated as: {[(431 small broker-dealers + (2,989 small registered-investment advisers x 8%) + 71 small insurers + 10 small robo-advisers + 30 small non-bank trustees) x 90% x 2 hours] + [(1,489 large broker-dealers + (13,409 large registered-investment advisers x 8%) + 13 large insurers + 190 large robo-advisers + 1 large non-bank trustee)) x 90% x 4 hours]} x $165.71 = $5,485,436.

[95] The burden is estimated as: [(431 small broker-dealers + (2,989 small registered-investment advisers x 8%) + 71 small insurers + 10 small robo-advisers + 30 small non-bank trustees) x 2 hours] + [(1,488 large broker-dealers + (13,409 large registered-investment advisers x 8%) + 13 large insurers + 190 large robo-advisers + 1 large non-bank

Table 10: Hour Burden and Equivalent Cost Associated with the Retrospective Review				
	Year 1		Subsequent Years	
Activity	**Burden Hours**	**Equivalent Burden Cost**	**Burden Hours**	**Equivalent Burden Cost**
Legal	36,258	$6,008,343	36,258	$6,008,343
Senior Executive Staff	67,467	$13,375,426	67,467	$13,375,426
Total	**103,726**	**$19,383,769**	**103,726**	**$19,383,769**

1.5 Costs Associated with Written Policies and Procedures

Under the original exemption, Financial Institutions were already required to maintain their policies and procedures. Financial Institutions who are not covered under the existing exemption may need to develop policies and procedures. The Department estimates that, for entities newly reliant upon PTE 2020-02 due to this rulemaking, this requirement will take legal professionals 40 hours at a large firm and 20 hours at a small firm in the first year.[96] Retail broker-dealers and all registered investment advisors should have policies and procedures in place to satisfy other regulators that can be amended to comply with this rulemaking. The Department estimates it will take 10 hours for small firms and 20 hours for large firms to amend their policies and procedures. The Department estimates the requirement to result in an hour burden of 111,864 with an equivalent cost of $18,536,977 in the first year.[97]

trustee)) x 4 hours] = 67,467 hours. The equivalent cost is estimated as: {[(431 small broker-dealers + (2,989 small registered-investment advisers x 8%) + 71 small insurers + 10 small robo-advisers + 30 small non-bank trustees) x 2 hours] + [(1,489 large broker-dealers + (13,409 large registered-investment advisers x 8%) + 13 large insurers + 190 large robo-advisers + 1 large non-bank trustee)) x 4 hours]} x $198.25 = $13,375,426.

[96] The Department estimates that 3,531 entities, consisting of 302 retail broker-dealers, 129 non-Retail broker-dealers, 85 SEC-registered Retail registered investment advisers, 144 SEC-registered non-Retail registered investment advisers, 2,192 state registered Retail registered investment advisers, 568 state registered Non-Retail registered investment advisers, 71 insurers and insurance agents, 10 robo-advisers, and 31 non-bank trustees, are considered small entities.

[97] The burden is estimated as follows: [(302 small retail broker-dealers + 85 small SEC-registered retail registered investment advisers + 144 small SEC-registered non-retail registered investment advisers + 2,192 small state registered retail registered investment advisers + 568 small state registered non-retail registered investment advisers)

Table 11: Hour Burden and Equivalent Cost Associated with Developing Policies and Procedures				
	Year 1		Subsequent Years	
Activity	**Burden Hours**	**Equivalent Burden Cost**	**Burden Hours**	**Equivalent Burden Cost**
Legal	111,864	$18,536,977	0	$0
Total	**111,864**	**$18,536,977**	**0**	**$0**

The Final Amendment requires Financial Institutions to review policies and procedures at least annually and to update them as needed to ensure they remain prudently designed, effective, and current. This includes a requirement to update and modify the policies and procedures, as appropriate, after considering the findings in the retrospective review report. For entities currently covered by PTE 2020-02, the Department estimates that it will take a legal professional an additional five hours for all entities covered under the existing and amended exemption. The Department expects that in the first year, only entities already reliant on PTE 2020-02 will satisfy this requirement but all entities will be required to satisfy it in subsequent years. The Department estimates this will result an estimated first year hour burden of 65,559 with an equivalent cost of $10,863,864. In subsequent years, this will result in an annual hour burden of 93,161 hours with an equivalent cost of $15,437,780 in subsequent years.[98]

x 30% newly reliant on the PTE x 10 hours] + {[(1,018 large retail broker-dealers + 129 small non-retail broker-dealers + 4,859 large SEC-registered retail registered investment advisers + 2,947 large SEC-registered non-retail registered investment advisers + 4,450 large state registered retail registered investment advisers + 1,153 large state registered non-retail registered investment advisers + 71 insurers) x 30% newly reliant on the PTE] + (10 small robo-advisers + 30 small non-bank trustees) × 20 hours} + {[(471 large non-retail broker-dealers + 13 large insurers) x 30% newly reliant on the PTE] + 190 large robo-advisers + 1 large non-bank trustee) × 40 hours]} = 111,864 hours. The labor rate is applied in the following calculation: 111,864 burden hours x $165.71 = $18,536,977. Note, the total values may not equal the sum of the parts due to rounding.

[98] The burden is estimated as follows: The first-year cost of updating policies and procedures for plans that currently have policies & procedures: [(302 small Retail broker-dealers + 85 small SEC-registered Retail registered investment advisers + 144 small SEC-registered non-retail registered investment advisers + 2,192 small state registered retail registered investment advisers + 568 small state registered non-retail registered investment advisers) x 30% newly reliant on the PTE x 10 hours] + {[(1,018 large Retail broker-dealers + 129 small Non-Retail broker-dealers + 4,859 large SEC-registered Retail registered investment advisers + 2,947 large SEC-registered Non-Retail

Table 12: Hour Burden and Equivalent Cost Associated with Reviewing and Updating Policies and Procedures				
	Year 1		Subsequent Years	
Activity	Burden Hours	Equivalent Burden Cost	Burden Hours	Equivalent Burden Cost
Legal	65,559	$10,863,864	93,161	$15,437,780
Total	**65,559**	**$10,863,864**	**93,161**	**$15,437,780**

The amendments will require Financial Institutions to provide their complete policies and procedures to the Department upon request. Based on the number of cases in the past and current open cases that would merit such a request, the Department estimates that the Department would request 165 policies and procedures in the first year and 50 policies and procedures in subsequent years. The Department estimates that it will take a clerical worker 15 minutes to prepare and send their complete policies and procedures to the Department resulting in an hourly burden of approximately 41 hours in the first year, with an equivalent cost of $2,722.[99] In subsequent years, the Department estimates that the requirement would result in an hour burden of approximately 13 hours with an equivalent cost of $825.[100] The Department assumes Financial Institutions would send the documents electronically and thus would not incur costs for postage or materials.

Table 13: Hour Burden and Equivalent Cost Associated with Providing Policies and Procedures to the Department				
	Year 1		Subsequent Years	
Activity	Burden Hours	Equivalent Burden Cost	Burden Hours	Equivalent Burden Cost
Clerical	41	$2,722	13	$825
Total	**41**	**$2,722**	**13**	**$825**

1.6 Overall Summary

registered investment advisers + 4,450 large state registered Retail registered investment advisers + 1,153 large state registered non-retail registered investment advisers + 71 insurers) x 30% newly reliant on the PTE] + (10 small robo-adviser) × 20 hours} + {[(471 large Non-Retail broker-dealers + 13 large insurers) x 70% already reliant on the PTE] + 190 large robo-advisers) = 14,143 entities x 5 hours = 65,559 hours. The labor rate is applied in the following calculation: 65,559 hours x $165.71 = $10,863,864. In subsequent years the cost of updating is calculated as: (All 18,632 affected entities x 5 hours) = 93,161 burden hours. The labor rate is applied in the following calculation: 93,161 burden hours x $165.71 burden hours = $15,437,780. Note, the total values may not equal the sum of the parts due to rounding.

99 The burden is estimated as: (165 x (15 minutes ÷ 60 minutes hours)) = 41 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: (165 x (15 minutes ÷ 60 minutes hours)) x $65.99 = $2,722. Note, the total values may not equal the sum of the parts due to rounding.

100 The burden is estimated as: (50 x (15 minutes ÷ 60 minutes hours)) = 13 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: (50 x (15 minutes ÷ 60 minutes hours)) x $65.99 = $825. Note, the total values may not equal the sum of the parts due to rounding.

The paperwork burden estimates are summarized as follows:

Type of Review: Revision of an existing collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Fiduciary Transaction Exemption

OMB Control Number: 1210–0163.

Affected Public: Business or other for-profit institution.

Estimated Number of Respondents: 18,632.

Estimated Number of Annual Responses: 114,609,171.

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

Estimated Total Annual Burden Hours: 2,599,221.

Estimated Total Annual Burden Cost: $18,359,543.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)[101] imposes certain requirements on rules subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act or any other law.[102] Under section 604 of the RFA, agencies must submit a final regulatory flexibility analysis (FRFA) of a final rulemaking that is likely to have a significant economic impact on a substantial number of small entities, such as small businesses, organizations, and governmental jurisdictions. This amended exemption, along with related amended exemptions and a rule amendment published elsewhere in this issue of the *Federal Register*, is part of a rulemaking regarding the definition of fiduciary investment advice, which the Department has determined likely will have a significant economic impact on a substantial number of small

[101] 5 U.S.C. 601 *et seq.*

[102] 5 U.S.C. 601(2), 603(a); *see* 5 U.S.C. 551.

entities. The impact of this amendment on small entities is included in the FRFA for the entire project, which can be found in the related notice of rulemaking found elsewhere in this edition of the *Federal Register*.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995[103] requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a final rule that may result in an expenditure of $100 million or more (adjusted annually for inflation with the base year 1995) in any 1 year by state, local, and tribal governments, in the aggregate, or by the private sector.

For purposes of the Unfunded Mandates Reform Act, this exemption is expected to have an impact on the private sector. For the purposes of the exemption the regulatory impact analysis published with the final rule shall meet the UMRA obligations.

Federalism Statement

Executive Order 13132 outlines fundamental principles of federalism. It also requires Federal agencies to adhere to specific criteria in formulating and implementing 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. Federal agencies promulgating regulations that have these federalism implications must consult with State and local officials and describe the extent of their consultation and the nature of the concerns of State and local officials in the preamble to the final Regulation. Notwithstanding this, Section 514 of ERISA provides, with certain exceptions specifically

[103] Pub. L. 104-4, 109 Stat. 48 (Mar. 22, 1995).

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 Department has carefully considered the regulatory landscape in the states and worked to ensure that its regulations would not impose obligations on impacted industries that are inconsistent with their responsibilities under state law, including the obligations imposed in states that based their laws on the NAIC Model Regulation. Nor would these regulations impose obligations or costs on the state regulators. As discussed more fully in the final Regulation and in the preamble to PTE 84-24, there is a long history of shared regulation of insurance between the States and the Federal government. The Supreme Court addressed this issue and held that "ERISA leaves room for complementary or dual federal or state regulation" of insurance.[104] The Department designed the final Regulation and exemptions to complement State insurance laws.[105]

The Department does not intend this exemption to change the scope or effect of ERISA section 514, including the savings clause in ERISA section 514(b)(2)(A) for State regulation of securities, banking, or insurance laws. Ultimately, the Department does not believe this class exemption has 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.

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[104] *See John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank,* 510 U.S. 86, 98 (1993).

[105] *See BancOklahoma Mortg. Corp.* v. *Capital Title Co., Inc.,* 194 F.3d 1089 (10th Cir. 1999) (stating that McCarran-Ferguson Act bars the application of a Federal statute only if (1) the Federal statute does not specifically relate to the business of insurance; (2) a State statute has been enacted for the purpose of regulating the business of insurance; and (3) the Federal statute would invalidate, impair, or supersede the State statute); *Prescott Architects, Inc.* v. *Lexington Ins. Co.,* 638 F. Supp. 2d 1317 (N.D. Fla. 2009); *see also U.S.* v. *Rhode Island Insurers' Insolvency Fund,* 80 F.3d 616 (1st Cir. 1996). The Supreme Court has held that to "impair" a State law is to hinder its operation or "frustrate [a] goal of that law." *Humana Inc. V. Forsyth*, 525 U.S. 299, 308 (1999).

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

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

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

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

The Department is granting the following amendment on its own motion, pursuant to its authority under ERISA section 408(a) and Code section 4975(c)(2) and in accordance with procedures set forth in 29 CFR part 2570, Subpart B (76 FR 66637 (October 27, 2011)).[106]

Prohibited Transaction Exemption 2020-02, Improving Investment Advice for Workers & Retirees

Section I—Transactions

(a) In General.

ERISA Title I (Title I) and the Internal Revenue Code (the Code) prohibit fiduciaries, as defined therein, that provide investment advice to Plans and individual retirement accounts (IRAs) from receiving compensation that varies based on their investment advice and compensation that is paid from third parties. Title I and the Code also prohibit fiduciaries from engaging in purchases and sales with Plans or IRAs on behalf of their own accounts (principal transactions). This exemption permits Financial Institutions and Investment Professionals who comply with the exemption's conditions to receive otherwise prohibited compensation when providing fiduciary investment advice to Retirement Investors and engaging in principal transactions with Retirement Investors, as described below.

Specifically, this exemption provides relief from the prohibitions of ERISA section 406(a)(1)(A), (D), and 406(b), and the sanctions imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(A), (D), (E), and (F), to Financial Institutions and Investment Professionals that provide fiduciary investment advice and engage in the conditions described in

[106] Reorganization Plan No. 4 of 1978 (5 U.S.C. App. 1 (2018)) generally transferred the authority of the Secretary of the Treasury to grant administrative exemptions under Code section 4975 to the Secretary of Labor. Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications were amended effective April 8, 2024 (29 CFR part 2570, Subpart B (89 FR 4662 (January 24, 2024)).

Section I, in accordance with the conditions set forth in Section II and are eligible pursuant to Section III, subject to the definitional terms and recordkeeping requirements in Sections IV and V. This exemption is available to allow Financial Institutions and Investment Professionals to receive reasonable compensation for recommending a broad range of investment products to Retirement Investors, including insurance and annuity products.

(b) Covered transactions.

This exemption permits Financial Institutions and Investment Professionals, and their Affiliates and Related Entities, to engage in the following transactions, including as part of a rollover, as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder:

(1) The receipt, directly or indirectly, of reasonable compensation; and

(2) The purchase or sale of an investment product to or from a Retirement Investor, and the receipt of payment, including a mark-up or mark-down.

(c) Exclusions

This exemption is not available if:

(1) The Plan is covered by Title I of ERISA and the Investment Professional, Financial Institution, or any Affiliate is:

(A) the employer of employees covered by the Plan, or

(B) the Plan's named fiduciary or administrator; provided, however, that a named fiduciary or administrator or their Affiliate, including a Pooled Plan Provider (PPP) registered with the Department of Labor under 29 CFR 2510.3-44, may rely on the exemption if it is selected to provide investment advice by a fiduciary who is Independent of the Financial Institution, Investment Professional, and their Affiliates; or

(2) The transaction involves the Investment Professional or Financial Institution acting in a fiduciary capacity other than as an investment advice fiduciary within the meaning of ERISA section 3(21)(A)(ii)) and Code section 4975(e)(3)(B) and regulations thereunder.

Section II—Investment Advice Arrangement

Section II(a) requires Investment Professionals and Financial Institutions to comply with Impartial Conduct Standards, including a Care Obligation and Loyalty Obligation, when providing fiduciary investment advice to Retirement Investors. Section II(b) requires Financial Institutions to acknowledge fiduciary status under Title I and/or the Code, and provide Retirement Investors with a written statement of the Care Obligation and Loyalty Obligation, a written description of the services they will provide and all material facts relating to Conflicts of Interest that are associated with their recommendations, and a rollover disclosure (if applicable). Section II(c) requires Financial Institutions to adopt policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards and other conditions of this exemption. Section II(d) requires the Financial Institution to conduct a retrospective review, at least annually, that is reasonably designed to detect and prevent violations of, and achieve compliance with, the Impartial Conduct Standards and the terms of this exemption. Section II(e) allows Financial Institutions to correct certain violations of the exemption conditions and continue to rely on the exemption for relief.

(a) Impartial Conduct Standards.

The Financial Institution and Investment Professional must comply with the following "Impartial Conduct Standards":

(1) Investment advice must, at the time it is provided, satisfy the Care Obligation and Loyalty Obligation. As defined in Section V(b), to meet the Care Obligation, advice must reflect

the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor. As defined in Section V(h), to meet the Loyalty Obligation, the advice must not place the financial or other interests of the Investment Professional, Financial Institution or any Affiliate, Related Entity, or other party ahead of the interests of the Retirement Investor or subordinate the Retirement Investor's interests to their own. For example, in choosing between two commission-based investments offered and available to the Retirement Investor on a Financial Institution's product menu, it would be impermissible for the Investment Professional to recommend the investment that is worse for the Retirement Investor but better or more profitable for the Investment Professional or the Financial Institution. Similarly, in recommending whether a Retirement Investor should pursue a particular investment strategy through a brokerage or advisory account, the Investment Professional must base the recommendation on the Retirement Investor's financial interests, rather than any competing financial interests of the Investment Professional. For example, an Investment Professional generally could not recommend that the Retirement Investor enter into an arrangement requiring the Retirement Investor to pay an ongoing advisory fee to the Investment Professional, if the Retirement Investor's interests were better served by the payment of a one-time commission to buy and hold a long-term investment. In making recommendations as to account type, it is important for the Investment Professional to ensure that the recommendation carefully considers the reasonably expected total costs over time to the Retirement Investor, and that the Investment Professional base its recommendations on the financial interests of the Retirement Investor and avoid subordinating those interests to the

Investment Professional's competing financial interests.

(2)(A) The compensation received, directly or indirectly, by the Financial Institution, Investment Professional, their Affiliates and Related Entities for their services must not exceed reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2); and (B) as required by the Federal securities laws, the Financial Institution and Investment Professional must seek to obtain the best execution of the investment transaction reasonably available under the circumstances; and

(3) The Financial Institution's and its Investment Professionals' statements to the Retirement Investor (whether written or oral) about the recommended transaction and other relevant matters must not be materially misleading at the time statements are made. For purposes of this paragraph, the term "materially misleading" includes omitting information that is needed to prevent the statement from being misleading to the Retirement Investor under the circumstances.

(b) Disclosure

At or before the time a covered transaction occurs, as described in Section I(b) of this exemption, the Financial Institution must provide, in writing, the disclosures set forth in paragraphs (1)-(4) below to the Retirement Investor. For purposes of the disclosures required by Section II(b)(1)-(4), the Financial Institution or Investment Professional is deemed to engage in a covered transaction on the later of (A) the date the recommendation is made or (B) the date the Financial Institution or Investment Professional becomes entitled to compensation (whether now or in the future) by reason of making the recommendation.

(1) A written acknowledgment that the Financial Institution and its Investment Professionals are providing fiduciary investment advice to the Retirement Investor and are

fiduciaries under Title I of ERISA, Title II of ERISA, or both with respect to the recommendation;

(2) A written statement of the Care Obligation and Loyalty Obligation, described in Section II(a), that is owed by the Investment Professional and Financial Institution to the Retirement Investor;

(3) All material facts relating to the scope and terms of the relationship with the Retirement Investor, including:

(A) The material fees and costs that apply to the Retirement Investor's transactions, holdings, and accounts; and

(B) The type and scope of services provided to the Retirement Investor, including any material limitations on the recommendations that may be made to them; and

(4) All material facts relating to Conflicts of Interest that are associated with the recommendation.

(5) *Rollover disclosure.* Before engaging in or recommending that a Retirement Investor engage in a rollover from a Plan that is covered by Title I of ERISA, or making a recommendation to a Plan participant or beneficiary as to the post-rollover investment of assets currently held in a Plan that is covered by Title I of ERISA, the Financial Institution and Investment Professional must consider and document the bases for their recommendation to engage in the rollover, and must provide that documentation to the Retirement Investor. Relevant factors to consider must include, to the extent applicable, but in any event are not limited to:

(A) the alternatives to a rollover, including leaving the money in the Plan, if applicable;

(B) the fees and expenses associated with the Plan and the recommended investment or account;

(C) whether an employer or other party pays for some or all of the Plan's administrative expenses; and

(D) the different levels of services and investments available under the Plan and the recommended investment or account.

(6) The Financial Institution will not fail to satisfy the conditions in Section II(b) solely because it, acting in good faith and with reasonable diligence, makes an error or omission in disclosing the required information, provided that the Financial Institution discloses the correct information as soon as practicable, but not later than 30 days after the date on which it discovers or reasonably should have discovered the error or omission.

(7) Investment Professionals and Financial Institutions may rely in good faith on information and assurances from the other entities that are not Affiliates as long as they do not know or have reason to know that such information is incomplete or inaccurate.

(8) The Financial Institution is not required to disclose information pursuant to this Section II(b) if such disclosure is otherwise prohibited by law.

(c) Policies and Procedures

(1) The Financial Institution establishes, maintains, and enforces written policies and procedures prudently designed to ensure that the Financial Institution and its Investment Professionals comply with the Impartial Conduct Standards and other exemption conditions.

(2) The Financial Institution's policies and procedures must mitigate Conflicts of Interest to the extent that a reasonable person reviewing the policies and procedures and incentive practices as a whole would conclude that they do not create an incentive for the Financial Institution or Investment Professional to place their interests, or those of any Affiliate or Related

Entity, ahead of the interests of the Retirement Investor. Financial Institutions may not use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives in a manner that is intended, or that a reasonable person would conclude are likely, to result in recommendations that do not meet the Care Obligation or Loyalty Obligation.

(3) Financial Institutions must provide their complete policies and procedures to the Department upon request within 30 days of request.

(d) Retrospective Review

(1) The Financial Institution conducts a retrospective review, at least annually, that is reasonably designed to detect and prevent violations of, and achieve compliance with the conditions of this exemption, including the Impartial Conduct Standards and the policies and procedures governing compliance with the exemption. The Financial Institution must update the policies and procedures as business, regulatory, and legislative changes and events dictate, to ensure that the policies and procedures remain prudently designed, effective, and compliant with Section II(c).

(2) The methodology and results of the retrospective review must be reduced to a written report that is provided to a Senior Executive Officer of the Financial Institution.

(3) The Senior Executive Officer must certify, annually, that:

(A) The Senior Executive Officer has reviewed the retrospective review report;

(B) The Financial Institution has filed (or will file timely, including extensions) Form 5330 reporting any non-exempt prohibited transactions discovered by the Financial Institution in connection with investment advice covered under Code section 4975(e)(3)(B), corrected those transactions, and paid any resulting excise taxes owed under Code section

4975(a) or (b);

(C) The Financial Institution has written policies and procedures that meet the requirements set forth in Section II(c); and

(D) The Financial Institution has a prudent process to modify such policies and procedures as required by Section II(d)(1).

(4) The review, report, and certification must be completed no later than six months after the end of the period covered by the review.

(5) The Financial Institution must retain the report, certification, and supporting data for a period of six years and make the report, certification, and supporting data available to the Department within 30 days of request to the extent permitted by law (including 12 U.S.C. 484 regarding limitations on visitorial powers for national banks).

(e) Self-Correction

A non-exempt prohibited transaction will not occur due to a violation of this exemption's conditions with respect to a covered transaction, provided:

(1) Either the violation did not result in investment losses to the Retirement Investor or the Financial Institution made the Retirement Investor whole for any resulting losses;

(2) The Financial Institution corrects the violation;

(3) The correction occurs no later than 90 days after the Financial Institution learned of the violation or reasonably should have learned of the violation; and

(4) The Financial Institution notifies the person(s) responsible for conducting the retrospective review during the applicable review cycle and the violation and correction is specifically set forth in the written report of the retrospective review required under subsection II(d)(2).

(f) ERISA section 3(38) Investment Managers.

To the extent a Financial Institution or Investment Professional provides fiduciary investment advice to a Retirement Investor as part of its response to a request for proposal to provide investment management services under section 3(38) of ERISA, and is subsequently hired to act as investment manager to the Retirement Investor, it may receive compensation as a result of the advice under this exemption, provided that it complies with the Impartial Conduct Standards as set forth in Section II(a). This paragraph does not relieve the Investment Manager, however, from its obligation to refrain from engaging in any non-exempt prohibited transactions in the ongoing performance of its activities as an Investment Manager.

Section III—Eligibility

(a) General

Subject to the timing and scope of ineligibility provisions set forth in subsection (b), an Investment Professional or Financial Institution will become ineligible to rely on this exemption with respect to any covered transaction, if on or after [INSERT DATE THAT IS 150 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER], the Financial Institution, an entity in the same Controlled Group as the Financial Institution, or an Investment Professional has been:

(1) Convicted by either:

(A) a U.S. Federal or State court as a result of any felony involving abuse or misuse of such person's employee benefit plan position or employment, or position or employment with a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary; income tax evasion; any felony involving larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element; or a crime that is identified or described in ERISA section 411; or

(B) a foreign court of competent jurisdiction as a result of any crime, however denominated by the laws of the relevant foreign or state government, that is substantially equivalent to an offense described in (A) above (excluding convictions that occur within a foreign country that is included on the Department of Commerce's list of "foreign adversaries" that is codified in 15 CFR 7.4 as amended); or

(2) Found or determined in a final judgment or court-approved settlement in a Federal or State criminal or civil court proceeding brought by the Department, the Department of the Treasury, the Internal Revenue Service, the Securities and Exchange Commission, the Department of Justice, the Federal Reserve, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Commodity Futures Trading Commission, a State insurance or securities regulator, or State attorney general to have participated in one or more of the following categories of conduct irrespective of whether the court specifically considers this exemption or its terms:

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

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

(C) engaged in a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330 or pay the resulting excise taxes imposed by Code section 4975 in connection with non-exempt prohibited transactions involving investment advice as defined under Code section 4975(e)(3)(B); or

(D) provided materially misleading information to the Department, the Department of the Treasury, the Internal Revenue Service, the Securities and Exchange Commission, the Department of Justice, the Federal Reserve, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Commodity Futures Trading Commission, a State insurance or securities regulator, or State attorney general in connection with the conditions of this exemption.

(3) Controlled Group. An entity is in the same Controlled Group as a Financial Institution if the entity (including any predecessor or successor to the entity) would be considered to be in the same "controlled group of corporations" as the Financial Institution or "under common control" with the Financial Institution as those terms are defined in Code section 414(b) and (c) (and any regulations issued thereunder),

(b) Timing and Scope of Ineligibility.

(1) Ineligibility shall begin upon either:

(A) the date of a conviction, which shall be the date of conviction by a U.S. Federal or State trial court described in Section III(a)(1) (or the date of the conviction of any trial court in a foreign jurisdiction that is the equivalent of a U.S. Federal or State trial court) that occurs on or after [INSERT DATE THAT IS 150 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER], regardless of whether that conviction remains under appeal; or

(B) the date of a final judgment (regardless of whether the judgment remains under appeal) or a court-approved settlement described in Section III(a)(2) that occurs on or after [INSERT DATE THAT IS 150 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

(2) One-Year Transition Period. A Financial Institution or Investment Professional that

becomes ineligible under Section III(a) may continue to rely on this exemption for up to 12 months after its ineligibility begins as determined under subsection (1) if the Financial Institution or Investment Professional provides notice to the Department at IIAWR@dol.gov within 30 days after ineligibility begins.

(3) A person will become eligible to rely on this exemption again only upon the earliest occurrence of the following:

(A) the date of a subsequent judgment reversing such person's conviction or other court decision described in Section III(a);

(B) 10 years after the person became ineligible under Section III(b)(1) or, if later, 10 years after the person was released from imprisonment as a result of a crime described in Section III(a)(1); or

(C) the effective date of an individual prohibited transaction exemption (under which the Department may impose additional conditions) permitting the person to continue to rely on this exemption.

(c) Alternative Exemptions

A Financial Institution or Investment Professional that is ineligible to rely on this exemption may rely on an existing statutory or separate class prohibited transaction exemption if one is available or may request an individual prohibited transaction exemption from the Department. To the extent an applicant requests retroactive relief in connection with an individual exemption application, the Department will consider the application in accordance with its retroactive exemption policy set forth in 29 CFR 2570.35(d). The Department may require additional prospective compliance conditions as a condition of providing retroactive relief.

Section IV—Recordkeeping

The Financial Institution must maintain for a period of six years following the covered transaction records demonstrating compliance with this exemption and make such records available to the extent permitted by law, including 12 U.S.C. 484, to any authorized employee of the Department or the Department of the Treasury, which includes the Internal Revenue Service.

Section V—Definitions

(a) "**Affiliate**" means:

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the Investment Professional 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, partner, employee, or relative (as defined in ERISA section 3(15)), of the Investment Professional or Financial Institution; and

(3) Any corporation or partnership of which the Investment Professional or Financial Institution is an officer, director, or partner.

(b) Advice meets the "**Care Obligation**" if, with respect to the Retirement Investor, such advice reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor.

(c) A "**Conflict of Interest**" is an interest that might incline a Financial Institution or Investment Professional—consciously or unconsciously—to make a recommendation that is not distinterested.

(d) "**Financial Institution**" means an entity that is not suspended, barred or otherwise prohibited (including under Section III of this exemption) from making investment recommendations by any insurance, banking, or securities law or regulatory authority (including any self-regulatory organization), that employs the Investment Professional 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 a 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)));

(3) An insurance company qualified to do business under the laws of a state, that: (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 five years, and (C) is domiciled in a state whose law requires that an actuarial review of reserves be conducted annually and reported to the appropriate regulatory authority;

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

(5) A non-bank trustee or non-bank custodian approved under Treasury Regulation 26 CFR §1.408-2(e) (as amended), but only to the extent they are serving in these capacities with

respect to Health Savings Accounts (HSAs), or

(6) An entity that is described in the definition of Financial Institution in an individual exemption granted by the Department after the date of this exemption that provides relief for the receipt of compensation in connection with investment advice provided by an investment advice fiduciary under the same conditions as this class exemption.

(e) For purposes of subsection I(c)(1), a fiduciary is "**Independent**" of the Financial Institution and Investment Professional if:

(1) the fiduciary is not the Financial Institution, Investment Professional, or an Affiliate;

(2) the fiduciary does not have a relationship to or an interest in the Financial Institution, Investment Professional, or any Affiliate that might affect the exercise of the fiduciary's best judgment in connection with transactions covered by this exemption; and

(3) the fiduciary does not receive and is not projected to receive within its current Federal income tax year, compensation or other consideration for its own account from the Financial Institution, Investment Professional, or an Affiliate, in excess of two (2) percent of the fiduciary's annual revenues based upon its prior income tax year.

(f) "**Individual Retirement Account**" or "**IRA**" means any plan that is an account or annuity described in Code section 4975(e)(1)(B) through (F).

(g) "**Investment Professional**" means an individual who:

(1) Is a fiduciary of a Plan or an IRA by reason of the provision of investment advice defined 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 of the Plan or IRA involved in the recommended transaction;

(2) Is an employee, independent contractor, agent, or representative of a Financial

Institution; and

(3) Satisfies the Federal and State regulatory and licensing requirements of insurance, banking, and securities laws (including self-regulatory organizations) with respect to the covered transaction, as applicable, and is not disqualified or barred from making investment recommendations by any insurance, banking, or securities law or regulatory authority (including any self-regulatory organization and by the Department under Section III of this exemption).

(h) Advice meets the "**Loyalty Obligation**" if, with respect to the Retirement Investor, such advice does not place the financial or other interests of the Investment Professional, Financial Institution or any Affiliate, Related Entity, or other party ahead of the interests of the Retirement Investor, or subordinate the Retirement Investor's interests to those of the Investment Professional, Financial Institution or any Affiliate, Related Entity, or other party.

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

(j) A "**Pooled Plan Provider**" or "**PPP**" means a pooled plan provider described in ERISA section 3(44).

(k) A "**Related Entity**" means any party that is not an Affiliate and (i) has an interest in an Investment Professional or Financial Institution that may affect the exercise of the fiduciary's best judgment as a fiduciary, or (ii) in which the Investment Professional or Financial Institution has an interest that may affect the exercise of the fiduciary's best judgment as a fiduciary.

(l) "**Retirement Investor**" means a Plan, Plan participant or beneficiary, IRA, IRA owner or beneficiary, Plan fiduciary within the meaning of ERISA section (3)(21)(A)(i) or (iii) and Code section 4975(e)(3)(A) or (C) with respect to the Plan, or IRA fiduciary within the meaning of Code section 4975(e)(3)(A) or (C) with respect to the IRA.

(m) A "**Senior Executive Officer**" is any of the following: the chief compliance officer, the chief executive officer, president, chief financial officer, or one of the three most senior officers of the Financial Institution.

Section VI—Phase-In Period

During the one-year period beginning [INSERT DATE THAT IS 150 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER], Financial Institutions and Investment Professionals may receive compensation under Section I of this exemption if the Financial Institution and Investment Professional comply with the Impartial Conduct Standards set forth in Section II(a) and the fiduciary acknowledgment requirement set forth in Section II(b)(1).

Signed at Washington, DC, this 10th day of April, 2024.

Lisa M. Gomez,

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

4510-29-P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

[Application No. D-12094]

ZRIN 1210-ZA34

Amendment to Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, and 86-128

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

ACTION: Amendments to Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, and 86-128.

SUMMARY: This document contains a notice of amendments to Prohibited Transaction Exemptions (PTEs) 75-1, 77-4, 80-83, 83-1, and 86-128, which are class 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 amendments (collectively, the Mass Amendment) affect participants and beneficiaries of plans, individual retirement account (IRA) owners, and certain fiduciaries of plans and IRAs.

DATES: The Mass Amendment is effective [INSERT DATE THAT IS 150 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Susan Wilker, telephone (202) 693-8540, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor (these are not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

As described elsewhere in this edition of the *Federal Register*, the Department of Labor (Department) is amending the regulation defining when a person renders "investment advice for a fee or other compensation, direct or indirect" with respect to any moneys or other property of an employee benefit plan, for purposes of the definition of a "fiduciary" in section ERISA 3(21)(A)(ii) of ERISA and in Code section 4975(e)(3)(B) (the "Regulation"). The Department also is amending PTE 2020-02 to provide additional clarity for advice fiduciaries and protections for retirement investors and PTE 84-24 to address specific issues that insurance companies face in complying with the conditions of PTE 2020-02 when distributing annuities through independent agents, elsewhere in this edition of the *Federal Register*.

On October 31, 2023, the Department released the proposed amendments to PTEs 75-1, 77-4, 80-83, 83-1, and 86-128 described below and invited all interested persons to submit written comments.[1] The Department received written comments on the proposed amendments, and on December 12 and 13, 2023, held a public hearing at which witnesses presented testimony. After careful consideration of the comments and testimony on the proposed amendments, the Department is granting the Mass Amendment with the modifications discussed herein.

The amendments to PTEs 75-1, 77-4, 80-83, 83-1, and 86-128 remove relief in those exemptions for the receipt of compensation as a result of the provision of

[1] The proposed amendments were released on October 31, 2023, and were published in the *Federal Register* on November 3, 2023. 88 FR 76032.

investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

After this amendment is effective, investment advice fiduciaries must meet the conditions of PTE 2020-02 or PTE 84-24 for administrative relief when they receive otherwise prohibited compensation as a result of their provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder to Retirement Investors (defined as plans, plan participants or beneficiaries, IRAs, IRA owners and beneficiaries, plan fiduciaries within the meaning of ERISA section (3)(21)(A)(i) or (iii) and Code section 4975(e)(3)(A) or (C) with respect to the Plan, or IRA fiduciaries within the meaning of Code section 4975(e)(3)(A) or (C) with respect to the IRA).

As described in more detail below, the Department also is amending PTE 75-1 by: (1) expanding the extension of credit provision in Part V; and (2) adding a definition of the term "IRA" in Part V. The Department also is amending PTE 86-128 by: (1) revising the exemption's "Recapture of Profits" exception; and (2) making certain technical corrections and editorial changes.

The ERISA and Code provisions at issue generally prohibit fiduciaries with respect to employee benefit plans and IRAs from engaging in self-dealing in connection with transactions involving plans and IRAs. The Department is granting these amendments pursuant to its authority under ERISA section 408(a) and Code section 4975(c)(2).[2]

[2] Reorganization Plan No. 4 of 1978 (5 U.S.C. App. 1 (2018)) generally transferred the authority of the Secretary of the Treasury to grant administrative exemptions under Code section 4975 to the Secretary of Labor.

Other Advice Exemptions

As discussed elsewhere in this edition of the *Federal Register*, the Department is amending investment advice exemptions to ensure consistent and protective standards apply to investment advice. After considering the comments it received, the Department made significant changes to both PTEs 2020-02 and 84-24 to ensure that there is an investment advice exemption available that applies to an appropriately wide range of situations. Many comments raised issues, or discussed concerns, with the Department's proposed amendments collectively (rather than proposal by proposal). In this same vein, the Department considered these comments holistically. For example, one commenter expressed concern that it would no longer be able to rely on PTE 77-4 for investment advice if the proposed amendments were finalized and was also concerned about whether it could use PTE 2020-02. After consideration of the comments, the Department determined it would make changes to PTE 2020-02 to revise certain conditions and broaden its scope rather than make changes to the Mass Amendment proposal. Although the changes to PTEs 2020-02[3] and 84-24[4] are discussed more completely in the respective documents, the changes in the three exemption documents reflect the full scope of comments received. The conditions to those exemptions, as finalized, emphasize long-standing principles of loyalty and prudence, require careful management of conflicts of interest, and are workable across different compensation structures and business

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[3] PTE 2020-02 requires financial institutions and investment professionals relying on the exemption to: (i) acknowledge their fiduciary status in writing; (ii) disclose their services and material conflicts of interest; and adhere to impartial conduct standards; (iii) adopt policies and procedures prudently designed to ensure compliance with the impartial conduct standards and mitigate conflicts of interest that could otherwise cause violations of those standards; (iv) document and disclose the specific reasons that any rollover recommendations from Title I plans to IRAs are in the retirement investor's best interest; (v) and conduct an annual retrospective compliance review.

[4] PTE 84-24 covers transactions with independent insurance agents, and requires them to comply with conditions similar to the amended PTE 2020-02.

models related to the provision of investment advice to Retirement Investors.

The Department has concluded that PTE 2020-02 and PTE 84-24 provide a uniform and workable framework for the definition of fiduciary under ERISA with respect to the provision of investment advice, and that the protections now afforded by those exemptions should be available to Retirement Investors generally when they receive recommendations from trusted advisers. For all the reasons described in the preambles to the amendments to PTE 84-24 and PTE 2020-02, published elsewhere today in this edition of the *Federal Register*, as well as the associated Regulatory Impact Analysis, the Department has determined to condition relief from the prohibited transaction rules for fiduciary advice on the terms of PTE 84-24 and PTE 2020-02. Retirement Investors will be best served by a uniform protective standard focused on the Impartial Conduct Standards, and associated policies and procedures, as set forth in the preambles and text of those exemptions. In the Department's judgment, there is no reason in law or policy to deprive Retirement Investors who receive advice that was formerly covered by the exemptions affected by these Mass Amendment of the protections now provided to all Retirement Investors under PTE 84-24 and PTE 2020-02.

Summary of Proposed Amendments to PTEs 75-1, 77-4, 80-83, 83-1, and 86-128.

The proposed Mass Amendment was primarily aimed to ensure that all parties relying on the exemptive relief for the provision of investment advice are held to level standards and consistent criteria. In order to accomplish this goal, the Department proposed to amend PTEs 75-1 Parts III and IV, 77-4, 80-83, 83-1, and 86-128 by removing exemptive relief for the provision of fiduciary investment advice. Specifically, the proposal would have added the following statement to each exemption: "*Exception.*

No relief from the restrictions of ERISA section 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is available for fiduciaries providing investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder."

This proposed amendment was intended to ensure that retirement investors would receive consistent and appropriate protections when receiving fiduciary investment advice. The Department proposed to accomplish this by removing relief for fiduciary investment advice from class exemptions except for PTE 2020-02 and PTE 84-24. The proposed amendment was intended to ensure that Retirement Investors received fiduciary investment advice that reflected an appropriate level of care and loyalty and financial professionals could rely on a single framework regardless of the business model or the compensation structure. The Department's intention was to create a level regulatory playing field that would apply to all of the investment products that fiduciary investment providers may recommend to Retirement Investors. Under the proposed amendments, retirement investors could expect to receive substantially the same strong protections with respect to fiduciary investment recommendations, irrespective of the type of investment product that was recommended, and advice providers would compete for retirement investor's business under a common standard focused on the investor's best interest.

Discussion of the Comments to the Mass Amendment in General.

Commenters stated that the Regulation and all the proposed amendments, taken together, have internal contradictions. These commenters were concerned with perceived inconsistencies, costly conditions, and inefficient duplication (including with respect to remedies). According to these commenters, the Department's proposed changes would result in uncertainties, unintended consequences, counterproductive effects, and needless litigation. Commenters also expressed concern about the comment period and the proposed effective date. These general comments, and comments about the interaction between the Department's proposals are discussed both here and in other final amendments, published elsewhere in today's edition of the *Federal Register*.

Those commenters who focused on the proposed Mass Amendment tied their concerns to PTE 2020-02, and what they characterized as the Department's approach of requiring all fiduciary investment advice relief into PTE 2020-02. In particular, one commenter focused on certain transactions that would have been permitted by the class exemptions affected by the Mass Amendment, but which would have been excluded from PTE 2020-02, as proposed.[5] At least one commenter stated that the preamble to the proposal failed to identify the transactions being excluded from relief or explain the Department's rationale for excluding such transactions, some of which fiduciaries have been permitted to engage in since ERISA was passed. One of these commenters further opined that the Department's cost analysis in these regards was insufficient, and that the Administrative Procedure Act (the APA) and Executive Orders 12866 and 13563 preclude this kind of "sleight-of-hand rulemaking." Other commenters cited the APA as

[5] One commenter stated that all of the following investments could not be traded in the dealer market under PTE 2020-02 as it currently exists: equities (U.S. and foreign), asset-backed trusts, U.S. bonds of entities other than corporations, certain structured notes issued by U.S. corporations and subject to registration requirements under the Securities Act of 1933, currency, foreign corporate bonds, foreign government bonds, Rule 144A securities, privately issued real estate securities, closed-end funds, equity IPOs, and debt IPOs. As noted elsewhere, the amended exemptions are not intended to limit the scope of the current exemptions except with respect to the receipt of compensation as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder. In addition, as discussed in the preamble to today's amendments to PTE 2020-02, and in its text, PTE 2020-02 has been broadly amended to encompass compensation for advice irrespective of the product recommended.

well, and some also stated that the Mass Amendment exceeds the Department's authority, including under ERISA Section 408(a).[6]

Commenters expressed concern regarding the proposed Mass Amendment in light of the decision by the U.S. Court of Appeals for the Fifth Circuit, vacating the Department's 2016 rulemaking with respect to fiduciary advice.[7] Other commenters stated the proposed Mass Amendment would constitute improper regulation of IRAs.

Many of the commenters on the proposed Mass Amendment criticized the Department's approach as costly and said the Department had not adequately accounted for the costs to affected parties. For example, one commenter stated that, in their view, the majority of the changes proposed by the Department will be disruptive and unhelpful. Another commenter stated that the costs to the industry of changing their reliance on all of these exemptions would be high and was insufficiently unanalyzed by the Department. According to these commenters, financial institutions have established their policies, procedures, compliance routines, risk assessments, training and supervision structures to accommodate the exemptions each has chosen to use and requiring all of those institutions to revamp their systems and processes will be expensive and time consuming. This commenter was concerned that these costs were not fully reflected in the Department's cost assessment or effective date of the exemption. This commenter raised threats of litigation and cautioned that to the extent these changes are ultimately invalidated, the industry and the plans they serve will suffer unnecessary costs and

[6] ERISA section 408(a) and Code section 4975(c)(2), expressly permit the Department (through the Reorganization Plan No. 4 of 1978) to grant "a conditional or unconditional exemption" as long as the exemption is "(A) administratively feasible, (B) in the interests of the plan and of its participants and beneficiaries, and (C) protective of the rights of participants and beneficiaries of the plan."

[7] *See generally Chamber of Commerce v. U.S. Dep't of Lab.*, 885 F.3d 360 (5th Cir. 2018).

investment in ultimately vacated rules. In the view of this commenter, low and middle-income families would be disproportionately harmed by these changes, because it is the commenter's view that some firms and financial professionals would no longer provide fiduciary investment advice to low and middle-income families. One commenter disagreed that any changes were appropriate because the Department did not identify any harm. Other commenters called the proposed amendment "arbitrary and capricious."

Some of the commenters on these amendments focused specifically on concerns about an anticipated loss of efficiency. These commenters described PTEs 75-1, 77-4, 80-83, 83-1, and 86-128 as designed to cover specific types of transactions that financial services firms commonly undertake for plan or IRA investors. The conditions built into those class exemptions were specifically tailored to protect investors, while allowing for efficient conduct of ordinary and necessary plan transactions. If the proposed Mass Amendment is granted, these commenters argued that the efficiencies associated with the affected class exemptions would be lost, resulting in higher costs and fewer benefits to investors, and perhaps other unintended consequences. Another commenter stated that the insurance industry's suitability standards far exceed any other regulatory agency protections for protecting retirement accounts.

Other commenters focused specifically on the amendment to PTE 77-4. One commenter stated that eliminating the availability of PTE 77-4 for fiduciary investment advice would be highly disruptive and would create material new costs which would ultimately be borne by plans and participants. According to the commenter, PTE 77-4 already provides robust protections for plans and participants and these changes would lead to increased costs that the Department has failed to properly identify, analyze, and account for, and the costs of the disruption alone far outweigh any theoretical benefit to plans and participants. The commenter stated that the outsized burden of complying with the disclosure, documentation, reporting, and recordkeeping requirements of PTE 2020-02 may be too great for it to be viewed as a viable alternative to PTE 77-4 in many cases. The commenter added that the potential result of this is that financial firms are likely to no longer offer certain services to plans if doing so would require them to rely on PTE 2020-02.

Another commenter offered similar views, adding that for over 45 years financial institutions have relied on PTE 77-4 for both investment advice and discretionary programs. According to the commenter, the proposed amendment would require firms to fully inventory every product and service to identify every use of PTE 77-4 and determine whether the exemption can continue to be used and, if not, whether there are any viable alternatives. Other commenters expressed concern that the proposed amendments would result in increased compliance costs, including by having to rely on two class exemptions when previously only one was relied on. For example, a fiduciary would have to comply with PTE 2020-02 to recommend a particular program but would have to comply with PTE 77-4 to manage those assets.

One commenter cited several of the reasons above to support the view that the Mass Amendment is impermissible under ERISA Section 408(a), adding that many plans and participants would be harmed by the Mass Amendment.

Commenters focused on the impact of removing investment advice from PTE 86-128. According to one commenter, the proposed changes do not address situations where an adviser may have limited discretion over the purchase and sale of certain securities within an advisory account, such as mutual funds and exchange-traded funds (ETFs), but acts on a non-discretionary basis with respect to other securities within that same account, such as fee-based variable annuities or private placements. The commenter urged the Department to look more closely at the conditions of the exemption in light of the fact that PTE 86-128 deals only with agency transactions in securities, a field that the commenter characterized as fully regulated by the SEC that requires substantial transaction-based reporting. Other commenters stated that costs to retirement investors would increase if the proposal is adopted, because the material cost savings PTE 86-128 provides for investors would be lost if its relief is transferred to PTE 2020-02. One of these commenters stated that, in its members' view, PTE 86-128 provided a significant economic benefit to retirement investors when it is used, because the investor effectively receives two investment services for the price of one.

At least one commenter cited the difficulty small businesses face in complying with complex regulations, and one of these commenters stated that the Department's class exemptions appear in "piecemeal" form on its website. The commenter recommended that the Department update its class exemptions on its website to facilitate the review of the current exemption text (i.e., with all amendments incorporated).

Numerous commenters expressed strong support for the proposed Mass Amendment, and the Department's proposal to move coverage of fiduciary investment advice to PTEs 2020-02 and 84-24 to ensure consistency for all types and forms of fiduciary investment advice. One commenter argued that the proposed changes were important and would provide vulnerable retirement investors with needed protection against bad actors. Another commenter emphasized the importance of a baseline of protection for American workers against predatory practices. One commenter raised concerns with the lack of transparency in the current system and indicated that a single set of standards would help increase accountability for financial advisors and would be an important step for restoring public trust in the work that financial advisors do. This same commenter also stated that the care and loyalty obligations proposed by the Department in PTE 2020-02 and PTE 84-24 were essential to ensure that investment advice fiduciaries were acting in the best interest of their clients and not for their own financial gain. According to this commenter, it would be problematic for the Department to offer exemptions that didn't have these same requirements.

Another commenter expressed surprise that investment advisers did not already have a uniform fiduciary responsibility to put the interests of their clients first and expressed approval of the Department's proposal. A commenter stated the "the best interest of the client should be the advisor's sole concern, with no secondary concern even coming into deliberation." Another commenter discussed how investment funds are vital to consumers, that the investment funds deserve appropriate fiduciary restrictions, and that such restrictions were present in the Department's proposed changes. One commenter viewed it as the government's responsibility to take steps to ensure that people who need money in their "old age" could trust their adviser. This commenter emphasized that the government should take action to ensure investment advisers worked to help retirement investors save money on fees while allowing savings to keep pace with inflation. Another commenter argued that it was imperative that financial advisers have a fiduciary duty to the retirement investor and no one else. In the commenter's view, this was accomplished through the Department's proposal. One commenter asked that the proposals be finalized as proposed, i.e., setting up PTEs 2020-02 and 84-24 for all fiduciary investment advice, stating that it would provide increased protection for investors and would result in advisers providing honest information to retirement investors.

One commenter stated that retirement investors should receive fair, unbiased financial recommendations and that the recommendations should not be influenced by how much the adviser stands to make on the recommendation. This commenter also noted that, in their view, requiring advisers to satisfy a fiduciary obligation to their clients should be the baseline minimum requirement. This same commenter expressed approval of the disclosure and recordkeeping requirements in PTEs 2020-02 and PTE 84-24, stating that these requirements allow the recommendations to be audited and verified after the fact. In the view of this commenter, this is necessary to ensure that advisers can be held accountable for irresponsible and illegal advice.

After reviewing the comments, the Department has determined to finalize its proposal to remove fiduciary investment advice as covered transactions from the exemptions herein. Following consideration of the different issues raised by commenters, the Department continues to believe that fiduciary investment advice is best covered through a single set of standards, as set forth in PTEs 2020-02 and 84-24. The Department agrees with those commenters who raised concerns that certain transactions would have been unable to rely on PTE 2020-02 as originally proposed. As described more fully in the preamble to the final amendment to PTE 2020-02, the Department is making changes to broaden the scope of that exemption in response to the commenters.

The Department agrees with those commenters who emphasized the importance of consistent standards and practices for all investment advice for Retirement Investors. The Department also agrees with those commenters who argued in favor of imposing consistent care and loyalty obligations on all fiduciary investment advisers, regardless of the advice given or the compensation received. In the Department's view, this is best accomplished by reliance on a single set of standards for all fiduciary investment advice. As discussed in greater detail in the preambles to the amendments to PTE 2020-02 and PTE 84-24, published elsewhere today in this edition of the *Federal Register*, the Department has worked to ensure that this single set of standards works for a wide range of business practices. Additionally, this set of standards was specifically crafted to build upon long-standing principles found throughout ERISA and trust law. The care obligation and loyalty obligation, along with the required disclosures, policies and procedures, and retrospective review will ensure that Retirement Investors are appropriately protected.

It remains the Department's intent, however, to exclude from these amended exemptions only the receipt of compensation as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder. After reviewing comments that indicated its intent was unclear, the Department has revised the final amendment to reflect this intent more clearly. Therefore, this final amendment clarifies that relief from the restrictions of ERISA section 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is not available for the receipt of compensation as the result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder.

Regarding comments that the proposed transactions are already the subject of different regulatory schemes, the Department notes that this has been the case since the passage of ERISA. The fact that regulators with responsibility for other state or Federal statutes and who have different areas of authority have imposed different conditions on the entities subject to the amended class exemptions does not foreclose the Department from meeting its responsibility to ensure that the interest of plans and Retirement Investors are protected as required under ERISA section 408(a) and Code section 4975(c)(2).

In addition, the Department has revised its cost analysis for the prohibited transactions, particularly for PTE 2020-02 since more entities will be relying on that exemption. Costs associated with the proposed Mass Amendment are discussed below. After reviewing the entire record, the Department maintains its position that the enhanced protections afforded to plans and IRAs, and the uniformity of the regulatory environment, will provide stability and savings to plans and IRAs that outweighs the cost concerns raised by commenters. The Department also believes that the imposition of a common set of protective standards for a wide range of advice transactions in PTE 84-24 and PTE 2020-02 promotes efficiency and clarity, inasmuch as one need only look to the terms of these two exemptions, which are materially similar, for relief from advice transactions, rather than a complex patchwork of exemptions covering different transactions.

Regarding comments expressing concern about the Mass Amendment in light of the decision by the U.S. Court of Appeals for the Fifth Circuit referenced above, the Department does not create new causes of actions, mandate enforceable contractual commitments, or expand upon the remedial provisions of ERISA or the Code. Regarding comments expressing concern that the Mass Amendment constitute improper regulation of IRAs, the Department notes this rulemaking does not alter the existing framework for bringing suits under State law against IRA fiduciaries and does not aim to do so.

With respect to the comments above regarding inconsistencies, alleged duplicities, uncertainties, and contradictions the Department has strived herein and in the amendments published elsewhere in today's edition of the *Federal Register* to address the concerns and issues raised by commenters. The Department encourages parties to contact the Department's Office of Exemption Determinations should any further issues of ambiguity remain.

Regarding comments about the Mass Amendment's comment period and effective date, the robust comment period is described above and in the preamble to the Regulation, and the effective date of the Mass Amendment is now 150 days following publication of the Mass Amendment in the *Federal Register*.

Regarding comments expressing concern that the Department has not made its findings under ERISA Section 408(a), after considering the entire record, the Department has determined that the Mass Amendment will provide important benefits that are in the interest of affected plans and IRAs. The Mass Amendment's protective conditions support a finding that the Mass Amendment is protective of affected plans and IRAs. The Department believes that Mass Amendment's conditions also support a finding that the Mass Amendment is administratively feasible. For a detailed discussion of the rationale, reasons, and responses to comments about the application of the exemption to advice transactions, the Department refers readers to the preambles to the amendments to PTE 84-24 and PTE 2020-02, published elsewhere today in this edition of the *Federal Register*.

The Department appreciates the comment regarding its class exemption website, and will strive to ensure its exemptions, including amendments thereto, are easily accessible.

Summary of Additional Proposed Amendments to PTE 75- [8]

Proposed Amendments to PTE 75-1, Part I, paragraphs (b) and (c): The Department proposed to revoke PTE 75-1, Part I, paragraphs (b) and (c), which has provided exemptive relief for certain non-fiduciary services provided by broker-dealers in securities transactions. As noted in the proposal, the Department proposed to revoke the relief provided in Parts I(b) and I(c) of PTE 75-1, because it duplicates the relief available under the statutory exemptions under Code section 4975(d)(2) and ERISA section 408(b)(2) and regulations thereunder.

Proposed Revocation of Part II(2) of PTE 75-1: The Department proposed to revoke Part II(2) of PTE 75-1 and requested comment regarding whether fiduciaries providing discretionary investment management services in connection with the purchase or sale of a mutual fund security in a principal transaction need the relief that is provided by PTE 75-1, Part II(2), and, if so, what conditions would be appropriate.

Proposed Amendment to PTE 75-1, Part II(f): The Department also proposed to revise the recordkeeping provisions of PTE 75-1, Part II(f) to place the responsibility for maintaining such records on the broker-dealer, reporting dealer, or bank engaging in the transaction with such plan or IRA rather than on the plan or IRA. The proposed amendment also would have required the broker-dealer to make the records reasonably

[8] The Department made the Proposed Amendments to PTE 75-1 discussed below as part of its 2016 rulemaking that was overturned by the U.S. Court of Appeals for the Fifth Circuit. *See generally Chamber of Commerce v. U.S. Dep't of Lab.*, 885 F.3d 360 (5th Cir. 2018).

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 authorized representative of such participant or beneficiary. In so doing, the proposal expanded the list of entities and persons eligible to receive these records, by adding the persons described in (B), the authorized representatives of the entities in (C), and the authorized representatives of the persons in (D).

None of the persons described in subparagraph (1)(B)–(D) above would have been authorized to examine privileged trade secrets or privileged commercial or financial information of such fiduciary, nor are they authorized to examine records regarding a plan or IRA other than the plan or IRA with which they are the fiduciary, contributing employer, employee organization, participant, beneficiary or IRA owner.[9]

Proposed Amendments to 75-1, Part V: The Department proposed to amend PTE 75-1, Part V, which permits a broker-dealer to extend credit to a plan or IRA in connection with the purchase or sale of securities. In the past, relief under PTE 75-1, Part V, has been limited in that the broker-dealer extending credit was not permitted to have

[9] The proposed amendment provided that if such plan fiduciary refused to disclose information on the basis that such information is exempt from disclosure, the plan fiduciary would have been required to provide a written notice by the close of the thirtieth (30th) day following the request advising the requestor of the reasons for the refusal and that the Department may request such information. Finally, the proposed amendment would have provided that failure to maintain the required records necessary to determine whether the conditions of this exemption have been met will result in the loss of the exemption only for the transaction or transactions for which records are missing or have not been maintained. It would not have affected the relief for other transactions.

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 was received by the broker-dealer or any affiliate of the broker-dealer in connection with the extension of credit.

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. For example, the Department understands that broker-dealers can be required, as part of their relationships with clearinghouses, 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 as a result of a failed security transaction, 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).

In the Department’s view, the extension of credit to avoid a failed securities transaction currently 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 investment advice fiduciaries, e.g., those who execute transactions but do not provide advice, were permitted to receive compensation for extending credit to avoid a failed securities transaction under the exemption as originally granted. Under the proposed amendment, the Department would have extended such relief to investment advice fiduciaries.

Specifically, under the proposed amendment to PTE 75-1, Part V(c), an investment advice fiduciary could have received 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 the expanded relief in the amended exemption, Proposed Section (c) would have imposed several conditions. First, the potential failure of the purchase or sale of the securities could not have been caused by the broker-dealer or any affiliate. Additionally, the terms of the extension of credit would have to 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 have received written disclosure of certain terms before the extension of credit. This disclosure would not have needed to be made on a transaction by transaction basis, and could have been part of an account opening agreement or a master agreement. The disclosure would have been required to 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 have been provided with prior written disclosure of any changes to these terms. The required disclosures were intended to be consistent with the requirements of Securities and Exchange Act Rule 10b-16, which governs broker-dealers' disclosure of credit terms in margin transactions.[10]

The Department also proposed to make the same revisions to the recordkeeping

[10] 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 exemption are satisfied.

provisions of PTE 75-1, Part V that were made to the recordkeeping provisions of PTE 75-1, Part II(f) that are described above. This included expanding the persons and entities eligible to receive certain documents from a broker-dealer in the same manner described above in the PTE 75-1, Part II(f) discussion.

Finally, the Department proposed to add a definition of the term "IRA" to PTE 75-1, Part V. Under the proposed definition the term IRA would have meant any 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).

Discussion of Comments on Additional Proposed Amendments to PTE 75-1

Proposed Amendment to Part I(b) and (c). One commenter asserted that although Part I(b) and (c) transactions are covered by 408(b)(2), the industry still relies on Part I because: (1) it covers the actual transaction, as well as clearance, settlement or custodial functions incidental thereto; and (2) it provides clarification and relief regarding the provision of research, analysis, availability of securities and reports concerning issuers, industries, securities or other property economic factors or trends, portfolio strategy and performance "under circumstances which do not make such party in interest or disqualified person a fiduciary with respect to such plan."

After considering the comment, that Department has determined not to delete Part I(b) and (c) as was proposed.

Proposed Amendment to Part II. A commenter opposed the Department's proposed revocation of Part II(2), stating that the Department did not provide adequate grounds to revoke this exemption. According to this commenter, this exemption remains the bedrock of institutional dealer sales of securities and there would be significant cost and disruption if the Department did revoke this relief.

More than one commenter expressed concern that the proposed recordkeeping amendment, which would require broker-dealers, reporting dealers and/or banks to provide certain records to persons and entities that include beneficiaries and employee organizations, among others, may open the door to privacy concerns, fishing expeditions, abuse, and unnecessary risk.

After considering the comments, the Department has determined not to finalize the revocation of PTE 75-1, Part II(2) as was proposed. The Department also is not finalizing: (1) the proposed amendment that would have required the broker-dealer, reporting dealer, or bank engaging in the covered transaction to satisfy the recordkeeping requirement in Part II(e) of the exemption; nor (2) the proposed expansion of Part II(f) that would have permitted additional parties to review the records described in Part II(e). Therefore, only the parties that are entitled to examine the records described in Part II(e) of the current exemption may do so.

Proposed Amendment to Parts III and IV. The Department proposed to amend PTEs 75-1 Parts III and IV, by adding the following statement to each exemption: "Exception. No relief from the restrictions of ERISA section 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is available for fiduciaries providing investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder."

One commenter stated that "the very thing covered by these parts is not permitted at all under PTE 2020-02. Plans and retirement investors will lose opportunities and trading efficiencies they currently enjoy with no alternative avenue open to them. Amazingly, the cost analysis does not mention the cost to plans or the market."

As described in the preamble to the final amendment to PTE 2020-02, the Department is expanding the scope of that exemption to cover recommendations of any investment product, as long as the recommendation meets the conditions of PTE 2020-02. Therefore, all recommendations will be subject to the same protective conditions. Accordingly, the Department is clarifying the language in the proposed amendment to provide that: "No relief from the restrictions of ERISA section 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is available for the receipt of compensation as a result of providing investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder." Fiduciary advice providers should look to amended PTE 2020-02 for relief.

Proposed Amendments to Part V. A commenter stated that it is appropriate to put the responsibility for recordkeeping on the financial firm. However, the commenter characterized the proposed condition in the extension of credit proposed amendment which would have provided that the failure of the purchase or sale of the securities was not caused by the fiduciary or its affiliate as a "mistake." According to the commenter, generally, when there is a failure in the market, it is extremely hard to tell the exact cause, so the relief should not be conditioned on finger pointing, which could create unnecessary delays.

More than one commenter expressed concern that the proposed expansion of the recordkeeping amendment, which would have required broker-dealers to provide access to certain records for examination by more persons and entities than the current exemption may, among other consequences, open the door to privacy concerns, fishing expeditions, abuse, and unnecessary risk.

After considering the comments, the Department has determined not to finalize the proposed condition that would have required the investment advice fiduciary not to have caused the potential failure of the purchase or sale of the securities in the extension of credit amendment. The Department has determined that fiduciaries should be able to extend credit in order to avoid a failed securities transaction. The Department did not receive any substantive comments on the IRA definition, which it is finalizing to read as follows: “Individual Retirement Account” or “IRA” means any plan that is an account or annuity described in Code section 4975(e)(1)(B) through (F). This language is consistent with the IRA definition in PTE 2020-02. After considering the comments, the Department also is not amending the recordkeeping provision in PTE 75-1 Part V.

Summary of Additional Proposed Amendments to PTE 86-128

The Department proposed certain administrative changes to PTE 86-128, which are not directly related to the provision of fiduciary investment advice. The Department proposed to delete Section IV(a), which provides an exclusion from the conditions of the exemption for certain plans not covering employees, including IRAs, to increase the safeguards available to these Retirement Investors. Therefore, under the proposed amendment, fiduciaries that exercise full discretionary authority or control with respect to IRAs could have continued to rely on PTE 86-128 but would have had to meet the protective conditions of this exemption for IRAs as well as for Title I plans.

The Department also proposed certain technical changes to the exemption, including deleting subsection IV(b)(1), and redesignating remaining sections as needed. The language currently in Section IV(b)(1) excludes fiduciary investment advice providers; however, under the proposed amendment, fiduciary investment advice providers would have been excluded from the exemption as a whole; therefore, the exclusion does not need to be repeated in Section IV. As a result of the deletion of Section IV(a) and IV(b)(1), the Department proposed to redesignate subsections IV(b)(2) and (3) as subsections IV(a)(1) and (2), respectively, Section IV(c) as Section IV(b), and Section IV(d) as Section IV(c).

Redesignated Section IV(b) of the proposed amendment would have provided that certain conditions in Section III 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. This provision is referred to as the "Recapture of Profits" exception. The Department provided an exception from the conditions in Section III for the recapture of profits due to the benefits plans and IRAs would derive from such arrangements.

Discretionary trustees were first permitted to rely on PTE 86-128 without meeting the Recapture of Profits provision pursuant to an amendment in 2002 (the 2002 Amendment). Before the 2002 Amendment, Section III(a) 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 2002 Amendment, the reference to "trustee (other than a nondiscretionary trustee)" was deleted from Section III(a); therefore, discretionary trustees had to satisfy additional conditions set forth in Section III(h) and (i) to rely on the exemption.[11]

The Department understands that after the 2002 Amendment, practitioners questioned whether discretionary trustees were permitted to rely on the Recapture of Profits exception, which allows persons identified in Section III(a) to engage in the covered transactions if they return or credit to the plan or IRA all profits, as an alternative to complying with Sections III(h) and (i). By deleting the reference to discretionary trustees from Section III(a), the Department understands that the 2002 Amendment inadvertently may have prevented discretionary trustees of plans or IRAs from using the Recapture of Profits exception from the conditions imposed by Section III of the exemption, and instead, may have limited the relief provided in the exemption to discretionary trustees that satisfy that additional conditions in Section III(h) and (i). This result was not intended; therefore, the Department proposed to modify the exemption to permit all discretionary trustees to utilize the recapture of profits exception as they originally were permitted to before the 2002 Amendment.

In order to achieve this result, the Department proposed to amend redesignated section IV(b) to provide that Sections III(a), III(h), 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 proposed to reinsert a reference to trustees (other than nondiscretionary trustees) in Section III(a) along with the existing

[11] 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, and Section III(i) requires discretionary trustees to provide additional disclosures.

references to plan administrators and employers. Finally, the Department proposed to add a sentence to the end of Section III(a) stating that: “Notwithstanding the foregoing, this condition does not apply to a trustee (other than a nondiscretionary trustee) that satisfies Section III(h) and (i), and to all persons identified in this paragraph that satisfy the Recapture of Profits exception in Section IV(b)).”

The purpose of these proposed amendments was to clarify that discretionary trustees may engage in covered transactions if they satisfy Section III(h) and (i) of the exemption. Moreover, the proposed amendment would have clarified that all parties identified in Section III(a)—discretionary trustees, plan administrators, or employers who have any employees covered by the plan—can engage in a transaction covered under PTE 86-128 if they satisfy the Recapture of Profits exception.

Lastly, the Department proposed to add a new Section VII to PTE 86-128 that would have required the fiduciary engaging in a covered transaction to maintain records necessary to enable certain persons (described in proposed Section VII(b)) to determine whether the conditions of this exemption have been met.

Discussion of Comments to Additional Proposed Amendments to PTE 86-128

Proposed Amendment to IV(a). At least one commenter stated that the Department did not consider the disruption that would be caused by eliminating the exclusion from the exemption conditions for covered transaction engaged in on behalf of IRAs. Another commenter stated that the Department did not explain how a retail investor would benefit from, or understand, complex and potentially confusing disclosures they would have been required to receive under the proposed amendment, which are intended for institutional, sophisticated plan fiduciaries. The commenter stated also that the proposed amendment does not provide any guidance on how persons engaging in covered transactions under the exemption can comply with the proposed amendment.

After considering these comments, the Department has determined not to eliminate the exclusion from the current exemption conditions of PTE 86-128 for covered transactions engaged in on behalf of IRAs. The Department's objective for amending PTE 86-128 and other affected exemptions is to ensure that consistent and protective standards apply to investment advice. The Department does not intend to impose any additional obligations on entities relying on PTE 86-128 at this time. The Department notes, however, that it may revisit the scope and content of PTE 86-128 as part of future notice and comment rulemaking.

Proposed Amendment to Part VII. Some commenters raised concerns with the proposed new recordkeeping provision. One commenter stated that absent such explanation or public policy rationale, it is not necessary to make the fiduciary's records available to the participants and beneficiaries (and their authorized representatives). The commenter recommended that the Department delete the proposed language that would allow retirement investors and their authorized representatives direct access to the records of fiduciaries relying on PTE 86-128.

Another commenter also expressed concerns about the proposed recordkeeping condition. Among other things, the commenter objected to unions being allowed to have any record of the plan. The commenter asserted that this provision undermines the careful balance of labor relations in this country and argued that it is preempted by the National Labor Relations Act.

After consideration of the comments, the Department has deleted the proposed recordkeeping requirements applicable to Section VII of PTE 86-128. However, as with PTE 2020-02, the Department intends to monitor compliance with the exemption closely and may revisit whether expanding the recordkeeping requirement is appropriate in the future. Any future amendments would be preceded by notice and an opportunity for public comment.

Other Proposed Change to PTE 86-128. The Department did not receive comments on the proposed technical changes discussed above, or the proposed modification that permits discretionary trustees to utilize the Recapture of Profits exception in Section IV(d) of PTE 86-128 as was permitted when the Department originally issued PTE 86-128. Therefore, the Department has finalized these technical changes as proposed.

Executive Orders

Executive Orders 12866[12] and 13563[13] direct agencies to assess all costs and benefits of available regulatory alternatives. If regulation is necessary, agencies must choose a regulatory approach that maximizes net benefits, including potential economic, environmental, public health and safety effects; distributive impacts; and equity. Executive Order 13563 emphasizes the importance of quantifying costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

Under Executive Order 12866, “significant” regulatory actions are subject to review by the Office of Management and Budget (OMB). As amended by Executive Order 14094,[14] entitled “Modernizing Regulatory Review,” section 3(f) of Executive

[12] 58 FR 51735 (Oct. 4, 1993).
[13] 76 FR 3821 (Jan. 21, 2011).
[14] 88 FR 21879 (Apr. 6, 2023).

Order 12866 defines a "significant regulatory action" as any regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of $200 million or more (adjusted every three years by the Administrator of the Office of Information and Regulatory Affairs (OIRA) for changes in gross domestic product); or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, Territorial, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4)raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in the Executive order, as specifically authorized in a timely manner by the Administrator of OIRA in each case.

It has been determined that this amendment is significant within the meaning of section 3(f)(1) of the Executive Order. Therefore, the Department has provided an assessment of the amendment's costs, benefits, and transfers, and OMB has reviewed the rulemaking.

Paperwork Reduction Act Statements

In accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), the Department solicited comments concerning the information collection requirements (ICRs) included in the proposed rulemaking. The Department received comments that addressed the burden estimates used in the analysis of the proposed rulemaking. The Department reviewed these public comments in developing the paperwork burden analysis and subsequently revised the burden estimates in the amendments to the PTEs discussed below.

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

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

Preliminary Assumptions

The Department assumes that several types of personnel will perform the tasks associated with information collection requests at an hourly wage rate of $65.99 for clerical personnel, $165.71 for a legal professional, $198.25 for a financial manager. [15]

In the proposal, the Department received several comments on the Department's labor cost estimate, particularly the cost for legal support, remarking that it was too low.

[15] Internal DOL calculation based on 2023 labor cost data and adjusted for inflation to reflect 2024 wages. For a description of the Department's methodology for calculating wage rate*s, see:* Employee Benefits Security Administration, *Labor Cost Inputs Used in the Employee Benefits Security Administration, Office of Policy and Research's Regulatory Impact Analyses and Paperwork Reduction Act Burden Calculations,* Employee Benefits Security Administration, https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf.

The Department assumes that tasks involving legal professionals will be completed by a combination of legal professionals, likely consisting of attorneys, legal support staff, and other professionals and in-house and out-sourced individuals. The labor cost associated with these tasks is estimated to be $165.71, which is the Department's estimated labor cost for an in-house attorney. The Department understands that some may feel this estimate is comparatively low to their experience, especially when hiring an outside ERISA legal expert. However, the Department has chosen this cost estimate understanding that it is meant to be an average, blended, or typical rate from a verifiable and repeatable source.

Removal of Investment Advice and PTE 2020-02

The Department is amending PTE 77-4, PTE 75-1, PTE 80-83, PTE 83-1, and PTE 86-128, to remove relief in those exemptions for the receipt of compensation as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder. Investment advice providers will instead have to rely on the amended PTE 2020-02 or PTE 84-24 for exemptive relief covering investment advice transactions. For an estimate of the costs incurred by entities now reliant on PTE 2020-02, refer to the discussion of the amendments to PTE 2020-02 and PTE 84-24 published in this issue of today' *Federal Register.*

In the proposal, the Department received several comments that the Mass Amendments would be costly and disruptive. Some of the commenters expressed concern that the exemptions are tailored to specific types of transactions and moving all investment advice transactions to PTE 2020-02 and PTE 84-24 would be burdensome.

Several commenters on the proposal expressed concern about the cost burden associated this change, with many stating that the Department had not considered the cost associated with moving to PTE 2020-02. In consideration of these comments, the Department has increased its cost estimates for entities newly relying on PTE 2020-02 and PTE 84-24. The increases include significant increases in the cost estimates to review and implement the rule and to establish policies and procedures. For a complete discussion of the cost estimates, refer to the Paperwork Reduction Act sections for PTE 2020-02 and PTE 84-24 or the regulatory impact analysis in Retirement Security Rule: Definition of an Investment Advice Fiduciary, also published in today's *Federal Register*.

Amendments to PTE 75-1

Affected Entities

Broker-dealers registered under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq*.), reporting dealers, and banks are eligible to rely on the exemption. According to the SEC, approximately 3,490 broker-dealers were SEC-registered as of December 2022.[16] Not all broker-dealers perform services for employee benefit plans. In 2022, 55 percent of registered investment advisers provided employer-sponsored retirement benefits consulting.[17] Assuming the percentage of broker-dealers providing advice to retirement plans is the same as the percent of investment advisers providing services to plans, the Department estimates 55 percent, or 1,919 broker-dealers, would be affected by PTE 75-1.

According to the Federal Deposit Insurance Corporation, there are 4,049

[16] Estimates based on SEC's FOCUS filings and SEC's Form ADV filings.
[17] Cerulli Associates, *U.S. RIA Marketplace 2023*, Exhibit 5.10, Part 1, The Cerulli Report.

commercial banks as of September 30, 2023.[18] If one-half of these banks (about 2,025) and 55 percent of broker-dealers (about 1,919 broker-dealers) relied on this exemption, there would be approximately 3,944 respondents.[19]

Disclosure Requirements

Under Part V(c) of PTE 75-1, when a fiduciary extends credit to avoid a failed purchase or sale of securities, the plan or IRA must receive written disclosure of the rate of interest (or other fees) that will apply and the method of determining the balance upon which interest will be charged, as well as prior written disclosure of any changes to these terms. The plan or IRA must also be provided with prior written disclosure of any changes to these terms.

The Department believes that it is a usual and customary business practice to maintain records required to demonstrate compliance with disclosure distribution regulations mandated by the Securities and Exchange Commission (SEC). The Department believes that this new disclosure requirement is consistent with the disclosure requirement mandated by the SEC in 17 CFR 240.10b-16(1) for margin transactions. Therefore, the Department concludes that this requirement produces no additional burden to the public.

Recordkeeping Requirements

In the proposal, the Department proposed to amended PTE 75-1 Parts II and V to adjust the recordkeeping requirement to shift the burden from plans and IRA owners to

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[18] Federal Insurance Deposit Corporation, *Quarterly Banking Profile*, Statistics at a Glance- as of September 30, 2023, https://www.fdic.gov/analysis/quarterly-banking-profile/statistics-at-a-glance/2023sep/industry.pdf

[19] Reporting dealers covered by the exemption are not accounted for separately because they are banks and security brokerages that trade in U.S. Government Securities; thus, reporting dealers are already accounted for in the number of broker-dealer firms and banks. The New York Federal Reserve Bank reported 21 primary dealers on March 21, 2013. http://www.newyorkfed.org/markets/pridealers_current.html

financial institutions. In the final rulemaking, the Department has decided to keep the recordkeeping requirement unchanged from the existing exemption.

The Department has assumed that financial service providers that transact with employee benefit plans will maintain these records on behalf of their client plans. Because of the sophisticated nature of financial service providers and the regulation of the securities industry by State and Federal government, and by self-regulatory organizations, the Department has assumed that the records required by this class exemption are the same records kept in the normal course of business, or in compliance with other requirements.

The Department has estimated that the time needed to maintain records for the financial institutions to be consistent with the exemption will be four hours per entity annually at a wage rate of $198.25 per hour.[20] Thus, the Department estimates it would take 15,778 hours at an equivalent cost of $3,127,949 to maintain the records and make the records available for inspection.[21]

Table 1: Hour Burden and Equivalent Cost Associated with Recordkeeping				
	Year 1		**Subsequent Years**	
Activity	**Burden Hours**	**Equivalent Burden Cost**	**Burden Hours**	**Equivalent Burden Cost**
Financial Manager	15,778	$3,127,949	15,778	$3,127,949
Total	**15,778**	**$3,127,949**	**15,778**	**$3,127,949**

Summary

[20] Internal Department calculation based on 2023 labor cost data. For a description of the Department's methodology for calculating wage rates, see https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf.

[21] The burden is estimated as follows: 3,944 financial institutions x 4 hours = 15,778 hours. A labor rate of $198.25 is used for a financial manager. The labor rate is applied in the following calculation: (3,944 financial institutions x 4 hours) x $198.25 = $3,127,949.

In sum, the Department estimates the total burden for the amended PTE 1975-1 is 15,778 hours at a total equivalent burden cost of $3,127,949. The total cost burden is estimated to be de minimis. The Department assumes that required records are maintained by the relevant affected entities, the broker-dealers and banks. Thus, there are no additional tasks performed outside of those performed by the brokerage firms and banks.

The paperwork burden estimates are summarized as follows:

Type of Review: Revision of an existing collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Titles: Prohibited Transaction Exemption 75-1

(Security Transactions with Broker-Dealers, Reporting Dealers and Banks)

OMB Control Number: 1210-0092.

Affected Public: Businesses or other for-profits; not for profit institutions.

Estimated Number of Respondents: 3,944

Estimated Number of Annual Responses: 3,944

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

Estimated Total Annual Burden Hours: 15,778 hours.

Estimated Total Annual Burden Cost: $0

Amendments to PTE 86-128

Affected Entities

Using data from 2021 Form 5500, the Department estimates that 1,257 unique plans hired service providers denoting on the Schedule C that they were a discretionary trustee. Further, among these plans, 801 also reported that they provided investment management services or received investment management fees paid directly or indirectly by the plan.[22] Based on these values, the Department estimates on average, 1,000 plans have discretionary fiduciaries with full discretionary control. As small plans do not file the Schedule C, this estimate may be an underestimate.

In the proposal, a few commenters expressed concern that disruption would be caused by the amendments. One commenter expressed concern that the removal of investment advice would increase costs to retirement investors, as entities would need to comply with PTE 2020-02. The Department did not receive comments specifically addressing the Department's estimates of the number of entities that would continue to rely on PTE 86-128 under the proposed amendments and did not receive any which directly discussed plan reliance on PTE 86-128.

The Department estimates that of the estimated 1,000 plans discussed above, 7.5 percent are new accounts or new financial advice relationships.[23] Based on these assumptions, the Department estimates that 75 plans would be affected by the proposed amendments to PTE 1986-128.[24]

The Department lacks reliable data on the number of investment advice providers who are discretionary fiduciaries that would rely on the amended exemption. For the purposes of this analysis, the Department believes that in trying to capture financial entities engaging in cross trades with discretionary control, the number of dual-registered broker-dealers that render services to retirement plans provides an accurate estimate. As of December 2022, there were approximately 456 broker-dealers registered as SEC- or

[22] Estimates based on 2021 Form 5500 data.

[23] EBSA identified 57,575 new plans in its 2021 Form 5500 filings, or 7.5 percent of all Form 5500 pension plan filings.

[24] The number of new plans is estimated as: 1,000 plans x 7.5 percent of plans are new ≈ 75 new plans.

state-registered investment advisers.[25] Consistent with the assumptions made about broker-dealers affected by the amendments to PTE 2020-02, the Department estimates that 55 percent, or 251 broker-dealers will be affected by the amendments.

The Department requested comment on this assumption, particularly with regard to what types of entities would be likely to rely on the amended exemption, as well as any underlying data. The Department did not receive any comments.

Written Authorizations, Evaluations, Forms, Reports, and Statements

Written Authorization from the Authorizing Fiduciary to the Broker-Dealer

Authorizing fiduciaries of new plans entering into a relationship with a transacting fiduciary are required to provide the transacting fiduciary with an advance written authorization to perform transactions for the plan. The Department estimates that there are approximately 75 plans that are new or that enter new arrangements each year.[26] Therefore, the Department estimates that approximately 75 authorizing fiduciaries are expected to send an advance written authorization. It is assumed that a legal professional will spend 15 minutes per plan reviewing the disclosures and preparing an authorization form. This results in a burden of 19 hours with an equivalent cost of $3,107.[27]

To produce and distribute the authorization, the Department assumes that 100 percent of plans will use traditional electronic methods at no additional burden. The Department assumes that clerical staff will spend five minutes preparing and sending the authorization, resulting in a burden of approximately 6 hours with an equivalent cost of

[25] Estimates are based on the SEC's FOCUS filings and Form ADV filings.
[26] 75 plans that are new or that enter new arrangements each year.
[27] The burden is estimated as follows: 75 plans x (15 minutes per plan ÷ 60 minutes) ≈ 19 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: [75 plans x (15 minutes per plan ÷ 60 minutes)] x $165.71 per hour ≈ $3,107.

$412.[28]

In total, the written authorization requirement is expected to result in a total burden of 25 hours with an equivalent cost of $3,520.

Table 2: Hour Burden and Equivalent Cost Associated with the Written Authorization				
	Year 1		**Subsequent Years**	
Activity	**Burden Hours**	**Equivalent Burden Cost**	**Burden Hours**	**Equivalent Burden Cost**
Legal	19	$3,107	19	$3,107
Clerical	6	$412	6	$412
Total	**25**	**$3,520**	**25**	**$3,520**

Note: The total value may not sum due to rounding.

Provision of Materials for Evaluation of Authorization of Transaction

Prior to a written authorization being made, the authorizing fiduciary must be provided by the financial institution with a copy of the exemption, a form for termination of authorization, a description of broker's placement practices, and any other reasonably available information. This information is assumed to be readily available.

To produce and distribute the materials, the Department assumes that 100 percent of financial institutions will use traditional electronic methods at no additional burden. The Department estimates that a clerical staff member will spend five minutes to prepare and distribute the required information to the authorizing fiduciary. This information will be sent to the 75 plans entering into an agreement with a financial institution, and based on the above, the Department estimates that this requirement results in a burden of 6 hours with an equivalent cost of $412.[29]

[28] The burden is estimated as follows: 75 plans x (5 minutes per plan ÷ 60 minutes) ≈ 6 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: [75 plans x (5 minutes per plan ÷ 60 minutes)] x $65.99 ≈ $412.

[29] The burden is estimated as follows: 75 plans x (5 minutes per plan ÷ 60 minutes) ≈ 6 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: [75 plans x (5 minutes per plan ÷ 60 minutes)] x $65.99 ≈ $412.

Table 3: Hour Burden and Equivalent Cost Associated with Provision of Materials for Transaction Authorization				
	Year 1		Subsequent Years	
Activity	**Burden Hours**	**Equivalent Burden Cost**	**Burden Hours**	**Equivalent Burden Cost**
Clerical	6	$412	6	$412
Total	**6**	**$412**	**6**	**$412**

Provision of an Annual Termination Form

Each authorizing fiduciary must be supplied annually with a form expressly providing an election to terminate the written authorization. It is assumed that legal professionals with each of the 251 affected transacting fiduciaries will spend on average 15 minutes preparing the termination forms, which results in a burden of 63 hours with an equivalent cost of $10,390.[30]

To produce and distribute the termination form to the 1,000 plans, the Department assumes that 100 percent of financial institutions will use traditional electronic methods at no additional burden. The Department estimates that clerical staff will spend five minutes per plan preparing and distributing the termination forms resulting in a burden of 83 hours with an equivalent cost of $5,499.[31]

In total, providing the annual termination form is expected to impose a burden of 146 hours with an equivalent cost of $15,889.

[30] The burden is estimated as follows: [251 transacting fiduciaries x (15 minutes per financial institution ÷ 60 minutes)] ≈ 63 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: [251 transacting fiduciaries x (15 minutes per financial institution ÷ 60 minutes)] x $165.71 per hour ≈ $10,390.
[31] The burden is estimated as follows: 1,000 plans x (5 minutes per plan ÷ 60 minutes) ≈ 83 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: [1,000 plans x (5 minutes per plan ÷ 60 minutes)] x $65.99 ≈ $5,499.

Table 4: Hour Burden and Equivalent Cost Associated with Provision of the Annual Termination Form				
	Year 1		Subsequent Years	
Activity	**Burden Hours**	**Equivalent Burden Cost**	**Burden Hours**	**Equivalent Burden Cost**
Legal	63	$10,390	63	$10,390
Clerical	83	$5,499	83	$5,499
Total	**146**	**$15,889**	**146**	**$15,889**

Transaction Reporting

The transacting fiduciary engaging in a covered transaction must furnish the authorizing fiduciary with either a conformation slip for each securities transaction or a quarterly report containing specified information. As discussed above, the provision of the confirmation already is required under SEC regulations. Therefore, if the transaction reporting requirement is satisfied by sending conformation slips, no additional hour and cost burden will occur.

Annual Statement

In addition to the transaction reporting requirement, transacting fiduciaries are required to send an annual report to each of the 1,000 authorizing fiduciaries[32] containing the same information as the quarterly report and also containing all security transaction-related charges, the brokerage placement practices, and a portfolio turnover ratio.

In addition, it is assumed that the information that must be sent annually could be sent together; therefore, the clerical staff hours required to prepare and distribute the report has been included with the provision of annual termination form requirement. Therefore, no additional hour or equivalent cost burden has been reported.

Report of Commissions Paid

[32] 1,000 plans.

A discretionary trustee must provide an 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. The collecting and generation of the information for the quarterly report is reported as a cost burden. The clerical hour burden to prepare and distribute the report is included with the provision of annual termination form requirement, because both items are required to be sent annually.

A financial institution who is a discretionary trustee must provide each of the 1,000 authorizing fiduciaries with an annual report showing commissions paid to affiliated and non-affiliated brokers, on both a total dollar and a cents-per-share basis. As the report is sent annually, it is assumed that it could be sent with the transaction report. The Department estimates that 100 percent of financial institutions will use traditional electronic methods at no additional burden.

Financial institutions are required to report specific transaction fees and information to the plan fiduciaries. The information must be tracked, assigned to specific plans, and reported. It is assumed that it costs the financial institution $3.30 per plan to track this information.[33] With approximately 1,000 affected plans, this results in a cost burden of approximately $3,300 annually.[34]

In total, providing the report is expected to impose a total cost burden of $3,300.

Table 5: Hour Burden and Cost Associated with Report of Commissions Paid				
	Year 1		**Subsequent Years**	
Activity	**Burden Hours**	**Cost Burden**	**Burden Hours**	**Cost Burden**
Clerical	0	$3,300	0	$3,300
Total	**0**	**$3,300**	**0**	**$3,300**

[33] This estimate is based on information from a Request for Information and from industry sources.
[34] 1,000 plans x $3.30 = $3,300.

Summary

In total, the conditions of this exemption will result in the production of 44,821 disclosures.[35] The Department assumes that 100 percent of plans and financial institutions will use electronic methods to distribute the required information, at de minimis burden. Production and distribution of disclosures will result in an overall hour burden of 177 hours with an equivalent cost of $19,821 and an overall cost burden of $3,300.

The paperwork burden estimates are summarized as follows:

Type of Review: Revision to an existing collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Titles: PTE 86-128 (Securities Broker-Dealers)

OMB Control Number: 1210-0059.

Affected Public: Businesses or other for-profits; not for profit institutions.

Estimated Number of Respondents: 326

Estimated Number of Annual Responses: 4,150

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

Estimated Total Annual Burden Hours: 177 hours.

Estimated Total Annual Burden Cost: $3,300

Amendments to PTE 77-4, 80-83 and PTE 83-1

The Department has determined that PTE 77-4 and PTE 80-83 do not have

[35] The total number of disclosures is calculated in the following manner: (75 Written authorization disclosures) + (75 Provision of materials for evaluation of authorization of transaction) + (1,000 Annual termination form) + (1,000 Annual Statement) + (1,000 Report of Commissions Paid) + (1,000 Information and fee tracking) = 4,150 disclosures.

information collections impacted by the removal of advice from the exemption. There is no paperwork burden related to PTE 83-1.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)[36] imposes certain requirements on rules subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act or any other law.[37] Under section 604 of the RFA, agencies must submit a final regulatory flexibility analysis (FRFA) of a final rulemaking that is likely to have a significant economic impact on a substantial number of small entities, such as small businesses, organizations, and governmental jurisdictions. This amended exemption, along with related amended exemptions and a rule amendment published elsewhere in this issue of the *Federal Register*, is part of a rulemaking regarding the definition of fiduciary investment advice, which the Department has determined likely will have a significant economic impact on a substantial number of small entities. The impact of this amendment on small entities is included in the FRFA for the entire project, which can be found in the related notice of rulemaking found elsewhere in this edition of the *Federal Register*.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995[38] requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a final rule that may result in an expenditure of $100 million or more (adjusted annually for inflation with the base year 1995) in any 1 year by state, local, and tribal governments, in

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[36] 5 U.S.C. 601 *et seq.*
[37] 5 U.S.C. 601(2), 603(a); *see* 5 U.S.C. 551.
[38] Pub. L. 104-4, 109 Stat. 48 (Mar. 22, 1995).

the aggregate, or by the private sector. For purposes of the Unfunded Mandates Reform Act, as well as Executive Order 12875, these amended exemptions do not include any Federal mandate that will result in such expenditures.

Federalism Statement

Executive Order 13132 outlines fundamental principles of federalism. It also requires Federal agencies to adhere to specific criteria in formulating and implementing 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. Federal agencies promulgating regulations that have these federalism implications must consult with State and local officials and describe the extent of their consultation and the nature of the concerns of State and local officials in the preamble to the final regulation. Notwithstanding this, 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 Department has carefully considered the regulatory landscape in the states and worked to ensure that its regulations would not impose obligations on impacted industries that are inconsistent with their responsibilities under state law, including the obligations imposed in states that based their laws on the NAIC Model Regulation. Nor would these regulations impose obligations or costs on the state regulators. As discussed more fully in the final Regulation and in the preamble to PTE 84-24, there is a long history of shared regulation of insurance between the States and the Federal government. The Supreme Court addressed this issue and held that “ERISA leaves room for complementary or dual federal or state regulation" of insurance.[39] The Department designed the final Regulation and exemptions to complement State insurance laws.[40]

The Department does not intend for these amendments to change the scope or effect of ERISA section 514, including the savings clause in ERISA section 514(b)(2)(A) for State regulation of securities, banking, or insurance laws. Ultimately, the Department does not believe these amendments have federalism implications because they have 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.

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

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[39] *See John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank,* 510 U.S. 86, 98 (1993).

[40] *See BancOklahoma Mortg. Corp.* v. *Capital Title Co., Inc.,* 194 F.3d 1089 (10th Cir. 1999) (stating that McCarran-Ferguson Act bars the application of a Federal statute only if (1) the Federal statute does not specifically relate to the business of insurance; (2) a State statute has been enacted for the purpose of regulating the business of insurance; and (3) the Federal statute would invalidate, impair, or supersede the State statute); *Prescott Architects, Inc.* v. *Lexington Ins. Co.,* 638 F. Supp. 2d 1317 (N.D. Fla. 2009); *see also U.S.* v. *Rhode Island Insurers' Insolvency Fund,* 80 F.3d 616 (1st Cir. 1996). The Supreme Court has held that to "impair" a State law is to hinder its operation or "frustrate [a] goal of that law." *Humana Inc. V. Forsyth*, 525 U.S. 299, 308 (1999).

exemption does not affect the requirements of Code section 401(a), including that the plan must operate for the exclusive benefit of the employees of the employer maintaining the Plan and their beneficiaries;

(2) In accordance with ERISA section 408(a) and Code section 4975(c)(2), and based on the entire record, the Department finds that this final amendment to class exemptions is administratively feasible, in the interests of plans, their participants and beneficiaries, and IRA owners, and protective of the rights of participants and beneficiaries of the plan and IRA owners;

(3) The final amendment to the class exemptions is applicable to a particular transaction only if the transaction satisfies the conditions specified in the exemption; and

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

The Department is granting the following amendments to class exemptions on its own motion, pursuant to its authority under ERISA section 408(a) and Code section 4975(c)(2) and in accordance with procedures set forth in 29 CFR part 2570, Subpart B (76 FR 66637 (October 27, 2011)).[41]

Amendments to Class Exemptions

[41] Reorganization Plan No. 4 of 1978 (5 U.S.C. App. 1 (2018)) generally transferred the authority of the Secretary of the Treasury to grant administrative exemptions under Code section 4975 to the Secretary of Labor. Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications were amended effective April 8, 2024 (29 CFR part 2570, Subpart B (89 FR 4662 (January 24, 2024)).

Prohibited Transaction Exemption 75-1, Exemptions from Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers and Banks

The Department amends Prohibited Transaction Exemption 75-1 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)).

I. Part III, *Underwritings*, is amended by inserting a new section III(h) to read as follows:

Exception. No relief from the restrictions of ERISA section 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is available for the receipt of compensation as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

II. Part IV, Market-making, is amended by inserting a new section IV(g) to read as follows:

Exception. No relief from the restrictions of ERISA section 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is available for the receipt of compensation as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder.

III. Part V, Extension of Credit, is amended by adding new Section (c) as follows and redesignating Sections (c) and (d) as Sections (d) and (e), respectively:

(c) Notwithstanding section (a)(2), a fiduciary under 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 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;

(2) 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)(2) will be considered satisfied if the plan or IRA receives the disclosure described in Securities Exchange Act Rule 10b-16;[42]

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 and 26 CFR 54.4975-9. Also, for the purposes of this exemption, the term "IRA" means any account or annuity described in Code section 4975(e)(1)(B) through (F).

Prohibited Transaction Exemption 77-4, Class Exemption for Certain Transactions Between Investment Companies and Employee Benefit Plans

The Department amends Prohibited Transaction Exemption 77-4 under the authority of ERISA section 408(a) and Code section 4975(c)(2), and in accordance with

[42] 17 CFR 240.10b-16.

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:

Exception. No relief from the restrictions of 406(b) and the taxes imposed by section 4975(a) and (b) by reason of sections 4975(c)(1)(E) and (F) is available for the receipt of compensation as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code 4975(e)(3)(B) and regulations thereunder.

Prohibited Transaction Exemption 80-83, Class Exemption for Certain Transactions Involving Purchase of Securities Where Issuer May Use Proceeds to Reduce or Retire Indebtedness to Parties in Interest.

The Department amends 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 new section I.E. is inserted to read as follows:

Exception. No relief from the restrictions of 406(b) and the taxes imposed by Code sections 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is available for the receipt of compensation as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder.

Transaction Exemption 83-1, Exemption for Certain Transactions Involving Mortgage Pool Investment Trusts

The Department amends 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 new section I.E. is inserted to read as follows:

Exception. No relief from the restrictions of ERISA 406(b) and the taxes imposed by Code sections 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is available for the receipt of compensation as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder.

Prohibited Transaction Exemption 86-128, Class Exemption for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers

The Department amends Prohibited Transaction Exemption 86-128 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)).

I. New sections II(d) is inserted as follows:

(d) *Exception.* No relief from the restrictions of ERISA 406(b) and the taxes imposed by Code sections 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is available for the receipt of compensation as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder.

II. Section III(a) is amended to read as follows:

"The person engaging in the covered transaction is not 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. Notwithstanding the foregoing, this condition does not apply to a trustee (other than a nondiscretionary trustee) that satisfies Section III(h) and (i) of this exemption."

III. Section IV(b)(1) is deleted, and Sections IV(b)(2) and (3) are redesignated as Sections IV(b)(1) and (2).

IV. Section IV(c) is amended to read as follows:

(c) Recapture of profits. Sections III(a), III(h), and III(i) of this exemption do not apply in any case where the person engaging in a covered transaction returns or credits to the plan all profits earned by that person in connection with the securities transactions associated with the covered transaction.

Signed at Washington, DC, this 10th day of April, 2024.

Lisa M. Gomez,

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