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DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

[Application Number D–11327]

ZRIN 1210–ZA25

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

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

ACTION: Adoption of amendments to and partial revocations of PTEs 86–128 and 75–1.

SUMMARY: This document contains amendments to Prohibited Transaction Exemptions (PTEs) 86–128 and 75–1, exemptions from certain prohibited transaction provisions of the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code of 1986 (the Code). The ERISA and Code provisions at issue generally prohibit fiduciaries with respect to employee benefit plans and individual retirement accounts (IRAs) from engaging in self-dealing in connection with transactions involving plans and IRAs. PTE 86–128 allows fiduciaries to receive compensation in connection with certain securities transactions entered into by plans and IRAs. The amendments increase the safeguards of the exemption. This document also contains a revocation of PTE 86–128 with respect to transactions involving investment advice fiduciaries and IRAs, and of PTE 75–1, Part II(2), and PTE 75–1, Parts I(b) and I(c), in light of existing or newly finalized relief, including the relief provided in the ''Best Interest Contract Exemption,'' published elsewhere in this issue of the **Federal Register**. The amendments and revocations affect participants and beneficiaries of plans, IRA owners and certain fiduciaries of plans and IRAs.

DATES: *Issance date:* These amendments and partial revocations are issued June 7, 2016.

Applicability date: These amendments are applicable to transactions occurring on or after April 10, 2017. For more information, see *Applicability Date,* below.

FOR FURTHER INFORMATION CONTACT: Brian Shiker or Erin Hesse, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Suite 400, Washington DC 20210, (202) 693–8540 (not a toll-free number).

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

Executive Summary

Purpose of Regulatory Action

These amendments and revocations are being granted in connection with its publication today, elsewhere in this issue of the **Federal Register**, of a final regulation defining who is a ''fiduciary'' of an employee benefit plan under ERISA as a result of giving investment advice to a plan or its participants or beneficiaries (Regulation). The Regulation also applies to the definition of a ''fiduciary'' of a plan (including an IRA) under the Code. The Regulation amends a prior regulation, dating to 1975, specifying when a person is a ''fiduciary'' under ERISA and the Code by reason of the provision of investment advice for a fee or other compensation regarding assets of a plan or IRA. The Regulation takes into account the advent of 401(k) plans and IRAs, the dramatic increase in rollovers, and other developments that have transformed the retirement plan landscape and the associated investment market over the four decades since the existing regulation was issued. In light of the extensive changes in retirement investment practices and relationships, the Regulation updates existing rules to distinguish more appropriately between the sorts of advice relationships that should be treated as fiduciary in nature and those that should not.

PTE 86–128 permits certain fiduciaries to receive fees in connection with certain mutual fund and other securities transactions entered into by plans and IRAs. A number of changes are finalized with respect to the scope of the exemption and of another existing exemption, PTE 75–1, including revocation of many transactions originally permitted with respect to IRAs. These amendments and revocations affect the conditions under which fiduciaries may receive fees and compensation when they transact with plans and IRAs.

The amendments and the partial revocations to PTEs 86–128 and 75–1 are part of the Department's regulatory initiative to mitigate the effects of harmful conflicts of interest associated with fiduciary investment advice. In the absence of an exemption, ERISA and the Code generally prohibit fiduciaries from using their authority to affect or increase their own compensation. A new exemption for receipt of compensation by fiduciaries that provide investment advice to IRA owners,[1] plan participants and beneficiaries, and certain plan fiduciaries, is adopted elsewhere in this issue of the **Federal Register**, in the ''Best Interest Contract Exemption.'' In the Department's view, the provisions of the Best Interest Contract Exemption better protect the interests of IRAs with respect to investment advice regarding the transactions for which relief was revoked.

ERISA section 408(a) specifically authorizes the Secretary of Labor to grant administrative exemptions from ERISA's prohibited transaction provisions.[2] Regulations at 29 CFR

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

[2] Code section 4975(c)(2) authorizes the Secretary of the Treasury to grant exemptions from the parallel prohibited transaction provisions of the Code. Reorganization Plan No. 4 of 1978 (5 U.S.C. app. at 214 (2000)) (Reorganization Plan) generally transferred the authority of the Secretary of the Treasury to grant administrative exemptions under Code section 4975 to the Secretary of Labor. To rationalize the administration and interpretation of dual provisions under ERISA and the Code, the Reorganization Plan divided the interpretive and rulemaking authority for these provisions between the Secretaries of Labor and of the Treasury, so that, in general, the agency with responsibility for a given provision of Title I of ERISA would also have responsibility for the corresponding provision in the Code. Among the sections transferred to the Department were the prohibited transaction provisions and the definition of a fiduciary in both Title I of ERISA and in the Code. ERISA's prohibited transaction rules, 29 U.S.C. 1106–1108, apply to ERISA-covered plans, and the Code's corresponding prohibited transaction rules, 26 U.S.C. 4975(c), apply both to ERISA-covered pension plans that are tax-qualified pension plans, as well as other tax-advantaged arrangements, such as IRAs, that are not subject to the fiduciary responsibility and prohibited transaction rules in ERISA. Specifically, section 102(a) of the Reorganization Plan provides the Department of Labor with ''all authority'' for ''regulations, rulings, opinions, and exemptions under section 4975 [of the Code]'' subject to certain exceptions not relevant here. Reorganization Plan section 102. In President Carter's message to Congress regarding the Reorganization Plan, he made explicitly clear

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2570.30 to 2570.52 describe the procedures for applying for an administrative exemption. The Department has determined that the amended exemptions are administratively feasible, in the interests of plans and their participants and beneficiaries and IRA owners, and protective of the rights of participants and beneficiaries of plans and IRA owners.

Summary of the Major Provisions

PTE 86–128, as amended, permits certain fiduciaries, including both investment advice fiduciaries as defined under the Regulation and fiduciaries with discretionary authority or control over plan assets (*i.e.,* investment management fiduciaries), and their affiliates, to receive a fee directly from a plan for effecting or executing securities transactions as an agent on behalf of a plan. It also allows such fiduciaries to act in an ''agency cross transaction''—as an agent both for the plan and for another party—and receive reasonable compensation from the other party. Relief is also provided for investment advice fiduciaries and investment management fiduciaries to receive commissions from a plan or a mutual fund in connection with mutual fund transactions involving plans. This relief was originally available in another exemption, PTE 75–1, Part II(2), which is revoked today.

The Department has amended the exemption to protect IRA investors from the harmful impact of conflicts of interest. Before these amendments, the exemption granted broad relief to transactions involving IRAs, without protective conditions. We have determined that this approach is unprotective of these retirement investors and incompatible with this regulatory initiative's goal of guarding retirement investors against the harms caused by conflicts of interest. Therefore, the amendment requires investment managers to meet the terms of the exemption before engaging in covered transactions with respect to IRAs, and revokes relief for investment advice fiduciaries with respect to IRAs. Investment advice fiduciaries with respect to IRAs may rely instead on the Best Interest Contract Exemption finalized today elsewhere in this issue of the **Federal Register**, which has conditions specifically tailored to protect the interests of IRA investors.

The amendment requires fiduciaries relying on PTE 86–128 to adhere to ''Impartial Conduct Standards,'' including acting in the best interest of plans and IRAs, when they exercise their fiduciary authority. The amendment also adopts the proposed definition of Commission which sets forth the limited types of payments that are permitted under the exemption, and revises the disclosure and recordkeeping requirements under the exemption.

Finally, other changes are adopted with respect to PTE 75–1. PTE 75–1, Part II, is amended to revise the recordkeeping requirement of that exemption. Part I(b) and (c) of PTE 75–1, which provided relief for certain non-fiduciary services to plans and IRAs, is revoked. Upon revocation, persons seeking to engage in such transactions should look to the existing statutory exemptions provided in ERISA section 408(b)(2) and Code section 4975(d)(2), and the Department's implementing regulations at 29 CFR 2550.408b–2, for relief.

Executive Order 12866 and 13563 Statement

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

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

Background

Regulation Defining a Fiduciary

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

that as a result of the plan, ''Labor will have statutory authority for fiduciary obligations. . . . Labor will be responsible for overseeing fiduciary conduct under these provisions.'' Reorganization Plan, Message of the President. These amended exemptions provide relief from the indicated prohibited transaction provisions of both ERISA and the Code.

[3] ERISA section 404(a).

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

for the breach.[5] In addition, violations of the prohibited transaction rules are subject to excise taxes under the Code.

The Code also has rules regarding fiduciary conduct with respect to tax-favored accounts that are not generally covered by ERISA, such as IRAs. In particular, fiduciaries of these arrangements, including IRAs, are subject to the prohibited transaction rules and, when they violate the rules, to the imposition of an excise tax enforced by the Internal Revenue Service. Unlike participants in plans covered by Title I of ERISA, IRA owners do not have a statutory right to bring suit against fiduciaries for violation of the prohibited transaction rules.

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

The statutory definition deliberately casts a wide net in assigning fiduciary responsibility with respect to plan and IRA assets. Thus, ''any authority or control'' over plan or IRA assets is sufficient to confer fiduciary status, and any persons who render ''investment advice for a fee or other compensation, direct or indirect'' are fiduciaries, regardless of whether they have direct control over the plan's or IRA's assets and regardless of their status as an investment adviser or broker under the federal securities laws. The statutory definition and associated responsibilities were enacted to ensure that plans, plan participants, and IRA owners can depend on persons who provide investment advice for a fee to provide recommendations that are untainted by conflicts of interest. In the absence of fiduciary status, the providers of investment advice are neither subject to ERISA's fundamental fiduciary standards, nor accountable under ERISA or the Code for imprudent, disloyal, or biased advice.

In 1975, the Department issued a regulation, at 29 CFR 2510.3–21(c)(1975), defining the circumstances under which a person is treated as providing ''investment advice'' to an employee benefit plan within the meaning of ERISA section 3(21)(A)(ii) (the ''1975 regulation'').[6] The 1975 regulation narrowed the scope of the statutory definition of fiduciary investment advice by creating a five-part test for fiduciary advice. Under the 1975 regulation, for advice to constitute ''investment advice,'' an adviser[7] must (1) render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing or selling securities or other property (2) on a regular basis (3) pursuant to a mutual agreement, arrangement or understanding, with the plan or a plan fiduciary that (4) the advice will serve as a primary basis for investment decisions with respect to plan assets, and that (5) the advice will be individualized based on the particular needs of the plan. The regulation provided that an adviser is a fiduciary with respect to any particular instance of advice only if he or she meets each and every element of the five-part test with respect to the particular advice recipient or plan at issue.

The market for retirement advice has changed dramatically since the Department first promulgated the 1975 regulation. Individuals, rather than large employers and professional money managers, have become increasingly responsible for managing retirement assets as IRAs and participant-directed plans, such as 401(k) plans, have supplanted defined benefit pensions. At the same time, the variety and complexity of financial products have increased, widening the information gap between advisers and their clients. Plan fiduciaries, plan participants and IRA investors must often rely on experts for advice, but are unable to assess the quality of the expert's advice or effectively guard against the adviser's conflicts of interest. This challenge is especially true of retail investors who typically do not have financial expertise, and can ill-afford lower returns to their retirement savings caused by conflicts. The IRA accounts of these investors often account for all or the lion's share of their assets, and can represent all of savings earned for a lifetime of work. Losses and reduced returns can be devastating to the investors who depend upon such savings for support in their old age. As baby boomers retire, they are increasingly moving money from ERISA-covered plans, where their employer has both the incentive and the fiduciary duty to facilitate sound investment choices, to IRAs where both good and bad investment choices are myriad and advice that is conflicted is commonplace. These rollovers are expected to approach $2.4 trillion cumulatively from 2016 through 2020.[8] These trends were not apparent when the Department promulgated the 1975 rule. At that time, 401(k) plans did not yet exist and IRAs had only just been authorized.

As the marketplace for financial services has developed in the years since 1975, the five-part test has now come to undermine, rather than promote, the statutes' text and purposes. The narrowness of the 1975 regulation has allowed advisers, brokers, consultants and valuation firms to play a central role in shaping plan and IRA investments, without ensuring the accountability that Congress intended for persons having such influence and responsibility. Even when plan sponsors, participants, beneficiaries, and IRA owners clearly relied on paid advisers for impartial guidance, the 1975 regulation has allowed many advisers to avoid fiduciary status and disregard basic fiduciary obligations of care and prohibitions on disloyal and conflicted transactions. As a consequence, these advisers have been able to steer customers to investments based on their own self-interest (*e.g.,* products that generate higher fees for the adviser even if there are identical lower-fee products available), give imprudent advice, and engage in transactions that would otherwise be prohibited by ERISA and the Code without fear of accountability under either ERISA or the Code.

In the Department's amendments to the regulation defining fiduciary advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B), (the ''Regulation'') which are also published in this issue of the **Federal Register**, the Department is replacing the existing regulation with

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

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

[7] 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.

[8] Cerulli Associates, ''Retirement Markets 2015.''

one that more appropriately distinguishes between the sorts of advice relationships that should be treated as fiduciary in nature and those that should not, in light of the legal framework and financial marketplace in which IRAs and plans currently operate.[9]

The Regulation describes the types of advice that constitute ''investment advice'' with respect to plan or IRA assets for purposes of the definition of a fiduciary at ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B). The Regulation covers ERISA-covered plans, IRAs, and other plans not covered by Title I, such as Keogh plans, and health savings accounts described in section 223(d) of the Code.

As amended, the Regulation provides that a person renders investment advice with respect to assets of a plan or IRA if, among other things, the person provides, directly to a plan, a plan fiduciary, plan participant or beneficiary, IRA or IRA owner, the following types of advice, for a fee or other compensation, whether direct or indirect:

(i) A recommendation as to the advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property, or a recommendation as to how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred or distributed from the plan or IRA; and

(ii) A recommendation as to the management of securities or other investment property, including, among other things, recommendations on investment policies or strategies, portfolio composition, selection of other persons to provide investment advice or investment management services, types of investment account arrangements (brokerage vs. advisory); or recommendations with respect to rollovers, transfers or distributions from a plan or IRA including whether, in what amount, in what form, and to what destination such a rollover, transfer or distribution should be made.

In addition, in order to be treated as a fiduciary, such person, either directly or indirectly (*e.g.,* through or together with any affiliate), must: Represent or acknowledge that it is acting as a fiduciary within the meaning of ERISA or the Code with respect to the advice described; represent or acknowledge that it is acting as a fiduciary within the meaning of ERISA or the Code; render the advice pursuant to a written or verbal agreement, arrangement or understanding that the advice is based on the particular investment needs of the advice recipient; or direct the advice to a specific advice recipient or recipients regarding the advisability of a particular investment or management decision with respect to securities or other investment property of the plan or IRA.

The Regulation also provides that as a threshold matter in order to be fiduciary advice, the communication must be a ''recommendation'' as defined therein. The Regulation, as a matter of clarification, provides that a variety of other communications do not constitute ''recommendations,'' including non-fiduciary investment education; general communications; and specified communications by platform providers. These communications which do not rise to the level of ''recommendations'' under the regulation are discussed more fully in the preamble to the final Regulation.

The Regulation also specifies certain circumstances where the Department has determined that a person will not be treated as an investment advice fiduciary even though the person's activities technically may satisfy the definition of investment advice. For example, the Regulation contains a provision excluding recommendations to independent fiduciaries with financial expertise that are acting on behalf of plans or IRAs in arm's length transactions, if certain conditions are met. The independent fiduciary must be a bank, insurance carrier qualified to do business in more than one state, investment adviser registered under the Investment Advisers Act of 1940 or by a state, broker-dealer registered under the Securities Exchange Act of 1934 (Exchange Act), or any other independent fiduciary that holds, or has under management or control, assets of at least $50 million, and: (1) The person making the recommendation must know or reasonably believe that the independent fiduciary of the plan or IRA is capable of evaluating investment risks independently, both in general and with regard to particular transactions and investment strategies (the person may rely on written representations from the plan or independent fiduciary to satisfy this condition); (2) the person must fairly inform the independent fiduciary that the person is not undertaking to provide impartial investment advice, or to give advice in a fiduciary capacity, in connection with the transaction and must fairly inform the independent fiduciary of the existence and nature of the person's financial interests in the transaction; (3) the person must know or reasonably believe that the independent fiduciary of the plan or IRA is a fiduciary under ERISA or the Code, or both, with respect to the transaction and is responsible for exercising independent judgment in evaluating the transaction (the person may rely on written representations from the plan or independent fiduciary to satisfy this condition); and (4) the person cannot receive a fee or other compensation directly from the plan, plan fiduciary, plan participant or beneficiary, IRA, or IRA owner for the provision of investment advice (as opposed to other services) in connection with the transaction.

Similarly, the Regulation provides that the provision of any advice to an employee benefit plan (as described in section 3(3) of ERISA) by a person who is a swap dealer, security-based swap dealer, major swap participant, major security-based swap participant, or a swap clearing firm in connection with a swap or security-based swap, as defined in section 1a of the Commodity Exchange Act (7 U.S.C. 1a) and section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)) is not investment advice if certain conditions are met. Finally, the Regulation describes certain communications by employees of a plan sponsor, plan, or plan fiduciary that would not cause the employee to be an investment advice fiduciary if certain conditions are met.

Prohibited Transactions

The Department anticipates that the Regulation will cover many investment professionals who did not previously consider themselves to be fiduciaries under ERISA or the Code. Under the Regulation, these entities will be subject to the prohibited transaction restrictions in ERISA and the Code that apply specifically to fiduciaries. ERISA section 406(b)(1) and Code section 4975(c)(1)(E) prohibit a fiduciary from dealing with the income or assets of a plan or IRA in his own interest or his own account. ERISA section 406(b)(2), which does not apply to IRAs, provides that a fiduciary shall not ''in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries.'' ERISA

[9] The Department initially proposed an amendment to its regulation defining a fiduciary within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) on October 22, 2010, at 75 FR 65263. It subsequently announced its intention to withdraw the proposal and propose a new rule, consistent with the President's Executive Orders 12866 and 13563, in order to give the public a full opportunity to evaluate and comment on the new proposal and updated economic analysis. The first proposed amendment to the rule was withdrawn on April 20, 2015, *see* 80 FR 21927.

section 406(b)(3) and Code section 4975(c)(1)(F) prohibit a fiduciary from receiving any consideration for his own personal account from any party dealing with the plan or IRA in connection with a transaction involving assets of the plan or IRA.

Parallel regulations issued by the Departments of Labor and the Treasury explain that these provisions impose on fiduciaries of plans and IRAs a duty not to act on conflicts of interest that may affect the fiduciary's best judgment on behalf of the plan or IRA.[10] The prohibitions extend to a fiduciary causing a plan or IRA to pay an additional fee to such fiduciary, or to a person in which such fiduciary has an interest that may affect the exercise of the fiduciary's best judgment as a fiduciary. Likewise, a fiduciary is prohibited from receiving compensation from third parties in connection with a transaction involving the plan or IRA.[11]

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

Prohibited Transaction Exemptions 86–128 and 75–1, Part II

As the prohibited transaction provisions demonstrate, ERISA and the Code strongly disfavor conflicts of interest. In appropriate cases, however, the statutes provide exemptions from their broad prohibitions on conflicts of interest. For example, ERISA section 408(b)(14) and Code section 4975(d)(17) specifically exempt transactions involving the provision of fiduciary investment advice to a participant or beneficiary of an individual account plan or IRA owner if the advice, resulting transaction, and the adviser's fees meet stringent conditions carefully designed to guard against conflicts of interest.

In addition, the Secretary of Labor has discretionary authority to grant administrative exemptions under ERISA and the Code on an individual or class basis, but only if the Secretary first finds that the exemptions are (1) administratively feasible, (2) in the interests of plans and their participants and beneficiaries and IRA owners, and (3) protective of the rights of the participants and beneficiaries of such plans and IRA owners. Accordingly, fiduciary advisers may always give advice without need of an exemption if they avoid the sorts of conflicts of interest that result in prohibited transactions. However, when they choose to give advice in which they have a conflict of interest, they must rely upon an exemption.

Pursuant to its exemption authority, the Department has previously granted several conditional administrative class exemptions that are available to fiduciary advisers in defined circumstances. PTE 86–128 [12] historically provided an exemption from these prohibited transactions provisions for certain types of fiduciaries to use their authority to cause a plan or IRA to pay a fee to the fiduciary, or its affiliate, for effecting or executing securities transactions as agent for the plan. The exemption further provided relief for these types of fiduciaries to act as agent in an ''agency cross transaction'' for both a plan or IRA and one or more other parties to the transaction, and for such fiduciaries or their affiliates to receive fees from the other party(ies) in connection with the agency cross transaction. An agency cross transaction is defined in the exemption as a securities transaction in which the same person acts as agent for both any seller and any buyer for the purchase or sale of a security.

As originally granted, the exemption in PTE 86–128 could be used only by fiduciaries who were not discretionary trustees, plan administrators, or employers of any employees covered by the plan.[13] PTE 86–128 was amended in 2002 to permit use of the exemption by discretionary trustees, and their affiliates subject to certain additional requirements.[14] Additionally, in 2011 the Department specifically noted in an Advisory Opinion that PTE 86–128 provides relief for covered transactions engaged in by fiduciaries who provide investment advice for a fee.[15]

Prohibited Transaction Exemption 75–1, Part II(2), provided relief for the purchase or sale by a plan of securities issued by an open-end investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*), provided that no fiduciary with respect to the plan who made the decision on behalf of the plan to enter into the transaction was a principal underwriter for, or affiliated with, such investment company within the meaning of sections 2(a)(29) and 2(a)(3) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(29) and 80a–2(a)(3)). The exemption permitted a fiduciary to receive a commission in connection with the purchase.

The conditions of the exemption required that the fiduciary customarily purchase and sell securities for its own account in the ordinary course of its business, that the transaction occur on terms at least as favorable to the plan as an arm's length transaction with an unrelated party, and that records be maintained. Contrary to our current approach to recordkeeping, the exemption imposed the recordkeeping burden on the plan or IRA involved in the transaction, rather than the fiduciary.

In connection with the proposed Regulation, the Department proposed an amendment to PTE 86–128. First, the Department proposed to increase the safeguards of the exemption by requiring fiduciaries that rely on the exemption to adhere to certain ''Impartial Conduct Standards,'' including acting in the best interest of the plans and IRAs when exercising fiduciary authority, and by more precisely defining the types of payments that are permitted under the exemption.[16] Second, on a going forward basis, the Department proposed to restrict relief to IRA fiduciaries with discretionary authority or control over the management of the IRA's assets (*i.e.,* investment managers) and to impose the exemption's protective conditions on investment management fiduciaries when they engage in transactions with IRAs. Finally, the Department proposed

[10] Subsequent to the issuance of these regulations, Reorganization Plan No. 4 of 1978, 5 U.S.C. App. (2010), divided rulemaking and interpretive authority between the Secretaries of Labor and the Treasury. The Secretary of Labor was given interpretive and rulemaking authority regarding the definition of fiduciary under both Title I of ERISA and the Internal Revenue Code. *Id.* section 102(a) (''all authority of the Secretary of the Treasury to issue [regulations, rulings opinions, and exemptions under section 4975 of the Code] is hereby transferred to the Secretary of Labor'').

[11] 29 CFR 2550.408b–2(e); 26 CFR 54.4975–6(a)(5).

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

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

[14] 67 FR 64137 (October 17, 2002).

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

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

to revoke relief for investment advice fiduciaries with respect to IRAs.

The Department also proposed that PTE 86–128 would apply to the transactions originally permitted under PTE 75–1, Part II(2). In this connection, we proposed to revoke PTE 75–1, Part II(2). We also proposed to revoke PTE 75–1, Part I(b) and (c), which provided relief for certain non-fiduciary services to plans and IRAs, in light of the existing statutory exemptions provided in ERISA section 408(b)(2) and Code section 4975(d)(2) and the Department's implementing regulations at 29 CFR 2550.408b–2.

These amendments and partial revocations follow a lengthy public notice and comment period, which gave interested persons an extensive opportunity to comment on the proposed Regulation, amendments and other related exemption proposals. The proposals initially provided for 75-day comment periods, ending on July 6, 2015, but the Department extended the comment periods to July 21, 2015. The Department then held four days of public hearings on the new regulatory package, including the proposed exemptions, in Washington, DC from August 10 to 13, 2015, at which over 75 speakers testified. The transcript of the hearing was made available on September 8, 2015, and the Department provided additional opportunity for interested persons to comment on the proposals or hearing transcript until September 24, 2015. A total of over 3000 comment letters were received on the new proposals. There were also over 300,000 submissions made as part of 30 separate petitions submitted on the proposal. These comments and petitions came from consumer groups, plan sponsors, financial services companies, academics, elected government officials, trade and industry associations, and others, both in support and in opposition to the rule.[17]

The Department has reviewed all comments, and after careful consideration of comments received, has decided to grant the amendments to and partial revocations of PTEs 86–128 and 75–1, Part II, as described below.

Description of the Amendments and Partial Revocations

As amended, PTE 86–128 preserves originally granted relief for mutual fund and securities transactions involving plans, with the added safeguards of the Impartial Conduct Standards and a clearer definition of the types of payments that are permitted. The amendment also adopts the proposed approach to relief for fiduciaries with respect to IRAs, which significantly increased the safeguards to these retirement investors. Investment management fiduciaries to IRAs may rely on Section I(a) of PTE 86–128 if they satisfy the conditions of the exemption, including the Impartial Conduct Standards, the disclosures and the authorizations. However, relief for investment advice fiduciaries is revoked. Also revoked is PTE 75–1, Part II(2), which permitted fiduciaries to receive compensation in connection with certain mutual fund transactions, under very few applicable safeguards, and PTE 75–1, Part I(b) and (c), in light of the statutory exemptions in ERISA section 408(b)(2) and Code section 4975(d)(2).

The Department revised PTE 86–128 and 75–1, Part II, in these ways in conjunction with the grant of a new exemption, the Best Interest Contract Exemption, adopted elsewhere in this issue of the **Federal Register**, that is specifically applicable to advice to certain ''retirement investors''—generally retail investors such as plan participants and beneficiaries, IRA owners, and certain plan fiduciaries. The Best Interest Contract Exemption provides broader relief for investment advice fiduciaries recommending mutual fund and other securities transactions to retirement investors. The conditions of the Best Interest Contract Exemption more appropriately address these arrangements.

With respect to IRA owners and participants and beneficiaries in non-ERISA plans, the Best Interest Contract Exemption requires the investment advice fiduciary to contractually acknowledge fiduciary status and commit to adhere to the Impartial Conduct Standards. As a result, the Best Interest Contract Exemption ensures that IRA owners and the non-ERISA plan participants and beneficiaries have a contract-based claim if their advisers violate the fundamental fiduciary obligations of prudence and loyalty, a protection that is not present in PTE 86–128 and 75–1, Part II.

More generally, the Best Interest Contract Exemption includes safeguards that are uniquely protective of both plans and IRAs in today's complex financial marketplace, including the requirement that financial institutions relying on the exemption adopt anti-conflict policies and procedures designed to ensure that advisers satisfy the Impartial Conduct Standards. The Best Interest Contract Exemption is specifically tailored to address, among other things, the particular conflicts of interest associated with third party payments such as revenue sharing and 12b–1 fees that may not be readily apparent to the retirement investor but can provide powerful incentives to investment advice fiduciaries.

In addition to the Best Interest Contract Exemption, the Regulation adopted today makes provision for certain parties to avoid fiduciary status when they engage in arm's length transactions with plans or IRAs that are independently represented by a fiduciary with financial expertise. Such independent fiduciaries generally include banks, insurance carriers, registered investment advisers, broker-dealers and other fiduciaries with $50 million or more in assets under management or control. This provision in the Regulation complements the limitations in the Best Interest Contract Exemption and is available for transactions involving mutual fund and other securities transactions.

A number of commenters objected generally to changes to PTE 86–128 and PTE 75–1, Part II(2), on the basis that the originally granted exemptions provided sufficient protections to retirement investors. Commenters said there is no demonstrated harm to these consumers under the existing approach. The Department does not agree. The extensive changes in the retirement plan landscape and the associated investment market in recent decades undermine the continued adequacy of our original approach in PTE 86–128 and PTE 75–1, Part II(2). As noted in the accompanying Regulatory Impact Analysis, the Department has determined that investors saving for retirement lose billions of dollars each year as a result of conflicts of interest. PTE 86–128 and PTE 75–1 did not adequately safeguard against these losses, and indeed, in some cases, imposed no protective conditions whatsoever with respect to conflicted investment advice. The changes to these exemptions, discussed below, respond to the ongoing harms caused by conflicts of interest.

The Department did not fully revoke PTE 86–128 and PTE 75–1, Part II, however, where it determined that the conditions of those exemptions continued to be appropriate in connection with the narrow scope of relief provided. PTE 75–1, Part II, remains available for transactions involving non-fiduciary service providers and PTE 86–128 continues to provide narrow relief for commission payments to fiduciaries, in transactions involving ERISA plans and managed

[17] As used throughout this preamble, the term ''comment'' refers to information provided through these various sources, including written comments, petitions and witnesses at the public hearing.

IRAs, subject to the Impartial Conduct Standards as additional conditions of relief. Broader relief, for more types of payments to investment advice fiduciaries, is provided in the Best Interest Contract Exemption for transactions involving plans, IRAs, and non-ERISA plans. The Best Interest Contract Exemption is designed to address the fiduciary conflicts of interest associated with the variety of payments received in connection with transactions involving all plans and IRAs.

Scope of the Amended PTE 86–128

As amended, PTE 86–128 applies to the following transactions set forth in Section I of the exemption:

(a) (1) A plan fiduciary's using its authority to cause a plan to pay a Commission directly to that person or a Related Entity as agent for the plan in a securities transaction, but only to the extent that the securities transactions are not excessive, under the circumstances, in either amount or frequency; and (2) A plan fiduciary's acting as the agent in an agency cross transaction for both the plan and one or more other parties to the transaction and the receipt by such person of a Commission from one or more other parties to the transaction; and

(b) A plan fiduciary's using its authority to cause the plan to purchase shares of an open end investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1 *et seq.*) (Mutual Fund) from such fiduciary, and to the receipt of a Commission by such person in connection with such transaction, but only to the extent that such transactions are not excessive, under the circumstances, in either amount or frequency; provided that, the fiduciary (1) is a broker-dealer registered under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*) acting in its capacity as a broker-dealer, and (2) is not a principal underwriter for, or affiliated with, such Mutual Fund, within the meaning of sections 2(a)(29) and 2(a)(3) of the Investment Company Act of 1940.

Thus, Section I(a) provides relief for transactions involving securities where a Commission, as defined in the exemption, is paid directly by the plan or IRA. Section I(b) provides relief for mutual fund transactions where a Commission is received but it does not have to be paid directly by the plan; the relief in Section I(b) extends to Commissions paid by a mutual fund or its affiliate. The final exemption makes clear that the relief provided in Section I(b) was intended to apply to broker-dealers acting in their capacity as broker-dealers.

Section I(c) establishes certain limitations on the relief provided, with respect to transactions involving IRAs. Section I(c)(1) provides that the exemption in Section I(a) does not apply if (A) the plan is an IRA [18] and (B) the fiduciary engaging in the transaction is a fiduciary by reason of the provision of investment advice for a fee, as described in Code section 4975(e)(3)(B) and the applicable regulations. Section I(c)(2) provides that the exemption in Section I(b) does not apply to transactions involving IRAs. Relief for investment advice fiduciaries (including broker-dealers) providing investment advice to IRAs is available under the Best Interest Contract Exemption.

Section I(c) was revised from the proposal, which stated: ''The exemptions set forth in Section I(a) and (b) do not apply to a transaction if (1) the plan is an Individual Retirement Account and (2) the fiduciary engaging in the transaction is a fiduciary by reason of the provision of investment advice for a fee, as described in Code section 4975(e)(3)(B) and the applicable regulations.'' The revision was made to clarify the intent of the proposal that, as amended, the exemption should be relied on for transactions involving IRAs only by fiduciaries with full investment discretion. As a result, the exemption in Section I(b) effectively would have been unavailable with respect to IRAs, since Section I(b) provides relief only to broker-dealers acting in their capacities as broker dealers. The final exemption makes that restriction explicit.

In addition, the exclusion from conditions of the exemption for certain plans not covering employees, including IRAs, contained in Section IV(a), was eliminated. Therefore, while investment advice fiduciaries to IRAs must rely on another exemption, fiduciaries that exercise full discretionary authority or control with respect to IRAs as described in Code section 4975(e)(3)(A) (*i.e.,* investment managers) may continue to rely on Section I(a) of the amended exemption, as long as they comply with the Impartial Conduct Standards and make the disclosures and receive the approvals that were originally required by the exemption with respect to other types of plans.

The Department notes that the transaction description set forth in Section I(a) of the proposal has been revised to refer to a ''securities transaction.'' The addition of the language is simply to ensure clarity with respect to the scope of the relief. PTE 86–128 has always been limited to securities transactions, and the Department added the language to remove any doubt that may have been created by its absence from the proposed language. Comments on issues of scope are discussed below.

IRAs

Commenters have broadly argued that no changes should be made with respect to the relief originally provided to and conditions imposed on IRA fiduciaries. The commenters stated that the Department has offered no evidence that a change is necessary. Further, they argued that excluding only certain IRA fiduciaries from PTE 86–128 will increase cost and create confusion.

As reflected in the Regulatory Impact Analysis, the prevalence of conflicts of interest in the marketplace for retirement investments is causing ongoing harm to retirement investors. Developments since the Department granted PTE 86–128, and its predecessor PTE 75–1, Part I, have exacerbated the dangers posed by conflicts of interest in the IRA marketplace. The amount of assets held in IRAs has grown dramatically, as the financial services marketplace and financial products have become more complex, and compensation structures have become increasingly conflicted.

To put the changes in the market place in context, IRAs were only established in 1975 (the same year as PTE 75–1 was issued). By 1984, IRAs still held just $159 billion in assets, compared with $589 billion in private-sector defined benefit plans and $287 billion in private-sector defined contribution plans. By the end of the 2014 third quarter, in contrast, IRAs held $6.3 trillion, far surpassing both defined benefit plans ($3.0 trillion) and defined contribution plans ($5.3 trillion). If current trends continue, defined benefit plans' role will decline further, and IRA growth will continue to outstrip that of defined contribution plans, as the workforce ages and the baby boom generation retires and more defined contribution accounts (and sometimes lump sum payouts of defined benefit benefits) are rolled into IRAs. Almost $2.5 trillion is projected to be rolled over from ERISA plans to IRAs between 2015 and 2019. The growth of IRAs has made more middle- and lower-income families into investors, and sound investing more critical to such families' retirement security.

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

Further, as more families have invested, investing has become more complicated. As IRAs grew during the 1980s and 1990s, their investment pattern changed, shifting away from bank products and toward mutual funds. Bank products typically provide a specified investment return, and perhaps charge an explicit fee. Single issue securities lack diversification and have uncertain returns, but the expenses associated with acquiring and holding them typically take the form of explicit up-front commissions and perhaps some ongoing account fees. Mutual funds are more diversified (and in this respect can simplify investing), but also have uncertain returns, and their fee arrangements can be more complex, and can include a variety of revenue sharing and other arrangements that can introduce conflicts into investment advice and that usually are not fully transparent to investors. The growth in IRAs and the shift in how IRA assets are invested point toward a growing risk that conflicts of interest will taint investment advice regarding IRAs and thereby compromise retirement security.

Prior to these amendments, PTE 86–128 did not protect IRA investors with respect to the transactions it covered, but rather gave fiduciaries a broad unconditional pass from the prohibited transaction rules, which Congress enacted to protect retirement investors from the dangers posed by conflicts of interest. Continuing to give free reign to conflicts of interest in this manner cannot be squared with the important anti-conflict purposes of the prohibited transaction rules, nor would it be in the interests of the IRAs or protective of the rights of IRA owners.[19] The amendments and revocations finalized today protect IRA investors from the abuses posed by conflicts of interest and the injuries identified in the Regulatory Impact Analysis. The decision to eliminate relief for investment advice fiduciaries in PTE 86–128 with respect to IRAs is consistent with the global approach that the Department has crafted to address the unique issues presented by investors in IRAs. Specifically, rather than increasing confusion and cost, the revocation of relief for such advisers from PTE 86–128 and the provision of relief for such advisers in the Best Interest Contract Exemption will ensure that IRA owners are treated consistently by those fiduciaries, as the fiduciaries comply with a common set of standards. The Best Interest Contract Exemption was crafted to more specifically address and protect the interests of retail retirement investors—plan participants and beneficiaries, IRA owners and certain plan fiduciaries—that rely on investment advice fiduciaries to engage in securities transactions, and it contains safeguards specifically crafted for these investors.

The amendments to PTE 86–128, by incorporating the same Impartial Conduct Standards as are required in the Best Interest Contract Exemption, will result in fiduciaries adhering to a common set of fiduciary norms across exemptions, covering multiple products and types of transactions. The uniform imposition of the standards will also reduce confusion to those consumers who already think their advisers owe them a fiduciary duty.[20] These amendments ensure that plans and IRAs receive advice that is subject to prudence and is in their best interest, and is not tilted to particular products, recommendations, or fees because they are less regulated, even though just as dangerous.

One commenter suggested that ''sophisticated'' IRA owners should not be subject to the exemption's amendments. The commenter argued that large or sophisticated investors are not in need of the protections and disclosures the amended exemption provides to IRAs, whether through PTE 86–128 or the Best Interest Contract Exemption. The Department does not agree, however, that the size of the account balance or the wealth of the retirement invest are strong indicators of investment expertise. Nor does the Department believe that large accounts or wealthy investors are less deserving of protection from losses caused by imprudent or disloyal advice. Individuals may have large account balances as a result of years of hard work and careful savings, rollover of an account balance from a defined benefit plan, or inheritance. None of these pathways to large accounts necessarily correlate with financial acumen or the ability to bear losses. Similarly, the Department does not believe that any particular level of income or amount of net assets renders disclosures of fees and conflicts of interest unnecessary or negates the importance of adherence to basic fiduciary norms when giving advice. In the Department's view, all IRAs would benefit from consistent adherence to fiduciary norms and basic disclosure.

Finally, a commenter requested assurances that this revocation of relief with respect to IRA investment advisers was not applicable to investment advice fiduciaries that provide advice to non-IRA plan clients. The language of Section I(c)(1) and (2) is specifically limited to IRAs (as defined in the exemption). If a plan is not an IRA, it is not subject to the exclusion set forth in that section, and the fiduciary may rely upon the exemption to the extent the transaction falls within the exemption's scope and the fiduciary complies with the exemption's conditions, further described below, such as the Impartial Conduct Standards, disclosure, and consent requirements. However, the Department notes the exemption, as amended, will not provide relief for a recommended rollover from an ERISA plan to an IRA, where the resulting compensation is a Commission on the IRA investments.

Mutual Fund Exemption

Section I(b) of PTE 86–128, as amended, includes relief for mutual fund transactions, originally permitted under PTE 75–1, Part II(2). Granted under the heading ''Principal transactions,'' PTE 75–1, Part II(2) contained an exemption for mutual fund purchases between fiduciaries and plans or IRAs. Although it provided relief for fiduciary self-dealing and conflicts of interest, the exemption was only available if the fiduciary who decides on behalf of the plan or IRA to enter into the transaction was not a principal underwriter for, or affiliated with, the mutual fund. As set forth above, it was subject to minimal safeguards for retirement investors.

The new covered transaction in Section I(b) applies to broker-dealers acting in their capacity as broker-dealers. The exemption is subject to the general prohibition in PTE 86–128 on churning, and the new Impartial Conduct Standards in Section II. In addition, a new Section IV to PTE 86–128 sets forth conditions applicable solely to the proposed new covered transaction. The new Section IV incorporates conditions originally applicable to PTE 75–1, Part II(2).

Specifically, the conditions applicable to the new covered transaction in Section I(b), as set forth in Section IV, are: (1) The fiduciary customarily sells securities for its own account in the ordinary course of its business as a broker-dealer; (2) the transaction is at least as favorable to the plan or IRA as an arm's length transaction with an unrelated party would be; and (3) unless

[19] Code section 4975(c)(2).

[20] Angela A. Hung, Noreen Clancy, Jeff Dominitz, Eric Talley, Claude Berrebi, Farrukh Suvankulov, Investor and Industry Perspectives on Investment Advisers and Broker-Dealers, RAND Institute for Civil Justice, commissioned by the U.S. Securities and Exchange Commission, 2008, at *http://www.sec.gov/news/press/2008/2008–1_randiabdreport.pdf.*

rendered inapplicable by Section V of the exemption, the requirements of Sections III(a) through III(f), III(h) and III(i) (if applicable), and III(j), governing who may rely on the exemption, and requiring certain disclosures and authorizations, are satisfied with respect to the transaction. The exceptions contained in Section V are applicable to this new covered transaction as well.[21]

One commenter expressed the broad belief that no changes should be made to the existing exemptive relief. The commenter indicated that no evidence of harm exists and no policy reason could justify the change, arguing that the only result will be increased burdens and costs. The Department disagrees. As outlined in the proposal and as described above, the movement of the existing exemption from PTE 75–1, Part II(2), to PTE 86–128 for plans, or the Best Interest Contract Exemption, for IRAs, is fitting based on the nature of the transaction, the ongoing injury that conflicts of interest cause to retirement investors, and the additional protections that can be provided to retirement investors. The Department's accompanying Regulatory Impact Analysis indicates that the status quo is harming investors.

Beyond a general objection, the same commenter suggested that the scope of the relief provided by Section I(b) should be significantly expanded. As originally proposed, Section I(b) was limited to transactions involving shares in an open end investment company registered under the Investment Company Act of 1940, in which the fiduciary was acting as ''principal.'' The commenter indicated that the exemption should include Unit Investment Trusts, which are registered investment companies but not open end investment companies, as well as other products that are traded on a principal basis.

The Department does not disagree with the commenter's premise that relief may be necessary for certain principal transactions and transactions involving Unit Investment Trusts. However, such relief is provided through separate exemptions under specifically tailored conditions, the Best Interest Contract Exemption and the Principal Transactions Exemption, published elsewhere in this issue of the **Federal Register**. Both of these exemptions cover Unit Investment Trusts and the Principal Transactions Exemption provides relief for principal transactions in certain other assets.

One commenter reacted to the Department's description of the transaction described in PTE 75–1, Part II(2) as a ''riskless principal'' transaction. The commenter indicated that the language of proposed Section I(b) required the transaction to be a ''principal'' transaction and would require the fiduciary engaged in the transaction to report the transaction as a principal transaction, while some market participants confirm these sales as agency trades. Although agency trades are covered by the relief in Section I(a), the relief in Section I(b) is broader in the sense that it covers the receipt of a commission from either the plan or the mutual fund.

The Department has revised the language of Section I(b) to eliminate the reference to the fiduciary acting as ''principal.'' The Department did not intend to require market participants to change the nomenclature in their confirmations or to exclude any transactions based solely on the nomenclature. To avoid any resulting confusion, the mutual fund exemption in PTE 86–128, as amended, is not limited to riskless principal transactions, and provides relief with respect to covered transactions regardless of whether they are technically confirmed as ''principal'' transactions.

In connection with the new covered transaction, the Department is revoking PTE 75–1, Part II(2), which had provided relief for a plan fiduciary's using its authority to cause the plan to purchase shares of a mutual fund from the fiduciary, because those transactions are now covered by PTE 86–128.

Related Entities

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

In the amended exemption, relief extends beyond the person and its affiliates, to ''related entities.'' [22] The term ''related entity'' is defined as an entity, other than an affiliate, in which a fiduciary has an interest that may affect the exercise of its best judgment as a fiduciary. This aspect of the proposal was designed to address concern that the relief provided by the exemption to persons (including their affiliates) would otherwise be too narrow to give adequate relief for covered transactions. In this regard, it is a prohibited transaction for a fiduciary to use the ''authority, control, or responsibility which makes such a person a fiduciary to cause a plan to pay an additional fee to such fiduciary (or to a person in which such fiduciary has an interest which may affect the exercise of such fiduciary's best judgment as a fiduciary) to provide a service.'' [23] It is not necessary, however, for a fiduciary to have control over or be under control by an entity (as contemplated by the definition of ''affiliate'') in order for the fiduciary to have an interest in the entity that may arguably affect the exercise of the fiduciary's best judgment as a fiduciary. As a result, the exemption might not have given full relief for some covered transactions because they generated compensation for related entities that fell outside the definition of ''affiliate.''

Accordingly, the Department proposed revising the exemption to encompass such related parties, and requested comment on the necessity of incorporating relief for related entities in PTE 86–128, and the approach taken in the proposal to do so. A single commenter responded to the Department's call for comment, and it supported incorporating relief for related entities and expressed its general agreement with the necessity of such action. The Department has finalized these amendments without change.

Impartial Conduct Standards

Section II of PTE 86–128, as amended, requires that the fiduciary engaging in a covered transaction comply with fundamental Impartial Conduct Standards. Generally stated, the Impartial Conduct Standards require that, with respect to the transaction, the fiduciary must act in the plan's or IRA's Best Interest; receive no more than reasonable compensation, and make no misleading statements to the plan or IRA. As defined in the exemption, a fiduciary acts in the Best Interest of a

[21] Relief was not proposed in the new Section I(b) for sales by a plan or IRA to a fiduciary due to the Department's belief that it is not necessary for a plan to sell a mutual fund share to a fiduciary. The Department requested comment on this limitation but no comments were received. As a result, in the final amendment, the Department has not expanded the description of the covered transaction in this respect.

[22] See Section VII(m).

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

plan or IRA when the fiduciary acts 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, based on the investment objectives, risk tolerance, financial circumstances, and needs of the plan or IRA, without regard to the financial or other interests of the fiduciary, its affiliate, a Related Entity or other party.

The Impartial Conduct Standards represent fundamental obligations of fair dealing and fiduciary conduct. The concepts of prudence, undivided loyalty and reasonable compensation are all deeply rooted in ERISA and the common law of agency and trusts.[24] These longstanding concepts of law and equity were developed in significant part to deal with the issues that arise when agents and persons in a position of trust have conflicting loyalties, and accordingly, are well-suited to the problems posed by conflicted investment advice. The phrase ''without regard to'' is a concise expression of ERISA's duty of loyalty, as expressed in section 404(a)(1)(A) of ERISA and applied in the context of advice. It is consistent with the formulation stated in the common law, and it is consistent with the language used by Congress in Section 913(g)(1) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act),[25] and cited in the Staff of the U.S. Securities and Exchange Commission ''Study on Investment Advisers and Broker-Dealers, as required under the Dodd-Frank Act'' (Jan. 2011) (SEC staff Dodd-Frank Study).[26] Further, the ''reasonable compensation'' obligation is already required under ERISA section 408(b)(2) and Code section 4975(d)(2) of financial services providers, including financial services providers, whether fiduciaries or not.[27]

Under ERISA section 408(a) and Code section 4975(c)(2), the Department cannot grant an exemption unless it first finds that the exemption is administratively feasible, in the interests of plans and their participants and beneficiaries and IRA owners, and protective of the rights of participants and beneficiaries of plans and IRA owners. Imposition of the Impartial Conduct Standards as a condition of this exemption is critical to the Department's ability to make these findings.

The Impartial Conduct Standards are conditions of the amended exemption for the provision of advice with respect to all plans and IRAs. However, in contrast to the Best Interest Contract Exemption and the Principal Transactions Exemption, there is no contract requirement for advice to plans or IRAs under this amended exemption.

The Department received many comments on the proposal to include the Impartial Conduct Standards as part of these existing exemptions. A number of commenters focused on the Department's authority to impose the Impartial Conduct Standards as conditions of the exemption. Commenters' arguments regarding the Impartial Conduct Standards as applicable to IRAs and non-ERISA plans were based generally on the fact that the standards, as noted above, are consistent with longstanding principles of prudence and loyalty set forth in ERISA section 404, but which have no counterpart in the Code. Commenters took the position that because Congress did not choose to impose the standards of prudence and loyalty on fiduciaries with respect to IRAs and non-ERISA plans, the Department exceeded its authority in proposing similar standards as a condition of relief in a prohibited transaction exemption.

With respect to ERISA plans, commenters stated that Congress' separation of the duties of prudence and loyalty (in ERISA section 404) from the prohibited transaction provisions (in ERISA section 406), showed an intent that the two should remain separate. Commenters additionally questioned why the conduct standards were necessary for ERISA plans, when such plans already have an enforceable right to fiduciary conduct that is both prudent and loyal. Commenters asserted that imposing the Impartial Conduct Standards as conditions of the exemption created strict liability for prudence violations.

Some commenters additionally took the position that Congress, in the Dodd-Frank Act, gave the SEC the authority to establish standards for broker-dealers and investment advisers and therefore, the Department did not have the authority to act in that area.

The Department disagrees that this amendment to the exemption exceeds its authority. The Department has clear authority under ERISA section 408(a) and the Reorganization Plan [28] to grant administrative exemptions from the prohibited transaction provisions of both ERISA and the Code. Congress gave the Department broad discretion to grant or deny exemptions and to craft conditions for those exemptions, subject only to the overarching requirement that the exemption be administratively feasible, in the interests of plans, plan participants and beneficiaries and IRA owners, and protective of their rights.[29] Nothing in ERISA or the Code suggests that the Department is forbidden to borrow from time-honored trust-law standards and principles developed by the courts to ensure proper fiduciary conduct.

The Impartial Conduct Standards represent, in the Department's view, baseline standards of fundamental fair dealing that must be present when fiduciaries make conflicted investment recommendations to retirement investors. After careful consideration, the Department determined that broad relief could be provided to investment advice fiduciaries receiving conflicted compensation only if such fiduciaries provided advice in accordance with the Impartial Conduct Standards—*i.e.,* if they provided prudent advice without regard to the interests of such fiduciaries and their affiliates and related entities, in exchange for reasonable compensation and without misleading the investors.

These Impartial Conduct Standards are necessary to ensure that advisers' recommendations reflect the best interest of their retirement investor customers, rather than the conflicting financial interests of the advisers and their financial institutions. As a result, advisers and financial institutions bear the burden of showing compliance with the exemption and face liability for engaging in a non-exempt prohibited

[24] See generally ERISA sections 404(a), 408(b)(2); Restatement (Third) of Trusts section 78 (2007), and Restatement (Third) of Agency section 8.01.

[25] Section 913(g) governs ''Standard of Conduct'' and subsection (1) provides that ''The Commission may promulgate rules to provide that the standard of conduct for all brokers, dealers, and investment advisers, when providing personalized investment advice about securities to retail customers (and such other customers as the Commission may by rule provide), shall be to act in the best interest of the customer without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice.''

[26] SEC Staff Study on Investment Advisers and Broker-Dealers, January 2011, available at *https://www.sec.gov/news/studies/2011/913studyfinal.pdf,* pp.109–110.

[27] ERISA section 408(b)(2) and Code section 4975(d)(2) exempt certain arrangements between ERISA plans, IRAs, and non-ERISA plans, and service providers, that otherwise would be prohibited transactions under ERISA section 406 and Code section 4975. Specifically, ERISA section 408(b)(2) and Code section 4975(d)(2) provide relief from the prohibited transaction rules for service contracts or arrangements if the contract or arrangement is reasonable, the services are necessary for the establishment or operation of the plan or IRA, and no more than reasonable compensation is paid for the services.

[28] *See* fn. 2, *supra,* discussing Reorganization Plan No. 4 of 1978 (5 U.S.C. app. at 214 (2000)).

[29] *See* ERISA section 408(a) and Code section 4975(c)(2).

transaction if they fail to provide advice that is prudent or otherwise in violation of the standards. The Department does not view this as a flaw in the exemptions, as commenters suggested, but rather as a significant deterrent to violations of important conditions under the exemptions.

The Department similarly disagrees that Congress' directive to the SEC in the Dodd-Frank Act limits its authority to establish appropriate and protective conditions in the context of a prohibited transaction exemption. Section 913 of that Act directs the SEC to conduct a study on the standards of care applicable to brokers-dealers and investment advisers, and issue a report containing, among other things:

> an analysis of whether [sic] any identified legal or regulatory gaps, shortcomings, or overlap in legal or regulatory standards in the protection of retail customers relating to the standards of care for brokers, dealers, investment advisers, persons associated with brokers or dealers, and persons associated with investment advisers for providing personalized investment advice about securities to retail customers.[30]

Section 913 authorizes, but does not require, the SEC to issue rules addressing standards of care for broker-dealers and investment advisers for providing personalized investment advice about securities to retail customers.[31] Nothing in the Dodd-Frank Act indicates that Congress meant to preclude the Department's regulation of fiduciary investment advice under ERISA or its application of such a regulation to securities brokers or dealers. To the contrary, Dodd-Frank in directing the SEC study specifically directed the SEC to consider the effectiveness of existing legal and regulatory standards of care under other federal and state authorities. Dodd-Frank Act, sec. 913(b)(1) and (c)(1). The Dodd-Frank Act did not take away the Department's responsibility with respect the definition of fiduciary under ERISA and in the Code; nor did it qualify the Department's authority to issue exemptions that are administratively feasible, in the interests of plans, participants and beneficiaries, and IRA owners, and protective of the rights of participants and beneficiaries of the plans and IRA owners.

Some commenters suggested that it would be unnecessary to impose the Impartial Conduct Standards on advisers with respect to ERISA plans, as fiduciaries to these Plans already are required to operate within similar statutory fiduciary obligations. The Department considered this comment but has determined not to eliminate the conduct standards as conditions of the exemptions for ERISA plans. One of the Department's goals is to ensure equal footing for all retirement investors. The SEC staff study required by section 913 of the Dodd-Frank Act found that investors were frequently confused by the differing standards of care applicable to broker-dealers and registered investment advisers. The Department hopes to minimize such confusion in the market for retirement advice by holding fiduciaries to similar standards, regardless of whether they are giving the advice to an ERISA plan, IRA, or a non-ERISA plan.

Moreover, inclusion of the standards as conditions of these existing exemptions adds an important additional safeguard for ERISA and IRA investors alike because the party engaging in a prohibited transaction has the burden of showing compliance with an applicable exemption, when violations are alleged.[32] In the Department's view, this burden-shifting is appropriate because of the dangers posed by conflicts of interest, as reflected in the Department's Regulatory Impact Analysis and the difficulties retirement investors have in effectively policing such violations.[33] One important way for financial institutions to ensure that they can meet this burden is by implementing strong anti-conflict policies and procedures, and by refraining from creating incentives to violate the Impartial Conduct Standards. Thus, the Standards' treatment as exemption conditions creates an important incentive for financial institutions to carefully monitor and oversee their advisers' conduct for adherence with fiduciary norms.

Other commenters generally asserted that the Impartial Conduct Standards were too vague and would result in the exemption failing to meet the ''administratively feasible'' requirement under ERISA section 408(a) and Code section 4975(c)(2). The Department disagrees with these commenters' suggestion that ERISA section 408(a) and Code section 4975(c)(2) fail to be satisfied by a principles-based approach, or that standards are unduly vague. It is worth repeating that the Impartial Conduct Standards are built on concepts that are longstanding and familiar in ERISA and the common law of trusts and agency. Far from requiring adherence to novel standards with no antecedents, the exemptions primarily require adherence to well-established fundamental obligations of fair dealing and fiduciary conduct. This preamble provides specific interpretations and responses to a number of issues raised in connection with a number of the Impartial Conduct Standards.

Comments on each of the Impartial Conduct Standards are discussed below. In this regard, some commenters focused their comments on the Impartial Conduct Standards in the proposed Best Interest Contract Exemption and other proposals, as opposed to the proposed amendment to PTE 86–128. The Department determined it was important that the provisions of the exemptions, including the Impartial Conduct Standards, be uniform and compatible across exemptions. For this reason, the Department considered all comments made on any of the exemption proposals on a consolidated basis, and made corresponding changes across the projects. For ease of use, this preamble includes the same general discussion of comments as in the Best Interest Contract Exemption, despite the fact that some comments discussed below were not made directly with respect to this exemption.

a. Best Interest Standard

Under Section II(a), when exercising fiduciary authority described in ERISA section 3(21)(A)(i) or (ii), or Code section 4975(e)(3)(A) or (B), with respect to the assets involved in the transaction, a fiduciary relying on the amended exemption must act in the Best Interest of the plan or IRA, at the time of the exercise of authority (including, in the case of an investment advice fiduciary, the recommendation). A fiduciary acts in the Best Interest of the plan or IRA when:

> the fiduciary acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person 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 plan [or IRA], without regard to the financial or other interests of the fiduciary, its affiliate, a Related Entity, or other party.

This Best Interest standard set forth in the final amendment is based on longstanding concepts derived from ERISA and the law of trusts. It is meant to express the concept, set forth in ERISA section 404, that a fiduciary is required to act ''solely in the interest of the participants . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a

[30] Dodd-Frank Act, sec. 913(d)(2)(B).

[31] 15 U.S.C. 80b–11(g)(1).

[32] *See e.g., Fish* v. *GreatBanc Trust Company,* 749 F.3d 671 (7th Cir. 2014).

[33] *See* Regulatory Impact Analysis, available at *www.dol.gov/ebsa.*

prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.'' Similarly, both ERISA section 404(a)(1)(A) and the trust-law duty of loyalty require fiduciaries to put the interests of trust beneficiaries first, without regard to the fiduciaries' own self-interest. Under this standard, for example, an investment advice fiduciary, in choosing between two investments, could not select an investment because it is better for the investment advice fiduciary's bottom line even though it is a worse choice for the plan or IRA.

A wide range of commenters indicated support for a broad ''best interest'' standard. Some comments indicated that the best interest standard is consistent with the way advisers provide investment advice to clients today. However, a number of these commenters expressed misgivings as to the definition used in the proposed amendment, in particular, the ''without regard to'' formulation. The commenters indicated uncertainty as to the meaning of the phrase, including whether it permitted the fiduciary engaging the in the transaction to be paid.

Other commenters asked the Department to use a different definition of Best Interest, or simply use the exact language from ERISA's section 404 duty of loyalty. Others suggested definitional approaches that would require that the fiduciary ''not subordinate'' their customers' interests to their own interests, or that the fiduciary ''put their customers' interests ahead of their own interests,'' or similar constructs.[34]

The Financial Industry Regulatory Authority (FINRA) [35] suggested that the federal securities laws should form the foundation of the Best Interest standard. Specifically, FINRA urged that the Best Interest definition in the exemption incorporate the ''suitability'' standard applicable to investment advisers and broker dealers under securities laws. According to FINRA, this would facilitate customer enforcement of the Best Interest standard by providing adjudicators with a well-established basis on which to find a violation.

Other commenters found the Best Interest standard to be an appropriate statement of the obligations of a fiduciary investment advice provider and believed it would provide concrete protections against conflicted recommendations. These commenters asked the Department to maintain the Best Interest definition as proposed. One commenter wrote that the term ''best interest'' is commonly used in connection with a fiduciary's duty of loyalty and cautioned the Department against creating an exemption that failed to include the duty of loyalty. Others urged the Department to avoid definitional changes that would reduce current protections to plans and IRAs. Some commenters also noted that the ''without regard to'' language is consistent with the recommended standard in the SEC staff Dodd-Frank Study, and suggested that it had the added benefit of potentially harmonizing with a future securities law standard for broker-dealers.

The final amendment retains the Best Interest definition as proposed, with minor adjustments. The first prong of the standard was revised to more closely track the statutory language of ERISA section 404(a), and, is consistent with the Department's intent to hold investment advice fiduciaries to a prudent investment professional standard. Accordingly, the definition of Best Interest now requires advice that 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 plan [or IRA]. . .'' The exemption adopts the second prong of the proposed definition, ''without regard to the financial or other interests of the fiduciary, affiliate, or other party,'' without change.

The Department continues to believe that the ''without regard to'' language sets forth the appropriate, protective standard under which a fiduciary investment adviser should act. Although the exemption provides broad relief for fiduciaries to receive commissions and other payments based on their advice, the standard ensures that the advice will not be tainted by self-interest. Many of the alternative approaches suggested by commenters pose their own ambiguities and interpretive challenges, and lower standards run the risk of undermining this regulatory initiative's goal of reducing the impact of conflicts of interest on plans and IRAs.

The Department has not specifically incorporated the suitability obligation as an element of the Best Interest standard, as suggested by FINRA, but many aspects of suitability are also elements of the Best Interest standard. An investment recommendation that is not suitable under the securities laws would not meet the Best Interest standard. Under FINRA's Rule 2111(a) on suitability, broker-dealers ''must have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer.'' The text of rule 2111(a), however, does not do any of the following: Reference a best interest standard, clearly require brokers to put their client's interests ahead of their own, expressly prohibit the selection of the least suitable (but more remunerative) of available investments, or require them to take the kind of measures to avoid or mitigate conflicts of interests that are required as conditions of this amended exemption.

The Department recognizes that FINRA issued guidance on Rule 2111 in which it explains that ''in interpreting the suitability rule, numerous cases explicitly state that a broker's recommendations must be consistent with his customers' best interests,'' and provided examples of conduct that would be prohibited under this standard, including conduct that this exemption would not allow.[36] The guidance goes on to state that ''[t]he suitability requirement that a broker make only those recommendations that are consistent with the customer's best interests prohibits a broker from placing his or her interests ahead of the customer's interests.'' The Department, however, is reluctant to adopt as an express standard such guidance, which has not been formalized as a clear rule and that may be subject to change. Additionally, FINRA's suitability rule may be subject to interpretations which could conflict with interpretations by the Department, and the cases cited in the FINRA guidance, as read by the Department, involved egregious fact patterns that one would have thought violated the suitability standard, even without reference to the customer's ''best interest.'' Accordingly, after review of the issue, the Department has decided not to accept the comment. The Department has concluded that its articulation of a clear loyalty standard within the exemption, rather than by reference to the FINRA guidance, will provide clarity and certainty to investors and better protect their interests.

The Best Interest standard, as set forth in the exemption, is intended to effectively incorporate the objective

[34] The alternative approaches are discussed in greater detail in the preamble to the Best Interest Contract Exemption, finalized elsewhere in this issue of the **Federal Register**.

[35] FINRA is registered with the Securities and Exchange Commission (SEC) as a national securities association and is a self-regulatory organization, as those terms are defined in the Exchange Act, which operates under SEC oversight.

[36] FINRA Regulatory Notice 12–25, p. 3 (2012).

standards of care and undivided loyalty that have been applied under ERISA for more than forty years. Under these objective standards, the fiduciary must adhere to a professional standard of care in making investment management decisions, executing transactions, or providing investment recommendations that are in the plan's or IRA's Best Interest. The fiduciary may not base his or her decisions or recommendations on the fiduciary's own financial interest. Nor may the fiduciary make or recommend the investment, unless it meets the objective prudent person standard of care. Additionally, the duties of loyalty and prudence embodied in ERISA are objective obligations that do not require proof of fraud or misrepresentation, and full disclosure is not a defense to making an imprudent recommendation or favoring one's own interests at the plan's or IRA's expense.

Several commenters requested additional guidance on the Best Interest standard. Investment advice fiduciaries that are concerned about satisfying the standard may wish to consult the policies and procedures requirement in Section II(d) of the Best Interest Contract Exemption. While these policies and procedures are not an express condition of PTE 86–128, they may provide useful guidance for financial institutions wishing to ensure that individual advisers adhere to the Impartial Conduct Standards. The preamble to the Best Interest Contract Exemption provides examples of policies and procedures prudently designed to ensure that advisers adhere to the Impartial Conduct Standards. The examples are not intended to be exhaustive or mutually exclusive, and range from examples that focus on eliminating or nearly eliminating compensation differentials to examples that permit, but police, the differentials.

A few commenters also questioned the requirement in the Best Interest standard that the fiduciary's actions be made without regard to the interest of the fiduciary, its affiliate, a Related Entity or ''*other party.*'' The commenters indicated they did not know the purpose of the reference to ''other party'' and asked that it be deleted. The Department intends the reference to make clear that a fiduciary operating within the Impartial Conduct Standards should not take into account the interests of any party other than the plan or IRA—whether the other party is related to the fiduciary engaging in the covered transaction or not—in exercising fiduciary authority. For example, an entity that may be unrelated to the fiduciary but could still constitute an ''other party,'' for these purposes, is the manufacturer of the investment product being recommended or purchased.

Other commenters asked for confirmation that the Best Interest standard is applied based on the facts and circumstances as they existed at the time of the recommendation, and not based on hindsight. Consistent with the well-established legal principles that exist under ERISA today, the Department confirms that the Best Interest standard is not a hindsight standard, but rather is based on the facts as they existed at the time of the recommendation. Thus, the courts have evaluated the prudence of a fiduciary's actions under ERISA by focusing on the process the fiduciary used to reach its determination or recommendation—whether the fiduciaries, ''at the time they engaged in the challenged transactions, employed the proper procedures to investigate the merits of the investment and to structure the investment.'' [37] The standard does not measure compliance by reference to how investments subsequently performed or turn fiduciaries into guarantors of investment performance, even though they gave advice that was prudent and loyal at the time of transaction.[38]

This is not to suggest that the ERISA section 404 prudence standard or Best Interest standard, are solely procedural standards. Thus, the prudence standard, as incorporated in the Best Interest standard, is an objective standard of care that requires fiduciaries to investigate and evaluate investments, make recommendations, and exercise sound judgment in the same way that knowledgeable and impartial professionals would. ''[T]his is not a search for subjective good faith—a pure heart and an empty head are not enough.'' [39] Whether or not the fiduciary is actually familiar with the sound investment principles necessary to make particular recommendations, the fiduciary must adhere to an objective professional standard. Additionally, fiduciaries are held to a particularly stringent standard of prudence when they have a conflict of interest.[40] For this reason, the Department declines to provide a safe harbor based solely on ''procedural prudence'' as requested by a commenter.

The Department additionally confirms its intent that the phrase ''without regard to'' be given the same meaning as the language in ERISA section 404 that requires a fiduciary to act ''solely in the interest of'' participants and beneficiaries, as such standard has been interpreted by the Department and the courts. Accordingly, the standard would not, as some commenters suggested, foreclose the fiduciary from being paid ''reasonable compensation,'' and the exemption specifically contemplates such compensation.

In response to commenter concerns, the Department also confirms that the Best Interest standard does not impose an unattainable obligation on fiduciaries to somehow identify the single ''best'' investment for the plan or IRA out of all the investments in the national or international marketplace, assuming such advice were even possible. Instead, as discussed above, the Best Interest standard set out in the exemption, incorporates two fundamental and well-established fiduciary obligations: The duties of prudence and loyalty. Thus, the fiduciary's obligation under the Best Interest standard is to manage or give advice that adheres to professional standards of prudence, and to put the plan's or IRA's financial interests in the driver's seat, rather than the competing interests of the fiduciary or other parties.

Finally, in response to questions regarding the extent to which this Best Interest standard or other provisions of the exemption impose an ongoing monitoring obligation on fiduciaries, the text does not impose a monitoring requirement, but instead leaves that to the parties' arrangements, agreements, and understandings. This is consistent with the Department's interpretation of an investment advice fiduciary's monitoring responsibility as articulated in the preamble to the Regulation.

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[37] *Donovan* v. *Mazzola,* 716 F.2d 1226, 1232 (9th Cir. 1983).

[38] One commenter requested an adjustment to the ''prudence'' component of the Best Interest Standard, under which the standard would be that of a ''prudent person serving clients with similar retirement needs and offering a similar array of products.'' In this way, the commenter sought to accommodate varying perspectives and opinions on particular investment products and business practices. The Department disagrees with the comment, which could be read as qualifying the stringency of the prudence obligation based on the fiduciary's independent decisions on which products to offer, rather than on the needs of the particular retirement investor. Therefore, the Department did not adopt this suggestion.

[39] *Donovan* v. *Cunningham,* 716 F.2d 1455, 1467 (5th Cir. 1983), *cert. denied,* 467 U.S. 1251 (1984); *see also DiFelice* v. *U.S. Airways, Inc.,* 497 F.3d 410, 418 (4th Cir. 2007) (''Good faith does not provide a defense to a claim of a breach of these fiduciary duties; 'a pure heart and an empty head are not enough.' '').

[40] *Donovan* v. *Bierwirth,* 680 F.2d 263, 271 (2d Cir. 1982) (''the decisions [of the fiduciary] must be made with an eye single to the interests of the participants and beneficiaries''); *see also Bussian* v. *RJR Nabisco, Inc.,* 223 F.3d 286, 298 (5th Cir. 2000); *Leigh* v. *Engle,* 727 F.2d 113, 126 (7th Cir. 1984).

b. Reasonable Compensation

The Impartial Conduct Standards also include the reasonable compensation standard, set forth in Section II(b). Under this standard, the fiduciary engaging in the covered transaction and any Related Entity must not receive compensation in excess of reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2).

The obligation to pay no more than reasonable compensation to service providers is long recognized under ERISA and the Code. ERISA section 408(b)(2) and Code section 4975(d)(2) require that services arrangements involving plans and IRAs result in no more than reasonable compensation to the service provider. Accordingly, fiduciaries—as service providers—have long been subject to this requirement, regardless of their fiduciary status. At bottom, the standard simply requires that compensation not be excessive relative to the value of the particular services, rights, and benefits the fiduciary is delivering to the plan or IRA. Given the conflicts of interest associated with the commissions, it is particularly important that fiduciaries adhere to these statutory standards which are rooted in common law principles.[41]

Several commenters supported this standard and said that the reasonable compensation requirement is an important and well-established protection. A number of other commenters requested greater specificity as to the meaning of the reasonable compensation standard. As proposed, the standard stated:

> All compensation received by the [fiduciary] and any Related Entity in connection with the transaction is reasonable in relation to the total services the person and any Related Entity provide to the plan.

Some commenters stated that the proposed reasonable compensation standard was too vague. Because the language of the proposal did not reference ERISA section 408(b)(2) and Code section 4975(d)(2), commenters asked whether the standard differed from those statutory provisions. In particular, a commenter questioned the meaning of the proposed language ''in relation to the total services the person and any Related Entity provide to the plan.'' The commenter indicated that the proposal did not adequately explain this formulation of reasonable compensation.

There was concern that the standard could be applied retroactively rather than based on the parties' reasonable beliefs as to the reasonableness of the compensation as determined at the time the fiduciary exercised authority over plan assets or made an investment recommendation. Commenters also indicated uncertainty as to how to comply with the condition and asked whether it would be necessary to survey the market to determine market rates. Some commenters requested that the Department include the words ''and customary,'' in the reasonable compensation definition, to specifically permit existing compensation arrangements. One commenter raised the concern that the reasonable compensation determination raised antitrust concerns because it would require investment advice fiduciaries to agree upon a market rate and result in anti-competitive behavior.

Commenters also asked the Department to provide examples of scenarios that met the reasonable compensation standard and safe harbors and others requested examples of scenarios that would fail to meet these standards. FINRA and other commenters suggested that the Department incorporate existing FINRA rules 2121 and 2122, and NASD rule 2830 regarding the reasonableness of compensation for broker-dealers.[42]

Finally, a few commenters took the position that the reasonable compensation determination should not be a requirement of the exemption. In their view, a plan fiduciary that is not the fiduciary engaging in the covered transaction (perhaps the authorizing fiduciary) should decide the reasonableness of the compensation. Another commenter suggested that if an independent plan fiduciary sets the menu this should be sufficient to comply with the reasonable compensation standard.

In response to comments on this requirement, the Department has retained the reasonable compensation standard as a condition of the exemption. As noted above, the obligation that service providers receive no more than ''reasonable compensation'' for their services is already established by ERISA and the Code, and has long applied to financial services providers, whether fiduciaries or not. The condition is also consistent with other class exemptions granted and amended today. It is particularly important that fiduciaries adhere to these standards when engaging in the transactions covered under this exemption, so as to avoid exposing plans and IRAs to harms associated with conflicts of interest.

Some commenters suggested that the reasonable compensation determination be made by another plan fiduciary. However, the exemption (like the statutory obligation) obligates investment advice fiduciaries to avoid overcharging their plan and IRA customers, despite any conflicts of interest associated with their compensation. Fiduciaries and other service providers may not charge more than reasonable compensation regardless of whether another fiduciary has signed off on the compensation. Nothing in the exemption, however, precludes fiduciaries from seeking impartial review of their fee structures to safeguard against abuse, and they may well want to include such reviews as part of their supervisory practices.

Further, the Department disagrees that the requirement is inconsistent with antitrust laws. Nothing in the exemption contemplates or requires that Advisers or Financial Institutions agree upon a price with their competitors. The focus of the reasonable compensation condition is on preventing overcharges to Retirement Investors, not promoting anti-competitive practices. Indeed, if Advisors and Financial Institutions consulted with competitors to set prices, the agreed-upon prices could well violate the condition.

In response to comments, however, the operative text of the final exemption was clarified to adopt the well-established reasonable compensation standard, as set out in ERISA section 408(b)(2) and Code section 4975(d)(2), and the regulations thereunder. The reasonableness of the fees depends on the particular facts and circumstances at the time of the fiduciary investment recommendation or exercise of fiduciary authority. Several factors inform whether compensation is reasonable including, *inter alia,* the market pricing of service(s) provided and the underlying asset(s), the scope of monitoring, and the complexity of the product. No single factor is dispositive in determining whether compensation is reasonable; the essential question is whether the charges are reasonable in relation to what the plan or IRA receives. Consistent with the Department's prior interpretations of this standard, the Department confirms that a fiduciary does not have to recommend the transaction that is the

[41] *See generally* Restatement (Third) of Trusts section 38 (2003).

[42] FINRA's comment letter described NASD rule 2830 as imposing specific caps on compensation with respect to investment company securities that broker-dealers may sell. While the Department views this cap as an important protection of investors, it establishes an outside limit rather than a standard of reasonable compensation.

lowest cost or that generates the lowest fees without regard to other relevant factors. In this regard, the Department declines to specifically reference FINRA's standard in the exemption, but rather relies on ERISA's own longstanding reasonable compensation formulation.

In response to concerns about application of the standard to investment products that bundle together services and investment guarantees or other benefits, the Department responds that the reasonable compensation condition is intended to apply to the compensation received by the Financial Institution, Adviser, Affiliates, and Related Entities in same manner as the reasonable compensation condition set forth in ERISA section 408(b)(2) and Code section 4975(d)(2). Accordingly, the exemption's reasonable compensation standard covers compensation received directly from the plan or IRA and indirect compensation received from any source other than the plan or IRA in connection with the recommended transaction.[43] When assessing the reasonableness of a charge, one generally needs to consider the value of all the services and benefits provided for the charge, not just some. If parties need additional guidance in this respect, they should refer to the Department's interpretations under ERISA section 408(b)(2) and Code section 4975(d)(2) and the Department will provide additional guidance if necessary.

The Department declines suggestions to provide specific examples of ''reasonable'' amounts or specific safe harbors. Ultimately, the ''reasonable compensation'' standard is a market based standard. As noted above, the standard incorporates the familiar ERISA section 408(b)(2) and Code section 4975(d)(2) standards. The Department is unwilling to condone all ''customary'' compensation arrangements and declines to adopt a standard that turns on whether the agreement is ''customary.'' For example, it may in some instances be ''customary'' to charge customers fees that are not transparent or that bear little relationship to the value of the services actually rendered, but that does not make the charges reasonable. Similarly, the Department declines to provide that the reasonable compensation condition is automatically satisfied as long as the charges do not exceed specific pricing ceilings or restrictions imposed by other regulators or self-regulatory organizations. Certainly, charging an investor even more than permitted under such a ceiling or restriction would generally violate the prohibition on ''unreasonable compensation.'' But the reasonable compensation standard does not merely forbid fiduciaries from charging amounts that are per se illegal under other regulatory regimes. Finally, the Department notes that all recommendations are subject to the overarching Best Interest standard, which incorporates the fundamental fiduciary obligations of prudence and loyalty. An imprudent recommendation for an investor to overpay for an investment transaction would violate that standard, regardless of whether the overpayment was attributable to compensation for services, a charge for benefits or guarantees, or something else.

c. Misleading Statements

The final Impartial Conduct Standard, set forth in Section II(c), requires that the fiduciary's statements about the transaction, fees and compensation, Material Conflicts of Interest, and any other matters relevant to a plan's or IRA's investment decisions, may not be materially misleading at the time they are made. For this purpose, a fiduciary's failure to disclose a Material Conflict of Interest relevant to the services the fiduciary is providing or other actions it is taking in relation to a plan's investment decisions is deemed to be a misleading statement. In response to commenters, the Department adjusted the text to clarify that the standard is measured at the time of the representations, *i.e.,* the statements must not be misleading ''at the time they are made.'' Similarly, the Department added a materiality standard in response to comments.

Some comments focused on the proposed definition of Material Conflict of Interest. As proposed, a Material Conflict of Interest was defined to exist when a person has a financial interest that could affect the exercise of its best judgment as a fiduciary in rendering advice to a plan or IRA. Some commenters took the position that the proposal did not adequately explain the term ''material'' or incorporate a ''materiality'' standard into the definition. A commenter wrote that the proposed definition was so broad it would be difficult for financial institutions to comply with the various aspects of the exemption related to Material Conflicts of Interest, such as provisions requiring disclosures of Material Conflicts of Interest.

Another commenter indicated that the Department should not use the term ''material'' in defining conflicts of interest. The commenter believed that it could result in a standard that was too subjective from the perspective of the fiduciary and could undermine the protectiveness of the exemption.

After consideration of the comments, the Department adjusted the definition of Material Conflict of Interest to provide that a material conflict of interest exists when a fiduciary has a ''financial interest that *a reasonable person would conclude* could affect the exercise of its best judgment as a fiduciary in rendering advice to a plan or IRA.'' This language responds to concerns about the breadth and potential subjectivity of the standard.

The Department did not accept certain other comments, however. One commenter requested that the Department add a qualifier providing that the standard is violated only if the statement was ''reasonably relied'' on by the retirement investor. The Department rejected the comment. The Department's aim is to ensure that fiduciaries uniformly adhere to the Impartial Conduct Standards, including the obligation to avoid materially misleading statements.

One commenter asked the Department to require only that the fiduciary ''reasonably believe'' the statements are not misleading. The Department is concerned that this standard too could undermine the protections of this condition, by requiring retirement investors to prove the fiduciary's actual knowledge rather than focusing on whether the statement is objectively misleading. However, to address commenters' concerns about the risks of engaging in a prohibited transaction, as noted above, the Department has clarified that the standard is measured at the time of the representations and has added a materiality standard.

The Department believes that plans and IRAs are best served by statements and representations that are free from material misstatements. Fiduciaries best avoid liability—and best promote the interests of plans and IRA—by ensuring that accurate communications are a consistent standard in all their interactions with their customers.

A commenter suggested that the Department adopt FINRA's ''Frequently Asked Questions regarding Rule 2210'' regarding the term misleading.[44]

[43] Such compensation includes, for example charges against the investment, such as commissions, sales loads, sales charges, redemption fees, surrender charges, exchange fees, account fees and purchase fees, as well as compensation included in operating expenses and other ongoing charges, such as wrap fees.

[44] *Currently available at http://www.finra.org/industry/finra-rule-2210-questions-and-answers.*

FINRA's Rule 2210, Communications with the Public, sets forth a number of procedural rules and standards that are designed to, among other things, prevent broker-dealer communications from being misleading. The Department agrees that adherence to FINRA's standards can promote materially accurate communications, and certainly believes that fiduciaries should pay careful attention to such guidance documents. After review of the rule and FAQs, however, the Department declines to simply adopt FINRA's guidance, which addresses written communications, since the condition of the exemption is broader in this respect. In the Department's view, the meaning of the standard is clear, and is already part of a plan fiduciary's obligations under ERISA. If, however, issues arise in implementation of the exemption, the Department will consider requests for additional guidance.

Commissions

To provide certainty with respect to the payments permitted by the exemption in both Section I(a) and new Section I(b), the amendment adds a new defined term ''Commission.'' This term replaces the language originally in the exemption that permits a fiduciary to cause a plan or IRA to pay a ''fee for effecting or executing securities transactions.'' The term ''Commission'' is defined to mean a brokerage commission or sales load paid for the service of effecting or executing the transaction, but not a 12b–1 fee, revenue sharing payment, marketing fee, administrative fee, sub–TA fee, or sub-accounting fee.[45] Further, based on the language of Section I(a)(1), the term ''Commission'' as used in that section is limited to payments directly from the plan or IRA.[46] The Department has clarified this by adding the word ''directly'' to the language of the final exemption for the avoidance of doubt. On the other hand, the Commission payment described in Section I(b) is not limited to payments directly from the plan or IRA and includes payments from the mutual fund. The Department understands that sales load payments in connection with mutual fund transactions are commonly made by the mutual fund.

In connection with this clarifying amendment to the definition of commission, two commenters requested that the Commission definition specifically include, not exclude, 12b–1 fees, revenue sharing payments, marketing fees, administrative fees, sub-TA fees, sub-accounting fees and other consideration. The commenters indicate that these forms of compensation are inherent to agency transactions and without documented harm. Further, these forms of compensation are used to pay for services. Without this compensation, the commenters argue, brokers will cease offering agency services to plans and IRAs.

The Department agrees that many of these forms of compensation may be commonly associated with agency transactions, particularly with respect to mutual fund purchases, holdings and sales. However, as stated above, such forms of compensation do raise substantial conflict of interest concerns that are not addressed by this exemption. PTE 86–128 was originally granted in 1975 and amended several times over the years. The exemption narrowly applied to fees from a plan or IRA for effecting or executing securities transactions. The Department has never formally interpreted or amended PTE 86–128 to provide relief for the forms of indirect compensation suggested by commenters, such as 12b–1 fees and revenue sharing payments. In the Department's view, it does not contain conditions that adequately address the particular conflicts associated with such payments. On the other hand, the Best Interest Contract Exemption was designed for such payments and includes conditions to address them. The Department intends that parties seeking a wider scope of relief should rely on the Best Interest Contract Exemption as opposed to PTE 86–128, as amended.

Conditions of the Exemption in Section III

Section III of the exemption establishes conditions applicable to the covered transactions. Among the conditions is the requirement in Section III(b) that the covered transaction occur under a written authorization executed in advance by an independent fiduciary of each plan whose assets are involved in the transaction. A commenter asked us to clarify whether an IRA owner could satisfy the authorization requirements applicable to the independent plan fiduciary. In response, we have added ''or IRA owner'' throughout the requirements in Section III related to plan fiduciary authorization, to make clear that an IRA owner may authorize the covered transaction with respect to the IRA. We did not, however, add the IRA owner to the provision requiring the plan fiduciary to be ''independent'' of the person engaging in the covered transaction. Therefore, an IRA owner employed by the investment management fiduciary relying on the exemption will still be able to satisfy the authorization requirement. This reflects the Department's view that the interaction of the employer and employee with regard to an IRA that is not employer sponsored is likely to be voluntary and less likely to have the heightened conflicts of interest associated with an employer providing advice to an employer-sponsored plan, and earning a profit. Accordingly, an investment management fiduciary may provide advice to the beneficial owner of an IRA who is employed by the fiduciary and receive prohibited compensation as a result, provided the IRA is not covered by Title I of ERISA.

For IRAs and non-ERISA plans that are existing customers as of the Applicability Date of this amendment, the Department has provided that the fiduciary engaging in the transaction need not receive the affirmative consent generally required by Section III(b), but may instead rely on the IRA's or non-ERISA plan's negative consent, as long as the disclosures and consent termination form are provided to the IRA or non-ERISA plan by the Applicability Date.

The Department received other comments on conditions in Section III of PTE 86–128 that touch on discreet concerns. One commenter raised the bulk of these concerns. The comments related to the annual reauthorization requirement in Section III(c) and the portfolio turnover ratio requirement in Section III(f)(4), and are discussed below.

Annual Reauthorization

Section III(c) provides that an annual reauthorization is necessary for a fiduciary to engage in transactions pursuant to the exemption. As an alternative to affirmative reauthorization, the fiduciary may supply a form expressly providing an election to terminate the authorization with instructions on the use of the form. The instructions must provide for a 30-day window after which failure to return the form or some other written notification of the plan's intent to terminate the authorization will result in continued authorization.

[45] In light of the proposed language referencing ''brokerage commission'' and ''sales loads,'' terms commonly associated with equity securities and mutual funds, this definition does not extend to a commission on a variable annuity contract or any other annuity contract that is a non-exempt security under federal securities laws.

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

A commenter first asked for clarification regarding the ability of a fiduciary to rely on the exemption's relief during the 30-day reauthorization window established in Section III(c). In response, the Department states that relief is available until the point at which a fiduciary fails to comply with a condition of the exemption. Since a fiduciary will not be in breach of a condition until the expiration of the 30-day window, the fiduciary may rely on the exemption's relief until the closing of that window, and it will not retroactively lose the relief relied upon by the fiduciary during the 30-day window.

Second, the commenter argued that the termination notice contemplated by Section III(c) should be effective only if the customer uses a specific termination form. The Department disagrees. The exemption provides that the termination notice must be a written notice (whether first class mail, personal delivery or email). Requiring a written notice should avoid the problems created by oral notices (*e.g.,* miscommunication, misremembering, etc.), without creating inappropriate impediments for the investor seeking to terminate the arrangement. The fiduciary's obligations rightly extend to ensuring that the plan's or IRA's decisions to terminate an arrangement are honored, rather than disregarded. The Department does not want to create technical hurdles that could prevent faithful adherence to the investor's decisions, or permit otherwise prohibited transactions to proceed without the investor's assent.

Portfolio Turnover Ratio

Section III(f)(4) establishes the requirement that the fiduciary provide a portfolio turnover ratio at least once per year. The portfolio turnover ratio is a disclosure designed to assist the authorizing fiduciary or IRA owner by disclosing the amount of turnover or churning in the portfolio during the applicable period. Section III(f)(4)(B) describes the ''annualized portfolio turnover ratio'' as calculated as a percentage of the plan assets over which the fiduciary had discretionary investment authority at any time during the period covered by the report.

The commenter addressed the application of the portfolio turnover ratio disclosure requirement to investment advice fiduciaries. The commenter argued that the provision of the portfolio turnover ratio was not originally required under the exemption and was not workable in the investment adviser context since the adviser does not manage the investor's portfolio.

The Department acknowledges that Section III(f), prior to the amendment, included potentially contradictory language regarding the applicability of the portfolio turnover ratio disclosure to investment advice fiduciaries. In addition, the Department concurs with the commenter that the portfolio turnover ratio may not be as necessary to plans and participants and beneficiaries in the context of an investment advice relationship, as opposed to an investment management relationship where the fiduciary is making discretionary investment decisions. As a result, the final exemption makes clear that the portfolio turnover ratio is not required from fiduciaries that have not exercised discretionary authority over trading in the plan's account during the applicable year.

Exceptions From Conditions in Section V

Recapture of Profits Exception

Section V(b) of the amended exemption provides 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 to the plans and IRAs of such arrangements.

As explained above, discretionary trustees were first permitted to rely on PTE 86–128 without meeting the ''recapture of profits'' provision pursuant to an amendment in 2002 (2002 Amendment). The 2002 Amendment imposed additional conditions on such trustees. However, the 2002 Amendment also introduced uncertainty as to whether trustees could continue to rely on the recapture of profits exception instead of complying with the additional conditions. The Department did not intend to call such arrangements into question, and, accordingly, has modified the exemption to permit trustees to utilize the exception as originally permitted in PTE 86–128 for the recapture of profits.

The Department received a supportive comment on these provisions and has finalized the amendments as proposed.

Pooled Funds

Section V(c) provides special rules for pooled funds. Under that provision, the disclosure and authorization conditions set forth in Section III(b), (c) and (d) do not apply to pooled funds, if the alternate conditions in Section V(c) are satisfied. One such condition, in Section V(c)(1)(B), is that

> [t]he authorizing fiduciary is furnished with any reasonably available information that the person engaging or proposing to engage in the covered transaction reasonably believes to be necessary to determine whether the authorization should be given or continued, not less than 30 days prior to implementation of the arrangement or material change thereto, including (but not limited to) a description of the person's brokerage placement practices, and, where requested any other reasonably available information regarding the matter upon the reasonable request of the authorizing fiduciary at any time.

The proposed amendment to PTE 86–128 included a revision to this provision, under which the authorizing fiduciary would be furnished with information ''reasonably necessary'' to determine whether the authorization should be given or continued, rather than ''reasonably available information'' that the investment advice fiduciary or investment management fiduciary reasonably believed is necessary to determine whether the authorization should be given or continued. One commenter objected to this proposed revision, on the basis that this new standard might require the fiduciary to provide information not in its possession or to prove that it had provided all information others might find relevant, and as a result, could cause fiduciaries to stop relying on the exemption.

The Department proposed the revision with a ''reasonableness'' qualifier to avoid overbroad application. However, the Department understands market participants' preference for a longstanding standard. As a practical matter, the Department does not believe that there will be much difference in the materials provided under this standard than under the one proposed. The authorizing fiduciary must still review sufficient information to determine whether the authorization should be given or continued. The Department, therefore, has accepted the comment, and the final amendment reverts back to the original language.

Recordkeeping Requirements

A new Section VI to PTE 86–128 requires the fiduciary engaging in a transaction covered by the exemption to maintain for six years records necessary to enable certain persons (described in Section VI(b)) to determine whether the conditions of this exemption have been

met with respect to the transaction. The recordkeeping requirement is consistent with other existing class exemptions as well as the recordkeeping provisions of the other exemptions published in this issue of the **Federal Register**.

One commenter addressed the proposed record keeping requirement. The commenter suggested that the requirement should contain a ''reasonableness'' standard. The commenter also suggested that the exemption make clear that access by plans and participants and beneficiaries is limited to their own plans and their own accounts, and that any failure to maintain the required records with respect to a given transaction or set of transactions does not affect exemptive relief for other transactions. Lastly, the commenter indicated that the 30 day requirement for notice with respect to a refusal of disclosure of records, on the basis that the records involve privileged trade secrets or other privileged commercial or financial information, was not sufficient. The commenter sought a 90-day period.

The Department has modified the recordkeeping provision to include a reasonableness standard for making the records available, and clarify which parties may view the records that are maintained by the fiduciary engaging in the covered transaction. As revised, the exemption requires the records be ''reasonably'' available, rather than ''unconditionally available'' and does not authorize plan fiduciaries, participants, beneficiaries, contributing employers, employee organizations with members covered by the plan, and IRA owners to examine records regarding another plan or IRA. In addition, fiduciaries are not required to disclose privileged trade secrets or privileged commercial or financial information to any of the parties other than the Department, as was also true of the proposal.

The Department also added new language to the recordkeeping condition to indicate that the consequences of failure to comply with the recordkeeping requirement are limited to the transactions affected by the failure. Therefore, a new Section VI(b)(4) provides 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 does not affect the relief for other transactions.

Finally, in accordance with other exemptions granted and amended today, Financial Institutions are also not required to disclose records if such disclosure would be precluded by 12 U.S.C. 484, relating to visitorial powers over national banks and federal savings associations.[47] The Department has not accepted the commenter's request to extend the response period from 30 days to 90 days for notifying a party seeking records that the records are exempt from disclosure based on the assertion that disclosure would divulge trade secrets or privileged information. The Department notes that this provision is standard in many prohibited transaction exemptions.[48] The Department does not anticipate that this provision will be widely used and believes the 30 day period is sufficient for the unusual circumstance in which it is invoked.

Definitions

Section VII of PTE 86–128 sets forth definitions applicable to the exemption. One commenter suggested revisions to the definition of ''independent'' in Section VII(f). This term is used in connection with the authorization requirements under the exemption and it requires that the person making the authorizations be independent of the investment advice fiduciary or investment management fiduciary seeking to rely on the exemption. As proposed, the definition of independent would have precluded the authorizing entity from receiving any compensation or other consideration for his or her own account from the investment advice fiduciary or investment management fiduciary.

A commenter indicated that the definition might inadvertently disqualify certain entities that provide services (*e.g.,* accounting, legal or consulting) to the fiduciary from utilizing the services of the fiduciary because they could not provide the independent authorizations required under the exemption. The commenter suggested defining entities that receive less than 5% of their gross income from the fiduciary as ''independent.''

The Department agrees with the commenter; provided, however, that the expanded definition is determined based on the current tax year and may not be in excess of 2% of the fiduciary's annual revenues based on the prior year. This approach is consistent with the Department's general approach to fiduciary independence. For example, the prohibited transaction exemption procedures provide a presumption of independence for appraisers and fiduciaries if the revenue they receive from a party is not more than 2% of their total annual revenue.[49] We have revised the definition accordingly.

The same commenter indicated that the exemption's definition of IRA in Section VII(k) should not include other non-ERISA plans covered by Code section 4975, such as Health Savings Accounts (HSAs), Archer Medical Savings Accounts and Coverdell Education Savings Accounts. However, in response, the Department notes that these accounts, like IRAs, are tax-preferred. Further, some of the accounts, such as HSAs, can be used as long term savings accounts for retiree health care expenses. These types of accounts also are expressly defined by Code section 4975(e)(1) as plans that are subject to the Code's prohibited transaction rules. Thus, although they generally may hold fewer assets and may exist for shorter durations than IRAs, there is no statutory reason to treat them differently than other conflicted transactions and no basis for suspecting that the conflicts are any less influential with respect to advice with respect to these arrangements. Accordingly, the Department does not agree with the commenters that the owners of these accounts are entitled to less protection than IRA investors. The Regulation continues to include advisers to these ''plans,'' and this exemption provides relief to them in the same manner it does for individual retirement accounts described in section 408(a) of the Code.

Amendment to and Partial Revocation of PTE 75–1

PTE 75–1, Part I(b) and (c)

The Department is revoking Part I(b) and I(c) of PTE 75–1, and Part II(2) of PTE 75–1. Part I(b) of PTE 75–1 provided relief from ERISA section 406 and the taxes imposed by Code section 4975(a) and (b), for the effecting of securities transactions, including clearance, settlement or custodial functions incidental to effecting the transactions, by parties in interest or disqualified persons other than fiduciaries. Part I(c) of PTE 75–1 provided relief from ERISA section 406

[47] A commenter with respect to the Best Interest Contract Exemption raised concerns that the Department's right to review a bank's records under that exemption could conflict with federal banking laws that prohibit agencies other than the Office of the Comptroller of the Currency (OCC) from exercising ''visitorial'' powers over national banks and federal savings associations. To address the comment, Financial Institutions are not required to disclose records if the disclosure would be precluded by 12 U.S.C. 484. A corresponding change was made in this exemption.

[48] *See e.g.,* PTE 2015–08, 80 FR 44753 (July 27, 2015) (Wells Fargo Company); PTE 2015–09, 80 FR 44760 (July 27, 2015) (Robert W. Baird & Co., Inc.); PTE 2014–06, 79 FR 3072 (July 24, 2014) (AT&T Inc.).

[49] 29 CFR 2570.31(j).

and Code section 4975(a) and (b) for the furnishing of advice regarding securities or other property to a plan or IRA by a party in interest or disqualified person under circumstances which do not make the party in interest or disqualified person a fiduciary with respect to the plan or IRA.

PTE 75–1 was granted shortly after ERISA's passage in order to provide certainty to the securities industry over the nature and extent to which ordinary and customary transactions between broker-dealers and plans or IRAs would be subject to the ERISA prohibited transaction rules. Paragraphs (b) and (c) in Part I of PTE 75–1, specifically, served to provide exemptive relief for certain non-fiduciary services provided by broker-dealers in securities transactions. Code section 4975(d)(2), ERISA section 408(b)(2) and regulations thereunder, have clarified the scope of relief for service providers to plans and IRAs.[50] The Department believes that the relief provided in Parts I(b) and I(c) of PTE 75–1 duplicates the relief available under the statutory exemptions. Therefore, the Department is revoking these parts.

PTE 75–1, Part II

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

A few commenters suggested that the Department should not revoke PTE 75–1, Part II(2). They argued that that exemption provides needed relief for consideration received in connection with mutual fund share transactions.

As stated above, the Department disagrees. PTE 75–1, Part II(2) was an exemption that was broadly interpreted beyond what was intended, and that contained minimal safeguards. Providing an exemption for fiduciaries to receive compensation under the conditions of PTE 75–1, Part II(2) is not protective of retirement investors. Instead, the Department has provided relatively limited relief for mutual fund transactions in Section I(b) of the amended PTE 86–128 and much broader relief in the Best Interest Contract Exemption. The Best Interest Contract Exemption, as stated above, imposes more appropriate conditions on the receipt of compensation that goes beyond simple commissions.

Applicability Date

The Regulation will become effective June 7, 2016 and these amended exemptions are issued on that same date. The Regulation is effective at the earliest possible effective date under the Congressional Review Act. For the exemptions, the issuance date serves as the date on which the amended exemptions are intended to take effect for purposes of the Congressional Review Act. This date was selected in order to provide certainty to plans, plan fiduciaries, plan participants and beneficiaries, IRAs, and IRA owners that the new protections afforded by the Regulation are officially part of the law and regulations governing their investment advice providers, and to inform financial services providers and other affected service providers that the Regulation and amended exemptions are final and not subject to further amendment or modification without additional public notice and comment. The Department expects that this effective date will remove uncertainty as an obstacle to regulated firms allocating capital and other resources toward transition and longer term compliance adjustments to systems and business practices.

The Department has also determined that, in light of the importance of the Regulation's consumer protections and the significance of the continuing monetary harm to retirement investors without the rule's changes, that an Applicability Date of April 10, 2017, is adequate time for plans and their affected financial services and other service providers to adjust to the basic change from non-fiduciary to fiduciary status. The amendments to and partial revocations of PTEs 86–128 and 75–1, Part II, as finalized herein have the same Applicability Date; parties may therefore rely on the amended exemptions beginning on the Applicability Date. For the avoidance of doubt, no revocation will be applicable prior to the Applicability Date.

Paperwork Reduction Act Statement

In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)), the Amendment to and Partial Revocation of Prohibited Transaction Exemption (PTE) 86–128 for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers; and the Amendment to and Partial Revocation of PTE 75–1, Exemptions From Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefits Plans and Certain Broker-Dealers, Reporting Dealers and Banks published as part of the Department's proposal to amend its 1975 rule that defines when a person who provides investment advice to an employee benefit plan or IRA becomes a fiduciary, solicited comments on the information collections included therein. The Department also submitted an information collection request (ICR) to OMB in accordance with 44 U.S.C. 3507(d), contemporaneously with the publication of the proposed regulation, for OMB's review. The Department received two comments from one commenter that specifically addressed the paperwork burden analysis of the information collections. Additionally, many comments were submitted, described elsewhere in the preamble to the accompanying final rule, which contained information relevant to the costs and administrative burdens attendant to the proposals. The Department took into account such public comments in connection with making changes to the prohibited transaction exemption, analyzing the economic impact of the proposals, and developing the revised paperwork burden analysis summarized below.

In connection with publication of this final amendment to and partial revocation of PTE 86–128 and this final amendment to and partial revocation of PTE 75–1, the Department is submitting an ICR to OMB requesting approval of a revision to OMB Control Number 1210–0059. The Department will notify the public when OMB approves the revised ICR.

A copy of the ICR may be obtained by contacting the PRA addressee shown below or at *http://www.RegInfo.gov.* PRA ADDRESSEE: G. Christopher Cosby, Office of Policy and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue NW., Room N–5718, Washington, DC 20210. Telephone: (202) 693–8824; Fax: (202) 219–4745. These are not toll-free numbers.

As discussed in detail below, as amended, PTE 86–128 will require financial firms to make certain disclosures to plan fiduciaries and owners of managed IRAs in order to receive relief from ERISA's and the Code's prohibited transaction rules for the receipt of commissions and to engage in transactions involving mutual

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

fund shares.[51] Financial firms relying on either PTE 86–128 or PTE 75–1, as amended, will be required to maintain records necessary to demonstrate that the conditions of these exemptions have been met. These requirements are information collection requests (ICRs) subject to the Paperwork Reduction Act.

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

- 51.8 percent of disclosures to retirement investors with respect to ERISA plans[52] and 44.1 percent of disclosures to retirement investors with respect to IRAs and non-ERISA plans[53] will be distributed electronically via means already used by respondents in the normal course of business and the costs arising from electronic distribution will be negligible, while the remaining disclosures will be distributed on paper and mailed at a cost of $0.05 per page for materials and $0.49 for first class postage;[54]
- Financial institutions will use existing in-house resources to prepare the legal authorizations and disclosures, and maintain the recordkeeping systems necessary to meet the requirements of the exemption;
- A combination of personnel will perform the tasks associated with the ICRs at an hourly wage rate of $167.32 for a financial manager, $55.21 for clerical personnel, and $133.61 for a legal professional;[55] and
- Approximately 2,800 financial institutions[56] will take advantage of this exemption and they will use this exemption in conjunction with transactions involving 23.7 percent of their client plans and managed IRAs.[57]

Disclosures and Consent Forms

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

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

Finally, Section III(f) requires the financial institution to provide the authorizing fiduciary or managed IRA owner with an annual summary of the confirmation slips or quarterly reports. The summary must contain the following information: The total of all securities transaction-related charges incurred by the plan or IRA during the period in connection with the covered securities transactions; the amount of the securities transaction-related charges retained by the authorized person and the amount of these charges paid to other persons for execution or other services; a description of the financial institution's brokerage placement practices if such practices have materially changed during the period covered by the summary; and a

[51] As discussed below, the amendment requires investment managers to meet the terms of the exemption before engaging in covered transactions with respect to IRAs, and revokes relief for investment advice fiduciaries with respect to IRAs.

[52] According to data from the National Telecommunications and Information Agency (NTIA), 33.4 percent of individuals age 25 and over have access to the Internet at work. According to a Greenwald & Associates survey, 84 percent of plan participants find it acceptable to make electronic delivery the default option, which is used as the proxy for the number of participants who will not opt out that are automatically enrolled (for a total of 28.1 percent receiving electronic disclosure at work). Additionally, the NTIA reports that 38.9 percent of individuals age 25 and over have access to the Internet outside of work. According to a Pew Research Center survey, 61 percent of Internet users use online banking, which is used as the proxy for the number of Internet users who will opt in for electronic disclosure (for a total of 23.7 percent receiving electronic disclosure outside of work). Combining the 28.1 percent who receive electronic disclosure at work with the 23.7 percent who receive electronic disclosure outside of work produces a total of 51.8 percent who will receive electronic disclosure overall.

[53] According to data from the NTIA, 72.4 percent of individuals age 25 and older have access to the Internet. According to a Pew Research Center survey, 61 percent of Internet users use online banking, which is used as the proxy for the number of Internet users who will opt in for electronic disclosure. Combining these data produces an estimate of 44.1 percent of individuals who will receive electronic disclosures.

[54] The Department received a comment stating that no cost of postage had been considered in the proposal. In fact, postage had been considered. Detail has been added for improved transparency.

[55] For a description of the Department's methodology for calculating wage rates, see *http://www.dol.gov/ebsa/pdf/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-march-2016.pdf.* The Department's methodology for calculating the overhead cost input of its wage rates was adjusted from the proposed amendment to this PTE to the final amendment to this PTE. In the proposal, the Department based its overhead cost estimates on longstanding internal EBSA calculations for the cost of overhead. In response to a public comment stating that the overhead cost estimates were too low and without any supporting evidence, the Department incorporated published U.S. Census Bureau survey data on overhead costs into its wage rate estimates.

[56] One commenter questioned the basis for the Department's assumption regarding the number of Financial Institutions likely to use the exemption. According to the ''2015 Investment Management Compliance Testing Survey,'' Investment Adviser Association, cited in the regulatory impact analysis for the accompanying rule, 63 percent of Registered Investment Advisers service ERISA-covered plans and IRAs. The Department is using this to form a proxy for the share of broker-dealers that service ERISA-covered plans and IRAs. The Department conservatively assumes that all of the 42 large broker-dealers, 63 percent of the 233 medium broker-dealers (147), and 63 percent of the 3,682 small broker-dealers (2,320) work with ERISA-covered plans and IRAs. Therefore, of the 3,997 broker-dealers registered with the Securities and Exchange Commission, 2,536 broker-dealers service ERISA-covered plans and managed IRAs. The Department anticipates that the exemption will be used primarily, but not exclusively, by broker-dealers. Further, the Department assumes that all broker-dealers servicing the retirement market will use the exemption. The Department believes that some Registered Investment Advisers will use the exemption, but all of those RIAs will be dually registered and accounted for in the broker-dealer counts. The Department has rounded up to 2,800 to account for any other financial institutions that may use the exemption. Further, the Department assumes that approximately 1,800 of the financial institutions using the exemption focus their business primarily on ERISA-covered plans, while 1,000 of the financial institutions using the exemption focus their business primarily on managed IRAs and non-ERISA plans.

[57] This is a weighted average of the Department's estimates of the share of DB plans and DC plans with broker-dealer relationships. The Department does not have a reliable estimate of the number of managed IRAs, and non-ERISA plans with relationships with financial institutions seeking exemptive relief, but believes it to be less than 10,000, which would not materially impact the weighted average.

portfolio turnover ratio calculated in a manner reasonably designed to provide the authorizing fiduciary the information needed to assist in discharging its duty of prudence. Section III(i) states that a financial institution that is a discretionary plan trustee who qualifies to use the exemption must provide the authorizing fiduciary or managed IRA owner 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.

Legal Costs

According to the 2013 Form 5500, approximately 681,000 plans exist in the United States that could enter into relationships with financial institutions. The Department lacks reliable data on the number of managed IRA and non-ERISA plans with relationships with broker-dealers, but estimates that they number less than 10,000. Of these plans and managed IRAs, the Department assumes that 6.5 percent are new plans, managed IRAs and non-ERISA plans, or plans, managed IRAs or non-ERISA plans entering into relationships with new financial institutions [58] and, as stated previously, 23.7 percent of these plans, managed IRAs and non-ERISA plans will engage in transactions covered under this class exemption. The Department estimates that reviewing documents and granting written authorization to the financial institutions will require five hours of legal time for each of the approximately 11,000 plans, managed IRAs and non-ERISA plans entering into new relationships with financial institutions each year.[59] During the first year that these amendments take effect, it will also take five hours of legal time each of the approximately 1,000 financial institutions to draft an authorization notice to send to managed IRAs and non-ERISA plans that are existing clients. Finally, the Department estimates that it will take one hour of legal time for each of the approximately 2,800 financial institutions to produce the annual termination form. This legal work results in a total of approximately 59,000 hours at an equivalent cost of $7.9 million during the first year and 56,000 hours at an equivalent cost of $7.5 million during subsequent years.

Production and Distribution of Required Disclosures

The Department estimates that approximately 161,000 plans and 2,000 managed IRAs and non-ERISA plans have relationships with financial institutions and are likely to engage in transactions covered under this exemption. Of these 161,000 plans and 2,000 managed IRAs and non-ERISA plans, approximately 11,000 plans, managed IRAs, and non-ERISA plans, are new clients to the financial institutions each year.

The Department estimates that 11,000 plans, managed IRAs and non-ERISA plans will send financial institutions a two page authorization letter each year. Prior to obtaining authorization, financial institutions will send the same 11,000 plans, managed IRAs and non-ERISA plans a seven page pre-authorization disclosure.[60] During the first year, financial institutions will send 2,000 authorization notices to existing managed IRA clients and non-ERISA plan clients. Paper copies of the authorization letter, pre-authorization disclosure, and authorization notice will be mailed for 48.2 percent of the plans and 55.9 percent of managed IRAs and non-ERISA plans, and distributed electronically for the remaining 51.8 percent and 44.1 percent respectively. The Department estimates that electronic distribution will result in a de minimis cost, while paper distribution will cost approximately $9,000 during the first year and $7,000 during subsequent years. Paper distribution of the letter, disclosure, and notice will also require two minutes of clerical preparation time per letter, disclosure, or notice resulting in a total of 400 hours at an equivalent cost of $23,000 during the first year and 300 hours at an equivalent cost of approximately $19,000 during subsequent years.[61]

The Department estimates that all of the 161,000 plans and 2,000 managed IRAs and non-ERISA plans will receive a two-page annual termination form from financial institutions; 51.8 percent will be distributed electronically to plans and 44.1 percent will be distributed electronically to managed IRAs and non-ERISA plans, while 48.2 percent and 55.9 percent, respectively, will be mailed. The Department estimates that electronic distribution will result in a de minimis cost, while the paper distribution will cost $47,000. Paper distribution will also require two minutes of clerical preparation time per form resulting in a total of 3,000 hours at an equivalent cost of $146,000.

The Department estimates that 60 percent of plans, managed IRAs and non-ERISA plans (approximately 97,000 plans and 1,000 managed IRAs and non-ERISA plans) will receive quarterly two-page transaction reports from financial institutions four times per year; 51.8 percent will be distributed electronically to plans and 44.1 percent will be distributed electronically to managed IRAs and non-ERISA plans, while 48.2 percent and 55.9 percent, respectively, will be mailed. The Department estimates that electronic distribution will result in a de minimis cost, while paper distribution will cost $112,000. Paper distribution will also require two minutes of clerical preparation time per statement resulting in a total of 6,000 hours at an equivalent cost of $349,000.

The Department estimates that all of the 161,000 plans and 2,000 managed IRAs and non-ERISA plans will receive a five-page annual statement with a two-page summary of commissions paid from financial institutions; 51.8 percent will be distributed electronically to plans and 44.1 percent will be distributed electronically to managed IRAs and non-ERISA plans, while 48.2 percent and 55.9 percent, respectively, will be mailed. The Department assumes that these disclosures will be distributed with the annual termination form, resulting in no further clerical hour burden or postage cost. Electronic distribution will result in a de minimis cost, while the paper distribution will cost $28,000 in materials costs.

The Department received one comment suggesting that the burden analysis in the proposal did not account for any costs to compile data necessary to produce the quarterly transaction reports, annual statements, and report of commissions paid. In fact, this burden was taken into account in the proposal and has been updated here. The Department estimates that it will cost financial institutions $3.30 per plan,

[58] This estimate is from the 2011–2013 Form 5500 data sets. The Department is using new ERISA plans as a proxy for new non-ERISA plans and IRAs.

[59] This estimate has been increased from one hour of legal time per plan in the proposal in response to a public comment. The proposal did not take into account any burden for reviewing the pre-authorization disclosures.

[60] One commenter questioned the availability of the required materials necessary to create the pre-authorization disclosure. Because PTE 86–128 has been in existence for decades, systems are already in place to compile the materials into a disclosure. Further, many of the components of the disclosure also fulfill other regulatory requirements. Therefore, the Department believes that the pre-authorization disclosure can be compiled electronically at de minimis cost. The incremental costs to financial institutions of printing and distributing this disclosure to plans comprise the only additional burden associated with the pre-authorization disclosure.

[61] One commenter questioned the basis for this estimate. The Department worked with clerical staff to determine that most notices and disclosures can be printed and prepared for mailing in less than one minute per disclosure. Therefore, an estimate of two minutes per disclosure is a conservative estimate.

managed IRA, or non-ERISA plan, for each of the 161,000 plans and 2,000 managed IRAs and non-ERISA plans, to track and compile all the transactions data necessary to populate the quarterly transaction reports, the annual statements, and the report of commissions paid. This results in an IT tracking cost of $540,000.[62]

Recordkeeping Requirement

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

The Department assumes that each financial institution will maintain these records in their normal course of business. Therefore, the Department has estimated that the additional time needed to maintain records consistent with the exemption will only require about one-half hour, on average, annually for a financial manager to organize and collate the documents or else draft a notice explaining that the information is exempt from disclosure, and an additional 15 minutes of clerical time to make the documents available for inspection during normal business hours or prepare the paper notice explaining that the information is exempt from disclosure. Thus, the Department estimates that a total of 45 minutes of professional time (30 minutes of financial manager time and 15 minutes of clerical time) per financial institution per year will be required for a total hour burden of 2,100 hours at an equivalent cost of $273,000.

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

Overall Summary

Overall, the Department estimates that in order to meet the conditions of this amended class exemption, over 13,000 financial institutions and plans will produce 910,000 disclosures and notices during the first year and 906,000 disclosures and notices during subsequent years. These disclosures and notices will result in approximately 71,000 burden hours during the first year and 67,000 burden hours during subsequent years, at an equivalent cost of $8.7 million and $8.3 million respectively. This exemption will also result in a total annual cost burden of almost $736,000 during the first year and $734,000 during subsequent years.

These paperwork burden estimates are summarized as follows:

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

Agency: Employee Benefits Security Administration, Department of Labor.

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

OMB Control Number: 1210–0059.

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

Estimated Number of Respondents: 13,445.

Estimated Number of Annual Responses: 910,063 during the first year, 905,632 during subsequent years.

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

Estimated Total Annual Burden Hours: 70,516 hours during the first year, 67,434 hours during subsequent years.

Estimated Total Annual Burden Cost: $735,959 during the first year, $734,055 during subsequent years.

General Information

The attention of interested persons is directed to the following:

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

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

(3) These amendments are applicable to a particular transaction only if the transaction satisfies the conditions specified in the amended exemptions; and

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

Amendment to PTE 86–128

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

Section I. Covered Transactions

(a) *Securities Transactions Exemptions.* If each of the conditions of Sections II and III of this exemption is either satisfied or not applicable under Section V, the restrictions of ERISA

[62] This estimate is based on feedback received from the industry in 2008 stating that service providers incur costs of about $3 per plan to compile statement and transaction data. This estimate has been inflated using the CPI to current dollars.

section 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code section 4975(c)(1)(E) or (F) shall not apply to—(1) A plan fiduciary's using its authority to cause a plan to pay a Commission directly to that person or a Related Entity as agent for the plan in a securities transaction, but only to the extent that the securities transactions are not excessive, under the circumstances, in either amount or frequency; and (2) A plan fiduciary's acting as the agent in an agency cross transaction for both the plan and one or more other parties to the transaction and the receipt by such person of a Commission from one or more other parties to the transaction.

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

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

(2) The exemption set forth in Section I(b) does not apply to transactions involving IRAs.

Section II. Impartial Conduct Standards

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

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

(b) All compensation received by the person and any Related Entity in connection with the transaction is not in excess of reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2).

(c) The fiduciary's statements about the transaction, fees and compensation, Material Conflicts of Interest, and any other matters relevant to a plan's investment decisions, are not materially misleading at the time they are made. For this purpose, a fiduciary's failure to disclose a Material Conflict of Interest relevant to the services the fiduciary is providing or other actions it is taking in relation to a plan's investment decisions is deemed to be a misleading statement.

Section III. Conditions Applicable to Transactions Described in Section I(a)

Except to the extent otherwise provided in Section V of this exemption, Section I(a) of this exemption applies only if the following conditions are satisfied:

(a) The person engaging in the covered transaction is not a trustee (other than a nondiscretionary trustee), an administrator of the plan, or an employer any of whose employees are covered by the plan. Notwithstanding the foregoing, this condition does not apply to a trustee that satisfies Section III(h) and (i).

(b)(1) The covered transaction is performed under a written authorization executed in advance by a fiduciary of each plan whose assets are involved in the transaction or, in the case of an IRA, the IRA owner. The plan fiduciary is independent of the person engaging in the covered transaction. The authorization is terminable at will by the plan, without penalty to the plan, upon receipt by the authorized person of written notice of termination.

(2) Notwithstanding subsection (1), with respect to IRA owners or non-ERISA plans that are existing customers as of the Applicability Date, a person relying on this exemption may satisfy this Section III(b) and Section III(d) if, no later than the Applicability Date, the person provides the disclosures required by Section III(d) and a form expressly providing an election to terminate the services arrangement, with instructions on the use of the form, to the IRA owner or plan fiduciary. The instructions for such form must include the following information:

(A) The arrangement is terminable at will by the IRA or non-ERISA plan, without penalty to the IRA or non-ERISA plan, when the authorized person receives (via first class mail, personal delivery, or email) from the IRA owner or plan fiduciary, a written notice of the intent of the IRA or non-ERISA plan to terminate the arrangement; and

(B) Failure to return the form or some other written notification of the IRA's or non-ERISA plan's intent to terminate the arrangement within thirty (30) days from the date the termination form is sent to the IRA owner or non-ERISA plan fiduciary will result in the continued authorization of the authorized person to engage in the covered transactions on behalf of the IRA or non-ERISA plan.

(c) The authorized person obtains annual reauthorization to engage in transactions pursuant to the exemption in the manner set forth in Section III(b). Alternatively, the authorized person may supply a form expressly providing an election to terminate the authorization described in Section III(b) with instructions on the use of the form to the authorizing fiduciary or IRA owner no less than annually. The instructions for such form must include the following information:

(1) The authorization is terminable at will by the plan, without penalty to the plan, when the authorized person receives (via first class mail, personal delivery, or email) from the authorizing fiduciary or other plan official having authority to terminate the authorization, or in the case of an IRA, the IRA owner, a written notice of the intent of the plan to terminate authorization; and

(2) Failure to return the form or some other written notification of the plan's intent to terminate the authorization within thirty (30) days from the date the termination form is sent to the authorizing fiduciary or IRA owner will result in the continued authorization of the authorized person to engage in the covered transactions on behalf of the plan.

(d) Within three months before an initial authorization is made pursuant to Section III(b), the authorizing fiduciary or, in the case of an IRA, the IRA owner is furnished with a copy of this exemption, the form for termination of authorization described in Section III(c), a description of the person's brokerage placement practices, and any other reasonably available information

regarding the matter that the authorizing fiduciary or IRA owner requests.

(e) The person engaging in a covered transaction furnishes the authorizing fiduciary or IRA owner with either:

(1) A confirmation slip for each securities transaction underlying a covered transaction within ten business days of the securities transaction containing the information described in Rule 10b–10(a)(1–7) under the Securities Exchange Act of 1934; or

(2) at least once every three months and not later than 45 days following the period to which it relates, a report disclosing:

(A) A compilation of the information that would be provided to the plan pursuant to Section III(e)(1) during the three-month period covered by the report;

(B) the total of all securities transaction-related charges incurred by the plan during such period in connection with such covered transactions; and

(C) the amount of the securities transaction-related charges retained by such person, and the amount of such charges paid to other persons for execution or other services. For purposes of this paragraph (e), the words ''incurred by the plan'' shall be construed to mean ''incurred by the pooled fund'' when such person engages in covered transactions on behalf of a pooled fund in which the plan participates.

(f) The authorizing fiduciary or IRA owner is furnished with a summary of the information required under Section III(e)(1) at least once per year. The summary must be furnished within 45 days after the end of the period to which it relates, and must contain the following:

(1) The total of all securities transaction-related charges incurred by the plan during the period in connection with covered securities transactions.

(2) The amount of the securities transaction-related charges retained by the authorized person and the amount of these charges paid to other persons for execution or other services.

(3) A description of the brokerage placement practices of the person that is engaging in the covered transaction, if such practices have materially changed during the period covered by the summary.

(4)(A) A portfolio turnover ratio, calculated in a manner which is reasonably designed to provide the authorizing fiduciary with the information needed to assist in making a prudent determination regarding the amount of turnover in the portfolio. The requirements of this paragraph (f)(4)(A) will be met if the ''annualized portfolio turnover ratio,'' calculated in the manner described in paragraph (f)(4)(B), is contained in the summary.

(B) The ''annualized portfolio turnover ratio'' shall be calculated as a percentage of the plan assets consisting of securities or cash over which the authorized person had discretionary investment authority (the portfolio) at any time or times (management period(s)) during the period covered by the report. First, the ''portfolio turnover ratio'' (not annualized) is obtained by dividing (i) the lesser of the aggregate dollar amounts of purchases or sales of portfolio securities during the management period(s) by (ii) the monthly average of the market value of the portfolio securities during all management period(s). Such monthly average is calculated by totaling the market values of the portfolio securities as of the beginning and end of each management period and as of the end of each month that ends within such period(s), and dividing the sum by the number of valuation dates so used. For purposes of this calculation, all debt securities whose maturities at the time of acquisition were one year or less are excluded from both the numerator and the denominator. The ''annualized portfolio turnover ratio'' is then derived by multiplying the ''portfolio turnover ratio'' by an annualizing factor. The annualizing factor is obtained by dividing (iii) the number twelve by (iv) the aggregate duration of the management period(s) expressed in months (and fractions thereof). Examples of the use of this formula are provided in Section VIII.

(C) The information described in this paragraph (f)(4) is not required to be furnished in any case where the authorized person has not exercised discretionary authority over trading in the plan's account during the period covered by the report.

For purposes of this paragraph (f), the words ''incurred by the plan'' shall be construed to mean ''incurred by the pooled fund'' when such person engages in covered transactions on behalf of a pooled fund in which the plan participates.

(g) If an agency cross transaction to which Section V(a) does not apply is involved, the following conditions must also be satisfied:

(1) The information required under Section III(d) or Section V(c)(1)(B) of this exemption includes a statement to the effect that with respect to agency cross transactions, the person effecting or executing the transactions will have a potentially conflicting division of loyalties and responsibilities regarding the parties to the transactions;

(2) The summary required under Section III(f) of this exemption includes a statement identifying the total number of agency cross transactions during the period covered by the summary and the total amount of all commissions or other remuneration received or to be received from all sources by the person engaging in the transactions in connection with the transactions during the period;

(3) The person effecting or executing the agency cross transaction has the discretionary authority to act on behalf of, and/or provide investment advice to, either (A) one or more sellers or (B) one or more buyers with respect to the transaction, but not both.

(4) The agency cross transaction is a purchase or sale, for no consideration other than cash payment against prompt delivery of a security for which market quotations are readily available; and

(5) The agency cross transaction is executed or effected at a price that is at or between the independent bid and independent ask prices for the security prevailing at the time of the transaction.

(h) Except pursuant to Section V(b), a trustee (other than a non-discretionary trustee) may engage in a covered transaction only with a plan that has total net assets with a value of at least $50 million and in the case of a pooled fund, the $50 million requirement will be met if 50 percent or more of the units of beneficial interest in such pooled fund are held by plans having total net assets with a value of at least $50 million.

For purposes of the net asset tests described above, where a group of plans is maintained by a single employer or controlled group of employers, as defined in ERISA section 407(d)(7), the $50 million net asset requirement may be met by aggregating the assets of such plans, if the assets are pooled for investment purposes in a single master trust.

(i) The trustee described in Section III(h) engaging in a covered transaction furnishes, at least annually, to the authorizing fiduciary of each plan the following:

(1) The aggregate brokerage commissions, expressed in dollars, paid by the plan to brokerage firms affiliated with the trustee;

(2) the aggregate brokerage commissions, expressed in dollars, paid by the plan to brokerage firms unaffiliated with the trustee;

(3) the average brokerage commissions, expressed as cents per share, paid by the plan to brokerage firms affiliated with the trustee; and

(4) the average brokerage commissions, expressed as cents per share, paid by the plan (to brokerage firms unaffiliated with the trustee.

For purposes of this paragraph (i), the words ''paid by the plan'' shall be construed to mean ''paid by the pooled fund'' when the trustee engages in covered transactions on behalf of a pooled fund in which the plan participates.

(j) In the case of securities transactions involving shares of Mutual Funds, other than exchange traded funds, at the time of the transaction, the shares are purchased or sold at net asset value (NAV) plus a commission, in accordance with applicable securities laws and regulations.

IV. Conditions Applicable to Transactions Described in Section I(b)

Section I(b) of this exemption applies only if the following conditions are satisfied:

(a) The fiduciary engaging in the covered transaction customarily purchases and sells securities for its own account in the ordinary course of its business as a broker-dealer.

(b) At the time the transaction is entered into, the terms are at least as favorable to the plan as the terms generally available in an arm's length transaction with an unrelated party.

(c) Except to the extent otherwise provided in Section V, the requirements of Section III(a) through III(f), III(h) and III(i) (if applicable), and III(j) are satisfied with respect to the transaction.

Section V. Exceptions From Conditions

(a) Certain agency cross transactions. Section III of this exemption does not apply in the case of an agency cross transaction, provided that the person effecting or executing the transaction:

(1) Does not render investment advice to any plan for a fee within the meaning of ERISA section 3(21)(A)(ii) with respect to the transaction;

(2) is not otherwise a fiduciary who has investment discretion with respect to any plan assets involved in the transaction, *see* 29 CFR 2510.3–21(d); and

(3) does not have the authority to engage, retain or discharge any person who is or is proposed to be a fiduciary regarding any such plan assets.

(b) Recapture of profits. Sections III(a) and III(i) do not apply in any case where the person who is engaging in a covered transaction returns or credits to the plan all profits earned by that person and any Related Entity in connection with the securities transactions associated with the covered transaction.

(c) Special rules for pooled funds. In the case of a person engaging in a covered transaction on behalf of an account or fund for the collective investment of the assets of more than one plan (a pooled fund):

(1) Sections III(b), (c) and (d) of this exemption do not apply if—

(A) the arrangement under which the covered transaction is performed is subject to the prior and continuing authorization, in the manner described in this paragraph (c)(1), of a plan fiduciary with respect to each plan whose assets are invested in the pooled fund who is independent of the person. The requirement that the authorizing fiduciary be independent of the person shall not apply in the case of a plan covering only employees of the person, if the requirements of Section V(c)(2)(A) and (B) are met.

(B) The authorizing fiduciary is furnished with any reasonably available information that the person engaging or proposing to engage in the covered transaction reasonably believes to be necessary to determine whether the authorization should be given or continued, not less than 30 days prior to implementation of the arrangement or material change thereto, including (but not limited to) a description of the person's brokerage placement practices, and, where requested any other reasonably available information regarding the matter upon the reasonable request of the authorizing fiduciary at any time.

(C) In the event an authorizing fiduciary submits a notice in writing to the person engaging in or proposing to engage in the covered transaction objecting to the implementation of, material change in, or continuation of, the arrangement, the plan on whose behalf the objection was tendered is given the opportunity to terminate its investment in the pooled fund, without penalty to the plan, within such time as may be necessary to effect the withdrawal in an orderly manner that is equitable to all withdrawing plans and to the nonwithdrawing plans. In the case of a plan that elects to withdraw under this subparagraph (c)(1)(C), the withdrawal shall be effected prior to the implementation of, or material change in, the arrangement; but an existing arrangement need not be discontinued by reason of a plan electing to withdraw.

(D) In the case of a plan whose assets are proposed to be invested in the pooled fund subsequent to the implementation of the arrangement and that has not authorized the arrangement in the manner described in Section V(c)(1)(B) and (C), the plan's investment in the pooled fund is subject to the prior written authorization of an authorizing fiduciary who satisfies the requirements of subparagraph (c)(1)(A).

(2) Section III(a) of this exemption, to the extent that it prohibits the person from being the employer of employees covered by a plan investing in a pool managed by the person, does not apply if—

(A) The person is an ''investment manager'' as defined in section 3(38) of ERISA, and

(B) Either (i) the person returns or credits to the pooled fund all profits earned by the person and any Related Entity in connection with all covered transactions engaged in by the fund, or (ii) the pooled fund satisfies the requirements of paragraph V(c)(3).

(3) A pooled fund satisfies the requirements of this paragraph for a fiscal year of the fund if—

(A) On the first day of such fiscal year, and immediately following each acquisition of an interest in the pooled fund during the fiscal year by any plan covering employees of the person, the aggregate fair market value of the interests in such fund of all plans covering employees of the person does not exceed twenty percent of the fair market value of the total assets of the fund; and

(B) The aggregate brokerage commissions received by the person and any Related Entity, in connection with covered transactions engaged in by the person on behalf of all pooled funds in which a plan covering employees of the person participates, do not exceed five percent of the total brokerage commissions received by the person and any Related Entity from all sources in such fiscal year.

Section VI. Recordkeeping Requirements

(a) The plan fiduciary engaging in a covered transaction maintains or causes to be maintained for a period of six years, in a manner that is reasonably accessible for examination, the records necessary to enable the persons described in Section VI(b) to determine whether the conditions of this exemption have been met, except that:

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

(2) No party in interest, other than such plan fiduciary who is responsible for complying with this paragraph (a), will be subject to the civil penalty that may be assessed under ERISA section

502(i) or the taxes imposed by Code section 4975(a) and (b), if applicable, if the records are not maintained or are not available for examination as required by paragraph (b) below; and

(b)(1) Except as provided below in subparagraph (2), or as precluded by 12 U.S.C. 484, and notwithstanding any provisions of ERISA section 504(a)(2) and (b), the records referred to in the above paragraph are reasonably 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.

(2) None of the persons described in subparagraph (1)(B)–(D) above are authorized to examine privileged trade secrets or privileged commercial or financial information of such fiduciary or are 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.

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

(4) 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 does not affect the relief for other transactions.

Section VII. Definitions

The following definitions apply to this exemption:

(a) The term ''person'' includes the person and affiliates of the person.

(b) An ''affiliate'' of a person includes the following:

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

(2) Any officer, director, partner, employee, 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 in which such person is a partner.

A person is not an affiliate of another person solely because one of them has investment discretion over the other's assets. The term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(c) An ''agency cross transaction'' is a securities transaction in which the same person acts as agent for both any seller and any buyer for the purchase or sale of a security.

(d) The term ''covered transaction'' means an action described in Section I of this exemption.

(e) The term ''effecting or executing a securities transaction'' means the execution of a securities transaction as agent for another person and/or the performance of clearance, settlement, custodial or other functions ancillary thereto.

(f) A plan fiduciary is ''independent'' of a person if it (1) is not the person, (2) does not receive or is not projected to receive within the current federal income tax year, compensation or other consideration for his or her own account from the person in excess of 2% of the fiduciary's annual revenues based upon its prior income tax year, and (3) does not have a relationship to or an interest in the person that might affect the exercise of the person's best judgment in connection with transactions described in this exemption. Notwithstanding the foregoing, if the plan is an individual retirement account not subject to title I of ERISA, and is beneficially owned by an employee, officer, director or partner of the person engaging in covered transactions with the IRA pursuant to this exemption, such beneficial owner is deemed ''independent'' for purposes of this definition.

(g) The term ''profit'' includes all charges relating to effecting or executing securities transactions, less reasonable and necessary expenses including reasonable indirect expenses (such as overhead costs) properly allocated to the performance of these transactions under generally accepted accounting principles.

(h) The term ''securities transaction'' means the purchase or sale of securities.

(i) The term ''nondiscretionary trustee'' of a plan means a trustee or custodian whose powers and duties with respect to any assets of the plan are limited to (1) the provision of nondiscretionary trust services to the plan, and (2) duties imposed on the trustee by any provision or provisions of ERISA or the Code. The term ''nondiscretionary trust services'' means custodial services and services ancillary to custodial services, none of which services are discretionary. For purposes of this exemption, a person does not fail to be a nondiscretionary trustee solely by reason of having been delegated, by the sponsor of a master or prototype plan, the power to amend such plan.

(j) The term ''plan'' means an employee benefit plan described in ERISA section 3(3) and any plan described in Code section 4975(e)(1) (including an Individual Retirement Account as defined in VII(k)).

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

(l) The term ''Related Entity'' means an entity, other than an affiliate, in which a person has an interest which may affect the person's exercise of its best judgment as a fiduciary.

(m) A fiduciary acts in the ''Best Interest'' of the plan when the fiduciary acts with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person 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 plan, without regard to the financial or other interests of the fiduciary, its affiliate, a Related Entity or other party.

(n) The term ''Commission'' means a brokerage commission or sales load paid for the service of effecting or executing the transaction, but not a 12b–1 fee, revenue sharing payment, marketing fee, administrative fee, sub-TA fee or sub-accounting fee.

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

Section VIII. Examples Illustrating the Use of the Annualized Portfolio Turnover Ratio Described in Section III(f)(4)(B)

(a) M, an investment manager affiliated with a broker dealer that M uses to effect securities transactions for the accounts that it manages, exercises

investment discretion over the account of plan P for the period January 1, 2014, though June 30, 2014, after which the relationship between M and P ceases. The market values of P's account with A at the relevant times (excluding debt securities having a maturity of one year or less at the time of acquisition) are:

Date	Market value ($ millions)
January 1, 2014	10.4
January 31, 2014	10.2
February 28, 2014	9.9
March 31, 2014	10.0
April 30, 2014	10.6
May 31, 2014	11.5
June 30, 2014	12.0
Sum of market value	74.6

Aggregate purchases during the 6-month period were $850,000; aggregate sales were $1,000,000, excluding in each case debt securities having a maturity of one year or less at the time of acquisition.

For purposes of Section III(f)(4) of this exemption, M computes the annualized portfolio turnover as follows:

A = $850,000 (lesser of purchases or sales)
B = $10,657,143 ($74.6 million divided by 7, *i.e.,* number of valuation dates)
Annualizing factor = C/D = 12/6 = 2
Annualized portfolio turnover ratio = 2 × (850,000/10,657,143) = 0.160 = 16.0 percent

(b) Same facts as (a), except that M manages the portfolio through July 15, 2014, and, in addition, resumes management of the portfolio on November 10, 2014, through the end of the year. The additional relevant valuation dates and portfolio values are:

Dates	Market value ($ millions)
July 15, 2014	12.2
November 10, 2014	9.4
November 30, 2014	9.6
December 31, 2014	9.8
Sum of market values	41.0

During the periods July 1, 2014, through July 15, 2014, and November 10, 2014, through December 31, 2014, there were an additional $650,000 of purchases and $400,000 of sales. Thus, total purchases were $1,500,000 (*i.e.,* $850,000 + $650,000) and total sales were $1,400,000 (*i.e.,* $1,000,000 + $400,000) for the management periods.

M now computes the annualized portfolio turnover as follows:
A = $1,400,000 (lesser of aggregate purchases or sales)
B = $10,509,091 ($10,509,091 ($115.6 million divided by 11)
Annualizing factor = C/D = 12/(6.5 + 1.67) = 1.47
Annualized portfolio turnover ratio = 1.47 × (1,400,000/10,509,091) = 0.196 = 19.6 percent.

Restatement of PTE 75–1, Part II

The Department is proposing to revoke Parts I(b), I(c) and II(2) of PTE 75–1. In connection with the proposed revocation of Part II(2), the Department is republishing Part II of PTE 75–1. Part II of PTE 75–1 shall read as follows:

The restrictions of section 406(a) of the Employee Retirement Income Security Act of 1974 (the Act) and the taxes imposed by section 4975(a) and (b) of the Internal Revenue Code of 1986 (the Code), by reason of section 4975(c)(1)(A) through (D) of the Code, shall not apply to any purchase or sale of a security between an employee benefit plan and a broker-dealer registered under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), a reporting dealer who makes primary markets in securities of the United States Government or of any agency of the United States Government (Government securities) and reports daily to the Federal Reserve Bank of New York its positions with respect to Government securities and borrowings thereon, or a bank supervised by the United States or a State if the following conditions are met:

(a) In the case of such broker-dealer, it customarily purchases and sells securities for its own account in the ordinary course of its business as a broker-dealer.

(b) In the case of such reporting dealer or bank, it customarily purchases and sells Government securities for its own account in the ordinary course of its business and such purchase or sale between the plan and such reporting dealer or bank is a purchase or sale of Government securities.

(c) Such transaction is at least as favorable to the plan as an arm's length transaction with an unrelated party would be, and it was not, at the time of such transaction, a prohibited transaction within the meaning of section 503(b) of the Code.

(d) Neither the broker-dealer, reporting dealer, bank, nor any affiliate thereof has or exercises any discretionary authority or control (except as a directed trustee) with respect to the investment of the plan assets involved in the transaction, or renders investment advice (within the meaning of 29 CFR 2510.3–21(c)) with respect to those assets.

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

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

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

(f)(1) Notwithstanding anything to the contrary in subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (e) are reasonably available for examination during normal business hours by:

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

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

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

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

(2) None of the persons described in subparagraph (1)(B)–(D) above shall be authorized to examine trade secrets or commercial or financial information of the broker-dealer, reporting dealer, or bank which is privileged or confidential, or records regarding a plan or IRA other than the plan or IRA with respect to which they are the fiduciary, contributing employer, employee organization, participant, beneficiary, or IRA owner.

(3) Should such broker-dealer, reporting dealer, or bank refuse to disclose information on the basis that such information is exempt from disclosure, the broker-dealer, reporting dealer, or bank shall, by the close of the thirtieth (30th) day following the request, provide a written notice advising that person of the reasons for the refusal and that the Department may request such information.

(4) 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 does not affect the relief for other transactions.

For purposes of this exemption, the terms ''broker-dealer,'' ''reporting dealer'' and ''bank'' shall include such persons and any affiliates thereof, and the term ''affiliate'' shall be defined in the same manner as that term is defined in 29 CFR 2510.3–21(e) and 26 CFR 54.4975–9(e).

Signed at Washington, DC, this 1st day of April, 2016.

Phyllis C. Borzi,

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

[FR Doc. 2016–07929 Filed 4–6–16; 11:15 am]

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

[Application Number D–11820]

ZRIN 1210–ZA25

Amendments to Class Exemptions 75–1, 77–4, 80–83 and 83–1

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

ACTION: Adoption of Amendments to Class Exemptions.

SUMMARY: This document contains amendments to prohibited transaction exemptions (PTEs) 75–1, 77–4, 80–83 and 83–1. Generally, the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (the Code) prohibit fiduciaries with respect to employee benefit plans and individual retirement accounts (IRAs) from engaging in self-dealing, including using their authority, control or responsibility to affect or increase their own compensation. These exemptions generally permit fiduciaries to receive compensation or other benefits as a result of the use of their fiduciary authority, control or responsibility in connection with investment transactions involving plans or IRAs. The amendments require the fiduciaries to satisfy uniform Impartial Conduct Standards in order to obtain the relief available under each exemption. The amendments affect participants and beneficiaries of plans, IRA owners, and fiduciaries with respect to such plans and IRAs.

DATES: *Issuance date:* These amendments are issued June 7, 2016.

Applicability date: These amendments are applicable to transactions occurring on or after April 10, 2017.

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

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

Executive Summary

Purpose of Regulatory Action

The Department grants these amendments to PTEs 75–1, 77–4, 80–83 and 83–1 in connection with its publication today, elsewhere in this issue of the **Federal Register**, of a final regulation defining who is a ''fiduciary'' of an employee benefit plan under ERISA as a result of giving investment advice to a plan or its participants or beneficiaries (Regulation). The Regulation also applies to the definition of a ''fiduciary'' of a plan (including an IRA) under the Code. The Regulation amends a prior regulation, dating to 1975, specifying when a person is a ''fiduciary'' under ERISA and the Code by reason of the provision of investment advice for a fee or other compensation regarding assets of a plan or IRA. The Regulation takes into account the advent of 401(k) plans and IRAs, the dramatic increase in rollovers, and other developments that have transformed the retirement plan landscape and the associated investment market over the four decades since the existing regulation was issued. In light of the extensive changes in retirement investment practices and relationships, the Regulation updates existing rules to distinguish more appropriately between the sorts of advice relationships that should be treated as fiduciary in nature and those that should not.

In connection with the adoption of the Regulation, PTEs 75–1, Part III, 75–1, Part IV, 77–4, 80–83 and 83–1 are amended to increase the safeguards of the exemptions. As amended, new ''Impartial Conduct Standards'' are made conditions of the exemptions. Fiduciaries are required to act in accordance with these standards in transactions permitted by the exemptions. The standards are incorporated in multiple class exemptions, including the exemptions that are the subject of this notice, other existing exemptions, and two new exemptions published elsewhere in this issue of the **Federal Register**, to ensure that fiduciaries relying on the exemptions are held to a uniform set of standards and that these standards are applicable to transactions involving both plans and IRAs. The amendments apply prospectively to fiduciaries relying on the exemptions.

ERISA section 408(a) specifically authorizes the Secretary of Labor to grant and amend administrative exemptions from ERISA's prohibited transaction provisions.[1] Regulations at 29 CFR 2570.30 to 2570.52 describe the procedures for applying for an administrative exemption. In amending these exemptions, the Department has determined that the amended exemptions are administratively feasible, in the interests of plans and their participants and beneficiaries and IRA owners, and protective of the rights of participants and beneficiaries of plans and IRA owners.

Summary of the Major Provisions

This notice amends prohibited transaction exemptions 75–1, Part III,

[1] Code section 4975(c)(2) authorizes the Secretary of the Treasury to grant exemptions from the parallel prohibited transaction provisions of the Code. Reorganization Plan No. 4 of 1978 (5 U.S.C. app. at 214 (2000)) (''Reorganization Plan'') generally transferred the authority of the Secretary of the Treasury to grant administrative exemptions under Code section 4975 to the Secretary of Labor. To rationalize the administration and interpretation of dual provisions under ERISA and the Code, the Reorganization Plan divided the interpretive and rulemaking authority for these provisions between the Secretaries of Labor and of the Treasury, so that, in general, the agency with responsibility for a given provision of Title I of ERISA would also have responsibility for the corresponding provision in the Code. Among the sections transferred to the Department were the prohibited transaction provisions and the definition of a fiduciary in both Title I of ERISA and in the Code. ERISA's prohibited transaction rules, 29 U.S.C. 1106–1108, apply to ERISA-covered plans, and the Code's corresponding prohibited transaction rules, 26 U.S.C. 4975(c), apply both to ERISA-covered pension plans that are tax-qualified pension plans, as well as other tax-advantaged arrangements, such as IRAs, that are not subject to the fiduciary responsibility and prohibited transaction rules in ERISA. Specifically, section 102(a) of the Reorganization Plan provides the Department of Labor with ''all authority'' for ''regulations, rulings, opinions, and exemptions under section 4975 [of the Code]'' subject to certain exceptions not relevant here. Reorganization Plan section 102. In President Carter's message to Congress regarding the Reorganization Plan, he made explicitly clear that as a result of the plan, ''Labor will have statutory authority for fiduciary obligations. . . . Labor will be responsible for overseeing fiduciary conduct under these provisions.'' Reorganization Plan, Message of the President. This exemption provides relief from the indicated prohibited transaction provisions of both ERISA and the Code.