41217

Submission of Federal Rules Under the Congressional Review Act

☐ President of the Senate ☐ Speaker of the House of Representatives ☑ GAO

Please fill the circles electronically or with black pen or #2 pencil.

1. Name of Department or Agency	2. Subdivision or Office
Department of Labor	Employee Benefits Security Administration

3. Rule Title

Retirement Security Rule: Definition of an Investment Advice Fiduciary

4. Rule Identification Number (RIN) or Other Unique Identifier (if applicable) 1210-AC02

5. Major Rule ● Non-major Rule ○

6. Final Rule ● Other ○ _____

7. With respect to this rule, did your agency solicit public comments? Yes ● No ○ N/A ○

8. Priority of Regulation (fill in one)

● Economically Significant; or Significant; or Substantive, Nonsignificant

○ Routine and Frequent or Informational/Administrative/Other ***(Do not complete the other side of this form if filled in above.)***

9. Effective Date (if applicable) 09/23/2024

10. Is a concise Summary of the Rule provided? Yes ● No ○

Submitted by: _____ (signature)

Name: Lisa M. Gomez

Title: Assistant Secretary

Employee Benefits Security Administration

For Congressional Use Only:

Date Received: _____

Committee of Jurisdiction: _____

AUTHENTICATED U.S. GOVERNMENT INFORMATION GPO

41217

	Yes	No	N/A
A. With respect to this rule, did your agency prepare an analysis of costs and benefits?	●	○	○
B. With respect to this rule, at the final rulemaking stage, did your agency			
1. certify that the rule would not have a significant economic impact on a substantial number of small entities under 5 U.S.C. § 605(b)?	○	◉	○
2. prepare a final Regulatory Flexibility Analysis under 5 U.S.C. § 604(a)?	◉	○	○
C. With respect to this rule, did your agency prepare a written statement under § 202 of the Unfunded Mandates Reform Act of 1995?	◉	○	○
D. With respect to this rule, did your agency prepare an Environmental Assessment or an Environmental Impact Statement under the National Environmental Policy Act (NEPA)?	○	○	●
E. Does this rule contain a collection of information requiring OMB approval under the Paperwork Reduction Act of 1995?	◉	○	○
F. With respect to this rule, did your agency prepare a statement regarding compliance with the requirements of the Administrative Pay-As-You-Go-Act of 2023, Pub. L. No. 118-5, div. B, title III, 137 Stat 31 (June 3, 2023)?	○	○	◉
G. Did you discuss any of the following in the preamble to the rule			
• E.O. 13132, Federalism	●	○	○
• E.O. 12630, Government Actions and Interference with Constitutionally Protected Property Rights	○	○	◉
• E.O. 12866, Regulatory Planning and Review	●	○	○
• E.O. 12988, Civil Justice Reform	○	○	◉
• E.O. 13045, Protection of Children from Environmental Health Risks and Safety Risks	○	○	◉

Other statutes or executive orders discussed in the preamble concerning the rulemaking process (please specify)

Pay-As-You-Go Act of 2023 does not apply to this rule because it does not increase direct spending.

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1. Name of Department or Agency	2. Subdivision or Office
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3. Rule Title

Amendment to Prohibited Transaction Exemption 84-24

4. Rule Identification Number (RIN) or Other Unique Identifier (if applicable) ZRIN 1210-ZA33

5. Major Rule ● Non-major Rule ○

6. Final Rule ● Other ○ _____

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1. Name of Department or Agency	2. Subdivision or Office
Department of Labor	Employee Benefits Security Administration

3. Rule Title

Amendment to Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, and 86-128

4. Rule Identification Number (RIN) or Other Unique Identifier (if applicable) ZRIN 1210-ZA34

5. Major Rule ● Non-major Rule ○

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Please fill the circles electronically or with black pen or #2 pencil.

1. Name of Department or Agency: Department of Labor

2. Subdivision or Office: Employee Benefits Security Administration

3. Rule Title: Amendment to Prohibited Transaction Exemption 2020-02

4. Rule Identification Number (RIN) or Other Unique Identifier (if applicable) ZRIN 1210-ZA32

5. Major Rule ● Non-major Rule ○

6. Final Rule ● Other ○ _____

7. With respect to this rule, did your agency solicit public comments? Yes ● No ○ N/A ○

8. Priority of Regulation (fill in one)

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4. Rule Identification Number (RIN) or Other Unique Identifier (if applicable) 1210-AC02

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Amendment to Prohibited Transaction Exemption 2020-02

4. Rule Identification Number (RIN) or Other Unique Identifier (if applicable) ZRIN 1210-ZA32

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3. Rule Title: Amendment to Prohibited Transaction Exemption 2020-02

4. Rule Identification Number (RIN) or Other Unique Identifier (if applicable) ZRIN 1210-ZA32

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	Yes	No	N/A
A. With respect to this rule, did your agency prepare an analysis of costs and benefits?	●	○	○
B. With respect to this rule, at the final rulemaking stage, did your agency			
1. certify that the rule would not have a significant economic impact on a substantial number of small entities under 5 U.S.C. § 605(b)?	○	●	○
2. prepare a final Regulatory Flexibility Analysis under 5 U.S.C. § 604(a)?	●	○	○
C. With respect to this rule, did your agency prepare a written statement under § 202 of the Unfunded Mandates Reform Act of 1995?	●	○	○
D. With respect to this rule, did your agency prepare an Environmental Assessment or an Environmental Impact Statement under the National Environmental Policy Act (NEPA)?	○	○	●
E. Does this rule contain a collection of information requiring OMB approval under the Paperwork Reduction Act of 1995?	●	○	○
F. With respect to this rule, did your agency prepare a statement regarding compliance with the requirements of the Administrative Pay-As-You-Go-Act of 2023, Pub. L. No. 118-5, div. B, title III, 137 Stat 31 (June 3, 2023)?	○	○	●
G. Did you discuss any of the following in the preamble to the rule			
• E.O. 13132, Federalism	●	○	○
• E.O. 12630, Government Actions and Interference with Constitutionally Protected Property Rights	○	○	●
• E.O. 12866, Regulatory Planning and Review	●	○	○
• E.O. 12988, Civil Justice Reform	○	○	●
• E.O. 13045, Protection of Children from Environmental Health Risks and Safety Risks	○	○	●

Other statutes or executive orders discussed in the preamble concerning the rulemaking process (please specify)

Pay-As-You-Go Act of 2023 does not apply to this rule because it does not increase direct spending.

41217

Submission of Federal Rules Under the Congressional Review Act

☑ President of the Senate ☐ Speaker of the House of Representatives ☐ GAO

Please fill the circles electronically or with black pen or #2 pencil.

1. Name of Department or Agency: Department of Labor

2. Subdivision or Office: Employee Benefits Security Administration

3. Rule Title

Amendment to Prohibited Transaction Exemption 84-24

4. Rule Identification Number (RIN) or Other Unique Identifier (if applicable) ZRIN 1210-ZA33

5. Major Rule ● Non-major Rule ○

6. Final Rule ● Other ○ _____

7. With respect to this rule, did your agency solicit public comments? Yes ● No ○ N/A ○

8. Priority of Regulation (fill in one)

● Economically Significant; or Significant; or Substantive, Nonsignificant

○ Routine and Frequent or Informational/Administrative/Other ***(Do not complete the other side of this form if filled in above.)***

9. Effective Date (if applicable) 9/23/24

10. Is a concise Summary of the Rule provided? Yes ● No ○

Submitted by: _____ (signature)

Name: Lisa M. Gomez

Title: Assistant Secretary

Employee Benefits Security Administration

For Congressional Use Only:

Date Received: _____

Committee of Jurisdiction: _____

41217

	Yes	No	N/A
A. With respect to this rule, did your agency prepare an analysis of costs and benefits?	●	○	○
B. With respect to this rule, at the final rulemaking stage, did your agency			
1. certify that the rule would not have a significant economic impact on a substantial number of small entities under 5 U.S.C. § 605(b)?	○	●	○
2. prepare a final Regulatory Flexibility Analysis under 5 U.S.C. § 604(a)?	●	○	○
C. With respect to this rule, did your agency prepare a written statement under § 202 of the Unfunded Mandates Reform Act of 1995?	●	○	○
D. With respect to this rule, did your agency prepare an Environmental Assessment or an Environmental Impact Statement under the National Environmental Policy Act (NEPA)?	○	○	●
E. Does this rule contain a collection of information requiring OMB approval under the Paperwork Reduction Act of 1995?	●	○	○
F. With respect to this rule, did your agency prepare a statement regarding compliance with the requirements of the Administrative Pay-As-You-Go-Act of 2023, Pub. L. No. 118-5, div. B, title III, 137 Stat 31 (June 3, 2023)?	○	○	●
G. Did you discuss any of the following in the preamble to the rule			
• E.O. 13132, Federalism	●	○	○
• E.O. 12630, Government Actions and Interference with Constitutionally Protected Property Rights	○	○	●
• E.O. 12866, Regulatory Planning and Review	●	○	○
• E.O. 12988, Civil Justice Reform	○	○	●
• E.O. 13045, Protection of Children from Environmental Health Risks and Safety Risks	○	○	●

Other statutes or executive orders discussed in the preamble concerning the rulemaking process (please specify)

Pay-As-You-Go Act of 2023 does not apply to this rule because it does not increase direct spending.

41217

Submission of Federal Rules Under the Congressional Review Act

☑ President of the Senate ☐ Speaker of the House of Representatives ☐ GAO

Please fill the circles electronically or with black pen or #2 pencil.

1. Name of Department or Agency: Department of Labor

2. Subdivision or Office: Employee Benefits Security Administration

3. Rule Title

Amendment to Prohibited Transaction Exemptions 75-1, 77-4, 80-83, 83-1, and 86-128

4. Rule Identification Number (RIN) or Other Unique Identifier (if applicable) ZRIN 1210-ZA34

5. Major Rule ● Non-major Rule ○

6. Final Rule ● Other ○ _____

7. With respect to this rule, did your agency solicit public comments? Yes ● No ○ N/A ○

8. Priority of Regulation (fill in one)

● Economically Significant; or Significant; or Substantive, Nonsignificant

○ Routine and Frequent or Informational/Administrative/Other ***(Do not complete the other side of this form if filled in above.)***

9. Effective Date (if applicable) 9/23/24

10. Is a concise Summary of the Rule provided? Yes ● No ○

Submitted by: _____ (signature)

Name: Lisa M. Gomez

Title: Assistant Secretary

Employee Benefits Security Administration

For Congressional Use Only:

Date Received: _____

Committee of Jurisdiction: _____

41217

	Yes	No	N/A
A. With respect to this rule, did your agency prepare an analysis of costs and benefits?	●	○	○
B. With respect to this rule, at the final rulemaking stage, did your agency			
1. certify that the rule would not have a significant economic impact on a substantial number of small entities under 5 U.S.C. § 605(b)?	○	●	○
2. prepare a final Regulatory Flexibility Analysis under 5 U.S.C. § 604(a)?	●	○	○
C. With respect to this rule, did your agency prepare a written statement under § 202 of the Unfunded Mandates Reform Act of 1995?	●	○	○
D. With respect to this rule, did your agency prepare an Environmental Assessment or an Environmental Impact Statement under the National Environmental Policy Act (NEPA)?	○	○	●
E. Does this rule contain a collection of information requiring OMB approval under the Paperwork Reduction Act of 1995?	●	○	○
F. With respect to this rule, did your agency prepare a statement regarding compliance with the requirements of the Administrative Pay-As-You-Go-Act of 2023, Pub. L. No. 118-5, div. B, title III, 137 Stat 31 (June 3, 2023)?	○	○	●
G. Did you discuss any of the following in the preamble to the rule			
• E.O. 13132, Federalism	●	○	○
• E.O. 12630, Government Actions and Interference with Constitutionally Protected Property Rights	○	○	●
• E.O. 12866, Regulatory Planning and Review	●	○	○
• E.O. 12988, Civil Justice Reform	○	○	●
• E.O. 13045, Protection of Children from Environmental Health Risks and Safety Risks	○	○	●

Other statutes or executive orders discussed in the preamble concerning the rulemaking process (please specify)

Pay-As-You-Go Act of 2023 does not apply to this rule because it does not increase direct spending.

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2510

RIN 1210–AC02

Retirement Security Rule: Definition of an Investment Advice Fiduciary

AGENCY: Employee Benefits Security Administration, Department of Labor

ACTION: Final rule

SUMMARY: The Department of Labor (Department) is adopting a final rule defining when a person renders ''investment advice for a fee or other compensation, direct or indirect'' with respect to any moneys or other property of an employee benefit plan, for purposes of the definition of a ''fiduciary'' in the Employee Retirement Income Security Act of 1974 (Title I of ERISA or the Act). The final rule also applies for purposes of Title II of ERISA to the definition of a fiduciary of a plan defined in Internal Revenue Code (Code), including an individual retirement account or other plan identified in the Code. The Department also is publishing elsewhere in this issue of the **Federal Register** amendments to Prohibited Transaction Exemption 2020–02 (Improving Investment Advice for Workers & Retirees) and to several other existing administrative exemptions from the prohibited transaction rules applicable to fiduciaries under Title I and Title II of ERISA.

DATES: This regulation is effective September 23, 2024.

FOR FURTHER INFORMATION CONTACT:

- *For questions regarding the rule:* contact Luisa Grillo-Chope, Office of Regulations and Interpretations, Employee Benefits Security Administration (EBSA), 202–693–8510. (Not a toll-free number).
- *For questions regarding the prohibited transaction exemptions:* contact Susan Wilker, Office of Exemption Determinations, EBSA, 202–693–8540. (Not a toll-free number).
- *For questions regarding the Regulatory Impact Analysis:* contact James Butikofer, Office of Research and Analysis, EBSA, 202–693–8434. (Not a toll-free number).

Customer Service Information: Individuals interested in obtaining information from the Department of Labor concerning Title I of ERISA and employee benefit plans may call the Employee Benefits Security Administration (EBSA) Toll-Free Hotline, at 1–866–444–EBSA (3272) or visit the Department of Labor's website (*https://www.dol.gov/agencies/ebsa*).

SUPPLEMENTARY INFORMATION:

A. Executive Summary

The Department is issuing a final rule defining an investment advice fiduciary for purposes of Title I and Title II of ERISA. The final rule defines when a person is a fiduciary in connection with providing advice to an investor saving for retirement through a workplace retirement plan or other type of retirement plan such as an IRA. Such retirement investors include participants and beneficiaries in workplace retirement plans, IRA owners and beneficiaries, as well as plan and IRA fiduciaries with authority or control with respect to the plan or IRA.

Under the final rule, a person is an investment advice fiduciary if they provide a recommendation in one of the following contexts:

- The person either directly or indirectly (*e.g.,* through or together with any affiliate) makes professional investment recommendations to investors on a regular basis as part of their business and the recommendation is made under circumstances that would indicate to a reasonable investor in like circumstances that the recommendation:
  - Æ is based on review of the retirement investor's particular needs or individual circumstances,
  - Æ reflects the application of professional or expert judgment to the retirement investor's particular needs or individual circumstances, and
  - Æ may be relied upon by the retirement investor as intended to advance the retirement investor's best interest; or
- The person represents or acknowledges that they are acting as a fiduciary under Title I of ERISA, Title II of ERISA, or both with respect to the recommendation.

The recommendation also must be provided ''for a fee or other compensation, direct or indirect'' as defined in the final rule.

As compared to the previous regulatory definition, which was finalized in 1975, the final rule better reflects the text and the purposes of ERISA and better protects the interests of retirement investors, consistent with the Department's mission to ensure the security of the retirement, health, and other workplace-related benefits of America's workers and their families.

The final rule is designed to ensure that retirement investors' reasonable expectations are honored when they receive advice from financial professionals who hold themselves out as trusted advice providers. The Department's regulation fills an important gap in those advice relationships where advice is not currently treated as fiduciary advice under the 1975 regulation's approach to ERISA's functional fiduciary definition. This may be the case even though the financial professional holds themselves out as providing recommendations that are based on review of the retirement investor's needs or circumstances and the application of professional or expert judgment to the retirement investor's needs or circumstances, and that can be relied upon to advance the retirement investor's best interest.

Together with amendments to administrative exemptions (PTEs) from the prohibited transaction rules applicable to fiduciaries under Title I and Title II of ERISA published elsewhere in this issue of the **Federal Register**, the final rule is intended to protect the interests of retirement investors by requiring persons who are defined in the final rule as investment advice fiduciaries to adhere to stringent conduct standards and mitigate their conflicts of interest. The amended PTEs' compliance obligations are generally consistent with the best interest obligations set forth in the Securities and Exchange Commission's (SEC) Regulation Best Interest and its Commission Interpretation Regarding Standard of Conduct for Investment Advisers (SEC Investment Adviser Interpretation), each released in 2019.

The Department anticipates that the most significant benefits of the final rule and amended PTEs will stem from the application of ERISA's fiduciary protections under Title I and Title II and PTE conditions to all covered investment advice provided to retirement investors. Under the final rule and amended PTEs, advice providers that satisfy the definition of an investment advice fiduciary will be required to adhere to the prudence standard of care, reduce retirement investor exposure to conflicted advice that may erode investment returns, and adopt protective conflict-mitigation requirements.[1]

Requiring advice providers to operate in compliance with ERISA fiduciary protections will be especially beneficial with respect to those transactions that currently are not uniformly covered by fiduciary protections consistent with ERISA's high standards. Those transactions include recommendations to roll over assets from a workplace

[1] The references in this document to a ''fiduciary'' are intended to mean an ERISA Title I and Title II fiduciary unless otherwise stated.

retirement plan to an IRA in those cases in which the advice provider is not subject to Federal securities law standards and, as is often the case, has not previously advised the customer about plan or IRA assets on a regular basis. Other examples include investment recommendations with respect to many commonly purchased retirement annuities, such as fixed indexed annuities; recommendations of other investments that may not be subject to the SEC's Regulation Best Interest, such as real estate, certain certificates of deposit, and other bank products; and investment recommendations to plan fiduciaries with authority or control with respect to the plan.

A proposed rule and proposed amendments to the PTEs were released by the Department on October 31, 2023 for notice and public comment, and public hearings on the proposals were held on December 12 and 13, 2023. The Department has made certain changes and clarifications in the final rule in response to public comments on the proposal and the testimony presented at the public hearings. The final rule narrows the contexts in which a covered recommendation will constitute ERISA fiduciary investment advice and makes clear that the test for fiduciary status is objective. Similarly, a new paragraph in the regulatory text confirms that sales recommendations that do not satisfy the objective test will not be treated as fiduciary advice, and that the mere provision of investment information or education, without an investment recommendation, is not advice within the meaning of the rule. Additionally, the final rule makes clear that the rule is focused on communications with persons with authority over plan investment decisions (including selecting investment options for participant-directed plans), rather than communications with financial services providers who do not have such authority. Accordingly, the rule excludes plan and IRA investment advice fiduciaries from the definition of a retirement investor. As a result, an asset manager does not render fiduciary advice simply by making recommendations to a financial professional or firm that, in turn, will render advice to retirement investors in a fiduciary capacity. The Department believes the final rule, with these revisions, appropriately defines an investment advice fiduciary to comport with reasonable investor expectations of trust and confidence.

B. Background

1. Title I and Title II of ERISA and the 1975 Rule

Title I of ERISA imposes duties and restrictions on persons who are ''fiduciaries'' with respect to employee benefit plans. In particular, fiduciaries to Title I plans must adhere to duties of prudence and loyalty. ERISA section 404 provides that Title I plan fiduciaries must act with the ''care, skill, prudence, and diligence under the circumstances then prevailing that a prudent [person] acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims,'' and that they also must discharge their duties with respect to a plan ''solely in the interest of the participants and beneficiaries.'' [2]

These fiduciary duties, which are rooted in the common law of trusts, are reinforced by prohibitions against transactions involving conflicts of interest because of the dangers such transactions pose to plans and their participants. The prohibited transaction provisions of ERISA, including Title II of ERISA which is codified in the Internal Revenue Code (Code), ''categorically bar[ ]'' plan fiduciaries from engaging in transactions deemed ''likely to injure the pension plan'' [3] absent compliance with a prohibited transaction exemption. The provisions include prohibitions on a fiduciary's ''deal[ing] with the assets of the plan in his own interest or for his own account,'' and ''receiv[ing] any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.'' [4] Thus, ERISA requires fiduciaries who have conflicts of interest, including from financial incentives, to comply with protective conditions in a prohibited transaction exemption. Congress included some statutory prohibited transaction exemptions in ERISA and also authorized the Department to grant conditional administrative exemptions from the prohibited transaction provisions, but only if the Department finds that the exemption is (1) administratively feasible for the Department, (2) in the interests of the plan and of its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries of such plan.[5]

Title II of ERISA, codified in the Code,[6] governs the conduct of fiduciaries to plans defined in Code section 4975(e)(1), which includes IRAs.[7] Some plans defined in Code section 4975(e)(1) are also covered by Title I of ERISA, but the definitions of such plans are not identical. Although Title II, as codified in the Code, does not directly impose specific duties of prudence and loyalty on fiduciaries as in ERISA section 404(a), it prohibits fiduciaries from engaging in conflicted transactions on many of the same terms as Title I.[8] Under the Reorganization Plan No. 4 of 1978, which Congress subsequently ratified in 1984,[9] Congress generally granted the Department authority to interpret the fiduciary definition and issue administrative exemptions from the prohibited transaction provisions in Code section 4975.[10]

Many of the protections, duties, and liabilities in both Title I and Title II of ERISA hinge on fiduciary status. ERISA includes a statutory definition of a

[2] ERISA section 404, 29 U.S.C. 1104.

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

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

[5] ERISA section 408(a), 29 U.S.C. 1108(a).

[6] This preamble discussion includes some references to the Code in the context of discussions of Title II of ERISA involving specific provisions codified in the Code. The Department understands that references to the Code are useful but emphasizes that both Title I and Title II are covered by the same general definition of fiduciary and the same general framework of prohibited transactions, and that, under both Title I and Title II, fiduciaries must comply with the conditions of an available prohibited transaction exemption in order to engage in an otherwise prohibited transaction.

[7] For purposes of the final rule, the term ''IRA'' is defined as any account or annuity described in Code section 4975(e)(1)(B)–(F), and includes individual retirement accounts, individual retirement annuities, health savings accounts, and certain other tax-advantaged trusts and plans. However, for purposes of any rollover of assets between a Title I plan and an IRA described in this preamble, the term ''IRA'' includes only an account or annuity described in Code section 4975(e)(1)(B) or (C). Additionally, while the Department uses the term ''*retirement* investor'' throughout this document to describe advice recipients, that is not intended to suggest that the fiduciary definition applies only with respect to employee pension benefit plans and IRAs that are retirement savings vehicles. As discussed herein, the final rule applies with respect to plans as defined in Title I and Title II of ERISA that make investments. In this regard, see also paragraph (f)(12) that provides that the term ''investment property'' ''does not include health insurance policies, disability insurance policies, term life insurance policies, or other property to the extent the policies or property do not contain an investment component.''

[8] 26 U.S.C. 4975(c)(1); *cf. id.* at 4975(f)(5), which defines ''correction'' with respect to prohibited transactions as placing a plan or an IRA in a financial position not worse than it would have been in if the person had acted ''under the highest fiduciary standards.''

[9] Sec. 1, Public Law 98–532, 98 Stat. 2705 (Oct. 19, 1984).

[10] 5 U.S.C. App. 752 (2018).

fiduciary at section 3(21)(A), which provides that a person is a fiduciary with respect to a plan to the extent the person (i) exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) has any discretionary authority or discretionary responsibility in the administration of such plan.[11] The same definition of a fiduciary is in Code section 4975(e)(3).[12]

These statutory definitions broadly assign fiduciary status for purposes of Title I and Title II of ERISA. Thus, ''any authority or control'' over plan assets is sufficient to confer fiduciary status, and any person who renders ''investment advice for a fee or other compensation, direct or indirect'' is an investment advice fiduciary, regardless of whether they have direct control over the plan's assets, and regardless of their status under another statutory or regulatory regime. In the absence of fiduciary status, persons who provide investment advice to retirement investors would neither be subject to Title I of ERISA's fundamental fiduciary standards, nor responsible under Title I and Title II of ERISA for avoiding prohibited transactions. The broad statutory definition, the prohibitions on conflicts of interest, and the core fiduciary obligations of prudence and loyalty (as applicable) all reflect Congress' recognition in 1974, when it passed ERISA, of the fundamental importance of investment advice to protect the interests of retirement investors.

In 1975, shortly after ERISA was enacted, the Department issued a regulation at 29 CFR 2510.3–21(c)(1) (the 1975 regulation) that defined the circumstances under which a person renders ''investment advice'' to an employee benefit plan within the meaning of ERISA section 3(21)(A)(ii), such that the person would be a fiduciary under ERISA.[13] The 1975 regulation significantly narrowed the plain and expansive language of ERISA section 3(21)(A)(ii), creating a five-part test that must be satisfied in order for a person to be treated as a fiduciary by reason of rendering investment advice. Under the five-part test, a person is a fiduciary only if they: (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. At the time the 1975 regulation was issued, the Department of the Treasury had sole regulatory authority over Code section 4975(e)(3), and issued a virtually identical regulation, 26 CFR 54.4975–9(c)(1), which applies to plans defined in Code section 4975.[14]

Since 1975, the retirement plan landscape has changed significantly, with a shift from defined benefit plans (in which decisions regarding investment of plan assets are primarily made by professional asset managers) to defined contribution/individual account plans, such as 401(k) plans (in which decisions regarding investment of plan assets are often made by plan participants who lack professional investment expertise). In 1975, individual retirement accounts had only recently been created (by ERISA itself), and 401(k) plans did not yet exist.[15] Retirement assets were principally held in pension funds controlled by large employers or other large plan sponsors and professional money managers. Now, IRAs and plans providing for participant-directed investments, such as 401(k) plans, have become more common retirement vehicles as opposed to traditional pension plans, and rollovers of workplace retirement plan assets to IRAs are commonplace. Individuals, regardless of their financial literacy, have thus become increasingly responsible for their own retirement savings, and have increasingly become direct recipients of investment advice with respect to those savings.

The shift toward individual control over retirement investing (and the associated shift of risk to individuals) has been accompanied by a dramatic increase in the variety and complexity of financial products and services, which has widened the information gap between investment advice providers and their clients. Plan participants and other retirement investors may be unable to assess the quality of the advice they receive and may not be in a position to learn of and guard against the investment advice provider's conflicts of interest.[16] However, as a result of the five-part test in the 1975 regulation, and its limiting interpretation of ERISA's statutory, functional fiduciary definition, many financial professionals, consultants, and financial advisers have no legal obligation to adhere to the fiduciary standards in Title I of ERISA or to the prohibited transaction rules in Title I and Title II of ERISA, despite the critical role these professionals, consultants and advisors play in guiding plan and IRA investments. In many situations, this disconnect undermines the reasonable expectations of retirement investors in today's marketplace; a retirement investor may reasonably expect that the advice they are receiving from a trusted adviser is fiduciary advice even when, under the 1975 regulation's interpretation, it is not. If these investment advice providers are not fiduciaries under Title I or Title II of ERISA, they do not have obligations under Federal pension law to either avoid prohibited transactions or comply with the protective conditions in a PTE.

Recently, other regulators have recognized the need for change in the regulation of investment recommendations and have imposed enhanced conduct standards on financial professionals who make investment recommendations, including broker-dealers and insurance agents. As a result, the regulatory landscape today is very different than it was even five years ago. In 2019, the SEC adopted Regulation Best Interest, which established an enhanced best interest standard of conduct applicable to broker-dealers when making a recommendation of any securities transaction or investment strategy involving securities to retail customers.[17] The SEC also issued its SEC Investment Adviser Interpretation

[11] ERISA section 3(21)(A), 29 U.S.C. 1002(21)(A).

[12] 26 U.S.C. 4975(e)(3).

[13] 40 FR 50842 (Oct. 31, 1975).

[14] 40 FR 50840 (Oct. 31, 1975). The issuance of this 1975 regulation pre-dated The Reorganization Plan No. 4 of 1978, and thus authority to issue this regulatory definition under Title II of ERISA was still with the Department of the Treasury.

[15] Section 2002(b) of Title II of ERISA established individual retirement accounts with the addition of 408(a) to the Code. *See* Public Law 93–406.

[16] In the securities law context, both SEC Regulation Best Interest and the Advisers Act fiduciary duty have specific obligations related to disclosure and/or mitigation of conflicts of interest. The SEC also adopted the Form CRS, which is a brief relationship summary required to be provided by broker-dealers and investment advisers to retail investors. The SEC stated that the Form CRS ''is intended to inform retail investors about: [t]he types of client and customer relationships and services the firm offers; the fees, costs, conflicts of interest, and required standard of conduct associated with those relationships and services; whether the firm and its financial professionals currently have reportable legal or disciplinary history; and how to obtain additional information about the firm.'' 84 FR 33492 (July 12, 2019).

[17] Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 FR 33318 (July 12, 2019) (Regulation Best Interest release).

in 2019, which addressed the conduct standards applicable to investment advisers under the Investment Advisers Act of 1940 (Advisers Act).[18] Describing these actions, the SEC has said, ''key elements of the standard of conduct that applies to broker-dealers under Regulation Best Interest will be substantially similar to key elements of the standard of conduct that applies to investment advisers pursuant to their fiduciary duty under the Advisers Act.'' [19] In this connection, the SEC has also stressed that Regulation Best Interest ''aligns the standard of conduct with retail customers' reasonable expectations.'' [20]

In 2020, the National Association of Insurance Commissioners (NAIC) also revised its Suitability In Annuity Transactions Model Regulation to provide that insurance agents must act in the consumer's best interest, as defined by the Model Regulation, when making a recommendation of an annuity. Under the NAIC Model Regulation, insurers would also be expected to establish and maintain a system to supervise recommendations so that the insurance needs and financial objectives of consumers at the time of the transaction are effectively addressed.[21] The stated goal of the NAIC working group related to the NAIC Model Regulation was ''to seek clear, enhanced standards for annuity sales so consumers understand the products they purchase, are made aware of any material conflicts of interest, and are assured those selling the products do not place their financial interests above consumers' interests.'' [22] According to the NAIC, as of March 11, 2024, 45 jurisdictions have implemented the revisions to the NAIC Model Regulation.[23]

These regulatory efforts reflect the widespread understanding that broker-dealers and insurance agents commonly make recommendations to their customers for which they are compensated as a regular part of their business; that investors rely upon these recommendations; and that regulatory protections are important to ensure that the recommendations are in the best interest of the retail customer (in the case of broker-dealers) or consumers (in the case of insurance agents).[24] After careful review of the existing regulatory landscape, the Department has concluded that the 1975 regulation should also be revised to reflect current realities in light of the text and purposes of Title I and Title II of ERISA.

In the current landscape, the 1975 regulation narrows the broad statutory definition in ways that no longer serve the purposes of Title I and Title II of ERISA to protect the interests of retirement investors. This is especially the case given the growth of participant-directed investment arrangements and IRAs, the conflicts of interest associated with investment recommendations, and the pressing need for plan participants, IRA owners, and their beneficiaries to receive sound advice from professional financial advisers when making critical investment decisions in an increasingly complex financial marketplace. As the SEC and NAIC recognized, many different types of financial professionals, including insurance agents, broker-dealers, investment advisers subject to the Advisers Act, and others, make recommendations to investors for which they are compensated, and investors rightly rely upon these recommendations with an expectation that they are receiving advice that is in their best interest. Like these other regulators, the Department has concluded that it is appropriate to update the existing regulatory structure to ensure that it properly protects the financial interests of retirement investors as Congress intended. As reflected in this regulatory package, after evaluation of the types of investment advisory relationships that should give rise to ERISA fiduciary status, the Department has concluded that it is appropriate to revise the regulatory definition of an investment advice fiduciary under Title I and Title II of ERISA in the manner set forth herein.

2. Prior Rulemakings

The Department began the process of reexamining the regulatory definition of an investment advice fiduciary under Title I and Title II of ERISA in 2010. After issuing two notices of proposed rulemaking, conducting multiple days of public hearings, and over six years of deliberations, on April 8, 2016, the Department replaced the 1975 regulation with a new regulatory definition of a fiduciary under ERISA (the 2016 Final Rule) which applied under Title I and Title II of ERISA.[25] In the preamble to the 2016 Final Rule, the Department noted that the 1975 regulation's five-part test had been created in a very different context and investment advice marketplace.[26] The Department expressed concern that specific elements of the five-part test—which are not found in the text of Title I or Title II of ERISA—worked to defeat retirement investors' legitimate expectations when they received investment advice from trusted advice providers in the modern marketplace for financial advice.[27]

The Department identified the ''regular basis'' element [28] in the five-part test as a particularly important example of the 1975 regulation's shortcomings.[29] The Department stated that the requirement that advice be provided on a ''regular basis'' had failed to draw a sensible line between fiduciary and non-fiduciary conduct and had undermined ERISA's protective purpose.[30] The Department pointed to examples of transactions in which a

[18] 84 FR 33669 (July 12, 2019).

[19] Regulation Best Interest release, 84 FR 33318, 33330 (July 12, 2019); *see also* Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Care Obligation, (''[b]oth [Regulation Best Interest] for broker-dealers and the [Advisers Act] fiduciary standard for investment advisers are drawn from key fiduciary principles that include an obligation to act in the retail investor's best interest and not to place their own interests ahead of the investor's interest.''), *https://www.sec.gov/tm/standards-conduct-broker-dealers-and-investment-advisers.*

[20] Regulation Best Interest release, 84 FR 33318 (July 12, 2019).

[21] Available at *www.naic.org/store/free/MDL-275.pdf.*

[22] *See https://content.naic.org/cipr-topics/annuity-suitability-best-interest-standard.*

[23] *See https://content.naic.org/sites/default/files/inline-files/275%20Final%20Map_2020%20Changes_March%2011%202024.pdf.*

[24] The SEC stated in the Regulation Best Interest release that ''there is broad acknowledgment of the benefits of, and support for, the continuing existence of the broker-dealer business model, including a commission or other transaction-based compensation structure, as an option for retail customers seeking investment recommendations.'' 84 FR 33318, 33319 (July 12, 2019). The NAIC Model Regulation section 5.M. defines a recommendation as ''advice provided by a producer to an individual consumer that was intended to result or does result in a purchase, an exchange or a replacement of an annuity in accordance with that advice.'' Section 5.B. defines ''cash compensation'' as ''any discount, concession, fee, service fee, commission, sales charge, loan, override, or cash benefit received by a producer *in connection with the recommendation* or sale of an annuity from an insurer, intermediary, or directly from the consumer.'' (Emphasis added), *https://content.naic.org/sites/default/files/inline-files/MDL-275.pdf.*

[25] *See* Definition of the Term ''Fiduciary,'' 75 FR 65263 (Oct. 22, 2010) (proposed rule); Definition of the Tern ''Fiduciary''; Conflict of Interest Rule—Retirement Investment Advice, 80 FR 21928 (Apr. 20, 2015) (proposed rule); Definition of the Term ''Fiduciary''; Conflict of Interest Rule—Retirement Investment Advice, 81 FR 20946 (Apr. 8, 2016) (final rule).

[26] Definition of the Term ''Fiduciary''; Conflict of Interest Rule—Retirement Investment Advice, 81 FR at 20946.

[27] *Id.* at 20955.

[28] This refers to the requirement in the 1975 regulation that, in order for fiduciary status to attach, investment advice must be provided by the person ''on a regular basis.'' *See* 40 FR 50842 (Oct. 31, 1975).

[29] Definition of the Term ''Fiduciary''; Conflict of Interest Rule—Retirement Investment Advice, 81 FR at 20955.

[30] *Id.*

discrete instance of advice can be of critical importance to the plan, such as a one-time purchase of a group annuity to cover all of the benefits promised to substantially all of a plan's participants for the rest of their lives when a defined benefit plan terminates, or a plan's expenditure of hundreds of millions of dollars on a single real estate transaction based on the recommendation of a financial adviser hired for purposes of that one transaction.[31]

The Department likewise expressed concern that the requirements in the 1975 regulation of a ''mutual agreement, arrangement, or understanding'' that advice would serve as ''a primary basis for investment decisions'' had encouraged investment advice providers in the current marketplace to use fine print disclaimers as potential means of avoiding ERISA fiduciary status, even as they marketed themselves as providing tailored or individualized advice based on the retirement investor's best interest.[32] Additionally, the Department noted that the ''primary basis'' element of the five-part test appeared in tension with the statutory text and purposes of Title I and Title II of ERISA.[33] If, for example, a prudent plan fiduciary hires multiple specialized advisers for an especially complex transaction, it should be able to rely upon any or all of the consultants that it hired to render advice, regardless of arguments about whether one could characterize the advice, in some sense, as primary, secondary, or tertiary.[34]

The 2016 Final Rule defined an investment advice fiduciary for purposes of Title I and Title II of ERISA in a way that would apply fiduciary status in a wider array of advice relationships than the five-part test in the 1975 regulation.[35] The 2016 Final Rule generally covered: (1) recommendations by a person who represents or acknowledges that they are acting as a fiduciary within the meaning of ERISA; (2) advice rendered pursuant to a written or verbal agreement, arrangement or understanding that the advice is based on the particular investment needs of the retirement investor; and, most expansively, (3) recommendations directed to a specific retirement investor or investors regarding the advisability of a particular investment or management decision with respect to securities or other investment property of the plan or IRA.[36]

The 2016 Final Rule also specifically superseded a 2005 Advisory Opinion, 2005–23A (commonly known as the Deseret Letter) which had opined that it is not fiduciary investment advice under Title I of ERISA to make a recommendation as to distribution options from an employee benefit plan, even if accompanied by a recommendation as to where the distribution would be invested.[37]

On the same date it published the 2016 Final Rule, the Department also published two new administrative class exemptions from the prohibited transaction provisions of Title I and Title II of ERISA: the Best Interest Contract Exemption (BIC Exemption) [38] and the Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Principal Transactions Exemption).[39] The Department granted the new exemptions with the objective of promoting the provision of investment advice that is in the best interest of retail investors such as plan participants and beneficiaries, IRA owners and beneficiaries, and certain plan fiduciaries, including small plan sponsors.[40]

The new exemptions included conditions designed to protect the interests of the retirement investors receiving advice.[41] The exemptions required investment advice fiduciaries to adhere to the following ''Impartial Conduct Standards'': providing advice in retirement investors' best interest; charging no more than reasonable compensation; and making no misleading statements about investment transactions and other important matters.[42] In the case of IRAs and non-Title I plans, the exemption required these standards to be set forth in an enforceable contract with the retirement investor, which also was required to include certain warranties and disclosures.[43] The exemption further provided that parties could not rely on the exemption if they included provisions in their contracts disclaiming liability for compensatory remedies or waiving or qualifying retirement investors' right to pursue a class action or other representative action in court.[44] In conjunction with the new exemptions, the Department also made amendments to pre-existing exemptions, namely PTEs 75–1, 77–4, 80–83, 83–1, 84–24 and 86–128, to require compliance with the Impartial Conduct Standards and to make certain other changes.[45]

3. Litigation Over the 2016 Rulemaking

The 2016 Final Rule and related new and amended exemptions (collectively, the 2016 Rulemaking) was challenged in multiple lawsuits. In *National Association for Fixed Annuities* v. *Perez,* a district court in the District of Columbia upheld the 2016 Rulemaking in the context of a broad challenge on multiple grounds.[46] Among other things, the court found that the 2016 Final Rule comports with both the text and the purpose of ERISA, and it noted ''if anything, it is the five-part test—and not the current rule—that is difficult to reconcile with the statutory text. Nothing in the phrase 'renders investment advice' suggests that the statute applies only to advice provided 'on a regular basis.' '' [47] Relatedly, in *Market Synergy* v. *United States Department of Labor,* the U.S. Court of Appeals for the Tenth Circuit affirmed a district court's decision similarly upholding the 2016 Rulemaking as it applied to fixed indexed annuities.[48]

On March 15, 2018, however, the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) overturned a district court's decision upholding the validity of the 2016 Final Rule [49] and vacated the entire 2016 Rulemaking, in *Chamber of Commerce* v. *United States Department*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* at 20955–56.

[35] *Id.* at 20946.

[36] *Id.* at 20997.

[37] *Id.* at 20949.

[38] 81 FR 21002 (Apr. 8, 2016).

[39] 81 FR 21089 (Apr. 8, 2016).

[40] 81 FR 21002 (April 8, 2016).

[41] Best Interest Contract Exemption, 81 FR 21002; *see also* ERISA section 408(a); Code section 4975(c)(2).

[42] Best Interest Contract Exemption, 81 FR at 21077.

[43] *Id.* at 21076.

[44] *Id.* at 21078–9.

[45] 81 FR 21139 (Apr. 8, 2016); 81 FR 21147 (Apr. 8, 2016); 81 FR 21181 (Apr. 8, 2016); 81 FR 21208 (Apr. 8, 2016).

[46] *Nat'l Assoc. for Fixed Annuities* v. *Perez,* 217 F.Supp.3d 1 (D.D.C. 2016) [hereinafter *NAFA*]. On December 15, 2016, the U.S. Court of Appeals for the District of Columbia denied an emergency request to stay application of the definition or the exemptions pending an appeal of the district court's ruling. *Nat'l Assoc. for Fixed Annuities* v. *Perez,* No. 16–5345, 2016 BL 452075 (D.C. Cir. 2016).

[47] *NAFA,* 217 F. Supp. 3d at 23, 27–28.

[48] 885 F.3d 676 (10th Cir. 2018); *see Thrivent Financial for Lutherans* v. *Acosta,* No. 16–CV–03289, 2017 WL 5135552 (D. Minn. Nov. 3, 2017) (granting the Department's motion for a stay and the plaintiff's motion for a preliminary injunction, with respect to Thrivent's suit challenging the BIC Exemption's bar on class action waivers as exceeding the Department's authority and as unenforceable under the Federal Arbitration Act).

[49] *Chamber of Commerce* v. *Hugler,* 231 F. Supp. 3d 152 (N.D. Tex. Feb. 8, 2017) (finding, among other things, that in the 2016 Final Rule, the Department reasonably removed the ''regular basis'' requirement; and noting, ''if anything, however, the five-part test is the more difficult interpretation to reconcile with who is a fiduciary under ERISA.'').

of Labor (Chamber).[50] The Fifth Circuit held that the 2016 Final Rule conflicted with ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B). Specifically, the Fifth Circuit found that the 2016 Final Rule swept too broadly and extended to relationships that lacked ''trust and confidence,'' which the court stated were hallmarks of the common-law fiduciary relationship that Congress intended to incorporate into the statutory definitions. The court concluded that ''all relevant sources indicate that Congress codified the touchstone of common-law fiduciary status—the parties' underlying relationship of trust and confidence—and nothing in the statute 'requires' departing from the touchstone.'' [51]

In addition to holding that the 2016 Final Rule conflicted with the statutory definitions in Title I and Title II of ERISA, the Fifth Circuit in *Chamber* also determined that the 2016 Rulemaking failed to honor the difference in the Department's authority over employee benefit plans under Title I of ERISA and IRAs under Title II, by imposing ''novel and extensive duties and liabilities on parties otherwise subject only to the prohibited transactions penalties.'' [52] These included the conditions of the BIC Exemption and Principal Transactions Exemption that required financial institutions and individual fiduciary advisers to enter into contracts with their customers with specific duties, warranties, and disclosures, and forbade damages limitations and class action waivers. Under the Code, IRA investors do not have a private right of action. Instead, the primary remedy for a violation of the prohibited transaction provisions under the Code is the assessment of an excise tax.[53] In the Fifth Circuit's view, the Department had effectively exceeded its authority by giving IRA investors the ability to bring a private cause of action that Congress had not authorized.[54]

In response to the Fifth Circuit's vacatur of the 2016 Rulemaking, on May 7, 2018, the Department issued Field Assistance Bulletin 2018–02, Temporary Enforcement Policy on Prohibited Transactions Rules Applicable to Investment Advice Fiduciaries (FAB 2018–02).[55] FAB 2018–02 announced that, pending further guidance, the Department would not pursue prohibited transaction claims against fiduciaries who were working diligently and in good faith to comply with the Impartial Conduct Standards for transactions that would have been exempted in the BIC Exemption and Principal Transactions Exemption, or treat such fiduciaries as violating the applicable prohibited transaction rules.

4. Subsequent Actions by the Department

In 2020, the Department issued a technical amendment to the Code of Federal Regulations (CFR) reinserting the 1975 regulation, reflecting the Fifth Circuit's vacatur of the 2016 Final Rule.[56] The technical amendment also reinserted into the CFR Interpretive Bulletin 96–1 (IB 96–1) relating to participant investment education, which had been removed and largely incorporated into the text of the 2016 Final Rule. Additionally, the Department updated its website to reflect the fact that the pre-existing prohibited transaction exemptions that had been amended in the 2016 Rulemaking had been restored to their pre-amendment form, and also to reflect that the Department had withdrawn the Deseret Letter.

The Department also adopted a new PTE, Improving Investment Advice for Workers & Retirees, also known as PTE 2020–02.[57] The exemption provides relief that is similar in scope to the BIC Exemption and the Principal Transactions Exemption, but it does not include contract or warranty provisions.

The preamble to PTE 2020–02 also included the Department's interpretation of when advice to roll over assets from a workplace retirement plan to an IRA would constitute fiduciary investment advice under the 1975 regulation's five-part test.[58] The preamble interpretation confirmed the Department's continued view that the Deseret Letter was incorrect, and that a recommendation to roll assets out of a Title I plan is advice with respect to moneys or other property of the plan and, if provided by a person who satisfies all of the requirements of the 1975 regulatory test, constitutes fiduciary investment advice.[59] The preamble interpretation also discussed when a recommendation to roll over assets from an employee benefit plan to an IRA would satisfy the ''regular basis'' requirement.[60] Additionally, the preamble set forth the Department's interpretation of the 1975 regulation's requirement of ''a mutual agreement, arrangement, or understanding'' that the investment advice will serve as ''a primary basis for investment decisions.'' [61] In April 2021, the Department issued Frequently Asked Questions (FAQs) that, among other things, summarized aspects of the preamble interpretation.[62]

The Department's preamble interpretation and certain FAQs were challenged as inconsistent with the 1975 regulation in two lawsuits filed after the issuance of PTE 2020–02.[63] On February 13, 2023, the U.S. District Court for the Middle District of Florida issued an opinion vacating the policy referenced in FAQ 7 (entitled ''When is advice to roll over assets from an employee benefit plan to an IRA considered to be on a 'regular basis' ? '') and remanded it to the Department for further proceedings.[64] On June 30, 2023, a magistrate judge in the Northern District of Texas filed a report with the judge's findings, conclusions, and recommendations, including a recommendation that the court should vacate portions of PTE 2020–02 that permit consideration of actual or expected Title II investment advice relationships when determining Title I fiduciary status, as inconsistent with the 1975 regulation.[65]

[50] 885 F.3d 360 (5th Cir. 2018); *but see id.* at 391 (''Nothing in the phrase 'renders investment advice for a fee or other compensation' suggests that the statute applies only in the limited context accepted by the panel majority.'') (Stewart, C.J., dissenting).

[51] *Id.* at 369; *but see Mertens* v. *Hewitt Associates,* 508 U.S. 248, 262 (1993) (finding that Congress intentionally departed from the common law of trusts by defining an ERISA '' 'fiduciary' not in terms of formal trusteeship, but in *functional* terms . . . thus expanding the universe of persons subject to fiduciary duties'') (citations omitted).

[52] *Chamber,* 885 F.3d at 384.

[53] Code section 4975(a), (b).

[54] *Chamber,* 885 F.3d at 384.

[55] Available at *https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2018-02.*

[56] 85 FR 40589 (July 7, 2020).

[57] 85 FR 82798 (Dec. 18, 2020).

[58] *Id.* at 82802–9.

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] New Fiduciary Advice Exemption: PTE 2020–02 Improving Investment Advice for Workers & Retirees Frequently Asked Questions, *https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/new-fiduciary-advice-exemption.*

[63] Compl., *Am. Sec. Ass'n.* v. *U.S. Dep't of Labor,* No. 8:22–CV–330VMC–CPT, 2023 WL 1967573 (M.D. Fla. Feb. 13, 2023); Compl., *Fed'n of Ams. for Consumer Choice* v. *U.S. Dep't of Labor,* No. 3:22–CV–00243–K–BT (N.D. Tex. Feb. 2, 2022).

[64] *Am. Sec. Ass'n.* v. *U.S. Dep't of Labor,* 2023 WL 1967573, at *22–23.

[65] *See* Findings, Conclusions, and Recommendations of the United States Magistrate Judge, *Fed'n of Ams. for Consumer Choice* v. *U.S. Dep't of Labor,* No. 3:22–CV–00243–K–BT, 2023 WL 5682411, at *27–29 (N.D. Tex. June 30, 2023) [hereinafter *FACC*]. As of the date of this final rule, the district court judge has not yet taken action regarding the magistrate judge's report and recommendations.

5. Other Regulatory Developments

U.S. Securities and Exchange Commission

Since the vacatur of the Department's 2016 Rulemaking, other regulators have considered and adopted enhanced standards of conduct for financial professionals as a method of addressing, among other things, conflicts of interest. At the Federal level, on June 5, 2019, the SEC finalized a regulatory package relating to conduct standards for broker-dealers and investment advisers. The package included Regulation Best Interest, which established an enhanced best interest standard of conduct applicable to broker-dealers when making a recommendation of any securities transaction or investment strategy involving securities to retail customers.[66]

The SEC's Regulation Best Interest enhanced the broker-dealer standard of conduct ''beyond existing suitability obligations.'' [67] According to the SEC, this

[A] lign[ed] the standard of conduct with retail customers' reasonable expectations by requiring broker-dealers, among other things, to: Act in the best interest of the retail customer at the time the recommendation is made, without placing the financial or other interest of the broker-dealer ahead of the interests of the retail customer; and address conflicts of interest by establishing, maintaining, and enforcing policies and procedures reasonably designed to identify and fully and fairly disclose material facts about conflicts of interest, and in instances where [the SEC has] determined that disclosure is insufficient to reasonably address the conflict, to mitigate or, in certain instances, eliminate the conflict.[68]

Regulation Best Interest's ''best interest obligation'' includes a Disclosure Obligation, a Care Obligation, a Conflict of Interest Obligation, and a Compliance Obligation. The Care Obligation requires broker-dealers, in making recommendations, to exercise ''reasonable diligence, care, and skill'' to:

(A) Understand the potential risks, rewards, and costs associated with the recommendation, and have a reasonable basis to believe that the recommendation could be in the best interest of at least some retail customers;

(B) Have a reasonable basis to believe that the recommendation is in the best interest of a particular retail customer based on that retail customer's investment profile and the potential risks, rewards, and costs associated with the recommendation and does not place the financial or other interest of the broker, dealer, or such natural person ahead of the interest of the retail customer; [and]

(C) Have a reasonable basis to believe that a series of recommended transactions, even if in the retail customer's best interest when viewed in isolation, is not excessive and is in the retail customer's best interest when taken together in light of the retail customer's investment profile and does not place the financial or other interest of the broker, dealer, or such natural person making the series of recommendations ahead of the interest of the retail customer.[69]

In guidance on the care obligations applicable to both broker-dealers and investment advisers, the SEC staff explained,

In the context of providing investment advice and recommendations to retail investors, the care obligations generally include three overarching and intersecting components.....[T]hese components are:

Understanding the potential risks, rewards, and costs associated with a product, investment strategy, account type, or series of transactions (the ''investment or investment strategy'');

Having a reasonable understanding of the specific retail investor's investment profile, which generally includes the retail investor's financial situation (including current income) and needs; investments; assets and debts; marital status; tax status; age; investment time horizon; liquidity needs; risk tolerance; investment experience; investment objectives and financial goals; and any other information the retail investor may disclose in connection with the recommendation or advice; and

Based on the understanding of the first two elements, as well as, in the staff's view, a consideration of reasonably available alternatives, having a reasonable basis to conclude that the recommendation or advice provided is in the retail investor's best interest.[70]

The Conflict of Interest Obligation requires the broker-dealer to establish, maintain, and enforce written policies and procedures reasonably designed to:

(A) Identify and at a minimum disclose, [in accordance with Regulation Best Interest], or eliminate, all conflicts of interest associated with such recommendations;

(B) Identify and mitigate any conflicts of interest associated with such recommendations that create an incentive for a natural person who is an associated person of a broker or dealer to place the interest of the broker, dealer, or such natural person ahead of the interest of the retail customer;

(C) Identify and disclose any material limitations placed on the securities or investment strategies involving securities that may be recommended to a retail customer and any conflicts of interest associated with such limitations, and prevent such limitations and associated conflicts of interest from causing the broker, dealer, or a natural person who is an associated person of the broker or dealer to make recommendations that place the interest of the broker, dealer, or such natural person ahead of the interest of the retail customer [in accordance with Regulation Best Interest]; and

(D) Identify and eliminate any sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sales of specific securities or specific types of securities within a limited period of time.[71]

A conflict of interest is defined as ''an interest that might incline a broker, dealer, or a natural person who is an associated person of a broker or dealer—consciously or unconsciously—to make a recommendation that is not disinterested.'' [72]

In guidance on conflicts of interest applicable to both broker-dealers and investment advisers, the SEC staff has stated,

All broker-dealers, investment advisers, and financial professionals have at least some conflicts of interest with their retail investors. Specifically, they have an economic incentive to recommend products, services, or account types that provide more revenue or other benefits for the firm or its financial professionals, even if such recommendations or advice are not in the best interest of the retail investor. . . . Consistent with their obligation to act in a retail investor's best interest, firms must address conflicts in a way that will prevent the firm or its financial professionals from providing recommendations or advice that places their interests ahead of the interests of the retail investor.[73]

In the Regulation Best Interest Release, the SEC stated that ''[t]he Commission has crafted Regulation Best Interest to draw on key principles underlying fiduciary obligations, including those that apply to investment advisers under the Advisers Act, while providing specific requirements to address certain aspects of the relationships between broker-dealers and their retail customers.'' [74] The SEC emphasized that, ''[i]mportantly, regardless of whether a retail investor chooses a broker-dealer or an investment adviser (or both), the retail investor will be entitled to a recommendation (from a broker-dealer) or advice (from an investment adviser) that is in the best interest of the retail investor and that does not place the interests of the firm or the financial

[66] *See* Regulation Best Interest release, 84 FR 33318 (July 12, 2019).

[67] *Id.*

[68] *Id.*

[69] 17 CFR 240.15l–1(a)(2)(ii).

[70] Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Care Obligations (footnotes omitted), *https://www.sec.gov/tm/standards-conduct-broker-dealers-and-investment-advisers.*

[71] 17 CFR 240.15l–1(a)(2)(iii).

[72] *Id.* at (b)(3).

[73] Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Conflict of Interest, *https://www.sec.gov/tm/iabd-staff-bulletin-conflicts-interest.*

[74] 84 FR 33318, 33320 (July 12, 2019).

professional ahead of the interests of the retail investor.'' [75] The SEC also noted that the standard of conduct established by Regulation Best Interest cannot be satisfied through disclosure alone.[76]

The SEC's Regulation Best Interest applies to broker-dealers and their associated persons when they make a recommendation to a retail customer of any ''securities transaction or investment strategy involving securities (including account recommendations).'' [77]According to the SEC, this language encompasses recommendations to roll over or transfer assets in a workplace retirement plan account to an IRA, and recommendations to take a plan distribution.[78] However, the SEC also stated that while Regulation Best Interest applies to advice regarding a person's own retirement account such as a 401(k) account or IRA, it does not cover advice to workplace retirement plans themselves or to their legal representatives when they are receiving advice on the plan's behalf.[79]

The SEC Investment Adviser Interpretation, published simultaneously with Regulation Best Interest, reaffirmed and in some cases clarified aspects of the fiduciary duty of an investment adviser under the Advisers Act.[80] The SEC stated that ''an investment adviser's fiduciary duty under the Investment Advisers Act comprises both a duty of care and a duty of loyalty.'' [81] According to the SEC, ''[t]his fiduciary duty is based on equitable common law principles and is fundamental to advisers' relationships with their clients under the Advisers Act.'' [82] The fiduciary duty under the Federal securities laws requires an adviser ''to adopt the principal's goals, objectives, or ends.'' [83] The SEC stated:

> This means the adviser must, at all times, serve the best interest of its client and not subordinate its client's interest to its own. In other words, the investment adviser cannot place its own interests ahead of the interests of its client. This combination of care and loyalty obligations has been characterized as requiring the investment adviser to act in the ''best interest'' of its client at all times.[84]

The SEC further stated, ''[t]he investment adviser's fiduciary duty is broad and applies to the entire adviser-client relationship.'' [85] An investment adviser's fiduciary duty under the Advisers Act applies to advice about whether to rollover assets from one account to another, including rolling over from retirement accounts into an account that will be managed by the investment adviser or an affiliate.[86]

State Legislative and Regulatory Developments

Since the vacatur of the Department's 2016 Rulemaking, there have also been legislative and regulatory developments at the State level involving conduct standards. For instance, the Massachusetts Securities Division amended its regulations to apply a fiduciary conduct standard under which broker-dealers and their agents must ''[m]ake recommendations and provide investment advice without regard to the financial or any other interest of any party other than the customer.'' [87]

Additionally, the NAIC Model Regulation, updated in 2020, provides that insurance agents must act in the consumer's ''best interest,'' as defined by the Model Regulation, when making a recommendation of an annuity, and insurers must establish and maintain a system to supervise recommendations so that the insurance needs and financial objectives of consumers at the time of the transaction are effectively addressed.[88] The NAIC Model Regulation also provides that it does not apply to transactions involving contracts used to fund an employee pension or welfare plan covered by ERISA.[89] According to the NAIC, as of March 11, 2024, 45 jurisdictions have implemented the revisions to the model regulation.[90]

The NAIC Model Regulation includes a best interest obligation comprised of a care obligation, a disclosure obligation, a conflict of interest obligation, and a documentation obligation, applicable to an insurance producer.[91] If these specific obligations are met, the producer is treated as satisfying the overarching best interest standard as expressed in the NAIC Model Regulation. The care obligation states that the producer, in making a recommendation, must exercise ''reasonable diligence, care and skill'' to:

> (i) Know the consumer's financial situation, insurance needs and financial objectives;
> (ii) Understand the available recommendation options after making a reasonable inquiry into options available to the producer;
> (iii) Have a reasonable basis to believe the recommended option effectively addresses the consumer's financial situation, insurance needs and financial objectives over the life of the product, as evaluated in light of the consumer profile information; and
> (iv) Communicate the basis or bases of the recommendation.[92]

The NAIC conflict of interest obligation requires the producer to ''identify and avoid or reasonably manage and disclose material conflicts of interest, including material conflicts of interest related to an ownership interest.'' [93] Further, under the NAIC Model Regulation, insurers are required to ''establish and maintain reasonable procedures to identify and eliminate any sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sales of specific annuities within a limited period of time.'' [94]

The NAIC Model Regulation's requirements regarding mitigation of material conflicts of interest are not as stringent as either the Department's approach under ERISA or the SEC's approach. This is made clear in the NAIC Model Regulation's definition of a ''material conflict of interest'' which expressly carves out all ''cash compensation or non-cash compensation'' from treatment as sources of conflicts of interest.[95] ''Cash compensation'' that is excluded from the definition of a material conflict of interest is broadly defined to include ''any discount, concession, fee, service fee, commission, sales charge, loan, override, or cash benefit received by a producer in connection with the

[75] *Id.* at 33321.

[76] *Id.* at 33390.

[77] 17 CFR 240.15l–1(a)(1).

[78] Regulation Best Interest Release, 84 FR 33318, 33337 (July 12, 2019).

[79] *Id.* at 33343–44.

[80] 84 FR 33669 (July 12, 2019).

[81] *Id.* at 33671 (footnote omitted).

[82] *Id.* at 33670.

[83] *Id.* at 33671.

[84] *Id.* (footnote omitted).

[85] *Id* at 33670. See also *id.* fn. 17 (citing authorities where the Commission previously recognized the broad scope of section 206 of the Advisers Act in a variety of contexts).

[86] *Id.* at 33674.

[87] 950 Mass. Code Regs. 12.204 & 12.207 as amended effective March 6, 2020; *see* Consent Order, *In the Matter of Scottrade, Inc.,* No. E–2017–0045 (June 30, 2020); *see also Enf't Section of Massachusetts Sec. Div. of Office of Sec'y of Commonwealth* v. *Scottrade, Inc.,* 327 F. Supp. 3d 345, 352 (D. Mass. 2018) (discussing enforcement actions under Massachusetts securities and other consumer protection laws). A challenge to the regulation was rejected by the Massachusetts Supreme Judicial Court. *See Robinhood Fin. LLC* v. *Sec'y of Commonwealth of Mass,* No. SJC–13381, 2023 WL 5490571 (Mass. Aug. 25, 2023).

[88] Available at *www.naic.org/store/free/MDL-275.pdf.*

[89] NAIC Model Regulation at section 4.B.(1).

[90] *See https://content.naic.org/sites/default/files/inline-files/275%20Final%20Map_2020%20Changes_March%2011%202024.pdf.*

[91] A producer is defined in section 5.L. of the NAIC Model Regulation as ''a person or entity required to be licensed under the laws of this state to sell, solicit or negotiate insurance, including annuities.'' Section 5.L. further provides that the term producer includes an insurer where no producer is involved.

[92] NAIC Model Regulation at section 6.A.(1)(a).

[93] *Id.* at section 6.A.(3).

[94] *Id.* at section 6.C.(2)(h).

[95] *Id.* at section 5.I.

recommendation or sale of an annuity from an insurer, intermediary, or directly from the consumer,'' and ''non-cash compensation'' is also broadly defined to include ''any form of compensation that is not cash compensation, including, but not limited to, health insurance, office rent, office support and retirement benefits.'' [96]

Recent guidance from the SEC staff on broker-dealer and investment adviser conflicts of interest, on the other hand, makes clear that conduct standards in the securities market require a ''robust, ongoing process that is tailored to each conflict.'' [97] The SEC staff guidance provides a detailed list of types of compensation that the SEC staff believes are examples of common sources of conflicts of interest, as follows:

compensation, revenue or other benefits (financial or otherwise) to the firm or its affiliates, including fees and other charges for the services provided to retail investors (for example, compensation based on assets gathered and/or products sold, including but not limited to receipt of assets under management (''AUM'') or engagement fees, commissions, markups, payment for order flow, cash sweep programs, or other sales charges) or payments from third parties whether or not related to sales or distribution (for example, sub-accounting or administrative services fees paid by a fund or revenue sharing);

compensation, revenue or other benefits (financial or otherwise) to financial professionals from their firm or its affiliates (for example, compensation or other rewards associated with quotas, bonuses, sales contests, special awards; differential or variable compensation based on the product sold, accounts recommended, AUM, or services provided; incentives tied to appraisals or performance reviews; forgivable loans based upon the achievement of specified performance goals related to asset accumulation, revenue benchmarks, client transfer, or client retention);

compensation, revenue or other benefits (financial or otherwise) (including, but not limited to, gifts, entertainment, meals, travel, and related benefits, including in connection with the financial professional's attendance at third-party sponsored trainings and conferences) to the financial professionals resulting from other business or personal relationships the financial professional may have, relationships with third parties that may relate to the financial professional's association or affiliation with the firm or with another firm (whether affiliated or unaffiliated), or other relationships within the firm; an

compensation, revenue or other benefits (financial or otherwise) to the firm or its affiliates resulting from the firm's or its financial professionals' sales or offer of proprietary products or services, or products or services of affiliates.[98]

The NAIC expressly disclaimed that its standard creates fiduciary obligations, and the obligations in its Model Regulation differ in significant respects from those applicable to broker-dealers in the SEC's Regulation Best Interest or to investment advisers pursuant to the Advisers Act's fiduciary duty.[99] In addition to disregarding all forms of compensation as a source of material conflicts of interest, as discussed above, the NAIC Model Regulation's ''best interest'' standard is satisfied by the four component obligations—the care, disclosure, conflict of interest, and documentation obligations—but these components do not expressly incorporate the best interest obligation not to put the producer's or insurer's interests before the customer's interests, even though compliance with the component obligations' terms is treated as meeting the NAIC Model Regulation's ''best interest'' standard. Similarly, the NAIC Model Regulation's care obligation does not repeat the ''best interest'' requirement but instead includes a requirement to ''have a reasonable basis to believe the recommended option effectively addresses the consumer's financial situation, insurance needs and financial objectives.....'' [100] Additionally, the obligation to comply with the ''best interest'' standard is limited to the individual producer, as opposed to the insurer responsible for supervising the producer.

The State of New York took a different approach than the NAIC Model Regulation in its NY Insurance Regulation 187, effective February 1, 2020. Under the New York regulation, an insurance producer acts in the best interest of the consumer when, among other things,

the producer's . . . recommendation to the consumer is based on an evaluation of the relevant suitability information of the consumer and reflects the care, skill, prudence, and diligence that a prudent person acting in a like capacity and familiar with such matters would use under the circumstances then prevailing. Only the interests of the consumer shall be considered in making the recommendation. The producer's receipt of compensation or other incentives permitted by the Insurance Law and the Insurance Regulations is permitted by this requirement provided that the amount of the compensation or the receipt of an incentive does not influence the recommendation.

Thus, under New York law, insurance producers must act prudently in making a recommendation and must not allow compensation or other incentives to influence their recommendations. According to the American Council of Life Insurers, out of 713 life insurers in the United States, 81 were domiciled in New York in 2022, and annuity direct premium receipts in New York in 2022 totaled $31.4 billion.[101]

The regulatory changes described above cover many, but not all, of the assets held by ERISA retirement plans and IRAs. Further, the SEC's Regulation Best Interest and the NAIC Model Regulation are each limited in important ways in terms of their application to advice provided to ERISA plan fiduciaries.[102] For example, Regulation Best Interest does not cover advice to workplace retirement plans or their representatives (such as an employee of a small business who is a fiduciary of the business's 401(k) plan).[103] The NAIC Model Regulation specifically states that it does not apply to transactions involving contracts used to fund an employee pension or welfare plan covered by ERISA.[104] And there remain investments held by retirement investors in retirement accounts that are not covered by securities laws or insurance laws, including real estate, certain certificates of deposit and other banking products, commodities, and precious metals. The Department believes that retirement investors and the regulated community are best served by ERISA fiduciary protections in Title I and Title II that apply to all

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

[97] Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Conflict of Interest, *https://www.sec.gov/tm/iabd-staff-bulletin-conflicts-interest.*

[98] *Id.*

[99] Section 6.A.(1)(d) of the NAIC Model Regulation provides, ''[t]he requirements under this subsection do not create a fiduciary obligation or relationship and only create a regulatory obligation as established in this regulation.'' In recent insurance industry litigation against the Department, plaintiff Federation of Americans for Consumer Choice, Inc., stated that ''[t]here is a world of difference'' between the NAIC Model Regulation and ERISA's fiduciary regime. *See* Pls.' (1) Br. In Opp'n to Defs.' Cross-Motion to Dismiss for Lack of Jurisdiction or, in the Alternative, for Summ. J., and (2) Reply Br. in Supp. of Pls. Mot. for Summ. J, 40, *Fed'n of Ams. for Consumer Choice* v. *U.S. Dep't of Labor,* No. 3:22–CV–00243–K–BT (Nov. 7, 2022) (comparing ERISA's best interest requirement to NAIC Model Regulation 275, sections 2.B and 6.A.(1)(d)).

[100] NAIC Model Regulation at section 6.A.(1)(a)(iii).

[101] ACLI 2023 Life Insurers Fact Book, *https://www.acli.com/-/media/public/pdf/news-and-analysis/publications-and-research/2023-fact-book-chapters/2023aclifactbook.pdf.*

[102] The fiduciary obligations of investment advisers under the Advisers Act are not limited in this way, however.

[103] Regulation Best Interest release, 84 FR 33318, 33343–44 (July 12, 2019). Regulation Best Interest would apply, however, to retail customers receiving recommendations for their own retirement accounts. *Id.*

[104] NAIC Model Regulation at section 4.B.(1).

investments that retirement investors may make with respect to their retirement accounts when they receive recommendations from trusted advice providers. Amendments to the ERISA regulation are necessary to achieve that result.

6. Coordination With Other Agencies

Under Title I and Title II of ERISA, the Department has primary responsibility for the regulation of ERISA fiduciaries' advice to retirement investors. Because of the fundamental importance of retirement investments to workers' financial security and the tax-preferred status of plans and IRAs, Congress defined the scope of ERISA fiduciary coverage broadly and imposed stringent obligations on ERISA fiduciaries, including prohibitions on conflicted transactions that do not have direct analogues under the securities and insurance laws. The fiduciary protections and prohibited transaction rules set forth in Title I and Title II of ERISA, as applicable, broadly apply to covered fiduciaries, irrespective of the particular investment product they recommend or their status as investment advisers under the Advisers Act, broker-dealers, insurance agents, bankers, or other status. This final rule is designed to ensure that the standards and rules applicable under Title I and Title II of ERISA are broadly uniform as applied to retirement investors receiving advice from a trusted advisor across different categories of investment advice providers and advisory relationships.

At the same time, many commenters stressed the need to harmonize the Department's efforts with rulemaking activities by other regulators, including the SEC's standards of care for providing investment advice and the Commodity Futures Trading Commission's (CFTC) business conduct standards for swap dealers (and comparable SEC standards for security-based swap dealers). In addition, some commenters have urged coordination with other agencies regarding IRA products and services.

As the SEC has adopted regulatory standards for broker-dealers that are based on fiduciary principles of care and loyalty also applicable to investment advisers under the Advisers Act, and the NAIC has issued a model law that includes a best interest standard, the Department believes that it is possible to hew to the unique regulatory structure imposed by the law governing tax-preferred retirement investments, adopt a regulatory approach that provides a broadly uniform standard for all retirement investors when they receive advice from a trusted advisor, as contemplated by Title I and Title II of ERISA, and avoid the imposition of obligations that conflict with financial professionals' obligations under other applicable Federal and State laws. In particular, in the Department's view, PTE 2020–02, as amended and published elsewhere in today's **Federal Register**, is consistent with the requirements of the SEC's Regulation Best Interest and the fiduciary obligations of investment advisers under the Advisers Act. Therefore, broker-dealers and investment advisers that have already adopted meaningful compliance mechanisms for Regulation Best Interest and the Advisers Act fiduciary duty, respectively, should be able to adapt easily to comply with the amended PTE.

Nevertheless, to better understand whether the proposed rule and proposed amendments to the PTEs would have subjected investment advice providers to requirements that conflict with or add to their obligations under other Federal laws, the Department has reached out to and consulted with the staff of the SEC; other securities, banking, and insurance regulators; [105] the Department of the Treasury, including the Federal Insurance Office; and the Financial Industry Regulatory Authority (FINRA), a self-regulatory organization that oversees broker-dealers.

The Department has also consulted and coordinated with the Department of the Treasury and the Internal Revenue Service (IRS), particularly on the subject of IRAs, and will continue to do so. Although the Department of Labor has responsibility for issuing regulations and prohibited transaction exemptions under section 4975 of the Code, which applies to IRAs, the IRS maintains general responsibility for enforcing the excise tax applicable to prohibited transactions. The IRS' responsibilities extend to the imposition of excise taxes on fiduciaries who participate in prohibited transactions. As a result, the Department and the IRS share responsibility for addressing self-dealing by investment advice fiduciaries to tax-qualified plans and IRAs.

7. Proposed Retirement Security Rule

On October 31, 2023, the Department released the proposed Retirement Security Rule: Definition of an Investment Advice Fiduciary, along with proposed amendments to PTE 2020–02 and proposed amendments to other administrative prohibited transaction exemptions available to investment advice fiduciaries.[106] The proposed rule was designed to ensure that protections established by Titles I and II of ERISA would apply to all advice that retirement investors receive from trusted advice providers concerning investment of their retirement assets in a way that ensures that retirement investors' reasonable expectations are honored.[107]

Under the proposal, a person would be an investment advice fiduciary under Title I and Title II of ERISA if they provide investment advice or make an investment recommendation to a retirement investor (*i.e.,* a plan, plan fiduciary, plan participant or beneficiary, IRA, IRA owner or beneficiary or IRA fiduciary); the advice or recommendation is provided ''for a fee or other compensation, direct or indirect,'' as defined in the proposed rule; and the person makes the recommendation in one of the following contexts:

- The person either directly or indirectly (*e.g.,* through or together with any affiliate) has discretionary authority or control, whether or not pursuant to an agreement, arrangement, or understanding, with respect to purchasing or selling securities or other investment property for the retirement investor;
- The person either directly or indirectly (*e.g.,* through or together with any affiliate) makes investment recommendations to investors on a regular basis as part of their business and the recommendation is provided under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest; or

[105] The Department acknowledges the comments from the NAIC expressing disappointment that the Department coordinated with the NAIC staff rather than with the NAIC members prior to the proposed rule's publication and that the Department did not share its intended approach in advance of public release of the proposal. As the NAIC's comment acknowledged, however, the staff level discussions focused on aspects of the NAIC Model Regulation. Further, immediately after the release of the proposed rule, the Department met with NAIC members and repeatedly offered additional meetings before the rule was finalized. The NAIC also offered substantive comments to the proposed rule after its release, which the Department has carefully considered along with other commenters, including the comments of many others in the insurance industry.

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

[107] Proposed Retirement Security Rule, 88 FR 75890 (Nov. 3, 2023).

- The person making the recommendation represents or acknowledges that they are acting as a fiduciary when making investment recommendations.[108]

The proposal's preamble highlighted developments in retirement savings vehicles and in the investment advice marketplace since the 1975 regulation was adopted that have altered the way retirement investors interact with investment advice providers.[109] As noted previously, in 1975, retirement plans were primarily defined benefit plans, which were typically managed by sophisticated financial professionals. IRAs were not major market participants and 401(k) plans were not yet in existence. Today, however, plan participants, IRA owners, and their beneficiaries exercise direct authority over their investments, and depend upon a wide range of financial professionals, including broker-dealers, investment advisers subject to the Advisers Act, insurance agents, and others on how to make complex decisions about the management of retirement assets.

The Department expressed the view in the proposal that when a financial professional satisfies all five parts of the 1975 regulation with respect to a given instance of advice, the professional is properly treated as an investment advice fiduciary in accordance with the parties' reasonable understanding of the nature of their relationship.[110] However, the 1975 regulation, as applied to the current marketplace, is underinclusive in assigning fiduciary status because it fails to capture many circumstances in which an investor would reasonably expect that they can place their trust and confidence in the advice provider as acting in their best interest. The Department's experience in the current marketplace is that the five-part test—in particular, the ''regular basis'' requirement and the requirement of ''a mutual agreement, arrangement or understanding'' that the investment advice will serve as ''a primary basis for investment decisions''—too often works to defeat legitimate retirement investor expectations of impartial advice and allows investment advice providers to hold themselves out as offering individualized advice that is intended to promote the best interest of the customer, when they, in fact, have no such obligation under the 1975 regulation's implementation of Title I or Title II of ERISA.

The proposal noted that these components of the five-part test are not found in the statute's text, and in today's marketplace, undermine legitimate investor understandings of a professional relationship centered around the investor's best interest.[111] In other words, there are currently many situations where the retirement investor reasonably expects that their relationship with the advice provider is one in which the investor can (and should) place trust and confidence in the recommendation, yet which are not covered by the 1975 regulation. The proposal was designed to reconcile the regulatory text with both today's retirement investors' reasonable expectations, along with the statutory text and purpose of ERISA.[112]

The Department stated in the proposal that an important premise of Title I and Title II of ERISA is that fiduciaries' conflicts of interest should not be left unchecked, but rather should be carefully regulated through rules requiring adherence to basic fiduciary norms and avoidance of prohibited transactions.[113] The specific duties to avoid conflicts of interest or comply with a prohibited transaction exemption applicable to fiduciaries under Title I and Title II of ERISA stem from Congress' judgment regarding the best way to protect the public interest in tax-advantaged benefit arrangements that are critical to workers' financial and physical health. In contrast to the Federal laws and other regulatory regimes which can permit certain conflicts if prescribed disclosure obligations are met, the statutory prohibited transaction provisions in Title I and Title II of ERISA contemplate a more stringent approach for the protection of these tax-advantaged retirement savings. In this context, an appropriately constructed regulatory definition of an investment advice fiduciary under Title I and Title II of ERISA is essential.

C. Overview of the Comments Received on the Proposal

The Department received over 400 individual comments and just under 20,000 petition submissions as part of 14 separate petitions on the proposal. These comments and petitions came from consumer groups, financial services companies, academics, trade and industry associations, and others, both in support of, and in opposition to, the proposed rule and proposed amendments to the PTEs.[114]

Commenters on the proposal generally agreed that as a result of the shift from defined benefit plans to 401(k)-type individual account retirement plans, retirement investors today face increased responsibility for ensuring their own secure retirement.[115] Commenters cited studies indicating that many Americans are concerned that they will not have saved enough money to achieve that goal.[116] Many commenters discussed the related importance of retirement investors' access to professional investment advice. In connection with these points, some commenters said the proposed update to the investment advice fiduciary definition would provide important protections that would support retirement investors' access to investment advice intended to advance their interests. Other commenters said the proposed update to the investment advice fiduciary definition was not necessary and that the scope of the proposed definition exceeded the Department's jurisdiction and could reduce access to advice. These comments and the Department's responses are discussed in this preamble Section C. Comments on specific provisions of the proposal are discussed in preamble Section D.

1. Comments Supporting the Proposal

Commenters supporting the proposal echoed many of the concerns expressed by the Department in the proposal's preamble. These commenters emphasized the need to update the 1975 regulation to better align with retirement investor expectations in today's retirement investment marketplace and to fill important gaps in advice relationships where advice is not currently required to be provided in the retirement investor's best interest

[108] *Id.*

[109] *Id.* at 75892–3, 75899–900.

[110] *Id.* at 75899.

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] The 2023 proposed rule and proposed amendments to the PTEs provided for a 60-day comment period which ended on January 2, 2024. The Department held a virtual public hearing on December 12–13, 2023, at which over 40 witnesses testified. The Department posted a video recording of the virtual public hearing on its website on December 19, 2023, an unofficial hearing transcript on December 22, 2023, and the official hearing transcript on January 10, 2024.

[115] References to ''comments'' and ''commenters'' in this preamble generally include written comments, petitions, and hearing testimony.

[116] *See, e.g.,* Board of Governors of the Federal Reserve System, ''Economic Well-Being of U.S. Households in 2022'' 67 May 2023, *available at https://www.federalreserve.gov/publications/files/2022-report-economic-well-being-us-households-202305.pdf,* (''While most non-retired adults had some type of retirement savings, only 31 percent of non-retirees thought their retirement saving was on track, down from 40 percent in 2021.'')

and the investor may not be aware of that fact.

Some commenters expressed specific support for applying ERISA fiduciary protections to recommendations to roll over assets from a workplace retirement plan to an IRA, in light of the significant consequences of that decision. They also expressed support for applying ERISA fiduciary protections to recommendations to plan fiduciaries where, currently, advice regarding plan investment options may not be considered to occur on a regular basis, and therefore would not be considered ERISA fiduciary advice. Commenters said many employers, even larger employers, are not necessarily knowledgeable about selecting prudent investment options for the plans they sponsor.

Commenters also said an updated regulatory definition of an investment advice fiduciary would protect retirement investors from harm caused by conflicts of interest. They said conflicts of interest can expose savers to higher costs, lower returns, and greater risk. Some commenters emphasized that retirement investors with modest balances are more vulnerable to harm from conflicted investment advice, as the high fees would disproportionately diminish their savings. One commenter, a State securities regulator, identified multiple examples of abusive sales tactics impacting retirement investors and said more protections are needed.

In this regard, Morningstar submitted a comment that quantified potential benefits of the proposal in two areas. First, as a result of the proposal's coverage of recommendations to plan fiduciaries about the fund lineups in defined contribution plans, participants in workplace retirement plans would save over $55 billion in the first 10 years and over $130 billion in the subsequent 10 years, in undiscounted and nominal dollars, due to reductions in costs associated with investing through their plans. Second, retirement investors rolling over retirement funds into fixed indexed annuities would save over $32.5 billion in the first 10 years and over $32.5 billion in the subsequent 10 years, in undiscounted and nominal dollars, also due to decreased pricing spreads.[117]

Commenters supporting the proposal discussed the need for application of ERISA fiduciary protections even in light of other regulators' conduct standards. Some commenters said SEC Regulation Best Interest had only limited reach in that it applies only to investments that are securities and some commenters also said it had only limited requirements for conflict mitigation at the financial institution level. A commenter also said there are disparities in the degree to which firms are implementing SEC Regulation Best Interest's requirements. Commenters referenced a 2023 report by the North American Securities Administrators Association on SEC Regulation Best Interest implementation that found that even as firms have updated their investor profile forms and policies and procedures to focus on Regulation Best Interest obligations, many broker-dealers continue to recommend complex products and rely on financial incentives instead of lower cost, lower risk products.[118] One commenter said alternative assets, which they said included for example, precious metals, real estate, private equity, and debt, may not be subject to standards set by the SEC and that state laws vary and leave gaps in protections for investors in these type of investments.

With respect to the insurance marketplace, several commenters described significant conflicts of interest associated with large commissions on some annuity sales, as well as abusive sales practices. Commenters also noted that the terms of annuity contracts, including surrender charges, may often be detrimental to retirement investors but may not be well understood. One commenter said recommendations of annuities for purchase inside retirement accounts deserve special scrutiny because the annuities are often marketed based on purported tax deferral advantages that would not be realized inside an already tax-preferred retirement account.

Some commenters said these issues are not addressed by the NAIC Model Regulation, which some described as providing a best interest standard in name only, when in substance it remains a suitability standard. One commenter presented a guide developed by the Certified Financial Planner (CFP) Board comparing the CFP Board's Code and Standards to the NAIC Model Regulation, which states, among other things, that the NAIC Model Regulation appears to provide a care obligation that does not rise to the level of a ''prudent professional standard.'' The guide further states that the NAIC Model Regulation does not effectively require the client's interests to come first.[119] Even though the NAIC Model Regulation's best interest obligation includes the requirement that the producer shall not place the producer's or the insurer's financial interest ahead of the consumer's interest, several commenters observed that none of the component obligations include a specific requirement for the producer to act in the best interest of the consumer. In other words, the NAIC Model Regulation treats the best interest obligation as satisfied if the producer meets specified component obligations, none of which require the producer to put the client's interests first.

Commenters also said the NAIC Model Regulation does not sufficiently address compensation-related conflicts of interest, noting that it does not include cash and non-cash compensation within the definition of a material conflict of interest. As discussed above, ''cash compensation'' that is excluded from the definition of a material conflict of interest is broadly defined to include ''any discount, concession, fee, service fee, commission, sales charge, loan, override, or cash benefit received by a producer in connection with the recommendation or sale of an annuity from an insurer, intermediary, or directly from the consumer,'' and ''non-cash compensation'' is also broadly defined to include ''any form of compensation that is not cash compensation, including, but not limited to, health insurance, office rent, office support and retirement benefits.'' [120] One commenter expressed the view that an annuity producer that recommends an annuity because that particular annuity pays a larger commission or will help the producer meet a sales goal or ensure the producer wins an expensive trip will meet the best interest standard in the NAIC Model Regulation so long as the annuity is ''suitable'' for the retirement saver.

Another commenter noted that there are abuses in life insurance recommendations as well, and that the NAIC has not addressed investment-oriented life insurance policies even

[117] Available at *https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC02/00290.pdf.* Morningstar also suggested that the Department should revise its Form 5500 to reduce gaps in the disclosures that would provide additional transparency on fees and compensation. Another commenter suggested that the Department should require plans to provide a 404a–5 participant fee disclosure with cost details, as with their annual reports on Form 5500. The Department acknowledges these comments but notes they are outside the scope of this project.

[118] NASAA, Report and Findings of NASAA's Broker-Dealer Section Committee: National Examination Initiative Phase II(B) (Sept. 2023) at 2–3, *https://www.nasaa.org/wp-content/uploads/2023/08/Reg-BI-Phase-II-B-Report-Formatted-8.29.23.pdf.*

[119] Available at *https://www.cfp.net/-/media/files/cfp-board/standards-and-ethics/compliance-resources/naic-comparison-guide.pdf.*

[120] NAIC Model Regulation at section 5.B. and J.

though regulators receive many thousands of customer complaints about the policies.

Several commenters responded to arguments that disclosures are sufficient for financial professionals to avoid conflicts of interest. The commenters stated that, while disclosures are important components of financial regulation and provide transparency, they are ineffective in protecting investors. The commenters noted that the disclosures are often long and full of technical language. The commenters stated that studies showed that disclosures cause investors to trust and increasingly rely on financial professionals, enhancing the ability of financial professionals to provide information not in the investors' best interest.

Overall, these commenters suggested that the proposal would benefit retirement investors by ensuring that investment advice they receive from trusted advice providers is consistent with ERISA's fiduciary protections under Title I and Title II.

2. Comments Opposing the Proposal

Some other commenters said the Department should retain the 1975 regulation as the applicable regulatory definition of an investment advice fiduciary. They said the five parts of the 1975 regulation are needed to describe a relationship of trust and confidence, consistent with the Fifth Circuit's *Chamber* opinion. Some of the commenters further said that the Department had not provided sufficient evidence of existing problems that would be solved by the updated investment advice fiduciary definition.

Commenters also said the proposed rule exceeded the Department's jurisdiction, for a variety of reasons, including in covering advice to roll over from a workplace retirement plan to an IRA as advice under Title I of ERISA. Many commenters said that the proposal suffered the same legal flaws as the 2016 Final Rule and would be legally vulnerable under the *Chamber* opinion. One commenter said that the statutory language in ERISA section 3(21)(A) and Code section 4975(e)(3) provides that a person is a fiduciary only ''*to the extent*'' they ''provide investment advice for a fee or other compensation, direct or indirect,'' which indicated there were limits on the breadth of what is considered ERISA fiduciary investment advice.

Some commenters also said that financial professionals paid by commission cannot satisfy the ERISA fiduciary duties under Title I which require, among other things, fiduciaries to discharge their duties with respect to the plan ''solely in the interests of the participants and beneficiaries.'' [121] These commenters said they understood this standard to require a complete disregard of any financial interest, which they said is incompatible with the business of broker-dealers and insurance agents. Some commenters also said the Department did not have jurisdiction to create a ''best interest'' standard, which they said has no basis in ERISA. Commenters also said the Department should not rely on ''best interest'' standards of other regulators to demonstrate trust and confidence required for ERISA fiduciary status. Some commenters said the SEC in Regulation Best Interest and the NAIC in its Model Regulation intentionally created standards that were not fiduciary standards, and the Department should not override those decisions.

Many of these commenters also said an updated definition of an investment advice fiduciary is unnecessary in light of the conduct standards in SEC Regulation Best Interest and the adoption by many States of the NAIC Model Regulation. Commenters described these regulatory actions as establishing robust, effective, and workable best interest standards while preserving the ability of retirement investors to work with the financial professional of their choosing and to retain choice as to how they pay for financial services and products.

Some commenters said the proposal's preamble discussion of the NAIC Model Regulation reflected misunderstanding by the Department. They said the NAIC Model Regulation sets forth a clear best interest standard despite not restating the ''best interest'' requirement in the component obligations. They also said that the NAIC Model Regulation did require mitigation of compensation-related conflicts of interest in the area of sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sales of specific annuities within a limited period of time, and the decision to exclude compensation from the definition of material conflicts of interest demonstrated a conscious choice that the best way to address conflicts is through disclosure.[122] Commenters also identified other types of State insurance laws that provide protection to retirement savers, such as regulations governing insurance advertising. An insurance commissioner commenter said the Department's proposal would displace the requirements of the NAIC Model Regulation as adopted by the States.

In sum, these commenters generally urged the Department to withdraw the proposal and focus its resources on other priorities.

3. Comments About Preserving Access to Investment Advice and Products in the Retail Market

Many commenters addressed the impact of the proposal on access to investment advice and products in the retail market. Some commenters believed that the rule would lead to advice providers imposing account minimums or raising their fees. Commenters also said that imposing ERISA fiduciary protections on advice and recommendations to retirement investors would lead to a decrease in commission-based arrangements and related access to certain investment products. They said this would be the case because status as an investment advice fiduciary would expose financial services providers to additional compliance costs and litigation risk. Commenters further said that the proposal was insufficiently specific about when ERISA fiduciary status would apply, and uncertainty would result in some providers taking a conservative approach and discontinuing serving retirement investors. Commenters said commission-based arrangements provide a valuable source for investment advice and information, and that a reduction in such arrangements would negatively impact retirement investors who may not be best suited for a fee-based investment advice arrangement.

A number of commenters said the proposal would have a negative impact on access to annuities, which are generally sold on commission. These commenters described annuities as an important option for retirement investors seeking a guaranteed lifetime income stream as part of their retirement plan. Some of these commenters said the Department's proposal failed to recognize the value of these products and was inconsistent with congressional intent to promote lifetime income options, as evidenced by recent pension legislation in the SECURE Act [123] and the SECURE 2.0 Act.[124] Commenters specifically mentioned such features as protection

[121] *See* ERISA section 404, 29 U.S.C. 1104.

[122] *See* NAIC Model Regulation at section 6.C.(2)(h).

[123] The Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019, Public Law 116–94, Dec.20, 2019, Division O.

[124] SECURE 2.0 Act of 2022, Public Law 117–328, Dec. 29, 2022, Division T.

against volatility, longevity and inflation risk through guarantees.

In this regard, some commenters said the Department's proposal would impose ERISA fiduciary duties on financial professionals who are traditionally considered salespeople. The commenters said that when the financial professional is paid on commission it should be clear to the retirement investor that the professional is engaging in sales activity, as opposed to providing advice. Commenters said that under the Fifth Circuit's *Chamber* opinion, salespersons are generally not considered to have a relationship of trust and confidence with their customers. One commenter said: ''the fact that a broker-dealer or insurance agent acts in a manner that is trustworthy and provides guidance and recommendations in the investor's best interest does not alter the sales relationship and does not implicate or confer fiduciary status.''

Another commenter discussed the proposal in the context of alternative investments, where the commenter said commissions are relatively large. The commenter said applying ERISA's reasonable compensation standard and the PTEs' conduct standards in this context would likely chill willingness to recommend investment products with higher-than-average commissions, including alternative investments that the commenter said provide diversification, income, and other important portfolio elements. They said that although the SEC in Regulation Best Interest does require a focus on costs associated with an investment, it does not employ a distinct inquiry into the broker-dealer's compensation analogous to ERISA's reasonable compensation standard. Therefore, they did not believe that the Department's proposal was consistent with the SEC's approach in Regulation Best Interest or workable for broker-dealers.

Other commenters generally urged the Department to be skeptical of industry predictions of loss of access to advice and services. They believed providers would remain available to serve retirement investors irrespective of account balance size. They also said they were not aware of any decrease in access to advice and products following the recent adoption of other conduct standards including Regulation Best Interest. Rather, they said, the experience with Regulation Best Interest shows that financial professionals paid on commission can comply with an explicit best interest standard that requires conflict mitigation. A commenter also pointed to the fact that financial professionals paid on commission are among the CFP professionals who have adopted the CFP Board fiduciary duty.

These commenters disagreed that retirement investors are well aware when they are receiving a sales pitch. They said retirement investors generally do not understand how financial professionals are paid or the differences in the regulatory requirements applicable to broker-dealers, investment advisers, and insurance agents.

A number of these commenters also said commission-based financial professionals commonly hold themselves out as trusted advice providers. Commenters said that marketing slogans and titles such as ''financial advisor,'' ''financial consultant,'' and ''wealth manager'' are commonly and deliberately used to establish a sense of trust and confidence. One commenter cited several examples of marketing strategies employed in the insurance industry. One such example described a ''Trusted Advisor Success Training Workshop'' showing insurance agents how they ''can have endless streams of new, repeat, and referral business'' by ''mak[ing] the move from a salesperson to a 'Trusted Advisor!'''

One commenter described a study that found that 25 of the largest insurance companies and broker-dealers substantively market themselves as offering advice services and using advice titles, even as they continued to rely on the regulatory standards that apply to salespersons.[125] Another commenter provided examples, such as the following statement they said was on the annuities page of an insurance company: ''by working with a trusted financial professional, you can discuss your unique circumstances and how best to prepare for the challenges that may lie ahead.'' These commenters did not agree that commission-based financial professionals should categorically be excluded as investment advice fiduciaries or that such a categorical exclusion was compelled by the Fifth Circuit's *Chamber* decision.

A number of comments from financial professionals paid on commission also indicated they did not think of themselves as salespeople. One financial services provider who testified at the Department's public hearing on the proposal and said that most of his customers pay by commission, stated he was not a salesperson and agreed that he did have a relationship of trust and confidence with his customers.[126] He described himself as ''[a]n advisor and somebody who helps and serves my clients, that's my highest ethic and creed.....I believe those individuals who are called to serve others gravitate towards professions like ours.'' [127]

The witness represented the National Association of Insurance and Financial Advisors (NAIFA), a large association representing the interests of insurance professionals, and said ''NAIFA members are Main Street advisors who primarily serve and maintain longstanding relationships with individuals, families and small businesses in their communities.'' [128] In describing the process for deciding whether to recommend an annuity to someone and determine what the right annuity is, the witness said: ''basically we have a long-term relationship where I get to know the client, get to know their needs, their objectives, their risk tolerance and try to figure out what the best products and services are to meet those needs.'' [129] Other comments similarly indicated that some financial professionals paid on commission nevertheless view themselves as trusted advisers.[130]

Other commenters said that the Department's proposal would lead to a reduction in sales recommendations in the institutional market and also in the provision of educational information. These comments are discussed in Section E of the preamble. Access to advice in the retail market is further

[125] The commenter cited the following press release relating to the study: ''Review of 25 Major Brokerage Firms & Insurance Companies Find All Posing as Fiduciaries, Misleading Consumers,'' Consumer Federation of America press release, Jan. 18, 2017, *https://consumerfed.org/press_release/review-25-major-brokerage-firms-insurance-companies-find-posing-fiduciaries-misleading-consumers.*

[126] Testimony of Bryon Holz, National Association of Insurance and Financial Advisors, Transcript of the Public Hearing on the Retirement Security Rule: Definition of an Investment Advice Fiduciary, December 12, 2023, at 176, 180, available at *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AC02/hearing-transcript-day-1.pdf.*

[127] *Id.*

[128] *Id.*

[129] *Id.* at 174.

[130] *See e.g.,* petition 4, with 3059 submitters (''Having a relationship with a trusted financial advisor helps people save more for retirement. I provide my clients with comprehensive financial advice and as an independent financial advisor, I can recommend products that are in their best interest. Currently, clients can choose how to pay for financial advice by working with financial advisors whose business model aligns with their goals.....[C]ommissions are an important way that advisors are able to serve those who may not otherwise be able to afford to work with an advisor because they have less investable assets or because a specific investment strategy with commissions is the most economically available option.''), *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/public-comments/1210-AC02/petition-004.pdf.*

discussed in section 7 of the Regulatory Impact Analysis.

4. The Department's Decision to Issue the Final Rule

After careful consideration of the comments discussed in this section, the Department has determined to issue a final rule updating the regulatory definition of an investment advice fiduciary, with changes reflecting input from the commenters. This decision reflects the continued view that applying ERISA fiduciary protections under Title I and Title II to trusted advice to retirement investors about their retirement accounts is necessary and appropriate to protect the retirement investors from conflicts of interest.

The Department's Jurisdiction

To begin with, as some commenters noted, when Congress enacted ERISA, it chose to impose a uniquely protective regime on the management and oversight of plan assets. The law's aim was to protect the interests of plan participants and beneficiaries by imposing especially high standards on those who exercise functional authority over plan investments, including rendering investment advice for a fee.[131] As many courts have noted, ERISA's obligations are the ''highest known to the law.'' [132] Thus, the Department has not deferred completely to the Federal securities laws and State insurance laws, as some commenters advocated, because such deference would not be consistent with congressional intent or ERISA's purposes.

Under Title I of ERISA, the Department has express authority to issue regulations defining terms in Title I and to grant administrative exemptions from the prohibited transactions provisions. Pursuant to the President's Reorganization Plan No. 4 of 1978,[133] which Congress ratified in 1984,[134] the Department's authority was expanded to include authority to issue regulations, rulings, and opinions on the definition of a fiduciary with respect to Title II plans under the Code (including IRAs) and to grant administrative prohibited transaction exemptions applicable to them.[135] Thus, the Department has clear authority to promulgate the regulatory definition of a fiduciary under both Title I and Title II of ERISA, and the Department has taken care in this final rule to honor the text and purposes of Title I and Title II of ERISA.

The final rule is consistent with the express text of the statutory definition and will better protect the interests of retirement investors as compared to the 1975 regulation. It comports with the broad language and protective purposes of the statute, while at the same time limiting the treatment of recommendations as ERISA *fiduciary* advice to those objective circumstances in which a retirement investor would reasonably believe that they can rely upon the advice as rendered by a financial professional who is acting in the investor's best interest and on their behalf.

In today's market, the 1975 regulation's five-part test is underinclusive in assigning fiduciary status as it fails to capture many circumstances in which an investor would reasonably expect that they can place their trust and confidence in the advice provider. As noted above, the Department has become concerned that the 1975 regulation's regular basis test has served to defeat objective understandings of the nature of the professional relationship and the reliability of the advice as based on the investor's best interest. The proposal noted that even a discrete instance of advice can be of critical importance to the plan. As another example, under the 1975 regulation's ''regular basis'' requirement, which is not found in the text of the statute, a financial professional could provide recommendations on a regular basis for many years to an investor regarding the investor's non-retirement accounts and yet still not be considered an investment advice fiduciary with respect to a recommendation to roll over all their retirement savings from the investor's workplace retirement plan to an IRA if that is the first instance of advice with respect to that plan account.

Therefore, the Department does not believe that the 1975 regulation's five-part test is the only test that can properly define an investment advice fiduciary under the statute, and the Department does not believe its authority to revisit the regulatory definition of an investment advice fiduciary and depart from the 1975 five-part test is foreclosed by the *Chamber* opinion. The discrete components of the five-part test are not found in the text of the statute, and commenters did not identify—and the Department's research did not uncover—any common law cases predating enactment of ERISA that limited the application of fiduciary status and obligations to those persons that meet all five of the requirements created and imposed by the 1975 regulation. To the contrary, the Department notes that multiple cases discuss how ERISA's statutory definition of ''fiduciary'' is broad,[136] with one such case indicating that the definition of ''fiduciary'' under ERISA is broader than the more restrictive approach the Department articulated through the 1975 five-part test.[137]

The Department also does not agree with a commenter that said that the proposal would render the ''*to the extent*'' language in the statute a nullity.[138] Under ERISA's functional test of fiduciary status, as the courts have repeatedly recognized, a person is a fiduciary *to the extent* the person engages in specified activities, and only

[131] One commenter provided following statement by the Chair of the Senate Committee on Labor and Public Welfare upon introduction of the Conference Report on ERISA:

Despite the value of full reporting and disclosure, it has become clear that such provisions are not in themselves sufficient to safeguard employee benefit plan assets from such abuses as self-dealing, imprudent investing, and misappropriation of plan funds. Neither existing State nor Federal law has been effective in preventing or correcting many of these abuses. Accordingly, the legislation imposes strict fiduciary obligations on those who have discretion or responsibility respecting the management, handling, or disposition of pension or welfare plan assets. The objectives of these provisions are to . . . establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets. . . .

Statement by Hon. Harrison A. Williams, Jr., Chairman, Senate Committee on Labor and Public Welfare, 120 Congressional Record S 15737 at 11 (Aug. 22, 1974) (introducing the Conference Report on H.R. 2).

[132] *Donovan* v. *Bierwirth,* 680 F.2d 263, 272 n. 8 (2d. Cir. 1982), *cert denied,* 459 U.S. 1069 (1982).

[133] 5 U.S.C. App. 752 (2018).

[134] Sec. 1, Public Law 98–532, 98 Stat. 2705 (Oct. 19, 1984).

[135] Sec. 102, 5 U.S.C. App. 752 (2018).

[136] *See Eaves* v. *Penn,* 587 F.2d 453, 458 (10th Cir. 1978); *Farm King Supply, Inc. Integrated Profit Sharing Plan & Tr.* v. *Edward D. Jones & Co.,* 884 F.2d 288, 293 (7th Cir. 1989); *see also Thomas, Head & Greisen Emps. Tr.* v. *Buster,* 24 F.3d 1114, 1117 (9th Cir. 1994) (''[T]he definition of fiduciary under ERISA should be liberally construed.'' (citing *Consolidated Beef Indus. Inc.* v. *New York Life Ins. Co.,* 949 F.2d 960, 964 (8th Cir. 1991), *cert. denied,* 503 U.S. 985 (1992))); H. Stennis Little, Jr., & Larry Thrailkill, *Fiduciaries Under ERISA: A Narrow Path to Tread,* 30 Vanderbilt L. Rev. 1, 4–5 (1977) (referring to the ''broadness of the [statutory] definition'' of ''fiduciary'' under ERISA, such that the definition could cover ''insurance salesmen who recommend the purchase of certain types of insurance and receive a commission on the sale of such insurance'' and ''stock brokers or dealers who recommend certain securities and then participate in the acquisition or disposition of securities and receive a commission for their services'').

[137] *See Farm King,* 884 F.2d at 293 (discussing ''evidence of the wide sweep given to the meaning of 'fiduciary' under ERISA'' in relation to the narrower definition codified in the 1975 test).

[138] ERISA section 3(21)(A)(ii) provides: ''a person is a fiduciary with respect to a plan to the extent . . . (ii) [t]he [person] renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so . . . .''

to that extent.[139] Under both the proposed rule and the final rule, therefore, a person renders fiduciary advice only to the extent they meet the regulatory definition with respect to the particular communication at issue. A person may be a fiduciary for purposes of one advice transaction and not another, and the person must meet the specific requirements of the final rule to be treated as a fiduciary with respect to any given transaction. To the extent a person does not meet the final rule's requirements (*e.g.,* by not making a recommendation, receiving a fee, providing individualized advice, or purporting to act in the investor's best interest), they are not a fiduciary with respect to that recommendation. The final rule fully adopts the statute's functional and transactional approach to the determination of fiduciary status.

The final rule also does not base fiduciary status on firms' or financial professionals' status under other laws, as some commenters have asserted. Instead, the final rule is focused on defining those circumstances in which the retirement investor has a reasonable expectation that the recommendation reflects a professional or expert judgment offered on their behalf and in their interest. In the circumstances specified, a retirement investor would be entitled to treat their relationship with the person making the recommendation as one of trust and confidence. To the extent that a financial professional satisfies the conditions, in part, based on compliance with other regulators' conduct standards, that would merely be a consequence of independent decisions made by other regulators. The final rule does not override those regulators' decisions as to how to characterize their conduct standards, require them to take any particular approach to oversight of investment recommendations, or pin fiduciary status on anything other than a reasonable understanding of the nature of the relationship between the persons giving and receiving the advice. The Department's regulation is based on its unique authority to define a fiduciary for purposes of Title I and Title II of ERISA, establish a uniform definition for all persons giving investment advice to retirement investors under Title I and Title II of ERISA, and fulfill the statute's investor-protective purposes in accordance with the text of the statute.

Moreover, commission-based financial professionals are fully able to satisfy ERISA's fiduciary standard of loyalty in Title I. The Department has long interpreted the duty of loyalty, as set forth in section 404(a)(1)(A) of ERISA (a fiduciary must discharge their duties with respect to the plan ''solely in the interests of the participants and beneficiaries'') as establishing a standard that prohibits a fiduciary from ''subordinating the interests of participants and beneficiaries in their retirement income to unrelated objectives.'' [140] This standard properly applies section 404(a)(1)(A)'s duty of loyalty in the context of advice arrangements. ERISA further permits fiduciaries to receive reasonable compensation—including commission-based compensation—for their services.[141]

Indeed, the statute recognizes the impossibility of avoiding all fiduciary conflicts of interest by giving the Department authority to grant exemptions from the prohibited transaction rules. The mere existence of a conflict is insufficient to defeat fiduciary status or to establish a violation of the prohibited transaction rules. Instead, the conflict of interest must be managed in accordance with a statutory exemption or administrative exemption granted by the Department. This does not prevent commission-based compensation arrangements, as some commenters have asserted, so long as the advice provider does not subordinate the interests of the retirement investor to their own financial interests and does not charge more than ''reasonable compensation,'' as expressly authorized by the statute.[142] Indeed, in many instances, such as those involving advice on ''buy and hold'' strategies, a commission-based model may be more appropriate for the investor, and a prudent fiduciary may recommend the use of a commission-based structure, rather than advise the investor to enter into an arrangement that requires the payment of ongoing fees without a commensurate need for ongoing advice. Nothing in the text of the statute, the text of the 1975 regulation, or previous guidance draws a distinction between commission-based compensation and other forms of compensation in determining whether a person is a fiduciary when making recommendations for direct or indirect compensation.

One commenter expressed concern that the rule could reduce access to advice on alternative investments because of the relatively large commissions paid in connection with alternative investments. The commenter said the reasonable compensation requirement did not have an analog in Regulation Best Interest and also would be unworkable for broker-dealers. However, the obligation to pay no more than reasonable compensation to service providers has been long recognized under Title I and Title II of ERISA. The statutory exemptions in ERISA section 408(b)(2) and Code section 4975(d)(2) expressly require services arrangements involving plans and IRAs to result in no more than reasonable compensation to the service provider. Financial institutions and investment professionals—when acting as service providers to plans or IRAs—have long been subject to this requirement, regardless of their fiduciary status. The reasonable compensation standard requires that compensation not be excessive, as measured by the market value of the particular services, rights, and benefits the financial institution and investment professional are delivering to the retirement investor.

To the extent an investment advice fiduciary's receipt of compensation would constitute a self-dealing type prohibited transaction under ERISA section 406(b) and Code section 4975(c)(1)(E) or (F), conditional relief for investment advice fiduciaries to receive compensation that varies based on their investment advice is provided pursuant to amended PTE 2020–02 and amended PTE 84–24. One such condition in these PTEs is adherence to a loyalty obligation that the Department has stated is consistent with the ''sole interest'' standard in ERISA section 404.[143] The use of the standard in the PTEs is an appropriate exercise of the Department's exemptive authority under ERISA section 408(a) and the Reorganization Plan No. 4 of 1978 to provide an exemption that is protective of the interests of retirement investors, not an improper conflation of the two standards, as suggested by some commenters. Based on this discussion, the Department disagrees with the commenter who said the proposal would be unworkable for broker-dealers.[144]

[139] *See, e.g., Mertens* v. *Hewitt Associates,* 508 U.S. 248, 264 (1993); *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank,* 510 U.S. 86, 98 (1993).

[140] *See, e.g.,* Advisory Opinion 2008–05A (June 27, 2008); Letter to Harold G. Korbee (Apr. 22, 1981).

[141] ERISA section 408(c)(2), 29 U.S.C. 1108(2); Code section 4975(d)(10).

[142] ERISA section 408(b)(2); 29 U.S.C. 1108(b)(2); Code section 4975(d)(2).

[143] Improving Investment Advice for Workers & Retirees, 85 FR 82798, 82823 (Dec. 18, 2020).

[144] The Department also notes that there are compensation requirements applicable to broker-

Continued

Some commenters also sought to draw a bright line distinction between recommendations made in a sales capacity and those made in a fiduciary capacity, asserting that commission-based recommendations are properly viewed as mere sales pitches that should not lead to ERISA fiduciary status. This approach, however, is neither supported by the text of the statute nor the Department's consistent views starting in 1975 that advice can be compensated through commissions.[145] The text of the statute does not draw a distinction between commissions and other fee-based forms of compensation, but rather broadly refers to ''advice for a fee or other compensation, direct or indirect,'' which the Department has consistently recognized includes commission-based advice. Accordingly, the final rule properly focuses on the nature of the relationship between the parties, rather than the specific mode of compensation. Whether a firm or financial professional has held themselves out as providing the sort of recommendation that may rightly be relied upon as a fiduciary recommendation is a function of the test set forth in the final rule, which requires compensation, but does not draw a bright line between commissions and fee-based compensation. In those circumstances where the final rule's definition is satisfied, the firm or investment professional is doing much more than merely executing a sale. They are offering a professional recommendation that is purportedly based on the investor's best interest, and that recommendation is central to the relationship and a key component of the services offered to the investor.

In this connection, however, it is important to note that neither the proposed rule nor the final rule assigns fiduciary status to a party who merely engages in a sales transaction with a retirement investor. Under the express terms of paragraph (d) of the final rule, merely executing a sale does not give rise to fiduciary status. Moreover, even if one makes a recommendation in connection with a commission-based transaction, that recommendation will not amount to fiduciary advice unless the recommendation meets the specific conditions set forth in the final rule, all of which are aimed at ensuring that the advice goes beyond a mere ''sales pitch,'' and instead reflects the sort of relationship of trust and confidence that should be afforded fiduciary status and protection. To that end, and in response to comments, the Department narrowed the contexts that give rise to fiduciary status, and included a new paragraph confirming that mere sales recommendations devoid of the two covered contexts will not result in ERISA fiduciary status and that investment information or education, without an investment recommendation, will also not result in ERISA fiduciary status.

Finally, some commenters said that the *Chamber* opinion indicated that the Department's authority to regulate conduct in the financial services industry has been limited by the Dodd-Frank Act. The commenters said that under Dodd-Frank, Congress had authorized the SEC, and not the Department, ''to promulgate enhanced, uniform standards of conduct for broker-dealers and investment advisers who render 'personalized investment advice about securities to a retail customer.' ''

The Department's well-settled authority under ERISA to regulate investment advice rendered by fiduciaries to retirement investors in the context of certain annuity sales was not impaired by the Dodd-Frank legislation. Rather, section 913 of the Dodd-Frank Act directed the SEC to study the effectiveness of the rules applicable to investment advice respecting securities by entities subject to SEC regulation ''and other Federal and State legal or regulatory standards.'' The reference to other standards demonstrates Congress' clear awareness that there are overlapping Federal regulatory schemes. Moreover, this rulemaking is closely aligned with the SEC's standards under both the Advisers Act and under Regulation Best Interest, which was adopted subsequent to the *Chamber* opinion and is rooted in fiduciary principles.[146]

In addition, some commenters posited that section 989J of Dodd-Frank limited regulation of fixed indexed annuities to States (provided certain criteria are met). In making this assertion, commenters cited language in the *Chamber* decision to the effect that ''[s]ection 989J . . . provides that 'fixed indexed annuities sold in states that adopted the [NAIC's] enhanced model suitability regulations, or companies following such regulations, shall be treated as exempt securities not subject to federal regulation.' ''[147] The quoted language, however, was taken from an appellate brief, not section 989J. The statutory language simply states that ''[t]he *Commission* [SEC] shall treat as exempt'' such annuities from regulation as securities. By its express terms, section 989J restricts regulation only by the SEC under the securities laws.[148] It does not address or limit the Department of Labor's separate authority under ERISA or its separate obligations with respect to retirement plans and IRAs. In accordance with its authority under ERISA, the Department has determined that it is appropriate to include investment advice regarding plan and IRA investments in fixed indexed annuities within this scope of this rule.

Need for an Updated Definition of an Investment Advice Fiduciary

The 1975 regulation makes it all too easy for financial professionals and firms to hold themselves out as trusted advisers acting in the individual investor's best interest and based on their individual circumstances when, in fact, they have no obligation to act in

dealers, *see e.g.,* FINRA rule 2121 (fair prices and commissions).

[145] *See e.g.,* U.S. Department of Labor Adv. Op. 83–60A (Nov. 21, 1983) (Rejecting the interpretation that fiduciary status under ERISA section 3(21)(A)(ii) would not attach to broker-dealers unless a broker-dealer provides investment advice for distinct, non-transactional compensation), The Department stated that ''if . . . the services provided by the broker-dealer include the provision of 'investment advice', as defined in regulation 2510 .3–21(c), it may be reasonably expected that, even in the absence of a distinct and identifiable fee for such advice, a portion of the commissions paid to the broker-dealer would represent compensation for the provision of such investment advice.'' *Id.* The statutory language broadly encompasses any ''fee or other compensation,'' and even under the five-part test promulgated in 1975, the Department rejected the position that payment of compensation through commissions categorically excluded a broker-dealer from being an investment-advice fiduciary. *See* 40 FR 508842 (Oct. 31, 1975).

[146] *See* Regulation Best Interest release, 84 FR 33318, 33330 (July 12, 2019) (noting that Regulation Best Interest ''draws from key fiduciary principles underlying fiduciary obligations'' and that the ''key elements of the standard of conduct that applies to broker-dealers under Regulation Best Interest will be substantially similar to key elements of the standard of conduct that applies to investment advisers pursuant to their fiduciary duty under the Advisers Act.''); *see also,* SEC Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Care Obligation (''Both [Regulation Best Interest] for broker-dealers and the [Advisers Act] fiduciary standard for investment advisers are drawn from key fiduciary principles that include an obligation to act in the retail investor's best interest and not to place their own interests ahead of the investor's interest.''), *https://www.sec.gov/tm/standards-conduct-broker-dealers-and-investment-advisers.*

[147] 885 F.3d at 385 (citation omitted). The decision incorrectly attributes the internally quoted language to the text of Dodd-Frank. *Id.* This language is actually from an appellate brief by the Indexed Annuity Leadership Council (IALC), one of the plaintiffs that challenged the 2016 Rulemaking. Brief of Plaintiff-Appellant, *Chamber of Com. of United States of Am.* v. *U.S. Dep't of Lab.,* 885 F.3d 360 (5th Cir. 2018) (No. 17–10238), 2018 WL 3301737, at *8. The statutory text itself provides no basis for the broad conclusion that fixed indexed annuities sold in a State that follows the NAIC's model suitability (or successor) regulations, among other criteria, are exempt from Federal regulation.

[148] 15 U.S.C. 77c Note (emphasis added).

the investor's best interest or otherwise adhere to the fiduciary standards under Title I and Title II of ERISA. While the actions of other regulators, particularly the SEC's adoption of Regulation Best Interest, have partly addressed this concern, significant gaps remain, and the current patchwork regulatory structure is neither uniform nor sufficiently protective of retirement investors. As discussed in greater detail in the Regulatory Impact Analysis, the Department has determined that the final rule will provide additional benefits and needed protections for retirement investors, even in light of other regulators' recently enhanced conduct standards.[149]

For example, commenters did not dispute the fact that certain recommendations by broker-dealers to retirement investors are not covered by SEC Regulation Best Interest, including recommendations to plan fiduciaries such as the fiduciaries of small employer plans who need assistance in constructing the lineup on a 401(k) plan menu.[150] Several commenters expressed strong support for applying ERISA fiduciary protections in this context, with Morningstar quantifying potential benefits of the proposal's coverage of recommendations to plan fiduciaries on the investment options in defined contribution plans as saving participants over $55 billion in the next 10 years in costs associated with investing through their plans. Other investments that may not be subject to the Federal securities law include: real estate, fixed indexed annuities, certain certificates of deposit and other bank products, commodities, and precious metals. Furthermore, there are a number of persons who provide investment advice services that are neither subject to the SEC's Regulation Best Interest nor to the fiduciary obligations in the Advisers Act. Additionally, some commenters indicated that are disparities in the degree to which firms have implemented Regulation Best Interest. The Department expects the addition of ERISA remedies and the Department's enforcement resources to enhance protection of retirement investors in Title I plans, and to better ensure that advice providers compete on a level playing field where recommendations are made pursuant to a common best interest standard.

Applying ERISA fiduciary protections to the recommendations covered by the rule will also result in increased protections in the insurance market, even in those States that have adopted the 2020 revisions to the NAIC Model Regulation. For example, commenters discussed significant conflicts of interest associated with large commissions on annuity sales, as well as abusive sales practices. Conflicted, imprudent, and disloyal advice with respect to such annuity sales can result in large investor losses. The dangers are compounded by the complexity of the products, which makes sound advice critical.

For example, recommendations of fixed indexed annuities are generally not covered by Regulation Best Interest, but typically are complex products that depend upon careful and expert assessment of myriad contract and investment features. Between 2005 and 2022, the number of indexes available in the market grew from a dozen to at least 150. Many of these indexes are hybrids, including a mix of one or more indexes, as well as a cash or bond component. More than 60 percent of premium allocations for new fixed indexed annuity sales in mid-2022 involved hybrid designs. In addition, the determination of the right annuity requires careful consideration of the method by which the index is credited to the contract's value, charges associated with the contract, potential surrender charges, and any limiting factors on the crediting (such as cap rates, participation rates, or spread). Given the complexity of the products, it is very easy for investors to purchase products that have very different risks and benefits than they thought they were purchasing, and that have considerably more downside than they expected. For all these reasons, fixed indexed annuities have been the subject of various regulatory alerts, warning investors of the dangers associated with the products.[151] Sound advice is critical. In its comment, Morningstar estimates that the Department's proposal would increase retirement investors' savings with respect to fixed indexed annuities by approximately $32.5 billion over the next ten years.

The Department agrees with those commenters who concluded that the NAIC Model Regulation is not as protective as Regulation Best Interest and does not protect retirement investors to the same degree as the fiduciary protections in Title I and Title II of ERISA.[152] Although the NAIC Model Regulation provides that insurers must ''establish and maintain reasonable procedures to identify and eliminate any sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sales of specific annuities within a limited period of time,'' [153] the Department believes that broader conflict mitigation is needed to protect the interests of retirement investors. An important premise of Title I and Title II of ERISA is that fiduciaries' conflicts of interest should not be left unchecked, but rather should be carefully regulated through rules requiring adherence to basic fiduciary norms and avoidance of prohibited transactions.

In particular, the Department is concerned about the NAIC Model Regulation's definition of ''material conflicts of interest'' which must be identified and avoided or reasonably managed and disclosed and which excludes all ''cash compensation'' and ''non-cash compensation.'' As a result, the NAIC Model Regulation excludes ''any discount, concession, fee, service fee, commission, sales charge, loan, override, or cash benefit received by a producer in connection with the recommendation or sale of an annuity from an insurer, intermediary, or

[149] One commenter urged the Department to follow the Statement on Standards in Personal Financial Planning Services implemented by the American Institute of CPAs (AICPA). The commenter described the standards as requiring CPAs to assess whether there are any conflicts of interest related to client engagements. If a conflict of interest exists, the CPA should determine if they can perform the engagement objectively. If they can, they must disclose all known conflicts of interest and obtain written consent. If they cannot, the engagement must be terminated. The Department believes in the context of ERISA fiduciary investment advice to retirement investors, ERISA's prohibited transaction rules provide the appropriate approach by requiring financial professionals to avoid conflicts of interest or comply with a prohibited transaction exemption.

[150] One commenter noted that other securities law protections, such as those under FINRA rules, would be applicable to broker-dealers making recommendations to plan sponsors. However, the commenter suggested that the protections lack a duty of loyalty of comparable rigor to that in PTE 2020–02.

[151] *See, e.g.,* SEC Office of Investor Education and Advocacy Updated Investor Bulletin: Indexed Annuities (July 31, 2020), *https://www.sec.gov/oiea/investor-alerts-and-bulletins/ib_indexedannuities;* Iowa Insurance Division, Bulletin 14–02 (September 15, 2014), *https://iid.iowa.gov/media/153/download?inline=.*

[152] The exclusion of commission payments and other compensation as well as non-cash compensation from the definition of a material conflict of interest is in direct contrast to the SEC's approach in Regulation Best Interest. *See* Regulation Best Interest release, 84 FR 33318, 33319 (July 12, 2019)(''Like many principal-agent relationships—including the investment adviser-client relationship—the relationship between a broker-dealer and a customer has inherent conflicts of interest, including those resulting from a transaction-based (*e.g.,* commission) compensation structure and other broker-dealer compensation.'') *see also* Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Conflicts of Interest which specifically identifies commissions as an example of a common source of a conflict of interest, available at *https://www.sec.gov/tm/iabd-staff-bulletin-conflicts-interest.*

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

directly from the consumer,'' as well as ''any form of compensation that is not cash compensation'' despite their obvious potential to drive recommendations that favor the financial professional's own financial interests at the expense of the investor's interests. [154]

Although some commenters said that the NAIC's approach reflected the view that the best way to address compensation conflicts is through disclosure, the Department discusses in the Regulatory Impact Analysis its view that disclosure without conflict mitigation is limited in its effectiveness at protecting investors from the dangers posed by conflicts of interest. The NAIC's approach also stands in marked contrast to ERISA's treatment of such competing financial incentives as material conflicts, which give rise to prohibited transactions that require protective conditional exemptions. It also conflicts with the SEC's approach with respect to broker-dealers and investment advisers, in which the SEC staff provided a detailed list of types of compensation that they believe are examples of common sources of conflicts of interest, as follows:

compensation, revenue or other benefits (financial or otherwise) to the firm or its affiliates, including fees and other charges for the services provided to retail investors (for example, compensation based on assets gathered and/or products sold, including but not limited to receipt of assets under management (''AUM'') or engagement fees, commissions, markups, payment for order flow, cash sweep programs, or other sales charges) or payments from third parties whether or not related to sales or distribution (for example, sub-accounting or administrative services fees paid by a fund or revenue sharing);

compensation, revenue or other benefits (financial or otherwise) to financial professionals from their firm or its affiliates (for example, compensation or other rewards associated with quotas, bonuses, sales contests, special awards; differential or variable compensation based on the product sold, accounts recommended, AUM, or services provided; incentives tied to appraisals or performance reviews; forgivable loans based upon the achievement of specified performance goals related to asset accumulation, revenue benchmarks, client transfer, or client retention);

compensation, revenue or other benefits (financial or otherwise) (including, but not limited to, gifts, entertainment, meals, travel, and related benefits, including in connection with the financial professional's attendance at third-party sponsored trainings and conferences) to the financial professionals resulting from other business or personal relationships the financial professional may have, relationships with third parties that may relate to the financial professional's association or affiliation with the firm or with another firm (whether affiliated or unaffiliated), or other relationships within the firm; and

compensation, revenue or other benefits (financial or otherwise) to the firm or its affiliates resulting from the firm's or its financial professionals' sales or offer of proprietary products or services, or products or services of affiliates.[155]

The Department also notes that the State of New York took a different approach than the NAIC Model Regulation in its NY Insurance Regulation 187. Under the New York regulation, ''[o]nly the interests of the consumer shall be considered in making the recommendation. The producer's receipt of compensation or other incentives permitted by the Insurance Law and the Insurance Regulations is permitted by this requirement *provided that the amount of the compensation or the receipt of an incentive does not influence the recommendation.*'' (Emphasis added.)

The NAIC Model Regulation also specifically disclaims creating fiduciary obligations and differs in significant respects from the protective standards applicable to broker-dealers and investment advisers under Regulation Best Interest and the Advisers Act, respectively, and this final rule. For example, in addition to disregarding compensation as a source of material conflicts of interest, the specific care, disclosure, conflict of interest, and documentation requirements do not expressly incorporate the ''best interest'' obligation not to put the producer's or insurer's interests before the customer's interests, even though compliance with these component obligations is treated as meeting the best interest standard. Instead, the core conduct standard of care includes a requirement to ''have a reasonable basis to believe the recommended option effectively addresses the consumer's financial situation, insurance needs, and financial objectives.'' Additionally, the obligation to comply with the ''best interest'' standard is limited to the individual producer, as opposed to the insurer responsible for supervising the producer. In contrast, the standards in the amended PTEs mirror ERISA section 404's standards of prudence and loyalty, and provide that the advice must:

- reflect the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the retirement investor, and
- must not place the financial or other interests of the investment professional, financial institution or any affiliate, related entity, or other party ahead of the interests of the retirement investor, or subordinate the retirement investor's interests to their own.

The amended PTE standards are aligned with the SEC's conduct standards applicable to broker-dealers and investment advisers.[156] Further, as noted above, the NY Insurance Regulation 187 includes a similar standard of care, providing that ''an insurance producer acts in the best interest of the consumer when, among other things, the producer's . . . recommendation to the consumer is based on an evaluation of the relevant suitability information of the consumer and reflects the care, skill, prudence, and diligence that a prudent person acting in a like capacity and familiar with such matters would use under the circumstances then prevailing.''

In response to commenters who expressed concern that the Department's rule would improperly displace State regulation in the annuities market, it bears repeating that in enacting ERISA, Congress imposed a uniquely protective regime on tax-preferred retirement investments. The Department's final rule, which covers compensated retirement recommendations under conditions where it is reasonable to place trust and confidence in the advice, falls well within ERISA's broad fiduciary definition, even if it is more protective of federally-protected retirement investments than State insurance regulations. It is also important to note the interaction between the NAIC Model Regulation and the fiduciary protections under Title I and Title II of ERISA is explicitly recognized in the NAIC Model Regulation's safe harbor for the recommendations and sales of annuities in compliance with comparable standards, including those applicable to fiduciaries under Title I and Title II of ERISA.[157]

Although some commenters maintained the Department misunderstands the NAIC Model Regulation, the Department's analysis is based on the terms of the Model

[154] NAIC Model Regulation at section 5.B. and J.

[155] SEC Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Conflicts of Interest, *https://www.sec.gov/tm/iabd-staff-bulletin-conflicts-interest.*

[156] *See generally,* Regulation Best Interest release, 84 FR 33318 (July 12, 2019); SEC Investment Adviser Interpretation, 84 FR 33669 (July 12, 2019).

[157] NAIC Model Regulation at section 6.E.

Regulation and is consistent with that of other commenters, including the CFP Board in their publication discussed above. There can be no misunderstanding with respect to the fact that the NAIC Model Regulation clearly and unambiguously excludes cash and non-cash compensation from the definition of a material conflict of interest.[158] Because of this exclusion, the NAIC Model Regulation does not provide that producers must identify and avoid or reasonably manage material conflicts of interest arising from cash and non-cash compensation. This leaves disclosure as the sole method of addressing such conflicts other than the prohibition of sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sales of specific annuities within a limited period of time, which are prohibited. The Department's PTEs' more stringent requirements will require insurance market participants not only to disclose but also to more broadly mitigate conflicts of interest associated with commissions and other cash and non-cash compensation to insurance producers providing recommendations to retirement investors, resulting in enhanced protections to consumers.[159]

The Chamber Opinion

Many commenters said the proposed regulation was essentially a re-proposal of the 2016 Rulemaking and had the same legal vulnerabilities. They generally said that, in *Chamber,* the court had approved the 1975 regulation's five-part test as defining a relationship of trust and confidence and they objected to any revision of the five-part test as inconsistent with both the statutory definition and the Fifth Circuit's opinion. The Department disagrees and notes the various differences between the 2016 Rulemaking and this final rule. In writing the proposal and this final rule, the Department has been careful to craft a definition that is consistent with both the statutory text and with the Fifth Circuit's focus on relationships of trust and confidence. The Department's authority to revisit the regulatory definition of an investment advice fiduciary and depart from the 1975 five-part test is not foreclosed by the *Chamber* opinion. In this regard, commenters did not identify for the Department, and the Department's research did not uncover, any common-law cases predating enactment of ERISA that limited the application of fiduciary status and obligations to those persons that meet all five of the requirements created and imposed by the 1975 regulation. Other courts that considered the Department's 2016 Final Rule noted that it was the 1975 five-part test that was difficult to reconcile with the statute, or that the elements of this test, such as the ''regular basis'' prong, do not appear in the text of ERISA.[160] To that end, the Department notes that other cases discuss how ERISA's statutory definition of ''fiduciary'' is broad,[161] with one such case indicating that the definition of ''fiduciary'' under ERISA is broader than the more restrictive approach the Department articulated through the 1975 five-part test.[162]

The final rule is far narrower than the previous rulemaking, which treated all investment recommendations directed to a specific retirement investor or investors regarding the advisability of a particular investment or management decision as fiduciary in nature, subject to a few carve-outs. By contrast, this rule specifically focuses on whether the investment recommendation can be appropriately treated as trust and confidence advice. Accordingly, and in response to certain comments (which are discussed in greater detail below), the final rule covers recommendations made in the following contexts:

- The person either directly or indirectly (*e.g.,* through or together with any affiliate) makes professional investment recommendations to investors on a regular basis as part of their business and the recommendation is made under circumstances that would indicate to a reasonable investor in like circumstances that the recommendation:

Æ is based on review of the retirement investor's particular needs or individual circumstances,

Æ reflects the application of professional or expert judgment to the retirement investor's particular needs or individual circumstances, and

Æ may be relied upon by the retirement investor as intended to advance the retirement investor's best interest; or

- The person represents or acknowledges that they are acting as a fiduciary under Title I of ERISA, Title II of ERISA, or both with respect to the recommendation.

In these circumstances, the failure to treat the recommendation as fiduciary advice would dishonor the investor's reasonable expectations of professional advice that is offered to advance their best interest and can be relied upon as rendered by a financial professional who occupied a position of trust and confidence. When firms and financial professionals meet the requirements of this definition, it would defeat ERISA's plan-protective purposes and the investor's legitimate expectations of trust and confidence to hold that the advice was not fiduciary. Accordingly, this final rule is wholly consistent with the Fifth Circuit's *Chamber* opinion and the broad language of the statute.

To the extent that the 1975 five-part test excluded such recommendations, it would be underinclusive from the

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

[159] One commenter provided a summary of the differences between the NAIC Model Regulation and ERISA's fiduciary responsibilities. These differences highlight the additional protection under ERISA in the insurance marketplace. *See* Federation of Americans for Consumer Choice 6 (''The differences between NAIC model regulation best interest and ERISA fiduciary duties include: (i) ERISA has a duty of loyalty to act solely in the interest of the client different from the NAIC model regulation requirement for agents not to put their interests ahead of client interests, (ii) ERISA contains a prudence requirement not considered applicable to insurance producers, (iii) the NAIC model regulation establishes four specified obligations deemed to satisfy the best interest standard consisting of care, disclosure, conflict of interest, and documentation, all of which comport with the sales function of an agent, (iv) the NAIC model regulation requires neither ongoing monitoring nor diversification of assets which may need to be considered by ERISA fiduciaries, (v) the NAIC model regulation does not define conflicts of interest as broadly as ERISA instead relying on disclosure befitting insurance sales practices, (vi) the NAIC model regulation contains no reasonable compensation restrictions but limits certain forms of incentive compensation, and (vii) the NAIC model regulation does not expose agents to common law fiduciary liabilities, DOL oversight, or potential private right of action under ERISA.''), *https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/rules-and-regulations/public-comments/1210-AC02/00345.pdf.*

[160] *National Association for Fixed Annuities* v. *Perez,* 217 F. Supp. 3d. 1, 23, 27 (D.D.C. 2016); *FACC* v. *U.S. Dep't of Lab.,* No. 3:22–CV–00243–K–BT, 2023 WL 5682411, at *18 (N.D. Tex. June 30, 2023); *see Chamber,* 885 F.3d at 393 (Stewart, C.J., dissenting); *see generally also Market Synergy* v. *U.S. Dep't of Lab.,* 885 F.3d 676 (10th Cir. 2018) (affirming a district court's decision in which several challenges to the 2016 Rulemaking, as it applied to fixed indexed annuities, were rejected).

[161] *See Eaves* v. *Penn,* 587 F.2d 453, 458 (10th Cir. 1978); *Farm King Supply, Inc. Integrated Profit Sharing Plan & Tr.* v. *Edward D. Jones & Co.,* 884 F.2d 288, 293 (7th Cir. 1989); *see also Thomas, Head & Greisen Emps. Tr.* v. *Buster,* 24 F.3d 1114, 1117 (9th Cir. 1994) (''[T]he definition of fiduciary under ERISA should be liberally construed.'' (citing *Consolidated Beef Indus. Inc.* v. *New York Life Ins. Co.,* 949 F.2d 960, 964 (8th Cir. 1991), *cert. denied,* 503 U.S. 985 (1992))); H. Stennis Little, Jr., & Larry Thrailkill, *Fiduciaries Under ERISA: A Narrow Path to Tread,* 30 Vanderbilt L. Rev. 1, 4–5 (1977) (referring to the ''broadness of the [statutory] definition'' of ''fiduciary'' under ERISA, such that the definition could cover ''insurance salesmen who recommend the purchase of certain types of insurance and receive a commission on the sale of such insurance'' and ''stock brokers or dealers who recommend certain securities and then participate in the acquisition or disposition of securities and receive a commission for their services'').

[162] *See Farm King,* 884 F.2d at 293 (discussing ''evidence of the wide sweep given to the meaning of 'fiduciary' under ERISA'' in relation to the narrower definition codified in the 1975 test).

standpoint of trust and confidence, as discussed above. For example, under the 1975 rule, a recommendation to a plan participant to roll over a lifetime of savings and invest them in a fixed indexed annuity would not count as fiduciary advice if the person making the investment recommendation had not regularly made recommendations to the investor about plan assets. This would be true, even if the advice followed a series of meetings about the particular financial circumstances and needs of the investor; purported expert recommendations about how to meet those needs and circumstances based upon consideration of the investor's most intimate financial details; and a clear understanding that the advice was being held out as based upon the best interest of the investor. Moreover, the five-part test would defeat fiduciary status even if the investor had relied upon the financial professional for advice about all aspects of their financial life for a period of many years encompassing many transactions, as long as that advice did not relate to plan assets. It is hard to square such a result with a trust and confidence test, and impossible to square the result with the text of the statute, which contains no such limitation. The final rule avoids such inequitable results, while limiting advice to those circumstances in which the investor reasonably should expect *fiduciary* advice.[163] In this way, the Department believes that treating one-time advice as fiduciary investment advice subject to ERISA is consistent with a relationship of trust and confidence, provided that all of the requirements of the regulatory test are satisfied.[164]

In the final rule, and in response to public comments, the Department has also made changes designed to ensure that it did not capture communications that were not properly viewed as fiduciary advice. Thus, for example, the final rule includes a new paragraph expressly declining fiduciary treatment for mere sales pitches that fall short of meeting the test above. Similarly, the rule makes clear that mere investment information or education, without an investment recommendation, is not treated as fiduciary advice.

This rule is not only a very different rule from the one that was before the Fifth Circuit in *Chamber;* it also addresses a very different regulatory landscape. The regulatory actions taken by the SEC and NAIC to update conduct standards reflect the understanding that broker-dealers and insurance agents commonly make recommendations to their customers for which they are compensated as a regular part of their business; that investors rely upon these recommendations; and that regulatory protections are important to ensure that the advice is in the best interest of the retail customer, in the case of broker-dealers, or consumers, in the case of insurance agents. In this regard, also as discussed above, commenters informed the Department that it is common for broker-dealers and insurance agents to hold themselves out as trusted advisers and take deliberate steps to develop relationships of trust and confidence with their customers.[165] Moreover, as the SEC has repeatedly noted, Regulation Best Interest ''draws from key fiduciary principles underlying fiduciary obligations, including those that apply to investment advisers'' under the Advisers Act.[166] As a result, the final rule is far more consistent with the SEC's regulation of advice than was true of the 2016 Rulemaking, which represented a significant departure from securities law regulation of broker-dealers at the time.

For all these reasons, both the final rule and the regulatory context are far different than the 2016 Final Rule considered by the Fifth Circuit in the *Chamber* opinion. In addition, there are other important ways in which the final rule is different than the 2016 Rulemaking, above and beyond this final rule's clear focus on relationships of trust and confidence:

- The final rule and associated exemptions, unlike the 2016 Rulemaking, contain no contract or warranty requirements. The 2016 Rulemaking required that advisers and financial institutions give their customers enforceable contractual rights. This final rule and amended PTEs do not create any such rights. The sole remedies for non-compliance are precisely those set forth in ERISA and the Code, which include only the imposition of excise taxes in the context of advice to IRAs.
- The amended PTEs, unlike the 2016 Rulemaking, do not prohibit financial institutions and advisers from entering into class-wide binding arbitration agreements with retirement investors.
- PTE 2020–02, as finalized, specifically provides an exemption from the prohibited transaction rules for pure robo-advice relationships, unlike the 2016 Rulemaking.
- PTE 84–24, unlike the 2016 Rulemaking, does not require insurance companies to assume fiduciary status with respect to independent insurance agents, an important concern of insurers with respect to the 2016 Rulemaking.
- Neither PTE 2020–02 nor PTE 84–24, as amended, require financial institutions to disclose all their compensation arrangements with third parties on a publicly available website, as was required by the 2016 Rulemaking.

In sum, commenters err in asserting that this rulemaking is simply a repeat of the 2016 Rulemaking, or in contending that the final rule fails to take proper account of the nature of the relationship between the advice provider and the advice recipient.

[163] As also noted by the magistrate judge in *Federation of Americans for Consumer Choice* v. *United States Dept. of Labor,* the Fifth Circuit's opinion ''did not foreclose that Title I duties may reach those fiduciaries who, as aligned with Title I's text, render advice, even for the first time, '*for* a fee or other compensation.' '' Findings, Conclusions, and Recommendations of the United States Magistrate Judge, *FACC,* No. 3:22–CV–00243–K–BT, 2023 WL 5682411, at *22 (N.D. Tex. June 30, 2023) (quoting ERISA section 3(21)(A)(ii), 29 U.S.C. 1002(21)(A)(ii)) (emphasis in original).

[164] One commenter cited the *Chamber* opinion for the proposition that a relationship of trust and confidence that involves ''control and authority'' is necessary for investment advice fiduciary status. The Department does not read the *Chamber* opinion to state that ''control and authority'' is required, but rather that the use of the terms ''control'' and ''authority'' in the other parts of the statutory fiduciary definition (*i.e.,* ERISA section 3(21)(A)(i) and (iii) and Code section 4975(e)(3)(A) and (C)) indicate that the investment advice part of the definition also involves a ''special relationship.'' *See* 885 F.3d at 376–77. As discussed herein, the final rule appropriately defines an investment advice fiduciary to comport with reasonable investor expectations of trust and confidence which is the special relationship described in the *Chamber* opinion.

[165] It is also worth noting that in the litigation surrounding the 2016 Final Rule, there were affidavits from independent insurance agents describing ongoing relationships with their customers in which detailed personal financial information is shared. One such affidavit filed by Donald E. Wales in *Market Synergy Group, Inc.* v. *United States Department of Labor* stated, ''I take great pride and care in developing deep familiarity with my clients' individual financial circumstances, resources, and goals. All my sales of life insurance and fixed annuities . . . are made following a face-to-face meeting with my clients..... I also attempt to have periodic meetings with my clients..... to review their financial state of affairs and recommend changes ..... to their financial plans. I proudly use the same financial products that I recommend to my clients . . . and often share my own personal results with them.'' Memorandum of Plaintiff-Appellant in Support of Motion for Preliminary Injunction at Exhibit 9, *Mkt. Synergy Grp., Inc.* v. *United States Dep't of Lab.,* No. 5:16–CV–4083–DDC–KGS, 2017 WL 661592 (D. Kan. Feb. 17, 2017), ECF No. 11–9, *aff'd,* 885 F.3d 676 (10th Cir. 2018).

[166] Regulation Best Interest release, 84 FR 33318 (July 12, 2019); *see also* SEC Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Care Obligation, (''Both Reg BI for broker-dealers and the IA fiduciary standard for investment advisers are drawn from key fiduciary principles that include an obligation to act in the retail investor's best interest and not to place their own interests ahead of the investor's interest,'') *https://www.sec.gov/tm/standards-conduct-broker-dealers-and-investment-advisers.*

D. Discussion of the Final Rule

Under the final rule, a person is an investment advice fiduciary if they provide a recommendation in one of the following contexts:

- The person either directly or indirectly (*e.g.,* through or together with any affiliate) makes professional investment recommendations to investors on a regular basis as part of their business and the recommendation is made under circumstances that would indicate to a reasonable investor in like circumstances that the recommendation:

Æ is based on review of the retirement investor's particular needs or individual circumstances,

Æ reflects the application of professional or expert judgment to the retirement investor's particular needs or individual circumstances, and

Æ may be relied upon by the retirement investor as intended to advance the retirement investor's best interest; or

- The person represents or acknowledges that they are acting as a fiduciary under Title I of ERISA, Title II of ERISA, or both with respect to the recommendation.

The recommendation also must be made ''for a fee or other compensation, direct or indirect'' as defined in the final rule.

The provisions of the final rule are organized into the following paragraphs and discussed in greater detail below. Paragraph (c) of the regulation defines the term ''investment advice.'' Paragraph (d) retains the provision in the existing regulation regarding ''execution of securities transactions.'' Paragraph (e) defines the phrase ''for fee or other compensation, direct or indirect.'' Paragraph (f) sets forth definitions used in the regulation. Paragraph (g) addresses applicability of the regulation. Paragraph (h) confirms the continued applicability of State law regulating insurance, banking, and securities.

1. Covered Recommendations

Definition of a Recommendation

Whether a person has made a ''recommendation'' is a threshold element in establishing the existence of fiduciary investment advice. For purposes of the final rule, whether a recommendation has been made will turn on the facts and circumstances of the particular situation, including whether the communication reasonably could be viewed as a ''call to action.'' The more individually tailored the communication to a specific customer or a targeted group of customers about a security or other investment or group of securities or other investments, the greater the likelihood that the communication may be viewed as a recommendation. The determination of whether a recommendation has been made is an objective rather than a subjective inquiry.

The Department intends that whether a recommendation has been made will be construed in a manner consistent with the SEC's framework in Regulation Best Interest. In the Regulation Best Interest release, the SEC stated,

> [T]he determination of whether a broker-dealer has made a recommendation that triggers application of Regulation Best Interest should turn on the facts and circumstances of the particular situation and therefore, whether a recommendation has taken place is not susceptible to a bright line definition. Factors considered in determining whether a recommendation has taken place include whether the communication ''reasonably could be viewed as a 'call to action' '' and ''reasonably would influence an investor to trade a particular security or group of securities.'' The more individually tailored the communication to a specific customer or a targeted group of customers about a security or group of securities, the greater the likelihood that the communication may be viewed as a ''recommendation.'' [167]

Commenters generally supported the Department's statement in the preamble for the proposal that it intended to take an approach that is similar to the SEC and FINRA on the definition of a recommendation, and some asked for confirmation that the Department would interpret the definition *consistent* with the SEC's framework in Regulation Best Interest. In this regard, some commenters identified the word ''suggestion'' in the following statement in the Department's preamble, and said this set too low a bar for fiduciary status:

> For purposes of the proposed rule, the Department views a recommendation as a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the retirement investor engage in or refrain from taking a particular course of action.[168]

Commenters also said this was inconsistent with the SEC's approach, although some commenters acknowledge this statement was consistent with prior FINRA guidance—and, in fact, quoted that guidance.[169] Based on the word ''suggestion'' some commenters posed scenarios involving the provision of information to a retirement investor and said those communications would appear to be covered as recommendations under the proposal.

Commenters also identified other statements in the proposal's preamble that they believed were not consistent with the SEC's approach in Regulation Best Interest. These statements are: ''the fact that a communication is made to a group rather than an individual would not be dispositive of whether a recommendation exists'' and ''providing a selective list of securities to a particular retirement investor as appropriate for the investor would be a recommendation as to the advisability of acquiring securities even if no recommendation is made with respect to any one security.'' [170]

The Department confirms that, for purposes of the final rule, the Department intends that whether a recommendation has been made will be construed consistent with the SEC Regulation Best Interest and the inquiry will focus on whether there is a ''call to action.'' To the extent a person provides information to a retirement investor that does not rise to the level of a recommendation as defined in this way, the communication would not lead to fiduciary status.

However, the Department does not believe that the statements regarding communications to a ''group'' or

[167] Regulation Best Interest release, 84 FR 33318, 33335 (July 12, 2019)(footnote omitted).

[168] Proposed Retirement Security Rule, 88 FR 75890, 75904 (Nov. 3, 2023).

[169] *See* FINRA Regulatory Notice 11–02 (''[S]everal guiding principles are relevant to determining whether a particular communication could be viewed as a recommendation for purposes of the suitability rule. For instance, a communication's content, context and presentation are important aspects of the inquiry. The determination of whether a ''recommendation'' has been made, moreover, is an objective rather than subjective inquiry. An important factor in this regard is whether—given its content, context and manner of presentation—a particular communication from a firm or associated person to a customer reasonably would be viewed as a suggestion that the customer take action or refrain from taking action regarding a security or investment strategy. In addition, the more individually tailored the communication is to a particular customer or customers about a specific security or investment strategy, the more likely the communication will be viewed as a recommendation. Furthermore, a series of actions that may not constitute recommendations when viewed individually may amount to a recommendation when considered in the aggregate.'') (footnote omitted), *https://www.finra.org/rules-guidance/notices/11-02. See also* FINRA Notice to Members 01–23 (''The determination of whether a 'recommendation' has been made, moreover, is an objective rather than a subjective inquiry. An important factor in this regard is whether—given its content, context, and manner of presentation—a particular communication from a broker/dealer to a customer reasonably would be viewed as a ''call to action,'' or suggestion that the customer engage in a securities transaction.''), *https://www.finra.org/rules-guidance/notices/01-23.*

[170] Proposed Retirement Security Rule, 88 FR 75890, 75904 (November 3, 2023).

communications about ''a selective list of securities'' are inconsistent with the SEC's approach. Both of those concepts appear in the SEC's discussion in the Regulation Best Interest release quoted above that indicates that both communications to a ''targeted group of customers'' and communications about ''a group of securities'' may be considered recommendations.

A commenter also said that the following statement made in the Department's preamble described a concept of a recommendation that was too expansive and unworkable: ''a series of actions, taken directly or indirectly (*e.g.,* through or together with any affiliate), that may not constitute a recommendation when each action is viewed individually may amount to a recommendation when considered in the aggregate.'' [171] The commenter suggested that the Department withdraw that preamble statement and include instead an ''anti-evasion'' provision such as: ''No person shall knowingly act in a manner that functions as an unlawful evasion of the purposes of this regulation.''

Although this quoted language is similar to language that appeared in the previous FINRA guidance, the Department's proposal expanded it to include the language ''directly or indirectly (*e.g.,* through or together with any affiliate).'' [172] This language is not intended to capture all actions of affiliates, however; rather, ''through or together with'' is intended to describe circumstances in which an advice provider, in its interactions with the retirement investor, utilizes an affiliate to formally deliver the recommendation to that investor. Therefore, the Department does not believe that this is unworkable or difficult to monitor. For that reason, the Department does not believe it is necessary to include an anti-evasion provision instead of this preamble discussion. However, the Department cautions that the description of ''indirectly'' is not limited to use of affiliates and would extend to parties working around this provision with non-affiliates.

A few commenters suggested alternative definitions of a recommendation. One commenter's proposed language focused on the nature of a recommendation as an endorsement and expression of support for the retirement investor making or refraining from making a specific investment decision. Another commenter had an opposite view that the Department should clarify that an endorsement or expression of opinion would not rise to the level of a recommendation. The Department did not adopt these suggestions, taking the view that it should remain consistent with the SEC on this familiar and well-established definitional term.

Commenters also asked the Department to include a definition of a recommendation in the regulatory text, as opposed to a preamble discussion, to provide parties greater certainty regarding how the term would be interpreted. In this regard, however, it is important to note that the SEC declined to include a definition of a recommendation in the text of Regulation Best Interest. The SEC said, ''what constitutes a recommendation is highly fact-specific and not conducive to an express definition in the rule text.'' [173] In order to maintain consistency with the SEC's approach, which commenters supported, the Department also declines to create a defined term in the final rule's regulatory text.

Types of Recommendations Covered (Paragraph (f)(10))

Paragraph (f)(10) defines the phrase ''recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property.'' This phrase largely parallels the language in the SEC's Regulation Best Interest, which applies to broker-dealers' ''recommendation of any securities transaction or investment strategy involving securities (including account recommendations).'' [174] The phrase's broader reference to ''other investment property'' reflects the differences in jurisdiction between the SEC and the Department.

Under paragraph (f)(10), the phrase ''recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property'' is defined as recommendations as to:

(i) The advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property, investment strategy, or 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;

(ii) 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, selection of investment account arrangements (*e.g.,* account types such as brokerage versus advisory) or voting of proxies appurtenant to securities; and

(iii) Rolling over, transferring, or distributing assets from a plan or IRA, including recommendations as to whether to engage in the transaction, the amount, the form, and the destination of such a rollover, transfer, or distribution.

The following sections discuss the components of the definition and the comments received.

Recommendations Related to Rollovers, Benefit Distributions, or Transfers From a Plan or IRA

Both paragraphs (f)(10)(i) and (iii) describe types of recommendations related to rollovers, benefit distributions, and transfers from a plan or IRA. Paragraph (f)(10)(iii) describes, as covered recommendations, recommendations as to ''[r]olling over, transferring, or distributing assets from a plan or IRA, including recommendations as to whether to engage in the transaction, the amount, the form, and the destination of such a rollover, transfer, or distribution.'' Paragraph (f)(10)(i) describes recommendations 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.''

These provisions of the final rule are consistent with the Department's longstanding interest in protecting retirement investors in the context of a recommendation to roll over workplace retirement plan assets to an IRA, as well as other recommendations to roll over, transfer, or distribute assets from a plan or IRA. Decisions to take a benefit distribution or engage in a rollover transaction are among the most, if not the most, important financial decisions that plan participants and beneficiaries, and IRA owners and beneficiaries are called upon to make. Advice provided in connection with a rollover decision, even if not accompanied by a specific recommendation on how to invest assets, is appropriately treated as fiduciary investment advice, provided that it falls within one of the two covered contexts articulated in this final rule and the other provisions of the final rule are satisfied. When an advice provider recommends that a retirement investor transfer assets out of a Title I plan, the recommendation entails the loss of the retirement investor's property

[171] *Id.* at 75904.

[172] *See* FINRA Regulatory Notice 11–02.

[173] Regulation Best Interest release, 84 FR 33318, 33336 (July 12, 2019).

[174] 17 CFR 240.15l–1(a)(1).

rights with respect to the plan, the sacrifice of protections under Title I of ERISA, and consequential changes to the nature of the retirement investor's account, services, fees, asset holdings, and investment options, all of which can affect the risk, reward, and returns associated with the retirement investor's holdings. Even if the assets would not continue to be covered by Title I or Title II of ERISA after they were moved outside the plan or IRA, the recommendation to change the plan or IRA investments in this manner and to extinguish investor interests and property rights under the plan is investment advice under Title I or Title II of ERISA. In the words of section 3(21)(A)(ii) of ERISA, it is advice with respect to ''any moneys or other property of the plan.''

Under paragraph (f)(10)(iii), recommendations on distributions from a workplace retirement plan (including rollovers or transfers into another plan or IRA) or recommendations to entrust plan assets to a particular IRA provider would fall within the scope of investment advice in the final rule, and would be covered by Title I of ERISA, including the enforcement provisions of section 502(a). Further, in the Department's view, the evaluation of whether a recommendation constitutes fiduciary investment advice should be the same regardless of whether it is a recommendation to take a distribution or make a rollover to an IRA or a recommendation not to take a distribution or to keep assets in a plan.

The provision in paragraph (f)(10)(i), regarding 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, addresses an important concern of the Department that investment advice providers should not be able to avoid fiduciary responsibility for a rollover recommendation by focusing solely on the investment of assets *after* they are rolled over from the plan.

The proposal stated that in many or most cases, a recommendation to a plan participant or beneficiary regarding the investment of securities or other investment property after a rollover, transfer, or distribution involves an implicit recommendation to the participant or beneficiary to engage in the rollover, transfer, or distribution.[175] It also stated that a prudent and loyal fiduciary generally could not make a recommendation on how to invest assets currently held in a plan after a rollover, without even considering the logical alternative of leaving the assets in the plan or evaluating how that option compares with the likely investment performance of the assets post-rollover, and that a fiduciary would violate ERISA's 404 obligations if it recommended that a retirement investor roll the money out of the plan without proper consideration of how the money might be invested after the rollover.[176]

The proposal also said that advice to a plan participant on how to invest assets currently held in an ERISA-covered plan is ''advice with respect to moneys or other property of such plan'' within the meaning of ERISA section 3(21)(A)(ii), inasmuch as the assets at issue are still held by the plan.[177]

Many commenters expressed specific support for the proposal's coverage of recommendations to roll over assets from a workplace retirement plan to an IRA as advice under Title I of ERISA. They cited the importance to the retirement investor of the rollover decision; the potential for increased costs outside of a workplace retirement plan; the loss of a fiduciary responsible for prudently selecting investment options in the workplace retirement plan; and financial professionals' conflicts of interest because they are likely to benefit financially if the retirement investor does roll their assets out of the workplace retirement plan. The North American Securities Administrators Association's comment on the proposal said that State securities regulators have routinely observed abuse in rollover and account transfer recommendations.

Other commenters said that recommendations regarding rollovers and recommendations regarding assets after they will leave the plan are not properly considered ERISA fiduciary investment advice under Title I, with the resulting application of the ERISA section 404 duties and the ERISA section 502(a) enforcement provisions. Commenters said that covering these recommendations as Title I advice is inconsistent with the Fifth Circuit's discussion in the *Chamber* decision on the distinction between the Department's jurisdiction under Title I and Title II. A commenter also stated that Congress has had opportunities in recent pension legislation to declare rollover advice as covered under ERISA Title I but has not. Some also said covering these recommendations would create additional liability under Title I for financial services providers where none exists now, which is similar to creating a private right of action that the Fifth Circuit found fault with. Commenters opposing covering these recommendations as fiduciary investment advice also said that the significance of the decision was not a sufficient basis for the Department to assert jurisdiction and that these recommendations would be protected by the conduct standards in Regulation Best Interest and the State insurance laws adopting the NAIC Model Regulation.

Some commenters focused on the Department's statements that recommendations to take a distribution necessarily involved a recommendation to change investments in the plan or to change fees or services directly affecting the return on those investments. One commenter provided examples of discussions about distributions that they did not think involved an investment recommendation, such as recommendations to take a distribution from a defined benefit plan, discussion of the merits of a participant loan or hardship withdrawal or educating a retirement investor about rules related to a required minimum distribution. The commenter suggested that the rule be clarified to provide that discussions about distributions and transfers of assets that are not for the purposes of changing investments are not covered recommendations.

Finally, a number of commenters expressed concern about the Department's position in the proposal that recommendations of 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 often would involve an implicit rollover recommendation. They said this position would lead to the conclusion that all conversations about rollovers would be ERISA fiduciary investment advice under Title I with no opportunity for information to be provided in a non-fiduciary capacity. Commenters believed this outcome would be detrimental to retirement investors. For example, one commenter said it is vitally important for retirement investors to be informed that they can leave their assets in the retirement plan even upon employment termination (if that is the case). Commenters urged the Department to state that the rollover decision can be separate from a recommendation as to how to invest the assets, and that discussions about rollovers can be purely educational. In this regard, one commenter asked the Department to make clear that the delivery of non-individualized information about a financial service

[175] Proposed Retirement Security Rule, 88 FR 75890, 75905 (November 3, 2023).

[176] *Id.*

[177] *Id.*

provider's offering without a reference to a specific investment product or strategy would not be fiduciary investment advice.

As discussed below, the Department views several of the positions taken by commenters as consistent with this final rule. The Department agrees that it is important that retirement investors continue to have access to information about the options available to them regarding rolling over, transferring or distributing retirement assets and that these discussions can be purely educational. However, to the extent there is a recommendation with respect to these options, the recommendation is evaluated under all parts of the final rule, and if the recommendation is with respect to assets held in a workplace retirement plan, it will be fiduciary advice under Title I of ERISA if all parts of the final rule are satisfied. Recommendations to take a distribution from a workplace retirement plan necessarily impact the specific investments in the plan or the fees and services directly affecting the return on those investments, even in the context of a recommendation to roll over from a defined benefit plan, and clearly change the investor's property interests with respect to the plan and associated legal protections. For these reasons, the Department continues to believe it is appropriate to treat such a recommendation as advice under Title I of ERISA if all the parts of the final rule are satisfied, and has not accepted the commenter's suggestion to provide that recommendations about distributions and transfers of assets that are not for the purposes of changing investments are not covered recommendations. The recommendation not to hold an asset in the plan, even if the intention is to hold essentially the same asset outside the plan, is still an investment recommendation. To the extent the recommendation falls within the test set forth in this rule it is clearly fiduciary advice ''with respect to any moneys or other property of such plan,'' within the meaning of ERISA section 3(21)(A)(ii).

The Department also continues to believe that recommendations of 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 often involve an implicit rollover recommendation. Further, in these scenarios too, recommendations regarding Title I plans are made with respect to ''moneys or other property of such plan'' within the meaning of ERISA section 3(21)(A)(ii), so coverage under Title I is appropriate. For this reason, the Department does not agree with a commenter that said a financial professional should be permitted to agree with its customer that any advice to be given will concern how to dispose of assets once removed from a Title I plan and no advice will be given regarding whether to remove the assets from the plan. If the customer is a current participant or beneficiary in a Title I plan, the recommendation necessarily involves the assets currently held in the Title I plan. A different conclusion would create loopholes in the final rule that would undermine the protection of retirement investors in this important context.

These provisions of the final rule do not create a new private right of action but rather adopt a regulatory definition of an investment advice fiduciary with an appropriate scope. The fact that Congress has not addressed the status of rollovers in recent pension legislation leaves the Department's clear jurisdiction, as discussed herein, undisturbed.

The final rule's approach in this respect aligns with the SEC's Regulation Best Interest, and with the Advisers Act fiduciary obligations, which extend to account recommendations to customers and clients as well as recommendations to customers and clients to roll over or transfer assets from one type of account to another. As stated by the SEC in Regulation Best Interest, ''account recommendations are recommendations of an approach or method (*i.e.,* a 'strategy') for how a retail customer should engage in transactions in securities, involve conflicts of interest, and can have long-term effects on investors' costs and returns from their investments.'' [178]

The Department's position is not, however, that all conversations regarding rollovers and distributions are recommendations. A recommendation is a threshold element in the analysis of whether a person is an investment advice fiduciary. For example, consistent with the SEC's position in Regulation Best Interest, the Department will not consider merely informing a retirement investor of the need to take a required minimum distribution under the Internal Revenue Code to be an investment ''recommendation.'' [179] Likewise, absent additional facts, merely discussing the merits of a participant loan or hardship withdrawal would not rise to the level of an investment recommendation. Section E.3. of this preamble provides additional guidance on investment information and education that will not be considered a recommendation leading to investment advice fiduciary status.

Recommendations Involving Securities, Other Investment Property, and Investment Strategies

Paragraph (f)(10)(i) also describes, as covered recommendations, recommendations as to ''the advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property, investment strategy, or 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.'' Similar to the SEC and FINRA, the Department will interpret ''investment strategy'' broadly, to include ''among others, recommendations generally to use a bond ladder, day trading . . . or margin strategy involving securities, irrespective of whether the recommendations mention particular securities.'' [180]

The reference to ''other investment property'' is intended to capture other investments made by plans and IRAs that are not securities. This includes, but would not be limited to, non-securities annuities, banking products, and digital assets (regardless of status as a security). The Department does not see any statutory or policy basis for differentiating advice regarding investments in CDs, including investment strategies involving CDs (*e.g.,* laddered CD portfolios), from other investment products, and therefore will interpret paragraph (f)(10) to cover such recommendations.

The term investment property, however, does not include health insurance policies, disability insurance policies, term life insurance policies,

[178] Regulation Best Interest release, 84 FR 33318, 33339 (July 12, 2019); *see also* SEC Investment Adviser Interpretation, 84 FR 33669, 33674 (July 12, 2019) (''An adviser's fiduciary duty applies to all investment advice the investment adviser provides to clients, including advice about . . . account type. Advice about account type includes advice about whether to open or invest through a certain type of account (*e.g.,* a commission-based brokerage account or a fee-based advisory account) and advice about whether to roll over assets from one account (*e.g.,* a retirement account) into a new or existing account that the adviser or an affiliate of the adviser manages.'') The SEC Investment Adviser Interpretation further provides that ''with respect to prospective clients, investment advisers have antifraud liability under section 206 of the Advisers Act, which, among other things, applies to transactions, practices, or courses of business which operate as a fraud or deceit upon prospective clients, including those regarding investment strategy, engaging a subadviser, and account type.'' *Id.,* at 33674 n. 42.

[179] Regulation Best Interest release, 84 FR 33318, 33338 (July 12, 2019).

[180] *Id.* at 33339 (citing FINRA Rule 2111.03 and FINRA Regulatory Notice 12–25, available at *https://www.finra.org/rules-guidance/notices/12-2*).

and other property to the extent the policies or property do not contain an investment component. This is confirmed in a definition of ''investment property'' in paragraph (f)(12). Although there can be situations in which a person recommending group health or disability insurance, for example, effectively exercises such control over the decision that the person is functionally exercising discretionary control over the management or administration of the plan as described in ERISA section 3(21)(A)(i) or section 3(21)(A)(iii), the Department does not believe that the definition of investment advice in ERISA's statutory text is properly interpreted or understood to cover a recommendation to purchase group health, disability, term life insurance, or similar insurance policies that do not have an investment component.

Commenters also asked the Department to provide additional guidance on the definition of investment property. Several focused on the definition as it would relate to group products, as opposed to retail products, and posed various scenarios involving recommendations of assets that they did not think should be considered investment property, including a group annuity contract. For example, one commenter asked the Department to eliminate both group life insurance policies and annuities from the definition of investment property because the purchase decision would be made by a plan fiduciary who already had a duty of loyalty to the plans' participants and beneficiaries. The Department has not accepted that comment, as that result would be contrary to the general approach taken in this final rule to include, as retirement investors, fiduciaries with control with respect to a plan or IRA. In those circumstances in which the person recommending the investment meets the final rule's terms, they occupy a position of trust and confidence with respect to the recommendation, and that recommendation merits fiduciary status. Certainly, nothing in the statute categorically carves out advice to plan fiduciaries. Many commenters supported the application of ERISA's protections in this context. Further, the Department believes there should be little question that the definition of investment property should include a group annuity contract that is a plan asset. Whether the other arrangements mentioned by commenters include an investment component would depend on a review of the specific facts and circumstances.

Recommendations on Management of Securities or Other Investment Property, Including Account Types

Paragraph (f)(10)(ii) of the final rule describes, as covered recommendations, recommendations 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, selection of investment account arrangements (*e.g.,* account types such as brokerage versus advisory), or the voting of proxies appurtenant to securities.''

In this regard, the statutory text broadly refers to ''investment advice . . . with respect to any moneys or other property of such plan.'' Recommendations as to investment management or strategy fall within the most straightforward reading of the statutory text. Accordingly, the final rule makes clear that covered investment advice is not artificially limited solely to recommendations to buy, sell, or hold particular securities or investment property to the exclusion of all the other important categories of investment advice that financial professionals routinely provide and that have the potential to impact retirement investors' costs and investment returns.

A commenter referenced the fact that this language was not limited to recommendations regarding a specific security or investment as an example that the proposal appeared overly broad. The Department does not think there is a basis for narrowing the definition of a covered recommendation to those regarding buying, holding, or selling particular securities or investment property. Language in the 1975 regulation indicates that it is not that narrow but would extend to recommendations regarding ''investment policies or strategy,'' ''overall portfolio composition,'' and ''diversification of plan investments.'' The SEC has also stated in Regulation Best Interest and the SEC Investment Adviser Interpretation that the conduct standards are not limited to recommendations that mention particular securities.[181]

A few other commenters said this covered recommendation, combined with what they viewed as broad proposed definitions of a ''recommendation'' and ''for a fee or other compensation, direct or indirect,'' would impact and limit information provided to plan sponsors. Other commenters raised questions about the limits of this covered recommendation.

The Department has made a number of changes and clarifications to the final rule to address concerns raised by these commenters. First, the Department has confirmed that it intends that whether a recommendation has occurred will be construed consistent with the SEC's framework in Regulation Best Interest. This should alleviate some commenters' concern about whether merely providing information to a retirement investor, including a plan sponsor, might be considered a covered recommendation under this part of the final rule. Additionally, it is important to remember that all parts of the final rule must be satisfied for ERISA fiduciary status to apply, including receipt of a fee or other compensation, direct or indirect, as defined in the final rule. Finally, the Department has provided additional clarifications regarding the application of the final rule in the institutional market that makes clear that parties are permitted under the final rule to define their own relationships.

This provision of the final rule also makes clear that recommendations as to the selection of investment account arrangements would be covered. Accordingly, a recommendation to move from a commission-based account to an advisory fee-based account (or vice versa) would be a covered recommendation. This provision too, is consistent with the SEC's Regulation Best Interest and the Advisers Act's antifraud provisions, which establish the Advisers Act fiduciary duty.[182]

[181] *Id.* at 33339 (July 12, 2019)(''Existing broker-dealer regulation and guidance stresses that the term ''investment strategy'' is to be interpreted broadly.....This approach appropriately recognizes that customers may rely on firms' and associated persons' investment expertise and knowledge, and therefore the broker-dealer should be responsible for such recommendations, regardless of whether those recommendations result in transactions or generate transaction-based compensation.'') (footnotes omitted); *Cf.* SEC Investment Adviser Interpretation, 84 FR at 33674 (''An adviser's fiduciary duty applies to all investment advice the investment adviser provides to clients, including advice about investment strategy, engaging a sub-adviser, and account type.'').

[182] 17 CFR 240.15l–1(a)(1) (''A broker, dealer, or a natural person who is an associated person of a broker or dealer, when making a recommendation of any securities transaction or investment strategy involving securities (*including account recommendations*) to a retail customer, shall act in the best interest of the retail customer at the time the recommendation is made, without placing the financial or other interest of the broker, dealer, or natural person who is an associated person of a broker or dealer making the recommendation ahead of the interest of the retail customer.'') (emphasis added); SEC Investment Adviser Interpretation, 84 FR 33669, 33674 (July 12, 2019) (''An adviser's

Continued

Recommendations on the Selection of Other Persons To Provide Investment Advice or Investment Management

Paragraph (f)(10)(ii) extends to recommendations as to the ''selection of other persons to provide investment advice or investment management services.'' Consistent with the Department's longstanding position, the final rule covers recommendations of another person to be entrusted with investment advice or investment management authority over retirement assets. Such recommendations are often critical to the proper management and investment of those assets and are fiduciary in nature if the other conditions of the definition are satisfied.

Recommendations of investment advisers or managers are similar to recommendations of investments that the plan or IRA may acquire and are often, by virtue of the track record or information surrounding the capabilities and strategies that are employed by the recommended fiduciary, inseparable from recommendations as to the types of investments that the plan or IRA will acquire. For example, the assessment of an investment fund manager or management is often a critical part of the analysis of which fund to pick for investing plan or IRA assets.

The Department's proposal discussed that the language in paragraph (f)(10)(ii) regarding recommendations of ''other persons'' to provide investment advice or investment management services was intentional to avoid concerns that the final rule would impose fiduciary status on a person based on the marketing of the person's own advisory or investment management services (sometimes referred to as ''hire me'' communications).[183] Thus, the Department said the proposed language would not result in a person becoming an investment advice fiduciary merely by engaging in the normal activity of marketing themselves (*i.e.,* ''hire me'') as a potential fiduciary to be selected by a plan fiduciary or IRA owner, without making a recommendation of a securities transaction or other investment transaction or any investment strategy involving securities or other investment property.[184]

Commenters on the ''hire me'' discussion generally asked the Department to allow for more expansive communications outside of ERISA fiduciary status for various marketing of services, and to make that explicit in the final rule. These comments and the Department's response are discussed further in Section E.1. of this preamble.

Some commenters also said that the Department should not consider a recommendation of *other persons* to provide investment services as a covered recommendation, as they saw it as distinct from investment advice. Commenters described referral arrangements that they believed are beneficial to investors by assisting in the identification of fiduciary service providers. One commenter asked for a ''hire them'' carve-out, under which a recommendation of another person to provide investment advice or investment management services would not be a covered recommendation for purposes of the final rule unless the person making the referral was specifically engaged to make such a recommendation for a fee or other compensation.

The Department has not eliminated recommendations of other persons to provide investment advice or investment management services as a type of covered recommendation, because it continues to believe that the recommendation of another person to provide investment advice or investment management services is conceptually indistinguishable from recommendations of investments that the plan or IRA may acquire. However, it is important to remember in this context that all parts of the final rule must be satisfied for a covered recommendation to be considered ERISA fiduciary investment advice, including the ''for a fee or other compensation, direct or indirect'' requirement. Accordingly, if the recommendation is not made for a fee or other compensation, direct or indirect, it would not give rise to fiduciary status. As the relevant fee or other compensation may be *direct or indirect,* a referral fee paid by a third party (*e.g.,* the person to whom investors are referred) would be relevant to the inquiry as to whether the person making the referral would be a fiduciary under the final rule.

Proxy Voting Appurtenant to Ownership of Shares of Corporate Stock

Paragraph (f)(10)(ii) also extends to recommendations as to the ''voting of proxies appurtenant to securities.'' The Department has long viewed the exercise of ownership rights as a fiduciary responsibility; consequently, advice or recommendations on the exercise of proxy or other ownership rights are appropriately treated as fiduciary in nature if the other conditions of the final rule are satisfied.[185]

Similar to other types of broad, generalized guidance that would not rise to the level of investment advice, however, guidelines or other information on voting policies for proxies that are provided to a broad class of investors without regard to a client's individual interests or investment policy and that are not directed or presented as a recommended policy for the plan or IRA to adopt, would not rise to the level of a covered recommendation under the rule. Similarly, a recommendation addressed to all shareholders in an SEC-required proxy statement in connection with a shareholder meeting of a company whose securities are registered under Section 12 of the Exchange Act, for example, soliciting a shareholder vote on the election of directors and the approval of other corporate action, would not, under the rule, constitute fiduciary investment advice from the person who creates or distributes the proxy statement.

Several commenters addressed including recommendations regarding proxy voting as a covered recommendation under the proposal, with some supporting the inclusion as important and relevant to plan participants' interests and others indicating the inclusion was too broad and likely to impede useful information from being provided to plan sponsors. The Department retained this provision in the final rule, consistent with its long-term position on this issue.

One commenter requested that the final rule regulatory text, as opposed to the preamble, make clear that merely providing proxy voting materials would not lead to investment advice fiduciary status. As discussed in greater detail in Section E, the Department has generally not included exceptions and specific carve-outs in the final rule text for specific circumstances but instead has opted to provide guidance in the preamble as to how the rule will apply.

2. When Covered Recommendations Are Fiduciary Investment Advice (Paragraph (c)(1))

Paragraph (c)(1) establishes the contexts in which a covered recommendation would be considered

fiduciary duty applies to all investment advice the investment adviser provides to clients, including advice about investment strategy, engaging a sub-adviser, and account type.'').

[183] Proposed Retirement Security Rule 88 FR 75890, 75906 (Nov. 3, 2023).

[184] *Id.*

[185] *See* Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, 85 FR 81658 (Dec. 16, 2020) (''In connection with proxy voting, the Department's longstanding position is that the fiduciary act of managing plan assets includes the management of voting rights (as well as other shareholder rights) appurtenant to shares of stock.'').

ERISA fiduciary investment advice if the remaining parts of the final rule are satisfied. Paragraph (c)(1)(i) sets forth an objective facts and circumstances test for when, based on the interactions between the advice provider and the retirement investor, the retirement investor would reasonably place their trust and confidence in the advice provider as acting to advance the retirement investor's best interest. Paragraph (c)(1)(ii) identifies a specific factual scenario—the advice provider's acknowledgment of ERISA Title I or Title II fiduciary status—as one in which the retirement investor can always reasonably place their trust and confidence in the advice provider as acting to advance the retirement investor's best interest. The contexts in the final rule are:

- *Paragraph (c)(1)(i):* The person either directly or indirectly (*e.g.,* through or together with any affiliate) makes professional investment recommendations to investors on a regular basis as part of their business and the recommendation is made under circumstances that would indicate to a reasonable investor in like circumstances that the recommendation:
  - Æ is based on review of the retirement investor's particular needs or individual circumstances,
  - Æ reflects the application of professional or expert judgment to the retirement investor's particular needs or individual circumstances, and
  - Æ may be relied upon by the retirement investor as intended to advance the retirement investor's best interest; or
- *Paragraph (c)(1)(ii):* The person making the recommendation represents or acknowledges that they are acting as a fiduciary under Title I of ERISA, Title II of ERISA, or both with respect to the recommendation.

In the proposal, the Department had identified three contexts in which a covered recommendation would be considered ERISA fiduciary investment advice. The contexts identified in the proposal were:

- *Proposed paragraph (c)(1)(i):* The person either directly or indirectly (*e.g.,* through or together with any affiliate) has discretionary authority or control, whether or not pursuant to an agreement, arrangement, or understanding, with respect to purchasing or selling securities or other investment property for the retirement investor;
- *Proposed paragraph (c)(1)(ii):* The person either directly or indirectly (*e.g.,* through or together with any affiliate) makes investment recommendations to investors on a regular basis as part of their business and the recommendation is provided under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest; or
- *Proposed paragraph (c)(1)(iii):* The person making the recommendation represents or acknowledges that they are acting as a fiduciary when making investment recommendations.[186]

Some commenters supported the paragraphs as proposed and said they would be appropriate to define an investment advice fiduciary. For example, one commenter agreed that in these contexts, clients reasonably expect a professional relationship of trust and confidence involving fiduciary obligations. Commenters who disagreed expressed various bases for their disagreement, including the view that the proposed paragraphs, without any specific exclusions or carve-outs, would result in a final rule that was too broad and did not sufficiently allow for non-fiduciary sales activity. Some commenters expressed particular concern about sales activity in the institutional market. Some of the commenters thought the proposal would result in ERISA fiduciary status being applied outside of a relationship of trust and confidence. Many of these commenters also objected to the possibility that one-time advice could ever lead to ERISA fiduciary status.[187]

One commenter suggested that the Department issue a ''salesperson's'' prohibited transaction exemption under which parties would not have to comply with ERISA's fiduciary obligations as long as they are clear and explicit that they are operating in a sales capacity to retirement investors, as a way of addressing the impact of the historical use of advice-oriented titles and marketing and providing additional clarity between advice services and sales. Another commenter suggested a new provision in the final rule under which recommendations to a plan fiduciary would not give rise to fiduciary status if made ''in the context of a communication or series of communications in which the seller of a product or service clearly indicates that such product or service provider has an interest in the transaction and that such plan fiduciary is responsible for independently evaluating and determining whether to enter into a transaction for the purchase of such product or service, including negotiating the terms of the transaction.'' Other commenters likewise advocated for provisions under which sales activity would not be considered fiduciary investment advice.

In the final rule, the Department made a number of changes to the proposal in response to these comments. As discussed in greater detail below, the contexts for fiduciary status in paragraph (c)(1) were narrowed and clarified, including the elimination of proposed paragraph (c)(1)(i). Additionally, a new paragraph (c)(1)(iii) was inserted in the regulatory text confirming that sales recommendations that do not satisfy the specific contexts for fiduciary advice will not lead to ERISA fiduciary status and that the provision of investment information and education, without an investment recommendation, also will not result in ERISA fiduciary status. Although commenters suggested different ways of addressing sales communications, including the suggestion of a special PTE for salespersons and the carve-out described above, the Department believes the revised regulatory text, including paragraph (c)(1)(iii), provide appropriate clarity with respect to those sales pitches that fall short of fiduciary advice, without creating improper loopholes that would defeat legitimate expectations of trust and confidence. Additionally, the Department revised the definition of a retirement investor to limit the scope of plan and IRA fiduciaries who would be treated as retirement investors to those with authority or control over plan or IRA assets. As a result, communications to plan or IRA fiduciaries acting as investment advice fiduciaries will not result in the person making the communication also being considered an investment advice fiduciary.

This preamble section discusses the contexts for fiduciary status adopted in

[186] Proposed Retirement Security Rule, 88 FR 75890, 75977 (Nov. 3, 2023).

[187] One commenter said the final rule should be revised to insert a proximity requirement between the financial professional providing the recommendation and the financial professional with whom the retirement investor works to act on the recommendation, as well as a time proximity requirement for the retirement investor to act on the recommendation. The commenter suggested this was needed to assist in operationalizing the rule. The Department believes certain principles will avoid the operational concerns suggested by this comment. First, whether ERISA's fiduciary duties and the PTEs' ''impartial conduct standards'' are satisfied will be measured as of the time of the recommendation, not in hindsight. *See Donovan* v. *Mazzola,* 716 F.2d 1226, 1232 (9th Cir. 1983); Improving Investment Advice for Workers & Retirees, 85 FR 82798, 82821 (December 18, 2020). Second, ERISA fiduciary status will occur only if all conditions of the final rule are satisfied, including the ''for a fee or other compensation, direct or indirect'' requirement.

the final rule paragraphs (c)(1)(i) and (ii) and the comments received on the proposed tests. The changes to the definition of a retirement investor are discussed in section D.4. of this preamble. Application of the final rule to certain specific circumstances is discussed in Section E of this preamble.

Proposed Paragraph (c)(1)(i)—Discretion—Not Adopted

Proposed paragraph (c)(1)(i) included a proposed expansion of a provision of the Department's 1975 regulation, which defined as a fiduciary a person who renders advice to the plan as to the value of securities or other property, or makes a recommendation as to the advisability of investing in, purchasing, or selling securities or other property, if the person

> either directly or indirectly (*e.g.,* through or together with any affiliate) . . . has discretionary authority or control, whether or not pursuant to agreement, arrangement or understanding, with respect to purchasing or selling securities or other property for the plan.[188]

The Department noted in the proposal's preamble that the proposed language expanded the existing provision beyond discretionary authority or control with respect to investments of the *plan,* to any investments of the *retirement investor,* stating ''[p]ersons that have discretionary authority or control over the investment of a retirement investor's assets necessarily are in a relationship of trust and confidence with respect to the retirement investor.'' [189]

Commenters said the proposed language to expand this context beyond investments of the plan was inconsistent with ERISA. They also said it would be a significant expansion that would be difficult to monitor, particularly in the context of pooled investment vehicles that a retirement investor might be invested in. Commenters also thought the meaning of discretionary authority or control was not clear and might be triggered by limited discretion that would ordinarily not result in ERISA fiduciary status.

Commenters were particularly concerned about the language in proposed paragraph (c)(1)(i) that would consider whether the person had discretion ''directly or indirectly (*e.g.,* through or together with any affiliate).'' [190] Paragraph (f)(1) of the proposal defined an affiliate as ''any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such person; any officer, director, partner, employee, representative, or relative (as defined in paragraph (f)(12) of this section) of such person; and any corporation or partnership of which such person is an officer, director, or partner.'' [191] Commenters viewed this language as very broad as applied to discretionary asset management and said in the context of a large financial institution, the language in the proposal could be satisfied by an affiliate with no direct relationship with the retirement investor. Other commenters noted that the provision appeared to use affiliates as an example of an indirect discretionary relationship, but the language would not necessarily be limited to affiliates.

Several commenters asked that the provision be revised to include an objective requirement that the advice or recommendation be individualized to the retirement investor. Another comment was that the provision should be revised to add language permitting parties to define their relationship by focusing on whether the facts and circumstances indicate that the recommendation may be relied upon by the investor as a basis for investment decisions that are in their best interest. A few commenters also advocated for complete removal of the provision, believing paragraphs (c)(1)(ii) and (iii) more clearly described an investment advice fiduciary relationship and to the extent paragraph (c)(1)(i) would apply more broadly, it was overbroad.

In response to these comments, the Department has determined not to include proposed paragraph (c)(1)(i) in the final rule. Although it is important to note that an existing provision in the 1975 regulation applies fiduciary status to a person who makes a covered recommendation and ''either directly or indirectly (*e.g.,* through or together with any affiliate) . . . has discretionary authority or control . . . with respect to purchasing or selling securities or other property for the plan,'' the Department is persuaded by commenters who said that the general approach in proposed (c)(1)(ii) would more appropriately define an investment advice fiduciary based on the facts and circumstances surrounding the covered recommendation and would likely include, to a more targeted extent, parties with investment discretion. Accordingly, paragraph (c)(1)(i) of the final rule is a revised version of proposed paragraph (c)(1)(ii). Paragraph (c)(1)(ii) of the final rule is a revised version of proposed paragraph (c)(1)(iii). A new paragraph (c)(1)(iii) clarifies that sales recommendations that are not made in one of the contexts set forth in paragraph (c)(1)(i) or (ii) would not result in a person being an investment advice fiduciary and the provision of investment information and education, without an investment recommendation, also will not result in ERISA fiduciary status.

Adopted Paragraph (c)(1)(i)—Facts and Circumstances

Adopted paragraph (c)(1)(i), establishes an objective facts and circumstances test that is satisfied if the ''person either directly or indirectly (*e.g.,* through or together with any affiliate) makes professional investment recommendations to investors on a regular basis as part of their business and the recommendation is made under circumstances that would indicate to a reasonable investor in like circumstances that the recommendation is based on review of the retirement investor's particular needs or individual circumstances, reflects the application of professional or expert judgment to the retirement investor's particular needs or individual circumstances, and may be relied upon by the retirement investor as intended to advance the retirement investor's best interest.''

Investment Recommendations as a Regular Part of Their Business

The requirement that the ''person either directly or indirectly (*e.g.,* through or together with any affiliate) makes professional investment recommendations to investors on a regular basis as part of their business'' is intended to limit application of the final rule to persons who retirement investors would typically view as making investment recommendations based on the retirement investors' interests. It is intended to update the ''regular basis'' prong of the 1975 regulation's five-part test to properly focus on persons who are in the business of providing investment recommendations, rather than defeating legitimate investor expectations by automatically excluding one-time advice from treatment as fiduciary investment advice.

A number of commenters addressed the proposed language which was: ''[t]he person either directly or indirectly (*e.g.,* through or together with any affiliate) makes investment recommendations to investors on a regular basis as part of their business.'' One commenter specifically supported this provision as indicating the test would suggest that the person making

[188] 29 CFR 2510.3–21(c)(1)(ii)(A).

[189] Proposed Retirement Security Rule, 88 FR 75890, 75901 (November 3, 2023).

[190] *Id.* at 75977.

[191] *Id.* at 75978.

the recommendation has expertise and professionalism.

Other commenters expressed the view that the proposed language did not place meaningful limits on investment advice fiduciary status. Similar to comments on proposed paragraph (c)(1)(i), some commenters said the ''directly or indirectly (*e.g.,* through or together with any affiliate)'' language would make this context very broad and difficult to monitor. Some said the proposed language would cover everyone in the financial services industry.

Commenters also said that whether a person made investment recommendations to investors as a regular part of their business had no bearing on whether there was a relationship of trust and confidence with the particular retirement investor receiving the recommendation, and further, that the ''regular basis'' prong of the 1975 regulation was needed because one-time advice would not be fiduciary advice under the Fifth Circuit's *Chamber* opinion.

The Department has retained this provision in the final rule with a slight revision, discussed below. In response to the commenters who said this requirement had no bearing on a relationship of trust and confidence with the particular retirement investor, the Department states that satisfying this provision, on its own, does not result in status as an investment advice fiduciary. Fiduciary status is imposed only if all parts of the final rule are satisfied. However, the fact that the person regularly provides advice as part of their business is an important component of the test, inasmuch as it limits application of the fiduciary definition to financial professionals who could reasonably be viewed as providing advice that can be relied upon with trust and confidence.

Consistent with the discussion in the preamble to the proposal, this provision is not intended to exclude parties in the financial services industry but rather persons outside the financial services industry who may engage in isolated communications that could fit within the definition of a covered recommendation but under circumstances that would not comport with a general understanding of professional investment advice.[192] In this way, the final rule's version of the regular basis test is more narrowly tailored than the 2016 rule and is relevant to the existence of trust and confidence between the advice provider and retirement investor, because retirement investors consulting advice providers who meet this test are likely to expect professional or expert investment advice that is based on the retirement investors' interests.

The final rule retains the language ''either directly or indirectly (*e.g.,* through or together with any affiliate).'' This language is in the 1975 regulation, and the Department believes it is important to include so as to avoid parties structuring their affiliate relationships to avoid application of fiduciary status. This language is not intended to capture all actions of affiliates, however; rather, ''through or together with'' is intended to describe circumstances in which an advice provider, in its interactions with the retirement investor, utilizes an affiliate to formally deliver recommendations to investors.

One commenter suggested that the Department revise the language of this provision to eliminate the ''indirectly'' reference and instead use the language ''either directly or through or together with any affiliate.'' The Department has not adopted this suggestion because it could result in parties working around this provision with non-affiliates.

Some commenters asked the Department to provide additional clarification as to how it would apply this provision in the rule. A commenter suggested that the final rule would be clearer if it were revised to limit fiduciary status to circumstances in which the person making the recommendation is:

> an employee, independent contractor, agent, or representative of a broker or dealer registered under the Securities Exchange Act of 1934 . . . , a financial institution described in [ERISA section 3(38)(B)], or other organization that provides financial advice on a regular basis as part of its business[.][193]

Another commenter asked the Department to clarify that the test would apply based on whether the individual person making the recommendation made regular investment recommendations as part of their business.

Other commenters said that although the Department's preamble said this provision would exclude human resources employees of the plan sponsor, they were not confident that human resources employees would, in fact, be excluded by the regulatory text, especially if they were employed by a financial services firm. A commenter asked for clarification regarding actions taken by a plan sponsor (either directly or through a third party) in connection with a merger or acquisition to provide information and assistance to affected employees regarding various retirement plan issues.[194] One commenter said the language also appeared to them to extend to real estate agents, life coaches, probation officers and divorce counselors, since those entities may provide financial counseling and education.

The Department will apply the test based on the activities of the ''person'', which would include the firm, and its employees, agents and representatives. The fact that the firm is a broker or dealer registered under the Securities Exchange Act of 1934 or a financial institution described in ERISA section 3(38)(B), would indicate that the test would likely be met, but the final rule is not limited to these financial institutions. Further, not all employees, independent contractors, agents, or representatives of a financial institution would be considered to provide investment recommendations on a regular basis. The test will also focus on the role of the individual providing the recommendation in relation to the retirement investor. Therefore, the Department did not adopt the language suggested by the commenter, as the inquiry will be based on all facts and circumstances.

The Department did revise this provision in the final rule to refer to ''professional'' investment recommendations. This change is designed to provide additional certainty that the provision would not be satisfied by the ordinary communications of a human resources employee, who is not an investment professional, in communications with plan participants.[195] Similarly, this language

[192] *Id.* at 75902.

[193] The financial institutions described in ERISA section 3(38)(B) include an entity that: (i) is registered as an investment adviser under the Advisers Act; (ii) is not registered as an investment adviser under such Act by reason of paragraph (1) of section 203A(a) of such Act, is registered as an investment adviser under the laws of the State (referred to in such paragraph (1)) in which it maintains its principal office and place of business, and, at the time the fiduciary last filed the registration form most recently filed by the fiduciary with such State in order to maintain the fiduciary's registration under the laws of such State, also filed a copy of such form with the Secretary; (iii) is a bank, as defined in that Act; or (iv) is an insurance company qualified to perform services described in subparagraph (A) under the laws of more than one State.

[194] The commenter also asked the Department to provide guidance that agreements regarding the integration of plans as part of a merger or acquisition and resulting plan amendments are settlor acts. The Department declines to address the settlor analysis as part of this final rule but will consider providing sub-regulatory guidance upon request of interested parties.

[195] The Department also would not consider salaries of human resources employees of the plan

Continued

is intended to make clear that the provision would not pick up other employees of the plan sponsor, who are not investment professionals, interacting with plan participants, including in the context of a merger or acquisition. The Department also does not intend that this language will be construed as being satisfied by the common activities of real estate agents selling homes to prospective residents, life coaches, probation officers and divorce counselors.

Trusted Advice Provider

The second element of paragraph (c)(1)(i) is that ''the recommendation is made under circumstances that would indicate to a reasonable investor in like circumstances that the recommendation is based on review of the retirement investor's particular needs or individual circumstances, reflects the application of professional or expert judgment to the retirement investor's particular needs or individual circumstances, and may be relied upon by the retirement investor as intended to advance the retirement investor's best interest.''

This provision is intended to define, objectively, when a retirement investor would reasonably place their trust and confidence in the advice provider. In the Department's view, when a financial professional provides a recommendation under circumstances that would indicate to a reasonable investor in like circumstances that the recommendation is individualized to the retirement investor, reflects professional or expert judgment as applied to the individual investor's circumstances, and may be relied upon by the retirement investor to advance their own interests, that financial professional has held themselves out as a trusted advice provider and invited the retirement investor's reliance on them. Several commenters agreed that when financial professionals hold themselves out as trusted advice providers, including through portraying themselves as knowledgeable experts, they have invited the investor's trust, regardless of the form of compensation they will receive.

In accordance with this facts and circumstances test, the application of paragraph (c)(1)(i) does not turn, however, on whether the financial professional expressly represents that each component has been or will be satisfied. In other words, the specific components of the test are not intended as talismanic phrases that the advice provider must utter before triggering fiduciary status. Rather, the definition turns on whether the facts and circumstances would indicate to a reasonable investor in like circumstances that the paragraph's components were met. For example, the retirement investor doesn't need to be expressly told the recommendation is individualized when it follows the collection of information on the investor's personal financial needs or circumstances. The components of the definition can be satisfied by the various facts and circumstances of the parties' interactions and, as noted above, are evaluated under the objective standard of a reasonable investor in like circumstances. Although the Department did not finalize proposed paragraph (c)(1)(i), which would have applied ERISA fiduciary status based in part on whether the person making the recommendation had investment discretion with respect to the retirement investor's assets, investment discretion could still be relevant to whether adopted paragraph (c)(1)(i) is satisfied. For example, absent unusual circumstances, in any case in which a financial professional has investment discretion with respect to the assets that are the subject of a recommendation, the circumstances would indicate to a reasonable investor in like circumstances that the recommendation is individualized to the retirement investor, reflects professional or expert judgment as applied to the individual investor's circumstances, and may be relied upon by the retirement investor to advance their own interests.

The language in the final rule was changed from the proposal which provided ''the recommendation is provided under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest.''

Some commenters asserted that they found the proposed language ''under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor'' to be meaningless and said the provision should instead require an explicitly customized or tailored communication. They also said the ''may be relied upon'' language set too low a bar for establishing fiduciary status and that the Department should retain the ''primary basis'' test from the 1975 regulation. Commenters said it was not clear whether this language was intended to establish an objective or subjective test, and several commenters suggested language that would specifically reference a ''reasonable'' investor or ''reasonable person in like circumstances.''

Some commenters also said that overall, the proposed test did not define a relationship of trust and confidence as it appeared to focus on the circumstances from the retirement investor's perspective and did not include the ''regular basis,'' ''mutual agreement, arrangement, or understanding'' and ''primary basis'' requirements that they believed were required to identify a relationship of trust and confidence as required by the Fifth Circuit's *Chamber* opinion. They also said the proposed language would apply in all interactions between financial professionals and retirement investors including sales pitches. Finally, commenters said to the extent this language would be satisfied because a financial professional was subject to another regulator's best interest standard, that was inappropriate as those standards are not intended to establish fiduciary standards.

In the final rule, the Department revised the language in several ways in response to comments. The provision is now clearly objective as it references a ''reasonable investor in like circumstances.'' The revised language includes three component parts that the Department believes identify objectively when a person has held themselves out as providing an individualized, reliable recommendation based on the application of their professional or expert judgment, and that is intended to advance the retirement investor's interest. Thus, the final rule will result in the application of fiduciary status under circumstances in which both parties should reasonably understand that the retirement investor would rely on the recommendation for investment decisions.[196]

sponsor to be a fee or other compensation in connection with or as a result of the educational services and materials that they provide to plan participants and beneficiaries. Further, the final rule does not alter the principles articulated in ERISA Interpretive Bulletin 75–8, D–2 (29 CFR 2509.75–8) (IB 75–8). IB 75–8 provides that persons who perform purely administrative functions for an employee benefit plan, within a framework of policies, interpretations, rules, practices and procedures made by other persons, but who have no power to make decisions as to plan policy, interpretations, practices or procedures, are not fiduciaries with respect to the plan by virtue of those purely ministerial functions.

[196] One commenter asked the Department to clarify that communications to a ''class of investors'' in the private equity context would not be considered individualized. As with the other scenarios posed by commenters, the Department will apply the final rule based on all facts and circumstances.

The final rule also changed the language ''may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest'' to ''may be relied upon by the retirement investor as intended to advance the retirement investor's best interest'' in response to a comment that suggested that the proposed language might cause confusion as to how the rule would apply in the event of a recommendation that is not in retirement investor's best interest. In the context of the final rule, ''best interest'' is not meant to refer back to the elements of the precise regulatory or statutory definitions of prudence or loyalty, but rather to refer more colloquially to circumstances in which a reasonable investor would believe the advice provider is looking out for them and working to promote their interests.

The Department also notes that the 1975 regulation's language in this respect requires a ''mutual agreement, arrangement *or understanding* ''regarding the retirement investor's reliance on the recommendation. This final rule also will apply in circumstances in which the parties each would reasonably understand that the retirement investor may rely on the recommendation as intended to advance their best interest. The Department continues to believe this is an improvement over the ''primary'' basis requirement in the 1975 regulation, as that requirement, which is not found in the text of the statute, is difficult to apply, unclear in its meaning, and ill-suited to determining whether the advisory relationship is one of trust and confidence. Similarly, the Department does not think that the lack of the ''regular basis'' requirement as expressed in the 1975 regulation means that a relationship of trust and confidence does not exist, as discussed above.

Finally, while other regulators' standards may result in firms and financial professionals being more or less likely to occupy a position of trust and confidence, the final rule's focus is on the nature of the relationship between the advice provider and the advice recipient, not on the specific status assigned to the advice provider under other regulatory regimes. The final rule is neither intended to pick up all interactions between financial professionals and retirement investors, nor to impose fiduciary status based on considerations other than the nature of the relationship as defined in the rule's specific provisions. Paragraph (c)(1)(i) will base fiduciary status on evaluation of the three objective components, as well as the other parts of the final rule.

Use of Titles

In the proposal, the Department said it intended to examine the ways in which investment advice providers market themselves and describe their services in deciding whether the context in proposed paragraph (c)(1)(ii) was satisfied.[197] The preamble noted that stakeholders had previously expressed concern that investment advice providers that adopt titles such as ''financial consultant,'' ''financial planner,'' and ''wealth manager,'' are holding themselves out as acting in positions of trust and confidence, even while simultaneously disclaiming status as an ERISA fiduciary in the fine print or otherwise.[198]

The Department expressed the view that an investment advice provider's use of such titles would routinely involve the provider holding themselves out as making investment recommendations that will be based on the particular needs or individual circumstances of the retirement investor and may be relied upon as a basis for investment decisions that are in the retirement investor's best interest. The Department invited comments on the extent to which particular titles are commonly perceived to convey that the financial professional is providing individualized recommendations that may be relied upon as a basis for investment decisions in a retirement investor's best interest (and if not, why such titles are used). The Department also requested comment on whether other types of conduct, communication, representation, and terms of engagement of investment advice providers should merit similar treatment.

Some commenters who addressed this issue agreed that when a financial professional uses titles such as financial consultant, financial planner, and wealth manager, they give an impression of financial expertise that has an impact on investors and creates a sense that the retirement investor may place their trust and confidence in the professional. One commenter said that in some cases, including in insurance markets, financial professionals characterize themselves as ''trusted advisors.'' In addition, the commenter said, they commonly describe their services as ''investment advice'' or ''retirement planning'' and market those services as designed to serve investors' best interest. These commenters said the Department's proposed approach to titles and marketing was appropriate, although a few commenters said the Department should provide guidance in the final rule to clarify when titles, credentials, and marketing would satisfy the provisions of the rule. Other commenters said that the use of titles should not be determinative or create a *per se* rule regarding ERISA fiduciary status but rather that status should be based on the facts and circumstances of the parties' relationship.

For purposes of evaluating paragraph (c)(1)(i) in the final rule, the Department intends that the use of titles, credentials, and marketing slogans will be a relevant consideration but will not generally be determinative. A person holding themselves out, for example as an adviser, would contribute to a reasonable investor's belief that they are receiving professional or expert advisory services and that the person's recommendations reflect the application of professional or expert judgment to the retirement investor's particular needs or individual circumstances, and may be relied upon by the retirement investor as intended to advance the retirement investor's best interest.

Adopted Paragraph (c)(1)(ii)—ERISA Title I or Title II Fiduciary Acknowledgment

Under paragraph (c)(1)(ii), a person making a recommendation is a fiduciary if they ''represent[] or acknowledge[] that they are acting as a fiduciary under Title I of ERISA, Title II of ERISA, or both, with respect to the recommendation.'' This paragraph identifies a specific factual scenario—the advice provider's acknowledgment of ERISA Title I or Title II fiduciary status—as one in which retirement investors can always reasonably place their trust and confidence in the advice provider as acting to advance the retirement investor's best interest.

As adopted, this provision of the final rule will focus on the substance of the acknowledgment, even if the exact words vary from the regulatory text; and thus, the provision will be satisfied if, for example, the acknowledgment spells out ERISA (*i.e.,* references ''the Employee Retirement Income Security Act''), or if the acknowledgment references the Internal Revenue Code rather than Title II of ERISA. The Department believes that status as an ERISA investment advice fiduciary should apply because a retirement investor who is told by a person that the person will be acting as an ERISA fiduciary reasonably and appropriately views the advice provider as occupying a position of trust and confidence.

[197] Proposed Retirement Security Rule, 88 FR 75890, 75902–3 (Nov. 3, 2023).

[198] *Id.* at 75903 (citing the preamble to Prohibited Transaction Exemption 2020–02, Improving Investment Advice for Workers Retirees, 85 FR 82798, 82803 (Dec. 18, 2020)).

The Department noted in the proposal that this provision would ensure that parties making a fiduciary representation or acknowledgment cannot subsequently deny their fiduciary status if a dispute arises, but rather must honor their words.[199] The proposal also noted that in the retirement context, the Department has stressed the importance of clarity regarding the nature of an advice relationship and has encouraged retirement investors to ask advice providers about their status as an ERISA fiduciary with respect to retirement accounts and seek a written statement of the advice provider's fiduciary status.[200] Several commenters expressed support for this provision for the reasons stated by the Department in the proposal.

Some commenters said that the Department should consider all the facts and circumstances surrounding the parties' relationship rather than a single acknowledgment, and that they, therefore, did not support including this provision in the final rule. The Department disagrees. To the extent that a person has specifically advised a retirement investor that their recommendation is made in their capacity as a fiduciary under ERISA Title I or Title II or both, they have necessarily assumed a position of trust and confidence with respect to the investor. Therefore, the Department has adopted this requirement in the final rule.

In the final rule, the Department made some changes to the language of the proposal, which read, ''[t]he person making the recommendation represents or acknowledges that they are acting as a fiduciary when making investment recommendations.'' As adopted, paragraph (c)(1)(ii) applies when an advice provider acknowledges their status as a fiduciary under *Title I of ERISA, Title II of ERISA, or both.* This change from the proposal responds to comments that said that acknowledging fiduciary status under Federal securities laws or State laws may be more remotely connected to the retirement investor and should not have the same effect as an ERISA Title I or Title II fiduciary acknowledgment. The Department concurs with this comment and has made the suggested change. Consequently, it is clear that this paragraph will not be satisfied by a person's marketing statements offering to be a ''trusted adviser'' or some term other than a ''fiduciary'' under Title I or Title II of ERISA, as one commenter suggested might be the case, although that type of representation will be relevant under paragraph (c)(1)(i).

Further, some commenters said the proposed language ''when making investment recommendations'' was too open-ended and should focus on the particular recommendation at issue. Otherwise, the commenters said, once a fiduciary acknowledgment had been made, it would appear to apply fiduciary status for every future interaction regardless of the circumstances of that interaction. Additionally, commenters said that if one financial professional acknowledged fiduciary status, this would apply to all financial professionals employed by the financial institution. The Department understands these commenters' concerns and accordingly revised the final rule so that it applies fiduciary status if the person acknowledges ERISA Title I or Title II fiduciary status with respect to *the recommendation.*

Some commenters requested that the Department ensure that for each provision in paragraph (c)(1), an individualized recommendation must be made. In the Department's proposal, only one of the proposed provisions (proposed paragraph (c)(1)(ii)) had included a requirement that the recommendation must be provided ''under circumstances indicating that it is based on the particular needs or individual circumstances of the retirement investor.'' Commenters expressed concern that this could result in fiduciary status being assigned based on communications that were made broadly to many investors or in marketing materials. As the Department revised the language of paragraph (c)(1)(ii) to be focused on a particular recommendation, the Department believes the commenters' concerns are addressed and has therefore not also revised the language to specify that the recommendation must be individualized.

One commenter suggested that the Department should limit this provision to a written representation. The Department has not adopted that requirement. A written representation will be the clearest way to demonstrate that this context has been satisfied, but the Department does not believe that it is appropriate to rule out oral communications in which an individual committed to fiduciary status. Whether the advice provider makes the acknowledgment in writing or orally, the significance is the same. In both circumstances, the provider is holding themselves out as an ERISA Title I or Title II fiduciary and should be held to that status.

Adopted Paragraph (c)(1)(iii)—Sales Pitches and Investment Education

The final rule includes a new paragraph (c)(1)(iii) that provides confirmation that sales pitches and investment education can occur without ERISA fiduciary status attaching. The paragraph generally provides that a person does not provide investment advice within the meaning of the final rule if they make a recommendation but neither paragraph (c)(1)(i) nor (c)(1)(ii) is satisfied, and further that the provision of investment information or education, without a recommendation, is not advice within the meaning of the final rule.

This provision was added to the final rule in response to commenters who said that the Department's proposal would apply too broadly and would eliminate the ability of salespeople to avoid fiduciary status with respect to mere sales pitches. Paragraph (c)(1)(iii) of the final rule includes a specific example regarding salespersons, which confirms that is not the case so long as the salesperson does not acknowledge fiduciary status under Title I or Title II of ERISA, and so long as the salesperson does not hold themselves out as making an individualized recommendation intended to advance the best interest of the customer based on the person's professional or expert review of the investor's particular needs or circumstances.

When, however, the person making the recommendation meets the specific elements of paragraphs (c)(1)(i) or (ii), they are not merely making a sales pitch. They are holding themselves out as providing an important advisory service, either by expressly acknowledging their fiduciary status under ERISA or by indicating that the recommendation is based on review of the retirement investor's particular needs or individual circumstances, reflects the application of professional or expert judgment to the retirement investor's particular needs or individual circumstances, and may be relied upon by the retirement investor as intended to advance the retirement investor's best interest. In these circumstances, they are offering far more than a mere sales pitch. Instead, they have assumed a position of trust and confidence with

[199] *Id.*

[200] *Id.* noting that Department of Labor FAQs, *Choosing the Right Person to Give You Investment Advice: Information for Investors in Retirement Plans and Individual Retirement Accounts* state ''A written statement helps ensure that the fiduciary nature of the relationship is clear to both you and the investment advice provider at the time of the transaction, and limits the possibility of miscommunication,'' available at *https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/choosing-the-right-person-to-give-you-investment-advice.*

respect to the investor, and provided a valuable service to the investor which the retirement investor can reasonably rely upon as intended to advance their interests. In such circumstances, it denigrates the work of the advice provider and the reasonable expectations of the investor to characterize the recommendation as a mere sales pitch.

Nothing in the final rule, however, requires mere sales pitches that fall short of the definition to be treated as fiduciary investment advice. Thus, for example, absent additional facts, the following scenario described in the *Chamber* opinion would not be sufficient to establish ERISA fiduciary status under the final rule: ''You'll love the return on X stock in your retirement plan, let me tell you about it,'' even if, as the opinion hypothesizes, the advice recipient buys the stock based solely on this communication.[201] Certainly, the salesperson touts the stock, but the scenario falls short of suggesting that the sales pitch was individualized, the salesperson considered the investor's particular circumstances, applied professional judgment to the investor's particular needs and circumstances, or was providing a recommendation intended to advance the best interest of the investor. Under the final rule, a mere sales pitch of this sort, without more, does not amount to fiduciary investment advice for purposes of ERISA.

Paragraph (c)(1)(iii) also makes clear that the mere provision of investment information or education, without an investment recommendation, is not advice within the meaning of the final rule. Investment education is discussed in greater detail in Section E.3. of this preamble.

Proposed Paragraph (c)(1)(iv)—Not Adopted

In the final rule, the Department did not adopt proposed paragraph (c)(1)(iv) which had provided, ''for purposes of this paragraph, when advice is directed to a plan or IRA fiduciary, the relevant retirement investor is both the plan or IRA and the fiduciary.'' One commenter said the meaning of this provision was unclear. Another commenter said, for purposes of analyzing proposed paragraph (c)(1)(ii), it was unclear how or why it would be required to evaluate the ''individual circumstances'' of a financial professional acting as a plan fiduciary.

In the final rule, the Department added a new defined term of a ''retirement investor'' in paragraph (f)(11) that means a plan, plan participant or beneficiary, IRA, IRA owner or beneficiary, plan fiduciary within the meaning of ERISA section (3)(21)(A)(i) or (iii) and Code section 4975(e)(3)(A) or (C) with respect to the plan or IRA fiduciary within the meaning of Code section 4975(e)(3)(A) or (C) with respect to the IRA. The definition of a retirement investor is discussed in Section D.4. of this preamble. In that discussion, the Department notes that under the final rule, for purposes of paragraph (c)(1)(i), when advice is rendered to a plan or IRA fiduciary within the meaning of ERISA section 3(21)(A)(i) or (iii) or Code section 4975(e)(3)(A) or (C), the relevant ''particular needs or individual circumstances'' are those of the plan or IRA, and the determination of whether the recommendation may be relied on by the ''retirement investor'' as intended to advance the ''retirement investor's best interest'', focuses on the plan or IRA.

Adopted Paragraph (c)(1)(iv)—Disclaimers

Paragraph (c)(1)(iv) in the final rule provides that ''[w]ritten statements by a person disclaiming status as a fiduciary under the ERISA Title I or Title II, or this final rule, or disclaiming the conditions set forth in paragraph (c)(1)(i) of this final rule, will not control to the extent they are inconsistent with the person's oral or other written communications, marketing materials, applicable State or Federal law, or other interactions with the retirement investor.''

This paragraph was proposed as paragraph (c)(1)(v) but was redesignated paragraph (c)(1)(iv) in the final rule. The Department's intent in including this paragraph is to permit parties to define the nature of their relationship, but also to ensure that to be given weight under the final rule, any disclaimer is consistent with oral or other written communications or actions, marketing material, State and Federal law, and other interactions based on all relevant facts and circumstances. Firms and financial professionals cannot readily evade fiduciary status through disclaimers that are at odds with their other communications with the retirement investor. Thus, a written disclaimer is insufficient to defeat fiduciary status if the advice provider makes professional investment recommendations to investors on a regular basis as part of their business and the recommendation is made under circumstances that would indicate to a reasonable investor in like circumstances that the recommendation is based on review of the retirement investor's particular needs or individual circumstances, reflects the application of professional or expert judgment to the retirement investor's particular needs or individual circumstances, and may be relied upon by the retirement investor as intended to advance the retirement investor's best interest. For example, a boilerplate disclaimer of fiduciary status is insufficient to defeat fiduciary status under the final rule when the rest of the advice provider's communications are calculated to reassure the investor that, in fact, the advice is precisely the sort of trustworthy advice that meets the regulatory standard.

The disclaimer provision extends not just to broad disclaimers of ERISA fiduciary status, but also to disclaimers of *the conditions set forth in paragraph (c)(1)(i) of this final rule.* Thus, any statement disclaiming that a recommendation is based on review of the retirement investor's particular needs or individual circumstances, that a recommendation reflects the application of professional or expert judgment to the retirement investor's particular needs or individual circumstances, or that a recommendation is intended to advance the retirement investor's best interest, would not control to the extent it is inconsistent with other oral or written communications, marketing materials, other interactions with the retirement investor, or with applicable State or Federal law. For example, depending on the facts and circumstances, such disclaimers from a broker-dealer or an investment adviser under the Advisers Act making recommendations to and providing advice to retail customers would generally be ineffective to the extent the disclaimers are inconsistent with their obligations under the securities laws. These obligations, which are rooted in fiduciary principles,[202] include, but are not limited to the requirement under SEC Regulation Best Interest to ''exercise[ ] reasonable diligence, care, and skill to . . . [h]ave a reasonable basis to believe

[201] *Chamber,* 885 F.3d 360, 369 (5th Cir. 2018).

[202] *See* Regulation Best Interest release, 84 FR 33318, 33327 (July 12, 2019) (''key elements of the standard of conduct that applies to broker-dealers under Regulation Best Interest will be substantially similar to key elements of the standard of conduct that applies to investment advisers pursuant to their fiduciary duty under the Advisers Act.''); *see also* SEC Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Care Obligation (''Both [Regulation Best Interest] for broker-dealers and the [Advisers Act] fiduciary standard for investment advisers are drawn from key fiduciary principles that include an obligation to act in the retail investor's best interest and not to place their own interests ahead of the investor's interest.''), *https://www.sec.gov/tm/standards-conduct-broker-dealers-and-investment-advisers.*

that the recommendation is in the best interest of a particular retail customer based on that retail customer's investment profile and the potential risks, rewards, and costs associated with the recommendation and does not place the financial or other interest of the broker, dealer, or such natural person ahead of the interest of the retail customer; [203] the obligation under the Advisers Act to provide investment advice ''in the best interest of the client based on a reasonable understanding of the client's objectives; [204] and the requirement in SEC Form CRS to disclose to retail investors the required associated standard of conduct associated with their relationship and services.[205] Waiver of these obligations under Regulation Best Interest and the Advisers Act's is generally not permitted.[206]Likewise, a disclaimer of any of the conditions of paragraph (c)(1)(i) by an insurance agent would not govern to the extent such disclaimer would be inconsistent with State insurance law.

In other contexts, however, firms and financial professionals may rely on disclaimers to a greater degree but must exercise care to ensure that their actions and communications are consistent with their disclaimer of fiduciary responsibility. When a disclaimer is at odds with the investment advice provider's oral or other written communications, marketing material, State or Federal law, or other interactions, the disclaimer is insufficient to defeat the retirement investor's legitimate expectations.

Commenters who supported this provision in the proposal said it would appropriately close loopholes in the 1975 regulation that had allowed financial professionals to disclaim elements of the five-part test in fine print. According to these commenters, instead of allowing fine print disclosures to govern, this provision would result in the consideration of the nature of the parties' other interactions as well as the advice provider's use of titles, marketing materials, and description of services, and would better give effect to retirement investors' expectations.

One commenter said the final rule should not permit a disclaimer to have any effect if the person would have met the fiduciary definition in the absence of the disclaimer. The Department has not adopted this suggestion. To the extent a written disclaimer is otherwise permitted by Federal or State law and the firm and financial professional's communications and conduct are consistent with the disclaimer, it is relevant to determine whether a reasonable investor in like circumstances would have viewed the recommendation as trustworthy advice aimed at advancing the retirement investor's best interest based on their individual needs and circumstances.

Other commenters criticized the proposal's treatment of disclaimers and even suggested that the proposal effectively prohibited disclaimers. Commenters said the proposed provision on disclaimers—along with the contexts in proposed paragraphs (c)(1)(i), (ii), and (iii) which they described as ''status based''—left no viable way for a financial institution or financial professional to define their relationship with an investor even by clearly stating they are not acting as a fiduciary. One commenter said disclaimers should be permitted to manage the legal risk of ''inadvertent'' fiduciary status unintended by the parties. Some commenters focused on the relevance of disclaimers in communications between plan fiduciaries, such as in connection with a request for proposal to provide asset management services, and in communications between asset managers and financial services providers who are themselves plan and IRA fiduciaries. One commenter said the final rule should allow an ''ERISA disclaimer'' that would allow parties to operate under Regulation Best Interest or other securities law but would limit their services merely to investment education to avoid ERISA fiduciary status.

As discussed above, the Department has not prohibited disclaimers of fiduciary status. Under the final rule, weight will be given to a disclaimer to the extent the disclaimer is consistent with State and Federal law, but it is clear that disclaimers are not ''dispositive'' when at odds with State and Federal law, or other actions and communications. To the extent firms and financial professionals wish to avoid fiduciary status, they should take care to ensure that their disclaimers are consistent with their actions and communications with respect to the retirement investor as well as with State and Federal law. Disclaimers should not function as mere legal boilerplate intended to insulate advice providers from fiduciary status and liability, while the remainder of the provider's actions, communications, and marketing materials are designed to reassure the investor that, disclaimer notwithstanding, they are providing the sort of professional advice that falls within the fiduciary definition and can be relied upon with trust and confidence.

The Department believes that concerns about ''status based'' provisions and ''inadvertent'' fiduciary status have been appropriately addressed by the text of the final rule, which provides an objective test based on reasonable investor understandings. As noted above, firms and financial professionals can best ensure that there are no misunderstandings as to fiduciary status by ensuring that they are clear and consistent in their communications with their client. Under the final rule's objective standards, fiduciary status does not turn on the retirement investor's subjective state of mind, but rather on how a reasonable investor in like circumstances would have viewed the relationship and recommendation, including whether the advice provider has expressly acknowledged ERISA fiduciary status. In this manner, the final rule ensures that neither the advice provider's, nor the retirement investor's, reasonable expectations will be dishonored. It is within the advice provider's control to manage how it interacts with and holds itself out to the investor, within the limits of other State and Federal laws.

A commenter additionally requested confirmation that a financial institution may agree with a customer expressly, clearly, and in writing that it is only providing brokerage trade execution services (*i.e.,* acting as an order taker) and such agreement may govern to avoid ERISA fiduciary status, so long as the disclaimer is consistent with the person's oral or other written communications, marketing materials, applicable State or Federal law, or other interactions with the retirement investor. The Department confirms and notes that this is the case even if other assets of the retirement investor are managed on a discretionary basis by the financial institution or an affiliate. Moreover, as discussed above, the new paragraph (c)(1)(iii) confirms that sales recommendations that do not meet paragraph (c)(1)(i) or (ii) will not give rise to fiduciary status.

[203] 17 CFR 240.15l–1(a)(2)(ii).

[204] SEC Investment Adviser Interpretation, 84 FR 33669, 33673 (July 12, 2019).

[205] Form CRS Relationship Summary; Amendments to Form ADV, 84 FR 33492 (July 12, 2019).

[206] Regulation Best Interest release, 84 FR 33318, 33327,33330 (July 12, 2019) (noting, among other things, that a ''broker-dealer will not be able to waive compliance with Regulation Best Interest, nor can a retail customer agree to waive her protections under Regulation Best Interest''); SEC Investment Adviser Interpretation, 84 FR 33669, 33672 (July 12, 2019).

The Department believes this provision on disclaimers should also address many commenters' concerns about communications to plan and IRA fiduciaries who are retirement investors under the final rule. Express disclaimers in the context of a request for proposal for asset management services or similar process would be permitted under this provision and would govern, provided the disclaimer is consistent with the other interactions and circumstances set forth in paragraph (c)(1)(iv). Additional discussion of requests for proposals and other specific circumstances is in Section E of this preamble. Also, as discussed in Section D.4. of this preamble, the Department has revised the definition of a retirement investor to make clear that financial services providers serving as plan and IRA investment advice fiduciaries are not captured within that definition.

The Department does not agree, however, that there should be an ''ERISA disclaimer'' under which parties that would otherwise satisfy all of the provisions in the final rule could nevertheless disclaim ERISA fiduciary status and only comply with securities law conduct standards. As Congress enacted ERISA against the backdrop of securities laws with the aim of imposing especially high standards in the context of retirement plans, the Department believes a flat disclaimer to avoid ERISA fiduciary status without limiting conduct accordingly is inconsistent with congressional intent and ERISA's purposes.[207] The final rule defines those circumstances in which a reasonable investor is entitled to rely upon a recommendation as a fiduciary recommendation made from a position of trust and confidence. In such circumstances, the advice provider cannot upend legitimate investor expectations and avoid fiduciary accountability merely by stating that they disclaim responsibility under ERISA, irrespective of the investor's reasonable understandings.

3. Fee or Compensation, Direct or Indirect (Paragraph (e))

Paragraph (e) in the final rule defines ''for a fee or compensation, direct or indirect'' for purposes of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) as follows:

> For purposes of section 3(21)(A)(ii) of ERISA and section 4975(e)(3)(B) of the Code, a person provides investment advice ''for a fee or other compensation, direct or indirect,'' if the person (or any affiliate) receives any explicit fee or compensation, from any source, for the investment advice or the person (or any affiliate) receives any other fee or other compensation, from any source, in connection with or as a result of the recommended purchase, sale, or holding of a security or other investment property or the provision of investment advice, including, though not limited to, commissions, loads, finder's fees, revenue sharing payments, shareholder servicing fees, marketing or distribution fees, mark ups or mark downs, underwriting compensation, payments to brokerage firms in return for shelf space, recruitment compensation paid in connection with transfers of accounts to a registered representative's new broker-dealer firm, expense reimbursements, gifts and gratuities, or other non-cash compensation. A fee or compensation is paid ''in connection with or as a result of'' such transaction or service if the fee or compensation would not have been paid but for the recommended transaction or the provision of advice, including if eligibility for or the amount of the fee or compensation is based in whole or in part on the recommended transaction or the provision of investment advice.

In the proposal, the Department explained that the proposed definition was consistent with the preamble of the 1975 regulation, which stated that ''a fee or other compensation, direct or indirect'' includes all fees or other compensation ''incident to the transaction in which the investment advice to the plan has been rendered or will be rendered,'' including, for example, brokerage commissions, mutual fund sales commissions, and insurance sales commissions.[208] The Department's proposal cited several other instances where the Department confirmed its longstanding view in this respect.[209]

Like the proposal, the definition in the final rule makes clear that there must be a link between the transaction-based compensation and the financial professional's recommendation. Thus, the compensation is treated as paid ''in connection with or as a result of'' the provision of advice only if it would not have been paid but for the recommended transaction or the provision of advice, or if the investment advice provider's eligibility for the compensation (or its amount) is based in whole or part on the recommended transaction or the provision of advice.

This definition in the final rule would also be satisfied by any fee that is paid explicitly for the provision of investment advice. This would include, for example, a fee paid to an investment adviser as defined in the Advisers Act based on the retirement investor's assets under management.

A fee or other compensation received in connection with an investment transaction also would fall within the definition of ''for a fee or other compensation, direct or indirect.'' This treatment of investment compensation is in accord with the actions of other State and Federal regulators, and with the modern marketplace for investment advice in which brokers and insurance agents can do far more than merely execute transactions, close sales, or make sales pitches. Financial professionals are commonly compensated for their advice through the payment of transaction-based fees, such as commissions, which are contingent on the investor's decision to engage in the recommended transaction. In the circumstances described in the fiduciary definition, the advice provider has either specifically acknowledged fiduciary status under Title I or Title II ERISA or both, or has otherwise offered individualized advice reflecting the application of expert or professional judgment to the retirement investor's financial circumstances and needs that may be relied upon to advance the investor's best interest. In these circumstances, the advice provider's compensation is not simply a charge for executing a transaction, but rather compensates the provider for the provision of a valuable fiduciary service.

The SEC acknowledged this reality in the Regulation Best Interest release, noting that ''there is broad acknowledgment of the benefits of, and support for, the continuing existence of the broker-dealer business model, including a commission or other transaction-based compensation structure, as an option for retail customers seeking investment

[207] *See* statement by the Chair of the Senate Committee on Labor and Public Welfare upon introduction of the Conference Report on ERISA: ''Despite the value of full reporting and disclosure, it has become clear that such provisions are not in themselves sufficient to safeguard employee benefit plan assets from such abuses as self-dealing, imprudent investing, and misappropriation of plan funds. Neither existing State nor Federal law has been effective in preventing or correcting many of these abuses. Accordingly, the legislation imposes strict fiduciary obligations on those who have discretion or responsibility respecting the management, handling, or disposition of pension or welfare plan assets. The objectives of these provisions are to . . . establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets .....'' Statement by Hon. Harrison A. Williams, Jr., Chairman, Senate Committee on Labor and Public Welfare, introducing the Conference Report on HR 2, 120 Congressional Record S 15737 at 11 (Aug. 22, 1974).

[208] Proposed Retirement Security Rule, 88 FR 75890, 75909 (Nov. 3, 2023) (citing 40 FR 50842 (Oct. 31, 1975); 41 FR 56760, 56762 (Dec. 29, 1976)).

[209] *Id.* (discussing the preamble of proposed PTE 77–9, 41 FR 56760, 56762 (Dec. 29, 1976) and U.S. Department of Labor Adv. Op. 83–60A (Nov. 21, 1983), available at *https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/1983-60a*).

recommendations.'' [210] The SEC discussion further contemplated that commissions compensate broker-dealers for their recommendations and may be the preferred method of investment advice compensation with respect to certain transactions; as an example, the SEC stated that retail customers seeking a long-term investment may determine that ''paying a one-time commission to a broker-dealer recommending such an investment is more cost effective than paying an ongoing advisory fee to an investment adviser merely to hold the same investment.'' [211] The SEC also noted that transaction-based compensation is not limited to commissions and includes markups or markdowns, 12b–1 fees and revenue sharing.[212] The Department agrees that there are benefits to ensuring a wide range of compensation structures remain available to retirement investors.

Likewise, the NAIC Model Regulation effectively acknowledged that insurance agents make recommendations and might be compensated for their recommendations through commissions. The NAIC Model Regulation defines a recommendation as ''advice provided by a producer to an individual consumer that was intended to result or does result in a purchase, an exchange or a replacement of an annuity in accordance with that advice.'' [213] The definition of ''cash compensation'' in the NAIC Model Regulation is: ''any discount, concession, fee, service fee, commission, sales charge, loan, override, or cash benefit received by a producer in connection with the recommendation or sale of an annuity from an insurer, intermediary, or directly from the consumer.'' [214]

When a financial professional meets the regulatory fiduciary definition, the services rendered by the professional include individualized advice, and the compensation, including commission payments, is not merely for execution of a sale, but for the professional advice provided to the investor, as uniformly recognized by the Department's previous guidance and by other State and Federal regulators.[215]

The statutory exemption for investment advice to participants and beneficiaries of individual account plans set forth in ERISA section 408(b)(14) indicates that Congress similarly recognized that compensation for advice often comes in the form of commissions and transaction-based compensation.[216] Accordingly, the exemption applies to transactions ''in connection with the provision of investment advice described in section 3(21)(A)(ii)'' including ''the direct or indirect receipt of fees or other compensation by the fiduciary adviser or an affiliate thereof . . . in connection with the provision of the advice *or in connection with an acquisition, holding, or sale of a security or other property available as an investment under the plan pursuant to the investment advice*.'' [217]

As has been true since the Department first proposed regulations under this section in 1975 and as discussed above, the Department understands the phrase ''for a fee or other compensation, direct or indirect'' to encompass a broad array of compensation incident to the transaction.[218]

Several commenters indicated the definition of ''for a fee or other compensation, direct or indirect'' in the proposal was too broad in extending to commissions outside the context of the 1975 regulation's five part-test. One said the Fifth Circuit made clear that commissions would fall within this language only if all parts of the of the five-part test are satisfied including a mutual understanding that the commission would be intended to pay for advice. Concern was expressed that the proposed rule would extend fiduciary status to an investment manager based on its provision of information about its services in a hiring context, if it ultimately was hired and paid, and to a platform provider that is hired to manage assets based on the provision of a narrowed-down list of investment options for the plan. In this connection, one commenter asked the Department to state that the definition does not extend to compensation that ''has a connection with 'incidental''' recommendations of financial products or services.

The Department does not believe that the definition of ''for a fee or other compensation, direct or indirect,'' must be narrowed in the context of the final rule. The Department believes the final rule is appropriately constructed to define when retirement investors can reasonably place their trust and confidence in an advice provider and their recommendations, and compensation received ''in connection with or as a result of'' recommended transactions or advice services from such financial professionals is appropriate to establish ERISA fiduciary status. The Department has consistently interpreted the statutory language ''for a fee or other compensation, direct or indirect'' to include transaction-based compensation since the adoption of the 1975 regulation, and the Department believes this approach is consistent with the recognition by the SEC that commissions may be paid, in part, for advice or recommendations. The Department has not adopted the suggestion of the commenter that sought an exception for compensation that has a connection with ''incidental'' recommendations of financial products or services. The commenter did not define ''incidental'' or explain why that restriction would be appropriate under the statutory definition, which provides that a person is a fiduciary ''to the extent'' the person provides compensated advice, without any such carve-out. The Department believes that concerns about marketing advice services and products are appropriately addressed in other ways in the final rule. Section E of this preamble discusses application of the final rule in specific circumstances involving ''hire me'' communications, requests for proposals and platform providers, and others.

Another commenter made a related comment that Federal securities laws recognize that financial professionals receive ''no compensation'' for the provision of advice that is incidental to brokerage services, and that absent specific language to the contrary, Congress must have intended the same in ERISA. The Department has concluded this assertion does not hold up under examination. While the Advisers Act includes an exception from the definition of an investment adviser for broker-dealers ''whose performance of such advisory services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation'' for those services, [219] this does not reflect

[210] Regulation Best Interest release, 84 FR 33318, 33319 (July 12, 2019).

[211] *Id.*

[212] *Id.* at 33402.

[213] NAIC Model Regulation at section 5.M.

[214] *Id.* at section 5.B.

[215] *E.g.,* U.S. Department of Labor, Adv. Op. 83–60A (Nov. 21, 1983), available at *https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/1983-60a.*

[216] 29 U.S.C. 1108(b)(14). *See* Code section 4975(d)(17) (parallel statutory exemption).

[217] 29 U.S.C. 1108(b)(14) (emphasis added).

[218] *See* Findings, Conclusions, and Recommendations of the United States Magistrate Judge, *Federation of Americans for Consumer Choice* v. *U.S. Dep't of Labor,* No. 3:22–CV–00243–K–BT, 2023 WL 5682411, at *21 (N.D. Tex. June 30, 2023) (''The expansive choice of investment advice 'for other compensation' indicates an intent to cover any transaction where the financial professional may receive conflicted income if they are acting as a trusted adviser.'')

[219] *See, e.g.,* section 202(a)(11)(C) of the Advisers Act; Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer

a broad view that broker-dealers are uncompensated for their advice or recommendations. Rather, it acknowledges that broker-dealers can provide a form of advice that is incidental to their primary business and that they can get compensated for such advice. They do not go uncompensated for those services, but rather are commonly compensated on a transaction basis for the work required to make a best interest recommendation. The SEC acknowledged this reality in the Regulation Best Interest release.[220] The quotes set forth earlier in this preamble Section D.3 from the NAIC Model Regulation definition of ''cash compensation'' reflect similar views in the insurance context.[221]

In response to another commenter who requested clarification of the analysis that would apply to non-transaction-based compensation models, such as salary or hourly paid positions, the Department responds that the definition of ''for a fee or other compensation, direct or indirect,'' includes any fee that is paid explicitly by any source for the provision of investment advice or any fee paid in connection with investment advice. This would include an assets under management fee, flat fee, or hourly fee paid in connection with advisory work. Other commenters asked the Department to confirm that a set salary or other fixed compensation paid to an individual who is providing information such as product information and operational or administrative information to participants does not constitute a fee or other compensation for rendering investment advice. The Department is unwilling to state that any particular compensation arrangement with an individual would categorically not constitute a ''fee or other compensation''; however, it is important to note that for fiduciary status to apply, all parts of the final rule must be satisfied, including the provision of a covered recommendation.

4. Retirement Investor Definition (Paragraph (f)(11))

Sophisticated Advice Recipients

Many commenters argued that the final rule should explicitly state in the regulatory text that recommendations to certain sophisticated advice recipients would not be considered ERISA fiduciary advice. Many commenters who suggested this type of limitation wanted it to apply to plan sponsors acting as plan fiduciaries and/or independent financial services providers who are themselves plan or IRA fiduciaries. These commenters said the Department should adopt a different approach in the institutional market than the retail market, where they said these plan fiduciaries are not expecting advice in their best interest and do not have a relationship of trust and confidence. The commenters said a specific limitation in the regulatory text for sophisticated advice recipients is needed to avoid impeding the exchange of important information such as market color and market availability and pricing between advice providers and plan fiduciaries. Some commenters pointed to Regulation Best Interest's limitation to recommendations to ''retail customers'' and other securities law provisions, such as for ''accredited investors'' as precedent for this approach.

Some commenters suggested the Department should include a limitation similar to the 2016 Final Rule's limitation for ''transactions with independent fiduciaries with financial expertise,'' while others said the Department should not take that approach again.[222] One commenter suggested including an assets-based test carving out plan sponsors with more than $100 million in assets, based on the commenter's analysis that there would be minimal benefit to plans and their participants from including these plan sponsors as retirement investors. Other commenters suggested securities-law based definitions such as ''accredited investors,'' ''qualified purchasers,'' or ''qualified institutional buyers.''

Some other commenters discussed the issue of sophisticated advice recipients in the context of ''wholesaling'' activity aimed at financial services providers such as broker-dealers, registered investment advisers, banks, insurance companies, and consultants, that are or might be serving in an ERISA Title I or Title II fiduciary capacity to plans or IRA investors. Commenters said asset managers should be free to engage in marketing efforts with these providers, sometimes described as intermediaries, to better inform the providers for purposes of their own fiduciary recommendations to plan and IRA clients. One scenario raised in a number of comments involves the provision of model portfolios. One commenter described a scenario involving model portfolios created by asset managers as a service to the financial services providers, such as broker-dealers, who then use those models in their direct interactions with investor clients. Commenters said that the proposal was not clear as to whether such interactions between wholesalers and advisers constituted fiduciary recommendations, and if they did, ERISA fiduciary status might attach broadly to asset managers providing these models based on the contexts in proposed paragraphs (c)(1)(i), (ii), and (iii).

In this regard, commenters said wholesaling interactions present clear examples where there is no relationship of trust and confidence involving a customer. They said the regulatory text of the final rule should reflect a limitation under which financial services providers receiving information in wholesaling interactions would not be considered ''retirement investors,'' with one commenter suggesting that the Department should eliminate the reference to ''plan and IRA fiduciaries'' altogether in the definition of a retirement investor and leave the reference to ''plans'' and ''IRAs'' as advice recipients. The commenter said this would avoid treating non-fiduciary interactions between financial professionals as fiduciary investment advice. Another commenter suggested that the definition of a retirement investor should be limited to plan fiduciaries that are named fiduciaries and IRA fiduciaries that are in a fiduciary relationship to a particular IRA or IRA owner or beneficiary and

Exclusion From the Definition of Investment Adviser, 84 FR 33681, 33682 (July 12, 2019).

[220] Regulation Best Interest release, 84 FR 33318, 33319 (July 12, 2019) (''there is broad acknowledgment of the benefits of, and support for, the continuing existence of the broker-dealer business model, including a commission or other transaction-based compensation structure, as an option for retail customers seeking investment recommendations.'')

[221] The commenter cited the *Chamber* opinion, 885 F.3d at 372–373, as support for the assertion that financial professionals receive ''no compensation'' for the provision of advice that is incidental to brokerage services. On page 373, the *Chamber* opinion stated, ''[s]tockbrokers and insurance agents are compensated only for completed sales ('directly or indirectly'), not on the basis of their pitch to the client. Investment advisers, on the other hand, are paid fees because they 'render advice.'" The Department does not read this passage as foreclosing the view that, in a completed investment transaction that was the subject of a fiduciary relationship of trust and confidence, a portion of the commission would be considered compensation for the recommendation. This is consistent with the position taken by the Department in Advisory Opinion 83–60A, which was discussed favorably by the court in *Chamber*. In that opinion, the Department said ''if, under the particular facts and circumstances, the services provided by the broker-dealer include the provision of 'investment advice', as defined in regulation 2510.3–21(c), it may be reasonably expected that, even in the absence of a distinct and identifiable fee for such advice, a portion of the commissions paid to the broker-dealer would represent compensation for the provision of such investment advice.'' Available at *https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/advisory-opinions/1983-60a.pdf.*

[222] See paragraph (c)(1) of the 2016 Final Rule, 81 FR 20946, 20999 (Apr. 8, 2016).

who are receiving the recommendation on behalf of a specific IRA or IRA owner or beneficiary.

A commenter discussed their views on the potential impact of the proposal on the private equity market. They described communications between fund sponsors and plan fiduciaries as ranging from sales communications to information about fund characteristics and responding to questions to aid in the due diligence process. Similar to other commenters expressing their desire for a sophisticated advice recipient carve-out, the commenter said it is widely understood that these communications are on an arm's length basis. Nevertheless, to avoid impacting ERISA plans' investment in private equity, the commenter suggested adding a provision to the regulatory text as follows:

Communications with sophisticated and independent parties. The provision of any advice, within the meaning of Section 3(21)(A)(ii) of the Act, by a person to a sophisticated and independent party in connection with an arm's length purchase, sale, loan, exchange or other transaction related to the investment of securities or other investment property, if the sophisticated and independent party has expressly acknowledged, in a clear and conspicuous manner, that such person is not acting as a ''fiduciary,'' within the meaning of Section 3(21)(A)(ii) of the Act or Section 4975(e)(3)(B) of the Code, to the sophisticated and independent party with respect to such transaction, and such person does not (i) receive a fee or other compensation directly from the sophisticated and independent party solely for the provision of such advice or (ii) expressly acknowledge or represent that it acts as a ''fiduciary,'' within the meaning Section 3(21)(A) of the Act or Section 4975(e)(3) of the Code, to such sophisticated and independent party with respect to the transaction.

A party is ''sophisticated'' if such person (or such person's representative) (i) is a ''bank,'' as defined in section 202 of the Investment Advisers Act of 1940 or similar institution that is regulated and supervised and subject to periodic examination by a State or Federal agency, (ii) is an insurance carrier which is qualified under the laws of more than one state to perform the services of managing, acquiring or disposing of assets of a plan, (iii) is an investment adviser registered under the Investment Advisers Act of 1940 or, if not registered as an investment adviser under the Investment Advisers Act by reason of paragraph (1) of section 203A of such Act, is registered as an investment adviser under the laws of the State (referred to in such paragraph (1)) in which it maintains its principal office and place of business, (iv) is a broker-dealer registered under the Securities Exchange Act of 1934, (v) has total assets or assets under management of at least $25 million, or (vi) meets the requirements of a ''qualified purchaser'' under the federal securities laws.

A party is ''independent'' of another person if the person were not, and were not affiliated with, the other person. For these purposes, an ''affiliate'' of a person is one who controls, is controlled by, or is under common control with, the other person.''

A communication is ''clear and conspicuous'' if it is reasonably understandable and noticeable to a typical sophisticated and independent party.

Many supporters of the Department's proposal, however, counseled against a limitation in the regulatory text regarding sophisticated advice recipients that are plan sponsors acting as plan fiduciaries. They said the various suggested carve-outs from the fiduciary definition do not reliably identify whether an advice recipient is in fact sophisticated, and they did not believe plan sponsors acting as plan fiduciaries would necessarily know that the fiduciary protections under Title I did not apply when they receive recommendations and advice. These commenters also said there is nothing in the text of ERISA that would indicate that Congress intended to deny protections to certain investors based on their presumed sophistication, and at least one commenter said that the use of wealth or income exemptions from public disclosure requirements in the securities context has led to harms to retail investors. Many of these commenters specifically supported extending ERISA's protections to plan sponsors and believed there would be significant benefits to plan participants and beneficiaries as a result. These commenters said that the fact that plan sponsors are neither protected under Regulation Best Interest nor under State laws adopting the NAIC Model Regulation weighs in favor of including them within the definition of a retirement investor.

In the final rule, the Department has determined not to include a provision that would generally exclude plan sponsors acting as fiduciaries from the definition of a retirement investor. The Department believes that rather than attempt to define financial sophistication through a particular asset test or other specific regulatory limitation as suggested by a few commenters, including the commenter advocating for a carve-out for ''communications with sophisticated and independent parties,'' it is preferable to retain the facts and circumstances test set forth in this rule for all recommendations. For example, when a financially sophisticated retirement investor engages in an arm's length transaction with a counterparty who makes an investment recommendation, absent an acknowledgment of fiduciary status under ERISA Title I or Title II, it is appropriate to consider whether a reasonable investor *in like circumstances* would rely on the recommendation as intended to advance the investor's best interest.

In many circumstances, plan fiduciaries with responsibility for plan investments may need professional advice to responsibly discharge their duties. For example, many fiduciaries of small plans do not have specialized investment expertise and are quite dependent on recommendations from financial professionals about the complexities of constructing a prudent 401(k) plan investment lineup. As noted above, in a comment on the proposal, Morningstar quantified the potential benefits from the proposal's coverage of recommendations to plan fiduciaries about the fund lineups in defined contribution plans as exceeding $55 billion in the first 10 years and $130 billion in the subsequent 10 years, in undiscounted and nominal dollars, due to reductions in costs associated with investing through their plans, noting that over 80 percent of these savings would be experienced by small-plan participants. Even plan fiduciaries responsible for large portfolios may require fiduciary advice to make decisions with respect to categories of investment or financial transactions for which they lack expertise. In these circumstances, the regulatory text enables the fiduciary with investment authority to obtain fiduciary advice when that is appropriate in accordance with the same objective test that applies to fiduciary advice generally. This approach will avoid an artificial limitation in the definition of a retirement investor that may not have bearing on the parties' relationships and could undermine application of the ERISA fiduciary protections under Title I to plan sponsors that many commenters supported. Moreover, as explained above, the Department believes this facts and circumstances approach based on the parties' relationship is fully consistent with the *Chamber* opinion's emphasis on relationships of trust and confidence, as opposed to an artificial carve-out from fiduciary status that does not reflect the parties' reasonable understandings.

In this regard, it is worth noting that the Department did not finalize proposed paragraph (c)(1)(i), which would have automatically treated recommendations from persons who had discretionary authority over the retirement investor's assets as fiduciary investment advice provided all the other parts of the definition were satisfied.

Many of the comments related to the proposed rule's overbreadth, especially in the institutional market, were focused on this provision, which the Department has deleted. As discussed in greater detail in Section E of this preamble, the Department has also made a number of other changes to the final rule that should alleviate concerns about the flow of information in the institutional marketplace.

In addition, the final rule does include a limitation in the regulatory text for recommendations to plan and IRA fiduciaries that are merely themselves investment advice fiduciaries. In such cases, the recipient of the communication does not have the authority or control necessary to invest the plans' assets, and the final rule does not treat the recommendation as fiduciary investment advice to the plan. Accordingly, a new paragraph (f)(11) is added in the final rule defining a ''retirement investor'' and it extends only to plan and IRA fiduciaries to the extent they are described in ERISA section 3(21)(A)(i) or (iii) or Code section 4975(e)(3)(A) or (C), which generally involve the exercise of authority or control over plan assets, or discretionary authority or discretionary control with respect to the plan's management, or the possession of discretionary authority or discretionary responsibility in the plan's administration. Any subsequent recommendation made by the investment advice fiduciary directly advising the plan or IRA, however, would itself be treated as fiduciary investment advice to the extent it met the terms of the final rule, including paragraph (c)(1).

In this regard, under the final rule, for purposes of paragraph (c)(1)(i), when advice is rendered to a plan or IRA fiduciary within the meaning of ERISA section 3(21)(A)(i) or (iii) or Code section 4975(e)(3)(A) or (C), the relevant ''particular needs or individual circumstances'' are those of the plan or IRA, and the determination of whether the recommendation may be relied on by the ''retirement investor'' as intended to advance the ''retirement investor's best interest'', focuses on the plan or IRA.

The Department disagrees with commenters' suggestion that the category of fiduciary retirement investors should be limited to the ''named fiduciary,'' inasmuch as it would exclude advice to many fiduciaries who have or exercise direct control over plan investments. The Department did not wholly eliminate the reference to plan or IRA fiduciaries leaving only the ''plan'' and the ''IRA'' as the retirement investor, as suggested by one commenter, out of concern that there would continue to be uncertainty as to whether recommendations received by a financial services provider that is a fiduciary would be considered advice to the plan or IRA.

Some commenters also presented an additional concern that a wholesaler would not be able to tell if a particular financial professional that they are interacting with might be a plan or IRA fiduciary, particularly if the wholesaler is presenting in a group setting such as an educational forum. To the extent that is the case, and the scenario is not addressed through the limited definition of a retirement investor discussed above, it would appear that any communication in this context would not be investment advice under the final rule as it would not be based on the individual needs or particular circumstances of any plan or IRA. Such communications, to the extent they are covered recommendations that are not accompanied by an acknowledgment of ERISA Title I or Title II fiduciary status with respect to the recommendation, would not meet paragraph (c)(1)(i) of the final rule. In the scenario in which a financial professional acts as both an investment advice fiduciary and a fiduciary with control over investment decisions, the limitation in the definition of a ''retirement investor'' would apply only to the extent of their role as an investment advice fiduciary. In their role as a fiduciary with control, communications to them would be analyzed under the provisions of the final rule discussed in this paragraph.

Several commenters also asked the Department to address the status of independent marketing organizations (IMOs), field marketing organizations (FMOs) and other insurance intermediaries, which commenters said play a significant role in the distribution, training, and sales support of producers and insurance carriers. Specifically, the commenter said these entities assist independent producers in training, compliance, marketing, product selection and many other roles. Based on the commenter's description of the interactions, the Department would determine the status of these entities under the final rule based on, among other things, determination of whether the communications involve ''recommendations'' and whether the insurance producers are considered ''retirement investors'' pursuant to this discussion.

Health and Welfare Plans and Health Savings Accounts

The proposal included, as retirement investors, employee benefit plans described in ERISA section 3(3) and Code section 4975(e)(1)(A), as well as IRAs, which were defined to include 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 (HSA). [223]

The proposal further stated:

> For purposes of the proposed rule, the term ''IRA'' is defined as any account or annuity described in Code section 4975(e)(1)(B)–(F), and includes individual retirement accounts, individual retirement annuities, health savings accounts, and certain other tax-advantaged trusts and plans. However, for purposes of any rollover of assets between a Title I Plan and an IRA described in this preamble, the term ''IRA'' includes only an account or annuity described in Code section 4975(e)(1)(B) or (C). Additionally, while the Department uses the term ''*retirement* investor'' throughout this document to describe advice recipients, that is not intended to suggest that the fiduciary definition would apply only with respect to employee pension benefit plans and IRAs that are retirement savings vehicles. As discussed herein, the rule would apply with respect to plans as defined in Title I and Title II of ERISA that make investments. In this regard, see also proposed paragraph (f)(11) that provides that the term ''investment property'' ''does not include health insurance policies, disability insurance policies, term life insurance policies, or other property to the extent the policies or property do not contain an investment component.'' [224]

Several commenters asked the Department to exclude HSAs from the final rule. These commenters described HSAs as individually-owned accounts established exclusively to fund health care expenses. They said the HSAs operate more like a deposit account than a retirement savings vehicle, with investments being merely an optional feature that is not commonly utilized. They said HSAs may accept rollovers from IRAs but not from workplace retirement plans, and the amounts they may accept are limited. Commenters expressed concern that routine provider communications regarding HSAs might become fiduciary investment advice under the rule, and they said that this would increase the cost of offering HSAs. Further, commenters said that HSAs are often held and administered by non-bank custodians or trustees, and

[223] Proposed paragraph (f)(6) (the term ''plan'') and (f)(3) (the term ''IRA'').

[224] Proposed Retirement Security Rule 88 FR 75890, 75891 n. 9 (Nov. 3, 2023).

these entities are not ''financial institutions'' eligible to rely on PTE 2020–02 for prohibited transaction exemptive relief.

To the extent the Department decided not to exclude HSAs as retirement investors under the final rule, commenters asked the Department to confirm that HSA providers would be considered the same as platform providers because HSA providers make available investment options that are acceptable to all of their HSA customers, including employers who may select service providers for their employees' HSAs. Commenters also asked the Department to include IRS-approved non-bank trustees and custodians as financial institutions in the final amendment to PTE 2020–02.

One commenter more broadly urged the Department to completely exclude health and welfare plans, policies, and benefits from the final rule. The commenter said these plans are complex and fundamentally different than retirement plans. The commenter expressed appreciation for the definition of ''investment property'' in the proposal but suggested there were additional questions related to that definition.[225]

The Department has not eliminated health and welfare plans and HSAs from the definition of a retirement investor in the final rule. The Department acknowledges commenters' views that there are significant differences in how these plans operate as compared to retirement savings vehicles, and that HSAs may not commonly involve investment activity at all. However, these plans are clearly covered by either Title I of ERISA or by the prohibited transaction provisions in Title II.

Based on commenters' descriptions of HSA operations, the Department agrees that HSA providers may fall within the analysis regarding platform providers, presented below in Section E.2 of the preamble, which confirms that providers who merely identify investment alternatives using objective third-party criteria (*e.g.,* expense ratios, fund size, or asset type specified by the plan fiduciary) to assist plan sponsors and plan fiduciaries in selecting and monitoring investment alternatives, without additional screening or recommendations based on the interests of the retirement investor, would not be considered under the final rule to be making a recommendation.

However, to the extent that a person makes a covered recommendation and satisfies the rest of the rule's requirements to any of these retirement investors, the Department does not see a reason to treat them differently or provide a lower level of protection for them than other plans covered by ERISA Title I or Title II. To address commenters' concerns about prohibited transaction relief, the Department has accepted the commenters' recommendation to allow IRS-approved non-bank trustees and custodians to rely on the prohibited transaction relief in PTE 2020–02 when they are serving in these capacities with respect to HSAs.

E. Application of the Final Rule to Specific Circumstances

The final rule generally retains the proposed approach of providing a general rule under which investment advice providers can determine their status through application of the facts and circumstances surrounding their interactions with retirement investors, as opposed to including provisions addressing specific circumstances. The use of carve-outs and special provisions in the 2016 Final Rule was criticized by the Fifth Circuit in *Chamber* as evidence of an overbroad rule.[226] Specifically, with respect to the 2016 Rulemaking, the Fifth Circuit's *Chamber* opinion had found that the rulemaking was overly broad and captured relationships that lacked the requisite hallmarks of a relationship of trust and confidence, such that fiduciary status under ERISA should not attach. The court further found that the exemptive relief and other carve-outs included in that rulemaking amounted to ''backdoor regulation'' of parties and transactions that the Department lacked authority to regulate.[227] As reiterated elsewhere in this final rule, the Department carefully considered the Fifth Circuit's emphasis on relationships of trust and confidence in developing this rule. To further distinguish the careful and judicious approach of this rulemaking (to extend fiduciary status to only relationships of trust and confidence) from the framework of the 2016 Rule, here the Department crafted a narrowed functional test that appropriately balances competing interests without the need for carve-outs.

Instead of proposing carve-out provisions in the regulatory text, the proposal's preamble included a discussion of the rule's intended application in certain common circumstances, specifically including circumstances involving sophisticated retirement investors, platform providers and pooled employer plans, swaps and security-based swaps, and valuation of securities and other investments.[228] The proposal sought comment on the discussion presented and whether the regulatory text should be adjusted to address any of the issues discussed.[229]

Commenters generally expressed appreciation for the Department's views presented in the proposal's preamble regarding the specific circumstances, however, many asked the Department to add provisions to the regulatory text to provide additional certainty regarding the Department's position. Some commenters said that without specific limitations in the regulatory text, the rule appeared overly broad and that without increased certainty as to how the rule would apply, providers may limit their services and beneficial information provided to retirement investors in a variety of settings. Commenters proposed specific carve-outs that they would like to see in the final rule to address specific circumstances, including the carve-outs that were included in the 2016 Final Rule. Some commenters also urged the Department to revise its position on some of the circumstances discussed in the proposal's preamble to broaden the circumstances in which ERISA fiduciary status would not apply.

Many commenters particularly highlighted interactions between parties in the institutional market and asserted that in these interactions it is clear that communications are sales activity and parties are interacting on an arm's-length basis. Commenters also described a broad range of circumstances and asked the Department to provide guidance as to how the rule would apply to the circumstances. Commenters also asked the Department to include specific language in the final rule addressing specific circumstances. The circumstances raised by commenters included those circumstances discussed in the proposal's preamble but also ranged to pension risk transfers; services provided by futures commission merchants; persons acting pursuant to CFTC and SEC safe harbors under 17 CFR 23.440 and 240.15Fh–5, respectively, related to swaps and security-based swaps; screening of retirement investors for access to exchange traded funds and futures; compensation arrangements applicable to less liquid, alternative investments; financial wellness programs;

[225] Comments on the definition of investment property are discussed in Section D.1 of this preamble.

[226] *Chamber,* 885 F3d. 360, 381 (5th Cir. 2018).

[227] *See id.* at 387–88 (citing *Hearth, Patio & Barbecue Ass'n* v. *U.S. Dep't of Energy,* 706 F.3d 499, 508–09 (D.C. Cir. 2013)).

[228] Proposed Retirement Security Rule 88 FR 75890, 75907–8 (Nov. 3, 2023).

[229] *Id.* at 75907.

discussions regarding foreign exchange transactions; services in connection with securities lending transactions; and financial professionals who solicit customers to join them when they move to a new firm, among others. One commenter posed a list of factual circumstances and asked the Department to confirm that they would not involve a covered recommendation when made to a retirement investor that is a financial institution, a named fiduciary with respect to an ERISA plan, or an authorized representative of either; the circumstances included, for example, the retirement investor soliciting information from more than one provider during a request for proposals. There were also requests for confirmation in areas outside the scope of this project, including on ERISA coverage issues.[230]

The changes made in the final rule should address many of the concerns expressed regarding application of the final rule and the potential for overbreadth. These changes include:

- confirmation that whether a ''recommendation'' has occurred will be interpreted consistent with the SEC's framework;
- elimination of proposed paragraph (c)(1)(i) and changes to the contexts in adopted paragraphs (c)(1)(i) and (ii) that narrowed them and made them more objective;
- adoption of a new paragraph (c)(1)(iii) confirming that sales recommendations that are not made in the circumstances set forth in paragraph (c)(1)(i) or (ii) will not result in investment advice fiduciary status and that providing investment information or education, without an investment recommendation, is not advice for purposes of the final rule; and
- revision of the definition of a ''retirement investor'' to exclude plan and IRA fiduciaries that are investment advice fiduciaries.

The Department also provided a discussion in Section D.2. of this preamble regarding paragraph (c)(1)(iv) that makes clear that parties can use disclaimers to define their relationships so long as written statements disclaiming fiduciary status are consistent with the person's oral or other written communications, marketing materials, applicable State or Federal law, or other interactions. That preamble discussion specifically addressed the use of disclaimers in the context of requests for proposals.

The Department also made clarifications in the amended PTEs in this context. Some commenters said it would be impractical to rely on a PTE during preliminary interactions before they know whether the retirement investor is going to hire them or otherwise act on their recommendations. In response, the Department confirmed in the amended PTEs that the disclosure conditions of the PTEs, such as the acknowledgment of fiduciary status, are not required at the time of the first meeting. Rather, the disclosure obligations apply at or before the time the covered investment transaction occurs. The Department also revised the final amendment to PTE 2020–02 to include a special provision for firms and financial professionals who provide fiduciary advice to a retirement investor in response to a request for proposal to provide services as an investment manager within the meaning of ERISA section 3(38).

The Department has not included provisions in the final rule's regulatory text suggested by commenters to address certain specific circumstances. The Department believes that the text of the rule properly applies a fiduciary definition that is consistent with the Fifth Circuit's *Chamber* opinion and the text of the statute, and that can be properly applied to the wide range of investment interactions described by the commenters, without need of special exceptions or carve-outs. However, below, the Department confirms that the proposal's discussions regarding certain specific circumstances remain applicable and adds some additional discussion to provide further guidance. The Department has also determined that it will not include questions and answers in the regulatory text, as some commenters suggested. The Department does not believe that including questions and answers on these specific factual circumstances would be an efficient or effective way to respond to myriad different factual patterns that could arise under the final rule. The Department looks forward to continuing its engagement with the public following publication of this final rule.

1. ''Hire Me'' Communications

In the preamble to the proposed rule, the Department stated that the proposal was not intended to result in a person becoming a fiduciary merely by engaging in the normal activity of marketing themselves as a potential fiduciary to be selected by a plan fiduciary or IRA owner, without making a recommendation of a securities transaction or other investment transaction or any investment strategy involving securities or other investment property (*i.e.,* ''hire me'' communications). Thus, touting the quality of one's own advisory or investment management services would not trigger fiduciary obligations. This was made clear in the language in proposed paragraph (f)(10)(ii) that extended to recommendations of ''other persons'' to provide investment advice or investment management services.

However, the Department cautioned that the proposal's preamble discussion should not be read to exempt a person from being a fiduciary with respect to any of the investment recommendations covered by proposed paragraph (c)(1) and defined in proposed paragraph (f)(10). There is a line between an investment advice provider making claims as to the value of its own advisory or investment management services in marketing materials, on the one hand, and making recommendations to retirement investors on how to invest or manage their savings, on the other. An investment advice provider can recommend that a retirement investor enter into an advisory relationship with the provider without acting as a fiduciary. But when the investment advice provider recommends, for example, that the investor pull money out of a plan or invest in a particular fund, that advice may be given in a fiduciary capacity even if part of a presentation in which the provider is also recommending that the person enter into an advisory relationship. The Department also said in the proposal's preamble that it believed that this is consistent with the functional fiduciary test laid out in the statute in which an entity is an investment advice fiduciary to the extent that they satisfy the definition. It does not follow from the fact that one piece of advice is not fiduciary investment advice (here, the ''hire me'' recommendation) that the rest of the advice is necessarily excluded from the definition (here, the advice to pull money out of the plan and invest in a particular fund). The investment advice fiduciary could not recommend that a plan participant roll

[230] One commenter asserted that the Department's proposal as applied in the ''hire me'' context conflicted with a decision by the U.S. Court of Appeals for the Fifth Circuit in *D.L. Markham* v. *VALIC,* which the commenter said held that service providers are not ''parties in interest'' before the service provider has started providing services or has at least agreed to do so. *D.L. Markham DDS, MSD, Inc. 401(K) Plan* v. *Variable Annuity Life Ins. Co.,* 88 F.4th 603 (5th Cir. 2023). The decision, which involved a different provision of ERISA than the fiduciary definition at issue here, is inapposite. Under the final rule, a person is treated as a fiduciary only if they have made investment recommendations for which they were ultimately compensated. The rule does not treat an investment professional or firm as a fiduciary before they have rendered the advisory service.

money out of a plan into investments that generate a fee for the fiduciary but make an imprudent recommendation that leaves the participant in a worse position than if the participant had left the money in the plan. Thus, when a recommendation to ''hire me'' effectively includes a recommendation on how to invest or manage plan or IRA assets (*e.g.,* whether to roll assets into an IRA or plan or how to invest assets if rolled over), that recommendation would need to be evaluated separately under the provisions in the proposed regulation.

In this discussion, the Department noted its belief that its proposed approach was consistent with the SEC's approach in Regulation Best Interest. In FAQs, the SEC staff described a scenario involving broker-dealer communications with a prospective retail customer that would not rise to the level of a recommendation.[231] The FAQs describe a scenario where the broker-dealer meets a prospective retail customer at a dinner party and says, ''I have been working with our mutual friend, Bob, for fifteen years, helping him to invest for his kids' college tuition and for retirement. I would love to talk with you about the types of services my firm offers, and how I could help you meet your goals. Here is my business card. Please give me a call on Monday so that we can discuss.'' However, unlike this scenario, the SEC staff cautioned that a recommendation made in the context of a ''hire me'' conversation or otherwise would be subject to Regulation Best Interest.

Some commenters addressing the proposal's ''hire me'' discussion advocated for a broader ''hire me'' limitation. This was based on the assertion that information beyond merely touting the quality of one's own services is commonly exchanged and needed for a robust hiring process. One commenter said that incidental recommendations in the context of a ''hire me'' discussion should not be covered recommendations under the final rule. Commenters further asked the Department to include the limitation in the regulatory text as opposed to the preamble. They argued that, without such a limitation, fear of liability could cause advice providers to curtail beneficial information exchanges.

One commenter described the reality of the selection process for an investment adviser subject to the Advisers Act as involving the adviser describing its investment offerings and services and its investment approach in general, to provide a basis for the retirement investor to make an informed hiring decision. The commenter asked the Department to confirm that this type of information exchange would not result in an adviser becoming an investment advice fiduciary.

Many other commenters addressed the ''hire me'' issue in the context of requests for proposals by plan fiduciaries. Commenters said requests for proposals often involve the plan asking for specific investment ideas, and if responses included information tailored to the plan, that would appear to result in the person marketing their services being considered an ERISA fiduciary under the proposal. Commenters offered varying descriptions of the types of information commonly provided, including ''investment strategies,'' ''industry trends,'' ''performance history,'' ''quality of services,'' ''detailed description of services,'' ''portfolio construction views and approach,'' ''suggestions of one or more strategies that would appear to be a fit for the plan's needs'' and others.

Some commenters asserted that the concern expressed about ''hire me'' conversations was exacerbated by the lack of a limitation in the proposal for recommendations to sophisticated advice recipients that could have otherwise addressed ''hire me'' communications in the institutional market. Commenters said uncertainty in this area will limit important information sharing between financial services providers and plan and IRA fiduciaries. One commenter also asserted that the difference in consequences for a recommendation under Regulation Best Interest as opposed to a recommendation under ERISA are significant enough to warrant different treatment. This is particularly the case if the advice provider would need to comply with a PTE in connection with the recommendation, and the communication occurred before it had entered into a contractual arrangement with the retirement investor, according to the commenter.

Commenters also raised questions about specific circumstances, including marketing bundled services arrangements; marketing additional services where a services relationship already exists; marketing discretionary management services; and communications between limited partners and private equity fund sponsors. One commenter suggested that the rule should be revised to differentiate ''level-fee'' advice providers' ''hire me'' discussions where the advice provider will operate on a level-fee basis after being hired and does not have an incentive to steer investors towards any particular investment product. Another commenter suggested a new paragraph should be added to the regulatory text as follows:

> Marketing or Sales Conversations. A person who engages in marketing or sales conversations with a Retirement Investor as to the advisability of engaging such person (or an affiliate) to provide investment advice or investment management services shall not be deemed to be a fiduciary within the meaning of section 3(21)(A) of the Act or section 4975(e)(3)(B) of the Code to the extent of such conversations, provided the person engaging in such conversations does not have discretionary authority or control with respect to a decision to engage the service provider and does not represent or acknowledge that they are acting as a fiduciary with respect to such decision.

In the final rule, the Department has taken the same approach as it took in the proposal regarding ''hire me'' communications. Persons can tout their own services and provide other information (including information about their affiliates' services), but to the extent ''hire me'' communications include covered investment recommendations, those recommendations are evaluated separately under the provisions of the final rule. The Department believes it is important to retain this distinction to avoid opening loopholes in the protections of the final rule similar to those resulting from the 1975 regulation's ''regular basis'' test. When firms and financial professionals make investment recommendations that satisfy the objective terms of the final rule's fiduciary definition, they occupy a position of trust and confidence with respect to those recommendations and are appropriately held to fiduciary protections and accountability under ERISA Titles I and II. In many cases, as in the rollover context or when the recommendation concerns the design of an entire plan portfolio, the investment recommendation made in those initial communications may be among the most important the plan receives. Denying fiduciary status to such recommendations would defeat legitimate investor expectations that meet the terms of the final rule just as it would in subsequent communications that are not associated with ''hire me'' conversations. Thus, the final rule extends ERISA fiduciary status to covered recommendations that are made in accordance with all parts of the final rule, even if the recommendations occur during ''hire me'' communications.

[231] *See* SEC Frequently Asked Questions on Regulation Best Interest, *https://www.sec.gov/tm/faq-regulation-best-interest.*

The Department does not believe this approach in the final rule will realistically expose advice providers to significantly increased litigation risk or unduly impair business interactions in the institutional market. Persons marketing their own services can provide a significant amount of information described by commenters (*e.g.,* ''industry trends,'' ''performance history,'' ''quality of services,'' ''detailed description of services'') that would not appear, without more, to rise to the level of a recommendation. Under the revised provisions of paragraph (c)(1)(i), they can also provide other generalized information, including information on investment strategies, including, for example, portfolio construction views, that are not based on the particular needs or individual circumstances of the plan, without ERISA fiduciary status attaching, as confirmed in paragraph (c)(1)(iii). Under paragraph (c)(1)(iv) they can also reinforce the non-fiduciary nature of their communications by including a clear disclaimer of ERISA fiduciary status with respect to communications provided in connection with the request for proposal, which one commenter said was common, so long as the disclaimer is consistent with person's oral or other written communications, marketing materials, applicable State or Federal law, or other interactions with the retirement investor.

The Department has declined to provide a special provision in the final rule for ''level-fee'' advice providers in connection with their marketing of their own services. The final rule states a functional test that applies based on the facts and circumstances without the need for carve-outs and that assigns fiduciary status in circumstances where a covered recommendation is made and the retirement investor can reasonably place their trust and confidence in the compensated provider. The Department does not agree that the assignment of fiduciary status should vary based on the nature of the compensation arrangement, or that it could plausibly read ''level fees'' out of the broad statutory reference to ''fee or other compensation, direct or indirect.'' The receipt of ''level fees'' may change the nature of conflicts of interest or affect the application of the prohibited transaction rules and administrative exemptions, but it is not a basis for avoiding fiduciary status under the statute or this final rule.

Finally, it is also important to emphasize that investment recommendations that are made during such interactions do not become ERISA fiduciary investment advice unless the elements of the facts and circumstances test are met, and the advice provider receives compensation, direct or indirect, for the advice. Moreover, to the extent concerns about ''hire me'' communications are based on the perceived need to rely on a PTE at the time of a recommendation, additional clarity has been provided in the amended PTE 2020–02 regarding the required timing of disclosures, as discussed above. In addition, a special provision has been added to provide relief for financial professionals providing fiduciary investment advice in response to a request for a proposal to provide services as investment managers within the meaning of ERISA section 3(38).

2. Platform Providers and Pooled Employer Plans

Platform Providers

Platform providers are entities that offer a platform or selection of investment alternatives to participant-directed individual account plans and their fiduciaries who choose the specific investment alternatives that will be made available to participants for investing their individual accounts. In connection with such offerings, platform providers may provide investment advice, or they may simply provide general financial information such as information on the historic performance of asset classes and of the investment alternatives available through the provider.

As stated in the proposal, application of the final rule to platform providers may often focus on whether the communications fall within the threshold definition of a recommendation. Whether a recommendation exists under the final rule will turn on the degree to which a communication is ''individually tailored'' to the retirement investor or investors, and providing a selective list of securities to a particular retirement investor as appropriate for the investor would be a recommendation as to the advisability of acquiring securities even if no recommendation is made with respect to any one security. Therefore, the inquiry may turn on whether the platform provider presents the investments on the platform as having been selected for and appropriate for the investor *(i.e.,* the plan and its participants and beneficiaries). In this regard, platform providers who merely identify investment alternatives using objective third-party criteria provided by the investor (*e.g.,* expense ratios, fund size, or asset type specified by the plan fiduciary) to assist in selecting and monitoring investment alternatives, without additional screening or recommendations based on the interests of plan or IRA investors, would not be considered under the final rule to be making a recommendation.

Commenters on the proposal's platform provider discussion generally said additional certainty on the status of platform providers is needed in the regulatory text to avoid loss of assistance to plan sponsors in developing plan investment lineups and support plan formation. One commenter said an exception for platform providers should be explicit in the text of the rule and should be available regardless of the legal structure of a particular investment platform, thus the exception should apply to insurers offering a variable annuity. Some of these commenters said platform provider interactions typically do not involve individualized recommendations, while others said the sample investment lineups are tailored to the plan but both the platform providers and the plans' fiduciaries are aware that the sample lineup is being delivered in the context of an arm's-length business negotiation.

One commenter provided specific language for a platform provider sales exclusion in the regulatory text as follows:

> Proposals of investment line-ups or menus by recordkeeping services investment platform providers, when made within the context of a request for proposal or other vendor selection process or where the platform provider's communications clearly indicate that the proposal is being advanced in connection with a negotiation for the terms of a potential future business relationship shall not give rise to a ''recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property''.

Another commenter suggested that as a means of avoiding fiduciary status, platform providers should be permitted to make a prominent disclosure on the website for the investment menu that the provider is not undertaking to provide impartial investment advice or to give advice in a fiduciary capacity.

For purposes of applying the final rule, the Department has not changed its position from the proposal that presenting a list of investments as having been selected for and appropriate for the investor *(i.e.,* the plan and its participants and beneficiaries) will not be carved out from ERISA fiduciary status. If the communications between a platform provider and a retirement investor amount to a covered recommendation, ERISA fiduciary status will attach if the

other parts of the final rule are satisfied. If there is a covered recommendation, the fact that it is made in the context of a request for proposal or other negotiation of a future business relationship should not, in and of itself, result in the recommendation being carved out as fiduciary investment advice. Similar to the conclusion reached in the ''hire me'' communications discussion, immediately above, the Department believes this position is important to avoid opening loopholes in the final rule that will defeat legitimate investor expectations and frustrate the text and purposes of ERISA's fiduciary definition.

When a firm or financial professional provides individualized recommendations to a plan on the construction of a prudent fund lineup, and otherwise meets the terms of the rule's definition, the investor is entitled to rely on the recommendation as fiduciary advice intended to advance the plan's best interest. Moreover, such advice is often profoundly important given that it defines and constrains the range of options available to plan participants for their retirement. As noted by some commenters who supported extending ERISA fiduciary protections to plan sponsors, recommendations on plan investment lineups can have significant impact on plan participants' and beneficiaries' retirement security and Morningstar quantified the potential benefits from the proposal's coverage of recommendations to plan fiduciaries about the fund lineups in defined contribution plans as exceeding $55 billion in the first 10 years and $130 billion in the subsequent 10 years, in undiscounted and nominal dollars, due to reductions in costs associated with investing through their plans.

However, the Department's position also remains that platform providers who merely identify investment alternatives using objective third-party criteria (*e.g.,* expense ratios, fund size, or asset type specified by the plan fiduciary) to assist in selecting and monitoring investment alternatives, without additional screening or recommendations based on the interests of plan or IRA investors, would not be considered under the final rule to be making a recommendation. Likewise, a provider does not make a recommendation merely by offering a preset list of investments as part of a variable annuity, or offering a menu of pre-selected HSA investment options, without additional facts. In this context, the parties can also define their relationship pursuant to paragraph (c)(1)(iv) so long as they conform their other actions and communications accordingly. The Department does not agree, however, that mere website disclosure that the investment menu provider is not undertaking to provide impartial investment advice or to give advice in a fiduciary capacity should be dispositive, as suggested by one commenter.[232] In this context, as in other contexts, one must consider all the relevant facts and circumstances and apply them to the tests set forth in the rule. For example, such website disclosure, even if reviewed by the retirement investor, would not defeat fiduciary status to the extent it was inconsistent with other communications and actions by the firm or financial professional that met the terms of the rule's objective test and demonstrated that the recommendation was given from a position of trust and confidence.

Pooled Employer Plans

In the preamble to the proposal, the Department stated that the analysis presented regarding platform providers would apply in the context of pooled employer plans (PEPs), which are individual account plans established or maintained for the purpose of providing benefits to the employees of two or more employers, authorized in the SECURE Act.[233] PEPs are required to designate a pooled plan provider (PPP) who is a named fiduciary of the PEP.[234] PPPs are in a unique statutory position in that they are granted full discretion and authority to establish the plan and all of its features, administer the plan, act as a fiduciary, hire service providers, and select investments and investment managers.

The Department stated in the proposal that when a PPP or another service provider interacts with an employer about investment options under the plan, whether they have made a recommendation under the proposal will turn, in part, on whether they present the investments as selected for, and appropriate for, the plan, its participants, or beneficiaries.

Commenters that addressed PEPs said preserving marketing and sales activity is especially important in the small plan market where many employers cannot afford an independent adviser and instead may rely on PEP providers to help them understand how plans work. Some believed that the Department's proposal would apply fiduciary status in the event there is only one investment lineup available through a PEP because that will be interpreted as a recommendation of that lineup. Commenters generally said imposing compliance burdens on the formation of these plans is inconsistent with congressional intent in including these type of plans in the SECURE Act.

Another commenter said that communications with employers about joining a PEP involve employers acting in their settlor capacity because they are considering adopting a plan or merging an existing plan into the PEP. Therefore, the commenter believed the Department should revise its discussion of this issue accordingly.

The Department continues to believe that the analysis of when a recommendation is made in the context of a PEP is the same as that of a platform provider. Accordingly, when a PPP or another service provider interacts with an employer about investment options under the plan, whether they have made a recommendation under the proposal will turn, in part, on whether they present the investments as selected for, and appropriate for, the plan, its participants, or beneficiaries.

This does not mean, however, that marketing a PEP with a single investment lineup is necessarily a recommendation to each employer that will result in ERISA fiduciary status. Whether a recommendation has occurred will be based on the facts and circumstances of the interaction. If a recommendation is made, paragraph (c)(1)(iii) in the final rule makes clear that sales and marketing activity can continue so long as any recommendation is not made in the context of paragraphs (c)(1)(i) or (ii).

The Department does not agree that employers joining the PEP act in a solely settlor capacity in doing so. The provisions in ERISA section 3(43) provide that each employer retains fiduciary responsibility for the selection and monitoring of the PPP and any other person who is designated as a named fiduciary as well as, to the extent not otherwise delegated to another fiduciary by the pooled plan provider and subject to the provisions of ERISA section 404(c), the investment and management of the portion of the plan's assets attributable to the employees of the employer (or beneficiaries of such employees). For these reasons, the Department has decided that this final

[232] A commenter also advocated for a platform provider exception that extended to the marketing and provision of brokerage window services and factual information provided to participants through such brokerage windows, as well as to call centers. The commenter did not describe why there was concern about ERISA fiduciary status related to marketing brokerage window services however, so this comment was not accepted. Comments related to call centers are discussed in Section E.3. of this preamble.

[233] ERISA section 3(43), 29 U.S.C. 1002(43).

[234] ERISA Section 3(43)(B), 29 U.S.C. 1002(43)(B).

rule strikes the correct balance and not to adopt changes that would single-out PEPs and PPPs.

3. Investment Information and Education

General

In the proposal's preamble, the Department stated that Interpretive Bulletin (IB) 96–1 relating to participant investment education would continue to provide guidance with respect to the fiduciary advice definition under the rule if finalized. IB 96–1 provides examples of four categories of information and materials regarding participant-directed individual account plans—plan information, general financial and investment information, asset allocation models, and interactive investment materials—that do not constitute investment advice.[235] This is the case irrespective of who provides the information (*e.g.,* plan sponsor, fiduciary, or service provider), the frequency with which the information is shared, the form in which the information and materials are provided (*e.g.,* on an individual or group basis, in writing or orally, or via video or computer software), or whether an identified category of information and materials is furnished alone or in combination with other identified categories of information and materials. The IB states that there may be many other examples of information, materials, and educational services, which, if furnished to participants and beneficiaries, would not constitute ''investment advice.''

Multiple commenters supported the preservation of non-fiduciary investment education under the IB. These commenters highlighted the importance of financial education to retirement investors and stressed the need for such communications to continue freely after adoption of the final rule. The commenters encouraged the Department to clarify that the final rule would not treat investment education as fiduciary advice, and some further suggested that the text of the final rule directly incorporate the IB or incorporate the provisions of the 2016 Final Rule on investment education.

Several commenters asked for confirmation that discussions about the benefits of enrolling and saving in a plan, including increasing contributions, would not be deemed ERISA fiduciary investment advice under the final rule. They said these conversations are important efforts to prepare retirement investors for retirement. Relatedly, commenters asked about educating participants about products and services offered by a plan and communicating the value of investment diversification.

Some commenters requested additional clarity on information relating to distributions and rollovers that can be provided without becoming an investment advice fiduciary. A commenter explained that its members make available beneficial forms of assistance that inform participants of their distribution and rollover options, encourage them to keep money in the retirement system until they retire, and help them connect their individual circumstances to rollover and transfer options that are available to them. In this commenter's view, such tools help reduce the problems associated with abandoned accounts and other issues that result when participants have accounts scattered among various employment-based plans and service providers. Another commenter indicated that participants can have avoidable misconceptions about retirement and termination, such as a mistaken belief that they are required to remove their plan accounts when their employment terminates. The commenter viewed it as critical that retirement educators be able to clearly communicate rules relating to rollovers, plan terms, general financial and investment information, and available distribution options. In this commenter's opinion, such communication could be made consistent with the principles of IB 96–1, but the emphasis on IRA rollover advice in the proposal's preamble raises concern that even general advice about the benefits of retaining retirement funds in a retirement plan as opposed to an IRA would be classified as ERISA fiduciary investment advice.

Some commenters also requested confirmation regarding the permissibility of referencing specific plan investments in non-fiduciary investment education. They noted that the preamble included cautionary language warning that service providers engaging in investment education may cross the line into fiduciary investment advice if the education relates to a specific investment or investments strategy. They requested confirmation that, as provided for conditionally in the IB, investment education may reference specific investment options available under a plan without triggering fiduciary status under the final rule.

Several commenters suggested that the Department take the broader step of generally updating the IB. They explained that there have been significant changes in the types of information being sought by plan participants and plan sponsors (*e.g.,* relating to spend down of assets, and auto-enrollment and auto-escalation plan features) and types of interactions utilized (*e.g.,* electronic and digital) since the IB was first published. They suggested that the Department take the opportunity to evaluate the impact of these developments on the types of information and materials that may be provided without constituting fiduciary investment advice under the final regulation.

In general, for purposes of the final rule, the line between an investment recommendation and investment education or information will depend on whether there is a call to action. Thus, many of the types of information cited by commenters as important to retirement investors could be provided under the final rule without the imposition of fiduciary status. For example, like the SEC in Regulation Best Interest, the Department believes that ''a general conversation about retirement planning, such as providing a company's retirement plan options'' to a retirement investor, would not rise to the level of a recommendation.[236]

In this regard, the Department confirms that providing educational information and materials such as those described in IB 96–1 will not result in the provision of fiduciary investment advice as defined in the final rule absent a recommendation, regardless of the type of retirement investor to whom it is provided. Information on the benefits of plan participation and on the terms or operation of the plan, as described in the first category of investment education in the IB, clearly could include information relating to plan distributions and distribution options. Additionally, an analysis of the plan-information category of investment education applied in the context of IRAs would allow such a plan sponsor or service provider to also provide a wide range non-fiduciary information about IRAs, such as tax benefits associated with rollovers into IRAs.

Likewise, the Department confirms that furnishing the categories of investment-related information and materials described in the ''Investment Education'' provision in the 2016 Final Rule would not result in the provision of fiduciary investment advice under

[235] 29 CFR 2509.96–1; see also 85 FR 40589 (July 7, 2020) (technical amendment reinstating Interpretive Bulletin 96–1 following the vacatur of the 2016 Final Rule).

[236] Regulation Best Interest release, 33337 (July 12, 2019).

the final rule.[237] The provision in the 2016 Final Rule included, for example, information on ''[g]eneral methods and strategies for managing assets in retirement (*e.g.,* systemic withdrawal payments, annuitization, guaranteed minimum withdrawal benefits).''

To the extent parties seek additional confirmation of specific information that may be provided regarding rollovers within the category of investment education, the Department notes that the IRS provides model safe harbor explanations that may be used to satisfy the Code section 402(f) requirement to provide certain information regarding eligible rollover distributions to the distributee within a reasonable period of time prior to making the distribution.[238] The model safe harbor explanations provide a significant amount of information on rollovers, including how to do a rollover, what types of plans accept rollovers, how much can be rolled over, the tax implications of pursuing a rollover or declining the rollover, and information about special circumstances such as offsets against plan balances by outstanding loans or rules involving employer stock. Merely providing the information contained in the model safe harbor explanations would not constitute ERISA fiduciary investment advice.

Some commenters asked the Department to address education to plan fiduciaries. They said that financial professionals may provide information to plan fiduciaries about how plans work as part of the sales process. Several commenters specifically asked about educational interactions between service providers and plan sponsors about features such as automatic enrollment and automatic escalation, among others. As stated above, provision of investment information or education, absent a recommendation, would not cause a financial professional to become a fiduciary under the final rule regardless of the type of retirement investor to whom it is provided. Based on the discussion set forth above, the Department believes there is significant flexibility and clarity for a plan sponsor or service provider to furnish helpful non-fiduciary investment education materials to participants relating to plan participation, distributions and rollovers. Likewise, the final rule is clear that absent a recommendation, provision of investment information to IRA owners and beneficiaries and plan and IRA fiduciaries that are retirement investors would not give rise to fiduciary status.

The Department emphasizes that the inquiry in this respect will focus on whether there is a call to action. Thus, the Department cautions providers against steering retirement investors towards certain courses of action under the guise of education. The SEC similarly stated in Regulation Best Interest that while certain descriptive information about employer sponsored plans would be treated as education, rather than as a recommendation, broker-dealers should ''ensure that communications by their associated persons intended as 'education' do not cross the line into 'recommendations.' '' [239]

The Department further emphasizes that a recommendation to take a distribution, even if it is not accompanied by a recommendation of a specific investment, is a ''recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property,'' such that if all the other parts of the final rule are satisfied, the person making the recommendation will be an ERISA fiduciary. For example, if a person states, ''After reviewing your plan, I think you should roll over into an IRA''—that is not investment education. Although the Department is not updating IB 96–1 at this time, it intends to monitor investment education practices to determine whether the principles in the IB are being used to evade fiduciary status under circumstances that would otherwise support the conclusion that a recommendation is being made by persons who occupy a position of trust and confidence. The Department may at a later date determine that the IB should be revisited.

Call Centers

Within the context of investment information and education, some commenters specifically addressed the functions of recordkeeper call center personnel and the information they provide to plan participants and beneficiaries who need assistance on a variety of plan-related matters. Several commenters said that the proposal would appear to result in the imposition of ERISA fiduciary status on call center personnel to the extent they provided investment-related information to a retirement investor or referred retirement investors to a financial professional. One commenter said that IB 96–1 is helpful in this context but does not address all matters that may arise in call center interactions. Several commenters stated that call center interactions typically do not involve collecting significant data about the retirement investor because call center representatives do not make individualized recommendations or suggest a specific course of action.

One commenter suggested a paragraph be added to the final rule excluding call center support personnel from fiduciary status as follows:

> Participant and Beneficiary Call Center Support. Notwithstanding other paragraphs of this section, a person who provides participant call center support services on behalf of a recordkeeper or other administrative services provider to a plan shall not be deemed to be a fiduciary, within the meaning of section 3(21)(A) of the Act or section 4975(e)(3)(B) of the Code with respect to a plan or an IRA solely because such person recommends a securities or investment transaction or any other investment strategy where such recommendation is limited to unbiased suggestions, consistent with generally accepted investment principles and sound plan administrative practices, that are directly responsive to a request for assistance initiated by a participant or beneficiary.

In the Department's view, the discussion earlier in this preamble section about the application of IB 96–1 in the context of the final rule is responsive to some comments on call centers. Further, although commenters said call center personnel may provide investment-related information to retirement investors, commenters generally indicated that call center activities involve neither collecting significant data about the retirement investor nor individualized recommendations or suggestions as to a specific course of action. Under the revised contexts in paragraph (c)(1)(i) and (ii), unless call center personnel provide an acknowledgment of ERISA Title I or Title II fiduciary status with respect to the recommendation, they can provide investment-related information that is not based on the particular needs or individual circumstances of the retirement investor without ERISA fiduciary status attaching, as confirmed in paragraph (c)(1)(iii). The Department declines to provide a broader limitation for call center activity, as requested by some commenters. Covered recommendations that meet all parts of the final rule should be subject to the ERISA fiduciary protections and not a different standard merely because they are made in a call center setting. Advice providers can just as easily hold

[237] Definition of the Term ''Fiduciary''; Conflict of Interest Rule—Retirement Investment Advice, 81 FR 20946, 20998 (April 8, 2016).

[238] *See* IRS Notice 2020–62, 2020–35 I.R.B. 476, *https://www.irs.gov/pub/irs-drop/n-20-62.pdf.*

[239] Regulation Best Interest release, 84 FR 33318, 33337 n. 181 (July 12, 2019)

themselves out as trusted advisers in phone communications as in other contexts.

4. Swaps and Security-Based Swaps

Swaps and security-based swaps are a broad class of financial transactions defined and regulated under amendments to the Commodity Exchange Act and the Securities Exchange Act of 1934 (Securities Exchange Act) by the Dodd-Frank Act. Section 4s(h) of the Commodity Exchange Act[240] and section 15F of the Securities Exchange Act[241] establish similar business conduct standards for dealers and major participants in swaps or security-based swaps. Special rules apply for swap and security-based swap transactions involving ''special entities,'' a term that includes employee benefit plans covered under ERISA. Under the business conduct standards in the Commodity Exchange Act as added by the Dodd-Frank Act, swap dealers or major swap participants that act as counterparties to ERISA plans must, among other conditions, have a reasonable basis to believe that the plans have independent representatives who are fiduciaries under ERISA.[242] Similar requirements apply for security-based swap transactions.[243] The CFTC and the SEC have issued final rules to implement these requirements.[244]

In the Department's view, when Congress enacted the swap and security-based swap provisions in the Dodd-Frank Act, including those expressly applicable to ERISA-covered plans, it did not intend to broadly and automatically impose ERISA fiduciary status on the plan's counterparty as it engaged in regulated conduct as part of the swap or security-based swap transaction with the employee benefit plan. The Department conferred with both the CFTC and SEC staff at the time of those agencies' rulemakings, and assured harmonization of any change in the ERISA fiduciary advice regulation so as to avoid unintended consequences.

The Department makes the same assurance with respect to this final rule. The disclosures required of plans' counterparties under the business conduct standards would not generally constitute a ''recommendation'' under the final rule, or otherwise compel the dealers or major participants to act as fiduciaries in swap and security-based swap transactions conducted pursuant to section 4s of the Commodity Exchange Act and section 15F of the Securities Exchange Act. This includes disclosures regarding material risks, characteristics, incentives and conflicts of interest; disclosures regarding the daily mark of a swap or security-based swap and a counterparty's clearing rights; disclosures necessary to ensure fair and balanced communications; and disclosures regarding the capacity in which a swap or security-based swap dealer or major swap participant is acting when a counterparty to a special entity, as required by the business conduct standards.

This is not to say that a dealer or major participant would necessarily fall outside the scope of the final rule if, in addition to providing the disclosures mandated above, it also chose to make specific investment recommendations to plan clients. In that circumstance, a swap dealer could become a fiduciary by virtue of their voluntary decision to make individualized investment recommendations to an ERISA-covered plan if the subparagraph's conditions were met.[245] To the extent dealers wish to avoid fiduciary status under the final rule, however, they can structure their relationships to avoid making such investment recommendations to plans. Additionally, clearing firms would not be investment advice fiduciaries under the final rule merely as a result of providing such services as valuations, pricing, and liquidity information. As discussed in greater detail in the next section, the final rule does not include valuation and similar services as a category of covered recommendations.

5. Valuation of Securities and Other Investment Property

The final rule does not include valuation services, appraisal services, or fairness opinions as categories of covered recommendations. In this regard, the Department notes that the definition of ''recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property'' in paragraph (f)(10) does not include reference to any of these functions. Accordingly, the provision of valuation services, appraisal services, or fairness opinions would not, in and of themselves, lead to fiduciary status under the final rule.

F. Scope of Investment Advice Fiduciary Duty

Paragraph (c)(2) of the final rule confirms that a person who is a fiduciary with respect to a plan or IRA by reason of rendering investment advice is not deemed to be a fiduciary regarding any assets of the plan or IRA with respect to which that person does not have or exercise any discretionary authority, control, or responsibility or with respect to which the person does not render or have authority to render investment advice defined by the rule. On the other hand, nothing in paragraph (c)(2) exempts such a person from the provisions of section 405(a) of ERISA concerning liability for violations of fiduciary responsibility by other fiduciaries or excludes such person from the definition of party in interest under section 3(14)(B) of ERISA or section 4975(e)(2) of the Code. This provision is unchanged from the current 1975 regulation.

Further, if a person's recommendations relate to the advisability of acquiring or exchanging securities or other investment property in a particular transaction, the final rule does not impose on the person an automatic fiduciary obligation to continue to monitor the investment or the retirement investor's activities to ensure the recommendations remain prudent and appropriate for the plan or IRA. Instead, the obligation to monitor the investment on an ongoing basis would be a function of the reasonable expectations, understandings, arrangements, or agreements of the parties.

One commenter asked the Department to make clear that for one-time recommendations, the parties' reasonable expectations typically do not include an ongoing duty to monitor unless the parties expressly agree to such a duty. The commenter believed that otherwise the Department would conclude that the parties' reasonable expectations always include an ongoing duty to monitor. The Department continues to believe that the parties' reasonable expectations, understandings, arrangements, or agreements should govern the monitoring obligation and does not concur with the commenter's concern that the Department would always conclude under that standard that a duty to monitor exists; accordingly the

[240] 7 U.S.C. 6s(h).

[241] 15 U.S.C. 78o–10(h).

[242] 7 U.S.C. 6s(h)(5); 17 CFR 23.450.

[243] 15 U.S.C. 78o–10(h)(4), (5).

[244] *See* 17 CFR 23.400–451; Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties, 77 FR 9734 (Feb. 17, 2012); 17 CFR 240.15Fh–3 through h–6; Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants, 81 FR 29960 (May 13, 2016).

[245] The business conduct standards do not preclude a swap dealer from giving advice if it chooses to do so. *See, e.g.,* 17 CFR 23.434 (imposing requirements on swap dealers that recommend a swap or trading strategy involving a swap to a counterparty); *see also* 17 CFR 240.15Fh–3(f) (similar provision applicable to security-based swap dealers).

discussion was not revised to require an express agreement to monitor.

Also, as has been made clear by the Department, there are a number of ways to provide fiduciary investment advice without engaging in transactions prohibited by Title I or Title II of ERISA because of the conflicts of interest they pose. For example, an investment advice provider can structure the fee arrangement to avoid a prohibited transaction (and the related conflicts of interest) by offsetting third-party payments against direct fees agreed to by the retirement investor, as explained in advisory opinions issued by the Department.[246] If there is not a prohibited transaction, then there is no need to comply with the terms of an exemption, though an investment advice fiduciary with respect to a Title I plan would still be required to comply with the statutory duties including prudence and loyalty.

Several commenters expressed concern about plan sponsors' co-fiduciary liability under ERISA. One commenter specifically focused on call centers and human resources employees. The commenter believed that if call center personnel cross the line and provide fiduciary advice, this would heighten the plan sponsor's obligation to monitor the call center and could expose the plan sponsor to co-fiduciary liability. The commenter asked the Department to provide a safe harbor to avoid plan sponsors having liability for acts of any plan service provider under certain conditions. Another commenter asked the Department to clarify that each fiduciary associated with the plan would not have to continually monitor the others to avoid co-fiduciary liability.

In response, the Department notes that plan sponsors already have fiduciary obligations in connection with the selection and monitoring of plan service providers (both fiduciary and non-fiduciary service providers), including service providers that provide educational materials and assistance to plan participants and beneficiaries. The Department does not believe the rule significantly expands the obligations or potential liabilities of plan sponsors in this regard. Accordingly, the Department does not believe it would be appropriate to create special rules or safe harbors with respect to co-fiduciary status or liability under this final rule, but rather believes that plan sponsor activity should be evaluated under the existing provisions of ERISA.

Paragraph (d) of the regulation is identical to paragraph (d) of the 1975 regulation, apart from updated references. The paragraph specifically provides that the mere execution of a securities transaction at the direction of a plan or IRA owner would not be deemed to be fiduciary activity.[247] The regulation's scope remains limited to advice relationships, as delineated in its text, and does not cover transactions that are executed pursuant to specific direction in which no advice is provided.

One commenter suggested revisions to paragraph (d) to address foreign broker-dealers and transactions in fixed income securities, options, and currency that are not executed on an agency basis. The Department has considered the suggestion but declines to adopt them without a more robust record regarding the reasons for, and impact of, the suggested changes.

G. Application to Code Section 4975

Certain provisions of Title I of ERISA, such as those relating to participation, benefit accrual, and prohibited transactions, also appear in Title II of ERISA, codified in the Code. This parallel structure ensures that the relevant provisions apply to Title I plans, whether or not they are ''plans'' defined in section 4975 of the Code, and to tax-qualified plans and IRAs, regardless of whether they are subject to Title I of ERISA. With regard to prohibited transactions, the ERISA Title I provisions generally authorize recovery of losses from, and imposition of civil penalties on, the responsible plan fiduciaries, while the Title II provisions impose excise taxes on persons engaging in the prohibited transactions. The definition of fiduciary is the same in section 4975(e)(3)(B) of the Code as the definition in section 3(21)(A)(ii) of ERISA, and, as noted above, the Department's 1975 regulation defining fiduciary investment advice is virtually identical to the regulation defining the term ''fiduciary'' under the Code.

To rationalize the administration and interpretation of the parallel provisions in Title I and Title II of ERISA, Reorganization Plan No. 4 of 1978 divided the interpretive and rulemaking authority for these provisions between the Secretaries of Labor and of the Treasury.[248] Under the Reorganization Plan, which Congress subsequently ratified in 1984,[249] Congress generally granted the Department authority to interpret the prohibited transaction provisions and the definition of a fiduciary in the Code.[250] ERISA's prohibited transaction rules, sections 406 to 408,[251] apply to Title I plans, and the Code's corresponding prohibited transaction rules, 26 U.S.C. 4975(c), apply to 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 Title I of ERISA.[252] In accordance with the above discussion, paragraph (g) of the rule, entitled ''Applicability'' provides that the regulation defines a ''fiduciary'' both for purposes of ERISA section 3(21)(A)(ii) and for the parallel provision in Code section 4975(e)(3)(B).

Paragraph (g) explains the applicability of Title I of ERISA and the Code in the specific context of rollovers. As that paragraph explains, ''a person who satisfies paragraphs (c)(1)(i) or (ii) and (e) of this section in connection with a recommendation to a retirement investor that is an employee benefit plan as defined in section 3(3) of the Act, a fiduciary of such a plan as defined in paragraph (f)(11), or a participant or beneficiary of such a plan, including a recommendation concerning the rollover of assets currently held in a plan to an IRA, is a fiduciary subject to the provisions of Title I of the Act.'' With this example, the Department intends to clarify the application of Title I to recommendations made regarding rollovers from a Title I plan under the final rule.

In the event of a recommendation to roll over assets from a Title I plan that meets the provisions of the final rule, the fiduciary duties of prudence and loyalty and the prohibited transaction provisions of ERISA section 406 would apply to advice to take the distribution and to roll over the assets. After the assets were distributed from the Title I plan into the IRA, fiduciary investment advice concerning investment of and ongoing management of the assets would be subject to obligations in the Code, including the prohibited transaction provisions in Code section 4975. For example, if a broker-dealer satisfies the fiduciary definition set

[246] *See* U.S. Department of Labor, Adv. Op. 97–15A (May 22, 1997).

[247] The citation in paragraph (d) of the proposal to ''section 4975(e)(3)(B) of the Code'' was revised in the final rule to read ''section 4975(e)(3) of the Code,'' consistent with the scope of the 1975 regulation as adopted by Treasury. *See* 40 FR 50840, 50841 (Oct. 31, 1975).

[248] 5 U.S.C. App. 752 (2018).

[249] Sec. 1, Public Law 98–532, 98 Stat. 2705 (Oct. 19, 1984).

[250] 5 U.S.C. App. 752 (2018).

[251] 29 U.S.C. 1106–1108.

[252] Reorganization Plan No. 4 of 1978 also transferred to the Secretary of Labor the authority to grant administrative exemptions from the prohibited transaction provisions in section 4975 of the Code. *See* Code section 4975(c)(2).

forth in this rule with respect to a recommendation to roll a retirement investor's assets out of their workplace retirement plan to an IRA, the broker-dealer would be a fiduciary subject to Title I with respect to the advice regarding the rollover. Following the rollover, the broker-dealer would be a fiduciary under the Code subject to the prohibited transaction provisions in Code section 4975 to the extent it gave subsequent fiduciary investment advice, within the meaning of the final rule, with respect to the assets rolled out of the plan.

One commenter set forth a series of assertions regarding the Department's jurisdiction to issue the final rule and the preamble discussion in the proposal. The commenter said that the proposal's preamble was misleading in describing prohibited transactions under Title II of ERISA as prohibiting fiduciary conduct, because the provisions in Code section 4975 do not include prohibitive language (*e.g.,* ''shall not'') restricting the conduct of fiduciaries to Title II plans. The commenter also asserted the Department lacked authority to include plan participants and beneficiaries as retirement investors, because the statutory language refers to advice to ''a plan.'' The commenter made several additional arguments that the Department's authority to issue a regulatory definition of an investment advice fiduciary was limited by ERISA section 404(c) (providing conditional relief from certain provisions of Part 4 of Title I of ERISA for fiduciaries of a pension plan that permits participants and beneficiaries to exercise control over the assets in their individual accounts), by ERISA section 408(b)(14) (providing a statutory exemption for transactions in connection with the provision of investment advice described in ERISA section 3(21)(A)(ii) to a participant or beneficiary of an individual account plan that permits such participant or beneficiary to direct the investment of assets in their individual account) and by the Reorganization Plan's provision in section 102 transferring authority to the Secretary of Labor to issue ''regulations, rulings, opinions, and exemptions under section 4975 of the Code, except for (i) subsections 4975(a), (b), [and] (c)(3) . . . of the Code.''

The Department disagrees with the assertion that it is misleading to describe the *prohibited transaction* provisions in Code section 4975 as ''prohibiting'' specified fiduciary conduct. Code section 4975(c), entitled ''Prohibited Transaction,'' sets forth a series of transactions, several of which apply only to fiduciaries as defined in Code section 4975(e)(3). For example, Code section 4975(c)(1)(E) defines a prohibited transaction as ''any . . . act by a disqualified person who is a fiduciary whereby he deals with the income or assets of a plan in his own interest or for his own account.'' Fiduciaries are subject to an excise tax for engaging in these transactions.

With respect to the commenter's other assertions, it is important to note that both Congress and the Department have recognized that advice to a participant or beneficiary in a participant-directed plan is advice within the meaning of ERISA section 3(21)(A)(ii).[253] Further, the fact that Congress provided a statutory prohibited transaction exemption applicable to investment advice fiduciaries is not the same as defining an investment advice fiduciary and does not limit the Department's authority to do so, as the commenter suggested. Likewise, the Department does not agree with the commenter's broad assertion that pursuant to ERISA section 404(c), Part 4 of Title I does not apply to individual account plans when participants have control and discretion over their individual accounts. The relief provided in ERISA section 404(c) is conditional and limited, and does not, for example, relieve a plan fiduciary from its duty to prudently select and monitor designated investment alternatives offered under the plan; therefore, there is no reason the Department could not define an investment advice fiduciary to include persons making recommendations to such plan fiduciaries. Finally, given the Reorganization Plan's clear assignment of authority to the Department under Code section 4975(e)(3), the Department does not agree that the reservation of authority with respect to Code section 4975(a), (b), or (c)(3) indirectly limits this authority. For these reasons, the Department does not agree with the commenter that the final rule exceeds the proper exercise of its regulatory authority under ERISA section 505, or that the rule expanded the definition of a ''plan'' in violation of ERISA section 514(d).

H. State Law

Paragraph (h) is entitled ''Continued applicability of State law regulating insurance, banking, or securities'' and provides ''[n]othing in this section shall be construed to affect or modify the provisions of section 514 of Title I of the Act, including the savings clause in section 514(b)(2)(A) for State laws that regulate insurance, banking, or securities.'' This paragraph acknowledges that ERISA section 514 expressly saves State regulation of insurance, banking, and securities from ERISA's express preemption provision, and confirms that the regulation is not intended to change the scope or effect of ERISA section 514, including the savings clause in ERISA section 514(b)(2)(A) for State regulation of insurance, banking, or securities.

I. Effective Date

The final rule is effective September 23, 2024. The amendments to the PTEs also finalized today are effective September 23, 2024. Both amended PTE 2020–02 and amended PTE 84–24 include a one-year transition period after their effective dates under which parties have to comply only with the Impartial Conduct Standards and provide a written acknowledgment of fiduciary status for relief under these PTEs.

In the proposed rule, the Department proposed that the rule would be effective 60 days after publication in the **Federal Register** but sought comment on whether additional time would be needed before the rule became applicable. Many commenters said 60 days would be an inadequate amount of time to review their businesses and prepare for and implement the compliance obligations in the rulemaking package, many of them noting that in previous rulemaking on this topic, the Department had provided more transition time than 60 days. Commenters requesting a delay suggested a range of compliance timetables which generally fell between 12 months and 36 months. The Department was also urged to stay enforcement for a period after applicability. On the other hand, several supporters of the proposal asked the Department to finalize it without undue delay.

The timetable established in the final rule and amendments to the PTEs provides a phased transition period. First, parties have approximately 5 months following the date of publication in the **Federal Register** before the final rule and amendments to the PTEs are effective. As of this effective date, the rules under Title I and Title II of ERISA would become applicable to parties who satisfy the final rule and compliance with the PTEs' Impartial Conduct Standards and

[253] *See* ERISA section 408(b)(14) (providing a statutory exemption for transactions in connection with the provision of investment advice described in ERISA section 3(21)(A)(ii) to a participant or beneficiary of an individual account plan that permits such participant or beneficiary to direct the investment of assets in their individual account); Code section 4975(d)(17) (same); *see also* Interpretive Bulletin 96–1, 29 CFR 2509.96–1.

the fiduciary acknowledgment would be required for relief under the amended PTEs. Compliance with all the conditions of the amended PTEs, in order to obtain relief under the PTEs, would not be required until the expiration of the PTEs' one-year transition period. The Department believes this approach addresses commenters' request for additional time before they would need to comply with the final rule and PTEs without unduly delaying the important protections in this rulemaking. The Department also confirms that, rather than take an enforcement-oriented approach in the initial period following applicability, its primary focus will be on promoting compliance and providing assistance to parties working in good faith to comply with the law's obligations.

Commenters also asked for assurances related to recommendations made and arrangements entered into before the effective or applicability date of the final rule and amended PTEs. One commenter described services agreements that would need revision to recognize that agreed upon services would now be considered fiduciary advice services. While the Department confirms that the final rule and amended PTEs apply to recommendations made after the applicability date, it cannot confirm that all existing agreements can be maintained as described by the one commenter.

J. Severability

The Department proposed that the rulemaking include a severability provision. The Department stated its intent that discrete aspects of the regulatory package would be severable.[254] The Department explained that it intended that the definition of investment advice fiduciary finalized in this rule would survive even if the amendments to any of the PTEs were set aside by a court.[255]

The Department received one comment in favor of including a severability provision. The commenter expressed the view that a severability provision is important for closing the regulatory gap to ensure that small business owners receive retirement investment advice that is not conflicted. The commenter suggested language the Department could include in the operative text stating that any aspects of this rulemaking package not vacated by potential court action would then remain in force. Separately, one commenter expressed the view that the Department provided its ''general intentions on the subject'' of severability but did not propose a specific severability provision or provide any rationale for severability.

Moreover, several commenters expressed opposition to a severability provision on the ground that the rulemaking package is not amenable to severability. The Department received many comments describing the entire rulemaking, namely the amendments to the regulation and PTEs, as a ''comprehensive regulatory package.'' Other commenters described the new fiduciary investment advice definition and PTE amendments as ''inextricably linked'' or an ''integrated package'' with individual parts that operate together. One commenter suggested that the entire rulemaking be vacated if any one part is vacated because the elimination of one such component could result in a ''gap for which there is no regulatory or exemptive solution.'' In this same vein, another commenter added that retaining any aspects of the rulemaking when another aspect is overturned would cause ''unintended impacts and harms.''

Other commenters suggested that the remaining aspects of the rulemaking would be unnecessary if part of the rulemaking is overturned. One commenter said that the amendments to existing PTEs were included to ''blunt'' the ''over inclusiveness'' (sic) of the new regulation. That same commenter added that the ''new affirmative obligations'' under amended PTEs 2020–02 and 84–24 lead to the conclusion that the elements of the rulemaking are not severable.

The Department acknowledges, as one commenter noted, that the notice of proposed rulemaking did not propose a specific severability provision. The Department disagrees, however, with the commenter that the Department did not provide notice of its ''initial position'' on severability. As noted above, when this rule was proposed, the Department expressed its intention that the definition of investment advice fiduciary finalized in this rule would survive even if the amendments to any of the PTEs were vacated by a court. This remains the Department's position. While courts take into account severability language in a rule when analyzing severability, a specific severability provision is not required for one element of a rulemaking to be severable from another.[256]

The Department also disagrees with the comments that different aspects of the rulemaking are inextricably linked. While the regulation updates the definition of an investment advice fiduciary to better accord with marketplace changes and the reasonable expectations of retirement investors, the amendments to the PTEs provide additional clarity for investment advice fiduciaries seeking to receive compensation for their advice, among other changes. In all its regulatory actions, the Department endeavors to ensure that any changes to the regulatory structure function smoothly. In accordance with that guiding principle, the Department has worked to ensure that each separate regulatory action being finalized today works together and works within ERISA's full framework. Together, these changes reduce the gap in protections with respect to ERISA-covered investments and level the playing field for all investment advice fiduciaries. Still, the amended regulation and PTEs operate independently and should remain if any component of the rulemaking is invalidated.

K. Administrative Procedure Act

Reliance Interests

The Department received comments that the proposed rulemaking failed to properly weigh reliance interests of advice providers in the pre-existing regulatory and exemptive framework, in violation of the Administrative Procedure Act (APA). One commenter states that, under the APA, when an agency reverses an existing policy and ''changes course,'' the agency must take into account ''serious reliance interests'' associated with the existing policy. The commenter further states that an agency must provide a ''reasoned explanation'' for the policy change. The commenter believes that the proposal did not adequately justify changing the definition of fiduciary investment advice when compared to the advice providers' reliance interests at stake and that the Department did not consider that advice providers have provided one-time rollover advice, for a fee or other compensation, for decades without needing to rely on exemptive relief from the prohibited transaction provisions in ERISA Title I and Title II. Other commenters described reliance interests in aligning their business

[254] 88 FR 75890, 75912.

[255] *Id.*

[256] *E.g., Bd. of Cnty. Commissioners of Weld Cnty., Colorado* v. *Env't Prot. Agency,* 72 F.4th 284, 296 (D.C. Cir. 2023) (''If parts of a regulation are invalid and other parts are not, we set aside only the invalid parts unless the remaining ones cannot operate by themselves or unless the agency manifests an intent for the entire package to rise or fall together. This is true for agency rules in general . . . .'').

models in accordance with the 1975 regulation and the existing PTEs.

The Department notes that even when there are certain reliance interests, an agency may change an existing policy if the new policy is permissible under the respective statute and the agency provides a reasoned explanation for the change—namely that the agency demonstrates awareness of the change and justifies the change with ''good reasons.'' [257] The Department is aware that a ''more detailed justification'' for a policy change is required ''when [the] prior policy has engendered serious reliance interests that must be taken into account.'' [258] In the event of ''significant'' reliance interests, an agency must ''weigh any such interests against competing policy concerns.'' [259] The Department has considered the reliance interests described by commenters and ultimately determined that these interests are outweighed by the public interest in protecting the interests of retirement investors to ensure the security of the retirement benefits of America's workers and their families.

As the Department outlines extensively throughout this document, there have been significant changes in the retirement plan landscape and investment marketplace since the 1975 regulation was adopted. Individuals, regardless of their financial literacy, have become increasingly responsible for their own retirement savings, and have increasingly become direct recipients of investment advice. At the same time, there has been a dramatic increase in the variety and complexity of financial products and services, which has widened the information gap between investment advice providers and their clients. One of the particular concerns of the Department is that recommendations to roll over from a workplace retirement plan to an IRA should be made in accordance with the retirement investors' best interest. This rulemaking ensures that ERISA's fiduciary protections in Title I and Title II apply to all advice that retirement investors receive from trusted advice providers concerning investment of their retirement assets in a way that aligns with the retirement investors' reasonable expectations.

Fundamentally, this rulemaking responds to the pervasiveness of conflicts of interest in investment advice, and the associated cost of these conflicts. Ultimately, that cost is borne by workers saving for a secure retirement, as the conflicts leave plan participants vulnerable to lower returns on their critical investment savings. Likewise, as greater numbers of retirement savers consider whether to roll over their retirement savings from a workplace retirement plan into an IRA or other plan, these savers are receiving conflicted advice from financial professionals, despite their reasonable expectations that the advice is provided in a fiduciary capacity and in each saver's best interest.

The Department recognizes that the final rule will result in some advice providers newly becoming investment advice fiduciaries. However, under the final rule, these providers would be fiduciaries only to the extent they make covered recommendations in contexts in which retirement investors reasonably expect that they can place their trust and confidence in the recommendation. As discussed above, the advice provider will be aware, by its conduct, that it has invited this trust and confidence. Accordingly, the advice provider should be able to adhere to the basic fiduciary norms of care and loyalty that correspond to such relationships of trust and confidence. Further, in developing the final rule and amended PTEs, the Department has considered the compliance burden on investment advice fiduciaries and has taken care to ensure that the compliance obligations—which generally involve adherence to fundamental obligations of fair dealing—align with the conduct standards adopted by the SEC and other regulators. These regulators too have moved to more protective standards in recent years, so that the Department's actions are consistent with the broad trend in the regulatory landscape. The Department has also taken care to ensure that to the extent that providers had implemented compliance with PTE 2020–02 prior to its amendment, the providers can build on that compliance to implement the amended PTE, without undue burden. Finally, the Department notes that this rulemaking follows more than 14 years in which the Department has expressed concern that the 1975 regulation no longer sensibly defined an investment advice fiduciary.[260] In light of each of these considerations, the Department does not believe that these providers' reliance interests in the 1975 regulation and current exemption structure, with the associated lack of comprehensive protections against conflicts of interest, outweigh the interests of America's retirement investors.

Comment Period

After the rulemaking was proposed, the Department received several requests for an extension of the public comment period beyond the original 60-day public comment period.[261] The Department considered the requests and decided not to extend the public comment period for the reasons explained in response to the requests.[262] The Department also received several comments that the comment period was too short. In the first instance, commenters said that a 60-day comment period is insufficient for a rule of this scope. Further, several commenters expressed the view that the comment period was effectively cut short because it overlapped with year-end holidays and because the Department held two days of public hearings on the proposal during the comment period.

The APA does not specify a minimum number of days for a comment period,

[257] *Encino Motorcars, LLC* v. *Navarro,* 579 U.S. 211, 221 (2016); *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009).

[258] *Fox,* 556 U.S. at 515.

[259] *Dep't of Homeland Sec.* v. *Regents of the Univ. of California,* 140 S. Ct. 1891, 1915 (2020).

[260] *See e.g.,* Definition of the Term Fiduciary, 75 FR 65263, 65265 (Oct. 22, 2010) (''The Department does not believe [the 1975 regulation's] approach to fiduciary status is compelled by the statutory language. Nor does the Department believe the current framework represents the most effective means of distinguishing persons who should be held accountable as fiduciaries from those who should not. For these reasons, the Department believes it is appropriate to update the 'investment advice' definition to better ensure that persons, in fact, providing investment advice to plan fiduciaries and/or plan participants and beneficiaries are subject to ERISA's standards of fiduciary conduct.''); see also Fall 2009 Regulatory Agenda (''This rulemaking is needed to bring the definition of 'fiduciary' into line with investment advice practices and to recast the current regulation to better reflect relationships between investment advisers and their employee benefit plan clients. The current regulation may inappropriately limit the types of investment advice relationships that should give rise to fiduciary duties on the part of the investment adviser,'') *https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=200910&RIN=1210-AB32.*

[261] Although the proposal was officially published in the **Federal Register** on November 3, 2023, the text of the proposal was announced and released on October 31, 2023. Press Release, EBSA, US Department Of Labor Announces Proposed Rule to Protect Retirement Savers' Interests by Updating Definition of Investment Advice Fiduciary (Oct. 31, 2023), *https://www.dol.gov/newsroom/releases/ebsa/ebsa20231031.* The Department first alerted the public that this rulemaking was underway in the Spring 2021 Unified Regulatory Agenda, nearly three years ago. U.S. Dep't of Lab., Unified Regulatory Agenda, RIN: 1210–AC02 (last visited Jan. 26, 2024), *available at https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=1210-AC02.*

[262] Letter from Lisa M. Gomez, Assistant Secretary, EBSA, to Lisa J. Bleier, SIFMA (Nov. 14, 2023) (on file with Department).The Department noted that the Department did not agree that an extension of the comment period was warranted in light of the significant public engagement on the topic of fiduciary investment advice since at least 2010, as well as the more recent informal engagements with an array of stakeholders, among other reasons. *Id.*

though it must be long enough to afford the public a meaningful opportunity to comment.[263] Ultimately, courts recognize the broad discretion agencies have in determining the reasonableness of a comment period, and courts have frequently upheld comment periods that were significantly less than the 60-day comment period here.[264] Moreover, holding hearings within the comment period did not limit the opportunity to comment; to the contrary, it provided commenters a forum for exchanging views and sharpening their own understanding prior to submitting comments. The record generated by the public notice and comment process was robust and reflected strong input from a wide range of affected parties on a wide range of issues. Based on its careful review of that record, the Department is confident that the process was full and fair, the process served its important goals, and the final rulemaking benefitted from the thoughtful input of the thousands of commenters, including firms, investment professionals, consumers, and others who participated in the process.

Regulatory Impact Analysis

The Department received a comment stating that it had failed to provide the underlying documents on which the regulatory impact analysis relied. Specifically, the commenter noted that the proposal's regulatory impact analysis cited a Department-sponsored study by Panis and Padmanabhan (2023) that had examined how investors timed the purchase and sale of mutual funds between 2007 and June 2023.[265] Two commenters noted that the study was not publicly available at the time the proposal was released.[266] One such commenter requested a copy of the study through a Freedom of Information Act filing. On November 28, 2023, that same commenter also requested a copy of the study through a submission to the Federal eRulemaking Portal. The Department promptly provided a link to the study the following day, November 29, 2023.

Another comment also noted that the proposal discussed Form 5500 data for 2021, which was taken from the Department's Private Pension Plan Bulletin: Abstract of 2021 Form 5500 Annual Reports (Bulletin)—a report that was ''forthcoming'' at the time of the proposal's publication.[267] That report was made publicly available December 13, 2023. Because the Panis and Padmanabhan (2023) study and updated Bulletin were not made available until the comment period was already underway, one commenter believes this hindered the commenter's ability to evaluate the proposal.

The Department understands the requirement that an agency supply technical studies and data relied upon as part of a rulemaking, including in particular ''critical factual data'' on which a rulemaking relies.[268] Here, the Panis and Padmanabhan (2023) study is discussed only briefly in the proposal and was made available during the comment period.[269] The Department concluded that the results of the study were consistent with an interpretation that Regulation Best Interest enhanced the standard of conduct for broker-dealers.[270] This conclusion is not disputed by commenters. The Department's assessment that there remains a gap in protections with respect to ERISA-covered investments is independent of this study. The Panis and Padmanabhan (2023) study does not represent critical factual data that are central to this rulemaking.

The Department used data in the updated Bulletin to estimate the number of plans that would be affected by the proposed amendments to the rule and related PTEs.[271] When this rule was first proposed, the Bulletin was undergoing internal departmental clearances for publication. The Bulletin was subsequently published online [272] on December 13, 2023. One group said that its assessment of the proposal was ''hindered'' due to the delayed release of the Bulletin and the Panis and Padmanabhan (2023) study. The data in these documents supplements the information in the rulemaking record, and confirms the Department's earlier assessments.

The Bulletin summarizes Form 5500 data filed by private-sector retirement plans for plan years ending in 2021. The underlying data on which the Bulletin relies were extracted from these publicly available Form 5500 filings. Therefore, while the Bulletin summaries were not available at the time the proposal was published, interested parties had the underlying data available to them and had the option to perform independent analyses of the relevant Form 5500 data.[273] The proposal details how the Department arrived at its estimates of affected entities, and the Bulletin analysis expands on and confirms the information in the proposal. The commenter did not explain how the release of the Bulletin summaries hindered the commenter's ability to examine and provide comments on the proposal, nor does the Department believe that the public's ability to meaningfully engage with the proposal was negatively affected by the timing of the publications of the Panis and Padmanabhan (2023) study and the Bulletin. This supplemental information confirms the Department's prior assessments, but does not change the methodology.

L. Other Legal Issues [274]

McCarran-Ferguson Act

A few commenters raised questions about the role of the McCarran-Ferguson

[263] *E.g., N. Carolina Growers' Ass'n, Inc.* v. *United Farm Workers,* 702 F.3d 755, 770 (4th Cir. 2012) (holding that there is no bright-line rule for the number of days necessary for adequate notice); Executive Orders 12866 and 13563 generally instruct Federal agencies to provide 60 days of public comment on a proposed rulemaking. *See* E.O. 12866 § 6(a)(1); E.O. 13563 § 2(b).

[264] *E.g., Nat'l Lifeline Ass'n* v. *FCC,* 921 F.3d 1102 (D.C. Cir. 2019) (endorsing 30 days for meaningful review of ''substantial rule changes'' (citing *Petry* v. *Block,* 737 F.2d 1193, 1201 (D.C. Cir. 1984))); *Connecticut Light & Power Co.* v. *Nuclear Regulatory Comm'n,* 673 F.2d 525, 534 (D.C. Cir. 1982) (upholding adequacy of 30-day comment period); *see North American Van Lines* v. *ICC,* 666 F.2d 1087, 1092 (7th Cir. 1981) (upholding a 45-day comment period); *see also Mayor & City Council of Baltimore* v. *Azar,* 439 F. Supp. 3d 591, 610–11 (D. Md. 2020) (upholding a 60-day comment period for a proposal that was ''complex or based on scientific or technical data'' (internal quotation marks omitted)), *aff'd sub nom. Mayor of Baltimore* v. *Azar,* 973 F.3d 258 (4th Cir. 2020).

[265] 88 FR 75890, 75943.

[266] The proposal noted that the study was then an ''unpublished draft.'' 88 FR at 75943 fn.414 (citing Constantijn Panis Karthik Padmanabhan, *Buy Low, Sell High: The Ability of Investors to Time Purchases and Sales of Mutual Funds,* Intensity, LLC. (August 14, 2023). Unpublished draft.).

[267] 88 FR at 75929 fn. 290, 75931 fn. 299.

[268] *E.g., Window Covering Mfrs. Ass'n* v. *Consumer Prod. Safety Comm'n,* 82 F.4th 1273, 1283 (D.C. Cir. 2023); *Am. Radio Relay League, Inc.* v. *F.C.C.,* 524 F.3d 227, 239 (D.C. Cir. 2008) (citation omitted).

[269] To access a copy of the study on EBSA's website, see *https://www.dol.gov/sites/dolgov/files/ebsa/researchers/analysis/retirement/buy-low-sell-high-the-ability-of-investors-to-time-purchases-and-sales-of-mutual-funds.pdf.*

[270] 88 FR at 75943, 75943 fn. 414.

[271] 88 FR at 75929–31.

[272] To access a copy of the Bulletin on EBSA's website, see *https://www.dol.gov/sites/dolgov/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletins-abstract-2021.pdf.*

[273] The Department's Form 5500 search tool allows users to filter filings by plan year, for example, and export the data to a Microsoft Excel spreadsheet. This search tool is available at *https://www.efast.dol.gov/5500search/.*

[274] Some commenters raised questions about the authority of Acting Secretary of Labor Julie A. Su. The Department disagrees and notes that Acting Secretary Su is serving lawfully in accordance with both the Department's organic statute and the Federal Vacancies Reform Act of 1998. *See* 5 U.S.C. 3345(a)(1)–(3); 29 U.S.C. 552. The Department also notes that the signatory for this rulemaking is Assistant Secretary for Employee Benefits Security Lisa M. Gomez, who is authorized to promulgate this rule pursuant to a valid delegation of authority. *See* Secretary's Order 1–2011 § 4, 77 FR 1088 (Jan. 9, 2012).

Act and the Department's authority to regulate insurance products. The McCarran-Ferguson Act states that Federal laws do not preempt State laws to the extent they relate to or are enacted for the purpose of regulating the business of insurance; it does not, however, prohibit Federal regulation of insurance.[275] Specifically, the Supreme Court has made it clear that ''the McCarran-Ferguson Act does not surrender regulation exclusively to the States so as to preclude the application of ERISA to an insurer's actions.'' [276] The Supreme Court further held that ''ERISA leaves room for complementary or dual federal or state regulation, and calls for federal supremacy when the two regimes cannot be harmonized or accommodated.'' [277] The Department has designed the final rule and amended PTEs to work with and complement State insurance laws, not to invalidate, impair, or preempt State insurance laws.[278]

Major Questions

The Department received several comments regarding the Major Questions Doctrine. One commenter stated that the Doctrine did not apply because the Department is closing loopholes and making relatively minor updates to existing exemptions. This commenter pointed to the dramatic changes in the retirement space since ERISA's enactment, stating that the Major Questions Doctrine ''does not prevent agencies from addressing new threats to the public interest that come with such changes.'' Other commenters disagreed, characterizing the proposal as an unprecedented and sudden change in the Department's regulatory scheme that lacked firm footing in ERISA. Many of those same commenters described the proposal as enormously impactful both economically and politically, and characterized it as a ''novel'' and ''unprecedented'' expansion of the Department's regulatory authority over a substantial segment of the U.S. economy. One commenter took specific issue with the compliance costs of the proposal as well as the proposal's impact on financial markets involving trillions of dollars.

In certain ''extraordinary cases . . . the history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion,'' has led the Supreme Court to consider ''whether Congress in fact meant to confer the power the agency has asserted.'' [279] In such cases, courts require a showing of ''clear congressional authority'' for the regulatory activity at issue.[280]

As is the case here, the Major Questions Doctrine does not apply where the regulatory action is grounded in neither an ancillary statutory provision [281] nor in the sudden ''discover[y] . . . [of] an unheralded power.'' [282] This final rule is rooted in one of the most fundamental provisions of ERISA upon which many of the statute's duties, protections, and liabilities are conditioned—the statute's definition of a fiduciary. This final rule builds on an extensive and continuous history of Department-issued regulatory and sub-regulatory guidance of investment advice fiduciaries. Although the Department first issued a regulation defining investment advice in 1975, it has continued to regulate in this space. The Department has issued numerous class PTEs regarding the provision of investment advice (*e.g.*, 75–1, 80–03, 81–8, 84–24, 86–128, 2020–02). Additionally, the Department issued Interpretive Bulletin 96–1, Advisory Opinions 97–15A, 2001–09A, and 2005–23A, Field Assistance Bulletins 2007–01 and 2018–02, and proposals to change the regulatory definition in 2010, 2015, and 2023. The Department's regulation of commission-earning insurance agents and brokers bears an equally extensive regulatory history, dating back to 1976 with the issuance of a proposal for what would become PTE 77–9. The PTE was issued in response to a class exemption request submitted by pension consultants and other interested parties, including the ACLI and ICI.[283] The applicants also requested the Department rule that ''the normal sales presentation and recommendations made by an insurance agent or broker to a plan or plan fiduciary will not be considered to constitute the rendering of investment advice for a fee so as to classify such agent or broker as a fiduciary,'' [284] but this request was notably absent from both the proposed and final versions of PTE 77–9.[285] This regulatory history highlights the Department's unique experience and expertise in matters involving employee benefit plans and their fiduciaries and the fact that the Department has the ''great[est] familiarity with the ever-changing facts and circumstances surrounding [employee benefit plans and their fiduciaries]'' of any agency.[286]

In any event, even if the Major Question Doctrine applied, Congress has clearly and expressly granted the Department the authority to issue the current proposal. Title I of ERISA delegates broad authority to the Department to issue regulations defining terms used in Title I and to establish exemptions from prohibited transactions.[287] The Department was granted the same regulatory authority with respect to Title II plans, including IRAs, by the President's Reorganization Plan No. 4 of 1978, as ratified by Congress in 1984.[288]

First Amendment

One commenter posits that the proposed amendments to the definition of an investment advice fiduciary amount to ''content-based'' and ''viewpoint-based'' regulation of speech that would presumptively violate the First Amendment to the U.S. Constitution. This commenter believes the new definition ''would directly regulate truthful sales speech by insurance agents and broker-dealers by prohibiting their recommendations about retirement products unless the rule's onerous fiduciary requirements are satisfied.'' As a result, the commenter claims that the Department must show the rule both advances a compelling government interest and is narrowly tailored to achieve that interest.

[275] *See John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank,* 510 U.S. 86, 97–101 (1993) (holding that ''ERISA leaves room for complementary or dual federal or state regulation, and calls for federal supremacy when the two regimes cannot be harmonized or accommodated'').

[276] *John Hancock,* 510 U.S. at 98.

[277] *Id.*

[278] *See BancOklahoma Mortg. Corp.* v. *Capital Title Co., Inc.,* 194 F.3d 1089 (10th Cir. 1999) (stating that McCarran-Ferguson Act bars the application of a Federal statute only if (1) the Federal statute does not specifically relate to the business of insurance; (2) a State statute has been enacted for the purpose of regulating the business of insurance; and (3) the Federal statute would invalidate, impair, or supersede the State statute); *Prescott Architects, Inc.* v. *Lexington Ins. Co.,* 638 F. Supp. 2d 1317 (N.D. Fla. 2009); *see also U.S.* v. *Rhode Island Insurers' Insolvency Fund,* 80 F.3d 616 (1st Cir. 1996). The Supreme Court has held that to ''impair'' a State law is to hinder its operation or ''frustrate [a] goal of that law.'' *Humana Inc. V. Forsyth,* 525 U.S. 299, 308 (1999).

[279] *West Virginia* v. *EPA,* 597 U.S. 697, 721 (2022).

[280] *Id.* at 723.

[281] *W. Va.,* 597 U.S. at 725, 730; *Whitman* v. *Am. Trucking Ass'ns, Inc.,* 531 U.S. 457, 468 (2001).

[282] *Util. Air Regulatory Grp.* v. *Envtl. Prot. Agency,* 537 U.S. 302, 324 (2014).

[283] PTE 77–9, 41 FR 56,760, 56,761 (Dec. 28, 1976) (known as ''PTE 84–24'' following the 1984 amendment).

[284] *Id.* Even here, the applicants noted that ''even if their requested ruling is issued, the consultative or advisory services performed for plans by insurance agents and brokers are such that in particular cases the agent or broker would become a plan fiduciary.''

[285] *Id.* at 56, 763–65.

[286] *See Food & Drug Admin.* v. *Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 132 (2000).

[287] 29 U.S.C. 1108(a), 1135.

[288] Sec. 1, Public Law 98–532, 98 Stat. 2705 (Oct. 19, 1984).

The rule applies to transactions, and does not prohibit speech based on content or viewpoint or in any capacity, nor does it prohibit financial professionals from recommending any type of investment. Rather, the rule imposes fiduciary duties on covered parties when those parties are providing covered investment advice to tax-preferred accounts. The rule works to ensure that such advice is in the client's best interest, is not conflicted, and accords with the reasonable expectations of client-investors. In this way, the rule regulates professional conduct, rather than speech. Courts have generally applied a deferential standard of review to regulations of professional conduct.[289] The Department is not aware of any cases in which a court has held that requiring that a fiduciary act in accordance with fiduciary obligations would violate the First Amendment. The rule does not fundamentally implicate—much less violate—the First Amendment. For example, an adviser who did not receive conflicted compensation (*e.g.,* received an hourly fee regardless of what was recommended), would not be governed by the rule in any way.

When the Federal Government (or a State) regulates professional conduct in a way that incidentally burdens speech, the regulation does not violate the First Amendment if the measure is sufficiently drawn to protect a substantial governmental interest.[290]

This rule directly advances the Government's substantial interest in protecting retirement savers, and their tax-preferred accounts, from conflicted investment advice, the harms of which are discussed throughout this preamble. Moreover, the Department drafted this rule to be responsive to the Fifth Circuit's decision in *Chamber,* which emphasized relationships of trust and confidence. In this way, and in contrast to the 2016 Final Rule, this rule provides that fiduciary status attaches only if compensated recommendations are made in certain specified contexts, each of which describes circumstances in which the retirement investor can reasonably place their trust and confidence in the advice provider. Accordingly, this rule advances a substantial governmental interest and is sufficiently drawn to advance that interest, and, as a result, does not violate the First Amendment.

M. Regulatory Impact Analysis

This section analyzes the economic impact of the final rule and amendments to the following class administrative exemptions (PTEs) providing relief from the prohibited transaction rules that are applicable to fiduciaries under Title I of ERISA and the Code: PTEs 2020–02, 84–24, 75–1, 77–4, 80–83, 83–1, and 86–128. The Department is publishing the amendments to the PTEs elsewhere in this issue of today's **Federal Register**. Collectively, the final rule and amendments to the PTEs are referred to as the ''rulemaking'' for this section for ease of discussion.

The final rule and the amendments to the PTEs are designed to work independently and are each separate regulatory actions. In order to consider the full impact of the regulatory actions, the costs, benefits, transfers and alternatives to each aspect of this rulemaking are discussed below.

Employment-based retirement plans and IRAs are critical to the retirement security of millions of America's workers and their families. Because Retirement Investors often lack financial expertise and are increasingly responsible for deciding how to invest their retirement savings, professional investment advice providers can play a critical role in guiding their investment decisions. Prudent professional investment advice helps consumers set and achieve appropriate retirement savings and decumulation goals more effectively than consumers would on their own. For many years, the benefits of professional investment advice, however, have been persistently undermined by conflicts of interest that occur if financial services firms compensate individual investment advice providers in a manner that incentivizes them to steer consumers toward investments and transactions that yield higher profits for the firms. These practices can bias the investment advice that providers render to Retirement Investors and detrimentally impact consumers' retirement savings by eroding plan and IRA investment results with excess fees and lower performance.

This rule focuses on the provision of fiduciary investment advice to ERISA plans, participants, beneficiaries, IRAs, IRA owners and beneficiaries, and plan and IRA fiduciaries with authority or control over the plans and IRAs, and seeks to reduce or eliminate the impacts of conflicts of interest on advice they receive, as well as to ensure that trusted advisers adhere to a stringent professional standard of care when making investment recommendations. The rule amends the definition of a fiduciary so that investors can be confident that the recommendations they receive are made by advisers relying on their professional judgment, based on the investor's individual circumstances or needs, and made with the expectation the investor will act on that advice. This change in the definition of a fiduciary will primarily impact service providers to plans, those recommending rollovers, and independent insurance producers recommending non-securities-based annuities.

The amendments to PTE 2020–02 build on the existing conditions to provide more certainty for Retirement Investors receiving advice and clarity for Financial Institutions and Investment Professionals that are complying with the exemption's conditions. The amendments expand the scope of the exemption to cover transactions involving ''pure'' robo-advice providers and recommendations to buy or sell a product on a principal basis. The amendments revise the disclosure obligations to more closely align with existing SEC disclosure requirements. The amendments will also provide more guidance for Financial Institutions and Investment Professionals complying with PTE 2020–02's requirements related to Financial Institutions' policies and procedures.

PTE 84–24 is also being amended to provide relief for compensated investment advice only for independent insurance producers that recommend annuities from multiple unaffiliated insurance companies to Retirement Investors, subject to conditions similar to those in PTE 2020–02. Additionally, PTEs 75–1 Parts III and IV, 77–4, 80–83, 83–1, and 86–128 are being amended to eliminate relief for the receipt of compensation resulting from fiduciary investment advice, as defined under ERISA.

Rather than look to an assortment of different exemptions with different conditions for different transactions, investment advice fiduciaries—apart from independent insurance producers—will generally be expected to rely solely on the amended PTE 2020–02 for administrative exemptive relief for covered investment advice transactions. These amendments extend the same or similar requirements for the provision of advice to Retirement Investors, regardless of the market and investment product.

[289] *Nat'l Inst. of Fam. & Lifdvocs.* v. *Becerra,* 138 S. Ct. 2361, 2372–73, 2377 (2018) [hereinafter *NIFLA*] (citations omitted).

[290] *Cap. Associated Indus., Inc.* v. *Stein,* 922 F.3d 198, 208–09 (4th Cir. 2019); *see NIFLA,* 138 S. Ct. at 2375. In the case of a rule with an incidental burden on speech, a deferential standard of review applies. *See id.* at 2372.

The most significant benefits of the rulemaking are expected to result from (1) changing the definition of a fiduciary by amending the 1975 five-part test, (2) requiring advice given to a broader range of advice recipients, including plan fiduciaries and non-retail investors, to meet fiduciary standards under ERISA, (3) extending the application of the fiduciary duties of care and loyalty in the market for non-securities-based annuities, to create a uniform standard of trust and confidence for investment advice across different retirement products and markets, and (4) requiring that more rollover recommendations be in the Retirement Investor's best interest.

These amendments generally align with the Advisers Act and the SEC's Regulation Best Interest. ERISA has a functional fiduciary test [291] and imposes fiduciary status only to the extent the functional test is satisfied.[292] The Department intends for the compliance obligations under this rulemaking to broadly align with the standards set by the SEC in Regulation Best Interest and the Advisers Act where practicable and has tried to accomplish such alignment in this rulemaking. The Department believes that by harmonizing the application of fiduciary duty for retirement investment advisers, irrespective of the type of product they recommend, Retirement Investors will benefit from more uniform protections from conflicted advice that ensures prudent and loyal investment recommendations from financial advisers regardless of the type of investment vehicle used. While extending fiduciary duties to more entities will generate costs, the Department believes any new compliance costs will not be unduly burdensome, as the rulemaking broadly aligns with those compliance obligations imposed under the Advisers Act and the SEC's Regulation Best Interest on investment advisers and broker-dealers, respectively, and simply expands these protections to additional sectors of the retirement market.

The Department has examined the effect of the rulemaking as required by Executive Order 13563,[293] Executive Order 12866,[294] the Regulatory Flexibility Act,[295] section 202 of the Unfunded Mandates Reform Act,[296] and Executive Order 13132.[297]

1. Executive Orders

Executive Orders 12866 (as amended by 14094) and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives. If regulation is necessary, agencies must choose a regulatory approach that maximizes net benefits, including potential economic, environmental, public health and safety effects; distributive impacts; and equity. Executive Order 13563 emphasizes the importance of quantifying costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

Under Executive Order 12866, ''significant'' regulatory actions are subject to review by the Office of Management and Budget (OMB). As amended by Executive Order 14094,[298] entitled ''Modernizing Regulatory Review,'' section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as any regulatory action that is likely to result in a rule that may:

(1) have an annual effect on the economy of $200 million or more (adjusted every three years by the Administrator of the Office of Information and Regulatory Affairs (OIRA) for changes in gross domestic product); or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, Territorial, or Tribal governments or communities;

(2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in the Executive order, as specifically authorized in a timely manner by the Administrator of OIRA in each case.

It has been determined that this rulemaking is significant within the meaning of section 3(f)(1) of the Executive Order. Therefore, the Department has provided an assessment of the rulemaking's costs, benefits, and transfers, and OMB has reviewed the rulemaking. Pursuant to the Congressional Review Act, OMB has determined that the rule and amended PTEs are ''major rules,'' as defined by 5 U.S.C. 804(2).

2. Need for Regulatory Action

In preparing this analysis, the Department has reviewed recent regulatory and legislative actions concerning investment advice, market developments in industries providing investment advice, and research literature weighing in on investment advice. From this review, the Department believes there is compelling evidence that Retirement Investors remain vulnerable to harm from potentially imprudent advice and conflicts of interest in the investment advice they receive. Given this evidence, and the Department's mission to ensure the security of retirement benefits of America's workers and their families, the Department is amending the definition of fiduciary and certain exemption relief.

Why Being an ERISA Fiduciary Matters

As described above, fiduciaries under ERISA are subject to specific requirements. ERISA section 404 requires Title I fiduciaries to act with the ''care, skill, prudence, and diligence under the circumstances then prevailing that a prudent [person] acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.'' Further, fiduciaries must carry out their duties ''solely in the interest of the participants and beneficiaries'' of the plan. Title II of ERISA, codified in the Internal Revenue Code, governs the conduct of fiduciaries to tax-qualified plans and IRAs. Under both Title I and Title II, fiduciaries are subject to prohibited transaction rules that forbid them from, among other things, self-dealing.[299] The aim of the prohibited transaction provisions is to protect plans, their participants, and beneficiaries from dangerous conflicts of interest that threaten the safety and security of plan benefits.[300]

This combination of a high standard of conduct and personal liability for violations of the standard of conduct for Title I fiduciaries, and restrictions on behavior for Title I and Title II fiduciaries, functions to protect plans, participants, and beneficiaries from fiduciary misdeeds. Previously, the Department conducted an economic analysis [301] (2016 Regulatory Impact

[291] *E.g., Perez* v. *Bruister,* 823 F.3d 250, 259 (5th Cir. 2016) (discussing ERISA's ''functional fiduciary'' test).

[292] *See Pegram* v. *Herdrich,* 530 U.S. 211, 225–26 (2000) (explaining the ''two hats'' doctrine under ERISA and how one may be a ''fiduciary only 'to the extent' that [the person] acts in such a capacity in relation to a plan'' (citing 29 U.S.C. 1002(21)(A))).

[293] 76 FR 3821 (Jan. 21, 2011).

[294] 58 FR 51735 (Oct. 4, 1993).

[295] Public Law 96–354, 94 Stat. 1164 (Sept. 19, 1980).

[296] Public Law 104–4, 109 Stat. 48 (Mar. 22, 1995).

[297] 64 FR 43255 (Aug. 9, 1999).

[298] 88 FR 21879 (Apr. 6, 2023).

[299] ERISA section 406, 29 U.S.C. 1106; Code section 4975(c), 26 U.S.C. 4975(c).

[300] *Lockheed Corp.* v. *Spink,* 517 U.S. 882 (1996); *Commissioner* v. *Keystone Consol. Industries, Inc.,* 508 U.S. 152 (1993).

[301] Employee Benefits Security Administration (EBSA), *Regulating Advice Markets Definition of the Term ''Fiduciary'' Conflicts of Interest – Retirement Investment Advice Regulatory Impact Analysis for*

Continued

Analysis (RIA)) of then-current market conditions and the likely effects of expanding the definition of fiduciary to include more individuals. It reviewed evidence that included:

- statistical comparisons finding poorer risk-adjusted investment performance in more conflicted settings;
- experimental and audit studies revealing questionable investment advice provider conduct, including recommendations to withdraw from low-cost, well diversified portfolios and invest in higher-cost alternatives likely to deliver inferior results;
- studies detailing gaps in consumers' financial literacy, errors in their financial decision-making, and the inadequacy of disclosure as a consumer protection;
- Federal agency reports documenting abuse and investors' vulnerability;
- economic theory, which predicts that when expert investment advice providers have conflicts of interest, non-expert investors will be harmed; and
- international experience with harmful advisory conflicts and responsive reforms.

The Department's analysis found that conflicted investment advice was widespread and caused serious harm to Retirement Investors, and that solely disclosing conflicts would fail to adequately mitigate the conflicts or remedy the harm. While subsequent market developments and changes to the regulatory landscape have mitigated some of this harm, the Department still finds that Retirement Investors are subject to conflicted investment advice and that conflicted advice causes Retirement Investors harm. Therefore, extending fiduciary protections to more types of advice will reduce advisory conflicts and deliver substantial net gains for Retirement Investors.

Some commenters criticized the Department's use of research and reports pre-dating the passage of Regulation Best Interest to justify the need for this rulemaking and in assessing its costs and benefits. The Department is aware of the limitations of using findings that precede the SEC's regulatory action to measure the impact of this rulemaking, and requested data measuring both the impact of Regulation Best Interest on mitigating harm from conflicted advice as well as how that action may have impacted markets not covered by the SEC's Regulation. While the Department relied on updated data and research as much as possible, it also utilizes earlier evidence that clearly demonstrates that conflicted advice causes harm and that, without a uniform standard requiring that all advisers act with both loyalty and prudence, Retirement Investors will continue to be subject to significant harm.

Also, while Regulation Best Interest caused important changes to the investment marketplace, Regulation Best Interest, in tandem with the Advisers Act, covers only a subset of the investment products and Investment Professionals covered by the Department's rulemaking. To a considerable degree, this rulemaking would extend the same important protections provided by Regulation Best Interest and the Advisers Act to the wider range of advisory relationships and transactions that ERISA covers, but Regulation Best Interest and the Advisers Act do not (*e.g.,* non-security recommendations, recommendations by broker-dealers to persons other than retail investors, such as plan fiduciaries, and advice given by Investment Professionals who are not broker-dealers or registered investment advisers). A large body of evidence, dating from before and after 2016, supports a finding that conflicted advice causes significant injury to investors, and that the broader and more uniform imposition of ERISA's fiduciary standards to such relationships will result in improved investor outcomes.

Changes in Retirement Savings Since the 1975 Regulation

While the 1975 regulation that established the five-part test has remained fixed, the private retirement savings landscape has changed dramatically. In the late 1970s, private retirement savings were mainly held in large employer-sponsored defined benefit plans. Under the terms of these plans and the governing legal structure, the plans and plan sponsors promised fixed payments to retirees, generally based on a percentage of their compensation and years of employment with the sponsoring employer. Plan sponsors hired professional asset managers, who were subject to ERISA's fiduciary obligations, to invest the funds, and the employers or other plan sponsors shouldered the risk that investment returns were insufficient to pay promised benefits. Individual plan participants did not take direct responsibility for management of the assets held by the plan and did not depend on expert advice for the sound management of funds, which were directly controlled by Investment Professionals.

Since then, much of the responsibility for investment decisions in employment-based plans has shifted from these large private pension fund managers to plan participants and beneficiaries, as well as IRA owners and beneficiaries, many with low levels of financial literacy.[302] Over time, the share of participants covered by defined contribution plans, in which benefits are based on contributions and earnings within an individual account, grew substantially, from just 26 percent in 1975 to 79 percent in 2021.[303] By 2021, 94 percent of active participants in defined contribution plans had responsibility for directing the investment of some or all of their account balances.[304] The Department could not have foreseen such a dramatic shift when it issued the existing fiduciary investment advice regulation in 1975. The passage of ERISA authorized IRAs in 1974, and IRAs remained in their infancy when the 1975 rule was issued. The vast majority of consumers were not managing their own retirement savings, nor consulting with investment advisers to do so, because 401(k) plans did not even exist in 1975.

Though workers have assumed more of the responsibility for their investment decisions, they still receive significant ERISA fiduciary oversight and protections while participating in certain employment-based plans—for example, plan fiduciaries must ensure that 401(k) plan lineups are prudently constructed and that the assets of defined benefit plans are managed in full conformity with ERISA's fiduciary duties. However, workers who change jobs or retire often roll over their retirement savings to an IRA, where they assume full responsibility for investing the assets in the larger marketplace without the protections

Final Rule and Exemptions, (Apr. 2016), *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.*

[302] Indeed, the American College of Financial Services announced in early 2024 the results of its 2023 Retirement Income Literacy Study, a ''comprehensive survey of retirement income literacy.'' Press Release, Am. C. of Fin. Servs., Retirement Income Literacy Study (Feb. 14, 2024), *available at https://www.theamericancollege.edu/knowledge-hub/press/study-finds-that-improving-financial-literacy-supports-retirement-wellness-and-confidence*. According to the study, ''older Americans [age 50–75] lack actionable retirement knowledge—averaging 31% [out of 100 percent] on a retirement literacy quiz.'' *Id.*

[303] EBSA, *Private Pension Plan Bulletin Historical Tables and Graphs 1975–2021,* Table E4, (Sept. 2023), *https://www.dol.gov/sites/dolgov/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletin-historical-tables-and-graphs.pdf.*

[304] EBSA, *Private Pension Plan Bulletin: Abstract of 2021 Form 5500 Annual Reports*, Table D5, (Sept. 2023), *https://www.dol.gov/sites/dolgov/files/EBSA/researchers/statistics/retirement-bulletins/private-pension-plan-bulletins-abstract-2021.pdf.*

that an employment-based plan could offer. Not only is it very common for defined contribution plan participants to roll over their retirement savings into an IRA, but it is also increasingly common among defined benefit plan participants. Defined benefit plan participants have the option to perform a rollover if their plan allows them to take a lump-sum payment when they separate from service. About 36 percent of private industry workers in traditional defined benefit plans have a lump-sum payment available at normal retirement, as do virtually all private industry workers in non-traditional defined benefit plans, such as cash balance plans.[305]

In 1981, private defined benefit plans held more than twice the assets in private defined contribution plans, and roughly 10 times more than IRA assets. By the third quarter of 2023, the order had reversed: IRAs held $13.0 trillion in assets, private defined contribution plans held $8.4 trillion, and private defined benefit plans held $3.7 trillion in assets.[306] This trend is expected to continue as Retirement Investors are projected to move $4.5 trillion from defined contribution plans to IRAs from 2022 through 2027.[307]

Moreover, workers have become more reliant on their retirement savings as Social Security benefits have eroded in recent decades. The age to receive full retirement benefits is gradually increasing from 65 to 67 between 2003 and 2027. Those who claim Social Security before age 66—which in 2021 was 57 percent of new retired-worker beneficiaries—receive reduced benefits.[308] For a hypothetical medium wage earner who first claims benefits at age 65, their Social Security benefit, as a share of average career earnings, was more than 40 percent in 2005 but is projected to be only about 35 percent in 2025.[309]

Investment Advice and the 1975 Regulation

As the nature of retirement savings has changed since 1975, investment advice has also evolved. Commercial relationships between employment-based pension plan sponsors and investment managers and their consulting advisers have been supplanted by retail relationships between consumers and the trusted experts they turn to for help managing their retirement plan and IRA savings.

Instead of ensuring that trusted advisers give prudent and unbiased advice in accordance with fiduciary norms, the 1975 regulation erected a multi-part series of conditions for fiduciary responsibility requiring, among other things, that advice must be on a ''regular basis'' and be ''a primary basis for investment decisions'' to confer fiduciary status. While advice providers that meet all of these conditions clearly occupy a position of trust and confidence, and are appropriately treated as fiduciaries under ERISA, the 1975 rule's technical requirements often defeat legitimate expectations of trust and confidence by failing to treat advice providers as fiduciaries, even though they hold themselves out as providing individualized and expert recommendations on behalf of the Retirement Investor and in the Retirement Investor's best interest. Advice providers that are not ERISA fiduciaries are not subject to its stringent duties of prudence and loyalty, leaving plans and plan participants vulnerable to advice providers who may engage in self-dealing transactions that would otherwise be flatly prohibited by ERISA and the Code. Moreover, the Department has found that the 1975 regulation requirement that a ''mutual agreement, arrangement, or understanding'' that advice would serve as ''a primary basis for investment decisions'' had unwittingly encouraged investment advisers, who presented themselves to investors as making a recommendation that considered an individual's personal circumstances and was in their best interest, to use fine print disclaimers stating that no such agreement or understanding exists, as potential means of avoiding ERISA fiduciary status.

While consumers often use financial advisers for investment advice related to their retirement savings, if an investment recommendation does not meet *all* five parts of the 1975 test, the adviser is not treated as a fiduciary under ERISA, no matter how complete the investor's reliance on recommendations purported to be based on their best interest in light of their individual circumstances.

For example, if a plan participant seeks advice on whether to roll over all their retirement savings, representing a lifetime of work, out of an ERISA-covered plan overseen by professional ERISA fiduciaries to purchase an annuity, the person making the recommendation with respect to the purchase of the annuity has no obligation to adhere to a best interest standard unless they meet all prongs of the 1975 rule, including regularly giving advice to the plan participant. This is true even if the person giving the advice holds themselves out as an investment expert whose recommendation is based solely on a careful and individualized assessment of the investor's needs or who has regularly provided advice to that investor on non-ERISA related investments such as the purchase of insurance products, the plan participant has no investment expertise whatsoever, and both parties understand that the participant is relying upon the advice for the most important financial decision of their life. Because the advice had not previously been rendered on a ''regular basis'' with respect to plan assets under the 1975 rule, in the absence of an expectation of ongoing advice to the Title I Plan, the adviser has no obligation under ERISA to adhere to fiduciary standards in the context of the rollover recommendation, and thus would not be subject to ERISA's requirement to act solely in the interests of the participant, allowing the adviser to recommend an annuity that is imprudent and ill-suited to the participant's circumstances, and favor the adviser's own financial interests at the expense of the participant.[310] This is not a sensible way to draw distinctions in fiduciary status, and finds no support

[305] U.S. Bureau of Labor Statistics, *National Compensation Survey: Retirement Plan Provisions For Private Industry Workers in the United States, 2022,* Table 6, (Apr. 2023), *https://www.bls.gov/ebs/publications/retirement-plan-provisions-for-private-industry-workers-2022.htm*.

[306] Board of Governors of the Federal Reserve System, *Financial Accounts of the United States: Flow of Funds, Balance Sheets, and Integrated Macroeconomic Accounts: Third Quarter 2023,* Tables L.117 & L.118, (Dec. 7, 2023), *https://www.federalreserve.gov/releases/z1/20231207/z1.pdf. https://www.federalreserve.gov/datadownload/Build.aspx?rel=z1*.

[307] Cerulli Associates, *U.S. Retirement Markets 2022: The Role of Workplace Retirement Plans in the War for Talent,* Exhibit 8.06, (2023).

[308] Cong. Res. Ser., *The Social Security Retirement Age* (July 6, 2022), *https://sgp.fas.org/crs/misc/R44670.pdf*.

[309] Social Security Administration, Office of the Chief Actuary, *Replacement Rates for Hypothetical Retired Workers,* Actuarial Note, 2021.9, Tables B & D (Aug. 2021), *https://www.ssa.gov/oact/NOTES/ran9/an2021-9.pdf*.

[310] Investors have suffered significant losses when an Investment Professional does not act in the investor's best interest. For example, in 2021, the SEC settled with Teachers Insurance and Annuity Association of America (TIAA) for $97 million, citing disclosure violations and failure to implement policies and procedures. *See https://www.sec.gov/litigation/admin/2021/33-10954.pdf*. While the SEC was able to settle, the Southern District of New York recently dismissed a complaint by plaintiffs in this same TIAA plan who argued that TIAA acted as an ERISA fiduciary when advising plan participants to roll over assets from their employer-sponsored plan to a TIAA managed account product. Although TIAA represented in market materials that it ''[met] a fiduciary standard'' when providing investment recommendations, the court found that it did not provide this advice on a regular basis and therefore did not satisfy the five-part test to be considered an ERISA fiduciary. *See Carfora* v. *TIAA*, 631 F. Supp. 3d 125, 138 (S.D.N.Y. 2022).

in the text of ERISA, which makes no mention of a ''regular basis'' requirement.

When the Department issued PTE 2020–02, it sought to ameliorate some of the effects of the regular basis requirement by suggesting that rollover advice could be treated as falling within the 1975 rule if it was rendered at the beginning of an ongoing advisory relationship. Accordingly, in an April 2021 FAQ, in the context of advice to roll over assets from an employee benefit plan to an IRA, the Department acknowledged that a single instance of advice would not satisfy the regular basis prong of the 1975 test [311] but explained that ''advice to roll over plan assets can also occur as part of an ongoing relationship or as the beginning of an intended future ongoing relationship that an individual has with an investment advice provider.'' [312]

Ultimately, however, that policy interpretation was struck down as inconsistent with the text of the 1975 rule.[313] In *American Securities Association* v. *United States Department of Labor,* the court found that ''the scope of the regular basis inquiry is limited to the provision of advice pertaining to a particular plan.'' [314] Further, the court held that, ''[b]efore a rollover occurs, a professional who gives rollover advice does so with respect to an ERISA-governed plan. However, after the rollover, any future advice will be with respect to a new non-ERISA plan, such as an IRA that contains new assets from the rollover. The professional's one-time rollover advice is thus the last advice that he or she makes to the specific plan.'' [315] As a result, the first instance of advice with respect to the assets that were rolled over will not be treated as fiduciary advice, no matter how important the recommendation (*e.g.,* to expend a lifetime of savings on a single annuity), even though the professional had previously made recommendations about plan assets and planned to continue making recommendations after the rollover. Based on the court's ruling, the Department sought to remedy the shortcomings of the ''regular basis'' test, which has no basis in the statutory text of ERISA, through new rulemaking.

Inexpert Customers

Researchers have consistently found that many Americans demonstrate low levels of financial knowledge and lack basic understanding of investment strategies. In particular, for the population age 50 and older and nearing retirement, many ''fail to grasp essential aspects of risk diversification, asset valuation, portfolio choice, and investment fees.'' [316] Such customers appear to be particularly vulnerable to receiving harmful advice. Egan et al. (2019) found that misconduct among investment advice professionals was higher in counties with populations that were less financially sophisticated, including those who are less educated and older.[317]

Retirement Investors face increasingly complex investment options that vary widely with respect to return potential, risk characteristics, liquidity, degree of diversification, contractual guarantees and/or restrictions, degree of transparency, regulatory oversight, and available consumer protections. As a result, Retirement Investors often rely on professional investment advice. While, theoretically, individuals know more about their personal assets and risk preferences than an adviser, Schwarcz and Siegelman argue in the insurance context that agents are much better situated than consumers to appreciate the implications of these facts and that the ability to process such information requires training and experience.[318] Due to high information costs, Retirement Investors are in a poor position to assess the quality of the advice they receive while the advisers' incentives are often misaligned with the investors' interests.[319] The dependence of inexpert clients on advisers with significant conflicts of interest creates a large risk of investment advice and investment decisions that are not in the best interest of Retirement Investors.

The Department's 2016 regulatory impact analysis [320] demonstrated that the balance of research and evidence indicates that the aggregate harm from cases in which consumers received bad advice due to investment advice providers' conflicts of interest is significant. The complex nature of financial markets alone, particularly for insurance products, creates information asymmetry that makes it difficult for inexpert investors to navigate savings for retirement. Multiple studies cited found that Retirement Investors often lack a basic understanding of investment fundamentals.[321] A subsequent 2018 FINRA study of non-retired individuals age 25–65 found that those investors who only had retirement accounts through their employment routinely scored lower on financial literacy questions than active investors and that these workplace-only investors scored only two percentage points higher than the general population (32 percent versus 30 percent) on a composite question regarding interest, inflation and risk diversification.[322] In

[311] EBSA, *New Fiduciary Advice Exemption: PTE 2020–02 Improving Investment Advice for Workers & Retirees Frequently Asked Questions,* (April 2021), *https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/new-fiduciary-advice-exemption*; Notably, although the Department does not think that a single instance of advice would satisfy the regular basis prong of the 1975 regulation, a single instance of advice can be sufficient to satisfy the language of the statute. See Findings, Conclusions, and Recommendations of the United States Magistrate Judge, *Federation of Ams. for Consumer Choice* v. *U.S. Dep't of Labor,* No. 3:22–CV–00243–K–BT, 2023 WL 5682411, at *18, (N.D. Tex. June 30, 2023) (''First-time advice may be sufficient to confer fiduciary status and is consistent *with ERISA*.'') (emphasis added).

[312] EBSA, *New Fiduciary Advice Exemption: PTE 2020–02 Improving Investment Advice for Workers & Retirees Frequently Asked Questions,* (April 2021), *https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/new-fiduciary-advice-exemption*.

[313] *Am. Sec. Ass'n* v. *U.S. Dep't of Lab.,* No. 8:22–CV–330VMC–CPT, 2023 WL 1967573, at *14–*19 (M.D. Fla. Feb. 13, 2023).

[314] *Id.* at *16.

[315] *Id.* at *17; *id.* (''Because assets cease to be assets of an ERISA plan after the rollover is complete, any future provision of advice is, by nature, no longer to that ERISA plan.''); Findings, Conclusions, and Recommendations of the United States Magistrate Judge, *Federation of Americans for Consumer Choice* v. *U.S. Dep't of Labor,* No. 3:22–CV–00243–K–BT, 2023 WL 5682411, at *18 (N.D. Tex. June 30, 2023) (''ERISA's text defines Title I and Title II 'plans' distinctly. By utilizing these separate definitions, Congress indicated how each Title's plans should be treated differently due to the nature of the relationship between financial professionals and Retirement Investors in Title I and Title II Plans. As the New Interpretation purports to consider recommendations as to Title II Plans when determining Title I fiduciary status, it conflicts with ERISA.'') (internal citation omitted).

[316] Annamaria Lusardi, Olivia Mitchell, & Vilsa Curto, *Financial Literacy and Financial Sophistication in the Older Population,* 13(4) Journal of Pension Economics and Finance 347–366, (Oct. 2014).

[317] Mark Egan, Gregor Matvos, & Amit Seru, *The Market for Financial Adviser Misconduct,* 127(1) Journal of Political Economy, (2019).

[318] Daniel Schwarcz and Peter Siegelman, *Insurance Agents in the 21st Century: The Problem of Biased Advice,* in D. Schwarcz & P. Siegelman (Eds.), *Handbook on the Economics of Insurance Law* (pp. 36–70). (Edward Elgar), *https://doi.org/10.4337/9781782547143.*

[319] Mark Egan, *Brokers vs. Retail Investors: Conflicting Interests and Dominated Products,* 74(3) Journal of Finance 1217–1260, (June 2019).

[320] 2016 RIA in this document refers to EBSA, *Regulating Advice Markets Definition of the Term ''Fiduciary'' Conflicts of Interest — Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions,* (Apr. 2016), *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.*

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

[322] Jill E. Fisch, Andrea Hasler, Annamaria Lusardi, & Gary Mottolo, *New Evidence on the Financial Knowledge and Characteristics of Investors* (Oct. 2019), *https://gflec.org/wp-content/*

addition to lacking rudimentary financial knowledge, many Retirement Investors do not understand the roles of different players in the investment industry and what those players are obligated to do.

The SEC has commissioned several studies on whether investors can differentiate between different types of investment service providers. A 2005 study considered four focus groups in different geographic locations and found that investors were generally unclear about distinctions between broker-dealers, financial advisers, investment advisers, and financial planners and often used the terms indistinguishably.[323] A 2008 household survey found that while most of the survey respondents had ''a general sense of the difference in services offered by brokers and by investment advisers but that they are not clear about their specific legal duties.'' [324] A 2018 study also evaluated four focus groups and found that participant understanding of the distinction between broker-dealers and investment advisers was low, even among those who were provided information describing the classifications of the two categories.[325] If investors are unable to distinguish between types of advice providers, they cannot be expected to understand legal distinctions of the standard to which that advice is held.

Confusion regarding the different types of advice providers and the different standards of conduct to which they must adhere is often made worse by industry marketing and other practices.[326] To attempt to address this, the SEC adopted as part of its 2019 Rulemaking a new required disclosure of a ''Form CRS Relationship Summary,'' under which registered investment advisers and broker-dealers must provide retail investors with certain information about the nature of their relationship with the firm and its financial professionals in plain language.[327] Although it does not apply to all of the products that a Retirement Investor might purchase, one of the purposes of the Form CRS is to help retail investors better understand and compare the services and relationships that investment advisers and broker-dealers offer in a way that is distinct from other required disclosures under the securities laws.[328]

Many investors also cannot effectively assess the quality of investment advice they receive. Research suggests that, in general, consumers often fail to fully comprehend the quality of professional services they receive, including services from doctors, lawyers, and banks in addition to investment advice providers.[329] The 2016 regulatory impact analysis cited research that advisers may inflate the bias in their advice to counteract any discounting that might occur because of the disclosure of conflicts.[330] It further cited evidence that advice from providers often encouraged investors' cognitive biases, such as return chasing, rather than correcting such biases; that payments made to broker-dealers influenced the advice provided to clients; and that funds distributed through more conflicted broker channels tend to perform worse.[331] Research also suggests that investors' opinions of adviser quality can be manipulated. For instance, Agnew et al. (2014) found that if an adviser first provides good advice on a financial decision that is easy to understand, the client will subsequently trust bad advice on a more difficult or complicated topic.[332] Investors who are unable to discern when they are receiving bad advice are at greater risk of being persuaded to make decisions that are not in their best interest.

The complexity of evaluating investment results to assess the quality of advice received is difficult for most Retirement Investors. Multiple studies have found that many individuals, across a variety of demographic groups, are not able to correctly answer questions about even the most basic principles of finance.[333] [334] [335] Furthermore, even if investors can determine whether investment returns are favorable, this is not tantamount to determining whether an adviser provides consistently sound investment advice.[336] Investment returns are noisy, and even several years of experience cannot reveal with high confidence whether the performance difference between an adviser's recommendations and a benchmark are due to chance or skill, unless the difference is substantial and persistent.[337]

Overall, the evidence demonstrates that the combination of inexpert customers and conflicted advisers results in investment underperformance compounded over time and negative outcomes for Retirement Investors. A substantial body of research showed that prior to 2016, IRA holders receiving conflicted investment advice could expect their investments to underperform by approximately 50 to 100 basis points per year.[338] Compounded over a 10 to 20 year investment period could mean that a retiree spending their savings down over 30 years would have 6 to 12

uploads/2019/10/FINRA_GFLEC_Investor_FinancialIlliteracy_Report_FINAL.pdf?x20348.

[323] Siegel & Gale, LLC, & Gelb Consulting Group, Inc, *Results of Investor Focus Group Interviews About Proposed Brokerage Account Disclosures: Report to the Securities and Exchange Commission* (March 2005).

[324] Angela 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, (Oct. 2008), *https://www.sec.gov/news/press/2008/2008-1_randiabdreport.pdf.*

[325] Brian Scholl, & Angela A. Hung, *The Retail Market for Investment Advice* (Oct. 2018), *https://bit.ly/3hGGNj4.*

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

[327] SEC, *Form CRS Relationship Summary: Amendments to Form ADV,* (September 19, 2019). *https://www.sec.gov/info/smallbus/secg/form-crs-relationship-summary*

[328] Form CRS Relationship Summary; Amendments to Form ADV, 84 FR 33492 (July 12, 2019).

[329] William Rogerson, *Reputation and Product Quality,* 14(2) The Bell Journal of Economics 508–516 (1983).

[330] George Loewenstein, Daylian M. Cain & Sunita Sah, *The Limits of Transparency: Pitfalls and Potential of Disclosing Conflicts of Interest,* 101(3) American Economic Review 423–28, (May 2011).

[331] EBSA, *Regulating Advice Markets Definition of the Term ''Fiduciary'' Conflicts of Interest — Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions,* pp. 145–158 (Apr. 2016), *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.*

[332] Julie Agnew, Hazel Bateman, Christine Eckert, Fedor Iskhakov, Jordan Louviere, & Susan Thorp, *Individual Judgment and Trust Formation: An Experimental Investigation of Online Financial Advice,* Australian School of Business Research Paper No. 2013 ACTL21, (2014).

[333] Lusardi, Annamaria, Olivia Mitchell, and Vilsa Curto. Financial Literacy and Financial Sophistication among Older Americans. NBER Working Paper 15469, 2009.

[334] Lusardi, Annamaria, and Olivia Mitchell. ''Financial Literacy and Retirement Planning in the United States.'' Journal of Pension Economics and Finance 10, no. 4 (2011): 509–525.

[335] Lusardi, Annamaria, and Olivia S. Mitchell. Financial Literacy: Evidence and Implications for Financial Education. Dartmouth College and University of Pennsylvania, 2009.

[336] EBSA, *Regulating Advice Markets Definition of the Term ''Fiduciary'' Conflicts of Interest — Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions,* pp. 136–140 (Apr. 2016), *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.*

[337] EBSA, *Regulating Advice Markets Definition of the Term ''Fiduciary'' Conflicts of Interest — Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions,* pp. 136–140 (Apr. 2016), *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.*

[338] Council of Economic Advisers, *The Effects of Conflicted Investment Advice on Retirement Savings,* (2015), *https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_coi_report_final.pdf.*

percent less to spend.[339] If a retiree encounters conflicts of interest and experiences a 100-basis point reduction in performance but still spends as though they were not encountering conflicts of interest, they would run out of retirement savings more than five years early.[340]

Pervasiveness of Conflicts of Interest in Investment Advice

Since the Department finalized the current rule in 1975, consolidation of the financial industry and innovations in products and compensation practices have multiplied opportunities for self-dealing and made fee arrangements less transparent to clients and regulators. Moreover, the existence of safeguards in only certain markets, such as those regulated by the SEC's Regulation Best Interest or the Advisers Act, creates incentives for agents to recommend conflicted products in less regulated markets.[341]

While the relative newness of Regulation Best Interest makes it challenging to measure its impact on the quality of advice in other markets, there is research demonstrating similar impacts from other policies addressing financial conflicts of interest or misconduct that varied across markets. Consistent with the previous version of their paper cited in the proposal, Bhattacharya et al. (2024) found that higher fiduciary standards lead to the sale of higher quality annuity products, identified as products with higher risk-adjusted returns.[342] Honigsberg et al. (2022) showed that variation in regulatory oversight regimes leads to a situation where the worst financial advisers, with a history of serious misconduct, operate in the most lightly regulated regimes.[343] Blanchett and Fichtner (2023) found that among households with higher levels of financial wealth, those that worked with commission-based financial advisers (*i.e.,* broker-dealers) claimed Social Security benefits two years earlier than those working with advisers paid hourly. This raises concerns that commission-based advisers were not acting in their clients' best-interest, as claiming Social Security earlier is generally inconsistent with the interests of higher income households who have more discretion on when they claim Social Security, and delaying claiming is associated with improved retirement-income outcomes.[344] Charoenwong et al. (2019) found that under lighter regulation, advisers were more likely to receive complaints, particularly advisers with past complaints or with conflicts of interest.[345] This rulemaking will impose the impartial conduct standards on trusted advice pertaining to ERISA-covered investments, regardless of the market, thereby extending the protections associated with fiduciary status under ERISA and ensure the security of retirement benefits of America's workers and their families.

Conflicts of Interest After the SEC's Regulation Best Interest

Under the Advisers Act, the SEC imposes a fiduciary duty on investment advisers, requiring them to act in a client's best interest. In 2019, with Regulation Best Interest, the SEC extended a ''best interest'' standard of conduct for broker-dealers and associated persons when they make a recommendation to a retail customer of any securities transaction or investment strategy involving securities, including recommendation of types of accounts.[346] In the Regulation Best Interest Release, the SEC stated that ''[t]he Commission has crafted Regulation Best Interest to draw on key principles underlying fiduciary obligations, including those that apply to investment advisers under the Advisers Act, while providing specific requirements to address certain aspects of the relationships between broker-dealers and their retail customers.'' [347] The SEC emphasized that, ''[i]mportantly, regardless of whether a retail investor chooses a broker-dealer or an investment adviser (or both), the retail investor will be entitled to a recommendation (from a broker-dealer) or advice (from an investment adviser) that is in the best interest of the retail investor and that does not place the interests of the firm or the financial professional ahead of the interests of the retail investor.'' [348]

The SEC also noted that the standard of conduct established by Regulation Best Interest cannot be satisfied through disclosure alone.[349] A conflict of interest is defined as ''an interest that might incline a broker, dealer, or a natural person who is an associated person of a broker or dealer—consciously or unconsciously—to make a recommendation that is not disinterested.'' [350] In guidance on conflicts of interest applicable to both broker-dealers and investment advisers, the SEC staff stated,

> All broker-dealers, investment advisers, and financial professionals have at least some conflicts of interest with their retail investors. Specifically, they have an economic incentive to recommend products, services, or account types that provide more revenue or other benefits for the firm or its financial professionals, even if such recommendations or advice are not in the best interest of the retail investor. . . . Consistent with their obligation to act in a retail investor's best interest, firms must address conflicts in a way that will prevent the firm or its financial professionals from providing recommendations or advice that places their interests ahead of the interests of the retail investor.[351]

The SEC Investment Adviser Interpretation, published simultaneously with

[339] For example, an ERISA plan investor who rolls $200,000 into an IRA, earns a 6 percent nominal rate of return with 2.3 percent inflation, and aims to spend down her savings in 30 years, would be able to consume $11,034 per year for the 30-year period. A similar investor whose assets underperform by 0.5, 1, or 2 percentage points per year would only be able to consume $10,359, $9,705, or $8,466, respectively, in each of the 30 years. The 0.5 and 1 percentage point figures represent estimates of the underperformance of retail mutual funds sold by potentially conflicted brokers. These figures are based on a large body of literature cited in the 2015 NPRM RIA, comments on the 2015 NPRM RIA, and testimony at the Department's hearing on conflicts of interest in investment advice in August 2015. The 2-percentage point figure illustrates a scenario for an individual where the impact of conflicts of interest is more severe than average. *See* EBSA, *Regulating Advice Markets Definition of the Term ''Fiduciary'' Conflicts of Interest – Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions,* p. 4 (Apr. 2016), *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.*

[340] Council of Economic Advisers, *The Effects of Conflicted Investment Advice on Retirement Savings* (2015), *https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_coi_report_final.pdf.*

[341] Colleen Honigsberg, Edwin Hu, & Robert J. Jackson, Jr., 74 *Regulatory Arbitrage and the Persistence of Financial Misconduct, Stanford Law Review* 797, (2022).

[342] Vivek Bhattacharya, Gaston Illanes, & Manisha Padi, *Fiduciary Duty and the Market for Financial Advice,* Working Paper, (February 27, 2024), *https://www.dropbox.com/scl/fi/gj5skfflsip2nhee1662c/Draft.pdf?rlkey=msd12c734n8ddrct8uzqg0qut&dl=0.* This is an updated version of the working paper cited in the proposal. (*See* Vivek Bhattacharya, Gaston Illanes, & Manisha Padi, *Fiduciary Duty and the Market for Financial Advice,* Working Paper, (May 20, 2020), *https://www.nber.org/papers/w25861.*)

[343] Colleen Honigsberg, Edwin Hu, & Robert J. Jackson, Jr., 74 *Regulatory Arbitrage and the Persistence of Financial Misconduct, Stanford Law Review* 797, (2022).

[344] David Blanchett and Jason Fichtner. *Biased Advice? The Relationship between Financial Professionals' Compensation and Social Security Benefit Claiming Decisions,* 12(1) *Retirement Management Journal* (December 2023)

[345] Ben Charoenwong, Alan Kwan, & Tarik Umar, *Does Regulatory Jurisdiction Affect the Quality of Investment-Adviser Regulation,* 109(10) *American Economic Review* (October 2019), *https://www.aeaweb.org/articles?id=10.1257/aer.20180412.*

[346] *See* 17 CFR 240.15l–1.

[347] 84 FR 33318, 33320 (July 12, 2019).

[348] *Id.* at 33321.

[349] *Id.* at 33318.

[350] 17 CFR 240.15l–1(b)(3).

[351] Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Conflict of Interest, *https://www.sec.gov/tm/iabd-staff-bulletin-conflicts-interest.*

Regulation Best Interest, reaffirmed and in some cases clarified aspects of the fiduciary duty of an investment adviser under the Advisers Act.[352] The SEC stated that ''an investment adviser's fiduciary duty under the Investment Advisers Act comprises both a duty of care and a duty of loyalty.'' [353] According to the SEC, ''[t]his fiduciary duty is based on equitable common law principles and is fundamental to advisers' relationships with their clients under the Advisers Act.'' [354] The fiduciary duty under the Federal securities laws requires an adviser ''to adopt the principal's goals, objectives, or ends.'' [355]

The SEC stated:

> This means the adviser must, at all times, serve the best interest of its client and not subordinate its client's interest to its own. In other words, the investment adviser cannot place its own interests ahead of the interests of its client. This combination of care and loyalty obligations has been characterized as requiring the investment adviser to act in the ''best interest'' of its client at all times.[356]

While the standards of care imposed under the Advisers Act and Regulation Best Interest overlap with ERISA's fiduciary standard, the SEC's jurisdiction does not cover all transactions that are covered under ERISA. Specifically, Regulation Best Interest does not cover advice to non-retail investors, and the SEC's authority under Regulation Best Interest and the Advisers Act is tied to the regulation of securities. Similarly, while there is a large overlap in the substance of the different regulatory regimes, in enacting ERISA, Congress provided special protections for tax-advantaged retirement savings that do not apply more broadly. For example, Congress prohibited transactions (absent an exemption) that were determined to raise significant risk to retirement plan participants and beneficiaries.

Regulation Best Interest shares the same goal as the Department's own rulemaking, in seeking to ensure investors are receiving investment advice in their best interest. Further, Regulation Best Interest expands protections in some of the same markets that are a concern of this rulemaking.

After Regulation Best Interest's adoption, the North American Securities Administrators Association's (NASAA) Broker-Dealer Section Committee concluded a review of over 200 examinations evaluating broker-dealers' compliance of Regulation Best Interest by State Examiners in 25 States.[357] This review revealed steady implementation progress, including that firms had been updating investor profile forms and policies and procedures; that firms recommending complex, costly or risky products were imposing restrictions based on ages, income/net worth and risk profiles; and that firms were utilizing cost-comparison tools to better consider reasonable investment alternatives.[358]

Moreover, the majority of the firms did not cease (94 percent) or restrict (76 percent) sales of any products following Regulation Best Interest. Only 2 percent or less of firms ceased the sale of options, non-traded real-estate investment trusts (REITs), highly-leveraged products, private securities, cryptocurrency or other digital assets, Special-purpose Acquisition Companies (SPACs), leveraged or inverse ETFs/ETNs, and penny stocks or other thinly-traded securities.[359] The report noted, however, that firms still struggled with considering reasonably available alternatives and conflict mitigation; ignoring lower cost and less risky products when recommending complex, costly and risky products and relying on financial incentives to sell them; and that firms have not enhanced point of sale disclosures.[360]

The SEC began conducting limited scope broker-dealer examinations and risk-based inspections in June 2020 to assess whether firms established written policies and procedures to comply with Regulation Best Interest and had made reasonable progress in implementing those policies and procedures. In their reviews, staff identified instances of deficiencies with respect to Regulation Best Interest's Disclosure, Care, Conflict of Interest, and Compliance Obligations.[361] FINRA has identified similar deficiencies in its Report on Examination and Risk Monitoring Program.[362] At the same time, the SEC's Division of Examination notes that, in response to deficiency letters identifying these issues, many broker-dealers modified their practices, policies and procedures.[363] In addition, the SEC staff released additional guidance in April 2023 focused on broker-dealers' and investment advisers' obligations with respect to their care and conflicts of interests obligations, in addition to account recommendations.[364]

The SEC staff announced in January 2023 that it intends to incorporate compliance with Regulation Best Interest into retail-focused examinations of broker-dealers [365] and both the SEC and FINRA have begun enforcement actions related to Regulation Best Interest.[366] In June 2022, the SEC charged a firm and five brokers for violating Regulation Best Interest and selling high-risk bonds to retirees and other retail investors [367] and in February 2024, the SEC reached a settlement of over $2.2 million with TIAA–CREF for failing to comply with Regulation Best Interest in connection with

[352] 84 FR 33669 (July 12, 2019).

[353] *Id.* at 33671 (footnote omitted).

[354] *Id.* at 33670.

[355] *Id.* at 33671.

[356] *Id.* (footnote omitted).

[357] North American Securities Administrators' Association, *Report and Findings of NASAA's Broker-Dealer Section Committee: National Examination Initiative Phase II (A),* (November 2021), *https://www.nasaa.org/wp-content/uploads/2021/11/NASAA-Reg-BI-Phase-II-A-Report-November-2021_FINAL.pdf?_hsenc=p2ANqtz-8omG4E39GJ9JKayUxU4AB8lSU7LF_fvSNO6yCo9KraMk81h65TjgkywccFhKf2QJUpgyaoj1iNEfMJ-b-l-2CDTG-fTw;* and North American Securities Administrators' Association, *Report and Findings of NASAA's Broker-Dealer Section Committee: National Examination Initiative Phase II (B)* (Sept. 2023) *https://www.nasaa.org/wp-content/uploads/2023/08/Reg-BI-Phase-II-B-Report-Formatted-8.29.23.pdf.*

[358] Ibid.

[359] Ibid.

[360] Ibid.

[361] SEC, *Risk Alert: Observations from Broker-Dealer Examinations Related to Regulation Best Interest,* (Jan. 30, 2023), *https://www.sec.gov/file/exams-reg-bi-alert-13023.pdf.*

[362] FINRA, *2023 Report on FINRA's Examination and Risk Monitoring Program,* (Jan. 2023), *https://www.finra.org/sites/default/files/2023-01/2023-report-finras-examination-risk-monitoring-program.pdf.*

[363] SEC, *Risk Alert: Observations from Broker-Dealer Examinations Related to Regulation Best Interest,* (Jan. 30, 2023), *https://www.sec.gov/file/exams-reg-bi-alert-13023.pdf.*

[364] SEC, *Staff Bulletin: Standards of Conduct for Broker Dealers and Investment Advisers Care Obligation,* (Apr. 20, 2023), *https://www.sec.gov/tm/standards-conduct-broker-dealers-and-investment-advisers;* SEC, *Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Account Recommendations for Retail Investors,* (Mar. 20, 2022), *https://www.sec.gov/tm/iabd-staff-bulletin;* SEC, *Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Conflict of Interest,* (Aug. 2, 2022), *https://www.sec.gov/tm/iabd-staff-bulletin-conflicts-interest; Securities and Exchange Commission, Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Care Obligation,* (Apr. 20, 2023), *https://www.sec.gov/tm/standards-conduct-broker-dealers-and-investment-advisers.*

[365] SEC, *Risk Alert: Observations from Broker-Dealer Examinations Related to Regulation Best Interest,* p. 1, (Jan. 30, 2023), *https://www.sec.gov/file/exams-reg-bi-alert-13023.pdf.*

[366] See SEC, *Press Release: SEC Charges Broker-Dealer with Violations of Regulation Best Interest and Fraud for Excessive Trading in Customer Accounts,* (Sept. 28, 2023), *https://www.sec.gov/enforce/34-98619-s; SEC Charges Broker-Dealers with Violations of Regulation Best Interest and Form CRS Rules for Failing to Effect Delivery of Required Disclosures,* (Sept. 28, 2023), *https://www.sec.gov/enforce/34-98609-s;* and *SEC Charges Wisconsin Broker-Dealer with Violations of Regulation Best Interest,* (Sept. 22, 2023), *https://www.sec.gov/enforce/34-98478-s.*

[367] SEC, *Press Release: SEC Charges Firm and Five Brokers with Violations of Reg BI,* (June 16, 2022), *https://www.sec.gov/news/press-release/2022-110.*

recommendations to retail customers to open a TIAA IRA.[368] Meanwhile, FINRA levied its first Regulation Best Interest-related fine in October 2022 and suspended two New York-based brokers in February 2023.[369]

Conflicts of Interest in Advice Given to Plan Fiduciaries

Concerns regarding investment advice extend to that received by ERISA plan fiduciaries. Pool et al. (2016) found that while mutual fund companies involved in plan management for 401(k) plans included both funds from their own family as well as unaffiliated funds in the menu of investment options, poor performing funds were less likely to be removed and more likely to be added to the menu if they were affiliated with the plan trustee.[370] In 2005, the SEC staff found evidence that some pension consultants do not adequately disclose their conflicts and steer plan fiduciaries to hire money managers based partly on the consultants' own financial interests.[371] The U.S. Government Accountability Office (GAO) found these inadequately disclosed conflicts were associated with substantial financial losses. GAO's study found that between 2000 and 2004, plans associated with pension consultants without adequate disclosure of their conflicts of interest saw annual rates of return 1.2 to 1.3 percentage points lower than plans associated with pension consultants with adequate disclosure of conflicts of interest.[372] In another study, GAO found that ERISA plan sponsors often are confused as to whether the advice they receive is fiduciary advice, and small plans in particular may suffer as a result.[373] This confusion leaves plan participants vulnerable to lower returns due to conflicted advice.

Conflicts of Interest in Rollover Recommendations or Advice

The treatment of rollover recommendations or advice under the 1975 rule has been a central concern in the Department's regulation of fiduciary investment advice. The decision to roll over assets from a plan to an IRA is often the single most important financial decision a plan participant makes, involving a lifetime of retirement savings.

Most IRA assets are attributable to rollover contributions, and the amount of assets rolled over to IRAs is large and expected to increase substantially.[374] In 2021, IRA rollovers from defined contribution plans increased by 4.9 percent. Cerulli Associates estimates that aggregate rollover contributions to IRAs from 2022 to 2027 will surpass $4.5 trillion.[375]

The decision to roll over one's retirement savings from an ERISA-covered employment-based plan into an IRA or other plan has significant consequences, and for many investors is the single most consequential advice they will receive and affects a lifetime of savings. About 57 percent of traditional IRA-owning households indicated that their IRAs contained rollovers from employment-sponsored retirement plans and of those households, 85 percent indicated they had rolled over their entire account balance in their most recent rollover.[376] In 2020, more than 95 percent of the dollars flowing into IRAs came from rollovers, while the rest came from regular contributions.[377]

Retiring workers must decide how best to invest a career's worth of 401(k) savings, and many look to an investment advice provider for guidance. Financial Institutions face an innate conflict of interest, in that a Financial Institution that provides a recommendation or advice concerning a rollover to a Retirement Investor may expect to earn transaction-based compensation such as commissions and/or receive an ongoing advisory fee that it likely would not receive if the assets were to remain in an ERISA-covered plan. Further, under the 1975 rule, if an investment advice provider makes a one-time recommendation that the worker move the entire balance of their retirement plan into an IRA and invest it in a particular annuity, and there is no expectation of ongoing advice to the original retirement plan, then the advice provider has no fiduciary obligation under ERISA to honor the worker's best interest unless this recommendation is part of a preexisting ''ongoing'' advice relationship with respect to plan assets. Moreover, if the advice provider makes the recommendation for the first time after the participant rolled the money out of the plan, and before they have received advice on specific investments in the IRA from the provider, the recommendation to invest all the assets in an annuity would not be treated as fiduciary advice, even if the adviser had regularly made recommendations to the participant for years about investments in the ERISA-covered plan or about other non-IRA investments. The resulting compensation represents a significant revenue source for investment advice providers.

While PTE 2020–02 mitigates some of these concerns by requiring investment advice fiduciaries to render advice in their customer's best interest in order to receive certain types of compensation from otherwise prohibited transactions resulting from rollover advice, the limitations of the existing five-part test for fiduciary status under the 1975 rule still result in significant portions of the retirement investment market operating outside of the PTE's protections.

Uniformity Across Markets and Product Types

The current regulatory approach to investment advice results in standards that vary by advice market and investment product.[378] As a result, Retirement Investors cannot rely on a single protective standard, and their exposure to risk is not only based on the types of products they invest in but also by who gives that advice or makes that recommendation and in what capacity they are acting. This creates investor confusion and makes room for regulatory arbitrage, where investment advice providers can use more favorable

[368] Securities and Exchange Commission, *Press Release: SEC Charges TIAA Subsidiary for Failing to Act in the Best Interest of Retail Customers,* (February 16, 2024), *https://www.sec.gov/news/press-release/2024-22*.

[369] Melanie Waddell, *FINRA Fines Long Island BD Over Reg BI,* Think Advisor, (Feb. 13, 2023), *https://www.thinkadvisor.com/2023/02/13/finra-fines-long-island-bd-over-reg-bi/*.

[370] Veronika K. Pool, Clemens Sialm, & Irina Stefanescu, *It Pays to Set the Menu: Mutual Fund Investment Options in 401(k) Plans*, 71(4) Journal of Finance 1779–1812, (2016).

[371] The report's findings were based on a 2002 to 2003 examination of 24 pension consultants. *See* SEC, *SEC Staff Report Concerning Examination of Select Pension Consultants*, (May 16, 2005), *http://www.sec.gov/news/studies/pensionexamstudy.pdf*.

[372] GAO Publication No. GAO–09–503T, *Private Pensions: Conflicts of Interest Can Affect Defined Benefit and Defined Contribution Plans,* (2009), *https://www.gao.gov/assets/gao-09-503t.pdf*.

[373] GAO Publication No. GAO–11–119, *401(K) Plans: Improved Regulation Could Better Protect Participants from Conflicts of Interest,* (2011), *http://www.gao.gov/products/GAO-11-119*.

[374] IRS, *SOI Tax Stats – Accumulation and Distribution of Individual Retirement Arrangement (IRA),* Table 1: Taxpayers with Individual Retirement Arrangement (IRA) Plans, By Type of Plan, Tax Year 2020, (2023).

[375] Cerulli Associates, *U.S. Retirement Markets 2022: The Role of Workplace Retirement Plans in the War for Talent,* Exhibit 8.06, (2023). Note that these numbers include public sector plans.

[376] Investment Company Institute, *The Role of IRAs in US Households' Savings for Retirement, 2021,* 28(1) ICI Research Perspective, (Jan. 2022), *https://www.ici.org/system/files/2022-01/per28-01.pdf*.

[377] Internal Revenue Service, *SOI Tax Stats – Accumulation and Distribution of Individual Retirement Arrangement (IRA),* Table 1: Taxpayers with Individual Retirement Arrangement (IRA) Plans, By Type of Plan, Tax Year 2020, (2023).

[378] For more information on the different regulatory regimes, refer to the Regulatory Baseline section in this analysis.

rules in one market to circumvent less favorable regulations elsewhere. The Department identifies the following nuances of the regulatory landscape as sources of investor confusion:

- Regulation Best Interest only applies to recommendations made by broker-dealers to retail customers. As a result of this limitation, broker-dealers' recommendations of securities transactions, investment strategies, plan design, and plan investment options to plan fiduciaries, generally fall outside its scope. This may be particularly confusing and, similar to retail individuals as described above, raise risks for small plan fiduciaries that lack investment expertise.
- Securities laws (*i.e.,* the Advisers Act and Regulation Best Interest) may not apply to advice on investments such as real estate, fixed indexed annuities, commodities, certain certificates of deposit, and other bank products.
- Variable annuities and some indexed annuities are considered securities and are subject to securities laws, while fixed annuities, including fixed indexed annuities, are subject to State law. As discussed in the Regulatory Baseline section, these laws vary significantly from State to State.
- The NAIC Model Regulation, which sets standards and procedures for recommending annuity products, has been adopted in most, but not all, States. Some States made substantive changes to the NAIC Model Regulation when adopting it, to ensure more robust protections, while other States adopted it in its entirety, including carve-outs that the regulation established for cash and non-cash compensation from best interest protections.

This list is not exhaustive but provides a sense of how many seemingly similar investments are subject to widely different regulators and protective standards.

Honigsberg et al. (2022) identified associated persons of broker-dealers who had been registered with FINRA between 2010 and 2020 but were no longer registered with the regulatory authority. Of those that exited, roughly one-third continued providing financial advice under a different regulatory regime, and eight percent of those had a history of serious misconduct while registered with FINRA. This share increased to 12 percent when compared to those that were still providing financial advice as an insurance producer registered with the NAIC and 13 percent when compared to the National Futures Association members providing advice regarding derivatives. The authors argued that the existing framework for regulating adviser misconduct creates incentives for the worst advisers to migrate to more poorly regulated State regimes.[379]

The risk posed by non-uniform regulatory environments is exemplified by the annuity market. A recent survey of insurers reported that 58 percent of insurers thought the SEC's Regulation Best Interest had improved protections for consumers.[380] However, as discussed above, generally only annuities that are considered securities are under the jurisdiction of the SEC and these comprised just 26 percent of retail annuity sales in 2023.[381] The remaining annuities are covered by State regulations that generally hold those selling such insurance products to a lower standard. In crafting this rulemaking, the Department strove to craft a definition that hews to both the text and purpose of ERISA.

An investor's retirement account may hold a wide range of investment products, those products may touch multiple regulatory regimes, and the Retirement Investor may not be aware of the different standards. Once the investment products are held in a plan or account covered by ERISA Title I or Title II, however, the Title I and Title II ERISA protections apply regardless of the type of investment product. This range of investment products held in these plans and accounts means that the regulatory definition of an investment advice fiduciary for purposes of Title I and Title II of ERISA takes on special importance in creating uniform standards for investment advice, particularly when a Retirement Investor may not realize the investment product is not covered by another regulatory regime such as Federal securities laws.

Need for Uniformity Concerning Rollovers

The difference between types of products, such as securities subject to regulation by the SEC and non-securities annuities subject to regulation by State insurance departments, creates problematic incentives for financial professionals to recommend certain products.

Under the Advisers Act and Regulation Best Interest, investment advisers and broker-dealers must have a reasonable basis to believe both the rollover itself and the account being recommended are in the retail investor's best interest.[382] SEC staff guidance recognizes that it would be difficult for an investment adviser or broker-dealer to have such a reasonable basis if it does ''not consider the alternative of leaving the retail investor's investments in their employer's plan, where that is an option.'' [383] Moreover, broker-dealers and investment advisers generally should consider certain factors when making rollover recommendations to retail investors, specifically and without limitation, including ''costs; level of services available; features of the existing account, including costs; available investment options; ability to take penalty-free withdrawals; application of required minimum distributions; protection from creditors and legal judgments; and holdings of employer stock.'' [384] As such, the SEC's regulatory framework is likely to mitigate some of the aforementioned harms to Retirement Investors, but only in markets where it applies.

In contrast, the NAIC Model Regulation, which is the basis for much of the State regulation on insurers,[385] makes no direct reference to rollovers, and imposes a less stringent obligation on annuity recommendations than the best interest standard imposed on securities recommendations and investment advice by the SEC. Given the average rollover contribution to a traditional IRA in 2019 was $112,000,[386]

[379] Colleen Honigsberg, Edwin Hu, & Robert J. Jackson, Jr., 74 *Regulatory Arbitrage and the Persistence of Financial Misconduct, Stanford Law Review* 797, (2022).

[380] Cerulli Associates, *U.S. Annuity Markets 2021: Acclimating to Industry Trends and Changing Demand*, Exhibit 1.06, The Cerulli Report, (2022).

[381] LIMRA, *U.S. Annuity Sales Post Another Record Year in 2023,* (January 24, 2024), *https://www.limra.com/en/newsroom/news-releases/2024/limra-u.s.-annuity-sales-post-another-record-year-in-2023/.*

[382] The SEC recognized in Regulation Best Interest that, ''as part of determining whether a broker-dealer has a reasonable basis to believe that a recommendation is in the best interest of the retail customer, a broker-dealer generally should consider reasonably available alternatives offered by the broker-dealer'' which the SEC viewed as ''an inherent aspect of making a 'best interest' recommendation.'' *See* Regulation Best Interest Adopting Release, 84 FR 33318, 33381. Investment advisers have fiduciary obligations with respect to rollover recommendations: ''An adviser's fiduciary duty applies to all investment advice the investment adviser provides to clients, including advice about investment strategy, engaging a sub-adviser, and account type. Advice about account type includes advice about whether to open or invest through a certain type of account (*e.g.,* a commission-based brokerage account or a fee-based advisory account) and advice about whether to roll over assets from one account (*e.g.,* a retirement account) into a new or existing account that the adviser or an affiliate of the adviser manages.'' *See* 2019 Fiduciary Interpretation, 84 FR 33674.

[383] SEC, *Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Account Recommendations for Retail Investors,* (March 30, 2022), *https://www.sec.gov/tm/iabd-staff-bulletin.*

[384] *Ibid; see Regulation Best Interest Adopting Release,* 84 FR 33318, 33383.

[385] For more information, refer to the discussion in the Regulatory Baseline section on state legislation and regulation.

[386] Matched file of Forms 1040, 1099–R, and 5498 for Tax Year 2019. IRS, Statistics of Income

Continued

the variation in regulatory standards regarding rollover advice can result in widely disparate outcomes among similarly situated Retirement Investors based solely on who they sought for advice and whether that adviser was required to put the investor's interests above their own.

An update to the regulatory definition of an investment advice fiduciary, for purposes of Title I of ERISA and the Code, is necessary to enhance protections of Retirement Investors. This approach both reflects ERISA's and the Code's statutory text, which adopts a uniform approach, as well as sound public policy. Investment recommendations should be consistently governed solely by the best interest of Retirement Investors, rather than adviser perceptions that advice on one category of investment product is subject to different regulatory standards than another.

How the Final Rule Addresses the Need for Regulatory Action

The amendments to the 1975 rule contained in this final rule will better reflect the text and purposes of ERISA and address inadequacies that the Department has observed during its decades of experience in implementing the 1975 rule. These amendments will honor the broad statutory definition of fiduciary in ERISA by amending the five-part test to create a uniformly protective fiduciary standard for Retirement Investors, subject to firm-level oversight, designed to mitigate and eliminate the harmful effects of biased advice. The amendments to the 1975 rule and related exemptions will also eliminate the risk of regulatory arbitrage, in which an investment advice provider may operate in a particular market to evade more stringent regulation. For instance, under the current regulation, an Independent Producer selling an indexed annuity, a financial professional giving a Retirement Investor one-time advice to roll investments into an IRA, or a financial professional giving advice on one transaction, could portray themselves as serving the best interest of the investor while being held to a lower care standard than financial professionals subject to the Advisers Act, the SEC's Regulation Best Interest or the Department's fiduciary standard. In contrast, the amended rule will broadly align the standard of care required of all financial professionals giving retirement investment advice with Retirement Investors' reasonable expectations that those recommendations are trustworthy. This will in turn create a retirement market where all advisers compete under a uniform fiduciary standard, reducing investor exposure to harms from conflicted advice.

The fiduciary standard, as buttressed by the protective conditions of the amended PTE 2020–02 and PTE 84–24, protects investors from getting investment recommendations that are improperly biased because of an adviser's competing financial interests. The fiduciary standard requires firms and advisers to put the interests of Retirement Investors first and to take appropriate action to mitigate and control conflicts of interest. These conditions should go a long way to redressing the dangers posed by biased advice.

In addition, the exemptions also give inexpert investors important information on the scope, severity, and magnitude of conflicts of interest. Moreover, by imposing a uniform fiduciary standard on conflicted advisers in the retirement marketplace, the final rule and amended exemptions reduce investor confusion about the standards governing advice. Retail investors who rely on expert advice are unlikely to have a sound understanding of differences in standards across various categories of investments and Investment Professionals,[387] but there is nearly universal agreement among Americans who have worked with a financial professional that those professionals providing advice about retirement investments should be required to act in their client's best interest.[388] The SEC Investor Advisory Committee, when considering a uniform adoption of a standard of duty for investment advisers and broker-dealers in 2013, found that ''investors do not distinguish between broker-dealers and investment advisers, do not know that broker-dealers and investment advisers are subject to different legal standards, do not understand the difference between a suitability standard and a fiduciary duty, and expect broker-dealers and investment advisers alike to act in their best interest when giving advice and making recommendation.'' [389]

Accordingly, when the SEC adopted Regulation Best Interest, it imposed a common standard based on fiduciary principles of care and loyalty that are applicable to broker-dealers and registered investment advisers alike. As noted in recent SEC Staff Bulletins on Regulation Best Interest, ''[b]oth [Regulation Best Interest] for broker-dealers and the [Advisers Act] fiduciary standards for investment advisers are drawn from key fiduciary principles that include an obligation to act in a retail investor's best interest and not to place their own interests ahead of the investor's interest.'' [390] These standards of conduct are aligned with the Department's rulemaking, and as SEC staff has noted, ''[a]lthough the specific application of [Regulation Best Interest] and the [Advisers Act] fiduciary standard may differ in some respect and be triggered at different times, in the staff's view, they generally yield substantially similar results in terms of the ultimate responsibilities owed to retail investors.'' [391]

While these issues have been mitigated to a considerable degree by the imposition of a common ''best interest'' standard for broker-dealers governed by Regulation Best Interest and investment advisers subject to the Advisers Act or State law, significant differences remain with respect to the standards governing investments that are not securities, such as fixed indexed annuities. Investor confusion is

Division, Individual Retirement Arrangements Study, February 2022.

[387] Angela A. Hung, Noreen Clancy, Jeff Emmett Dominitz, Eric Talley, Claude Berrebi, & Farrukh Suvankulov, *Investor and Industry Perspectives on Investment Advisers and Broker-Dealers,* RAND Corporation, (2008), *https://www.rand.org/pubs/technical_reports/TR556.html*.

[388] CFP Board. ''Retirement Investor Expectations form Financial Advisors Survey,'' (Mar. 2024). *https://www.cfp.net/-/media/files/cfp-board/knowledge/reports-and-research/cfp-retirement-investor-expectations-from-financial-advisors-survey.pdf?la=en&hash=D191BA975D8D4D9E03B5A02CAF029619*.

[389] SEC. ''Recommendation of the Investor as Purchaser Subcommittee Broker-Dealer Fiduciary Duty,'' November 1, 2013. *https://www.sec.gov/spotlight/investor-advisory-committee-2012/fiduciary-duty-recommendation.pdf*.

[390] *See* SEC, *SEC Staff Bulletin: Standards of Conduct for Broker Dealers and Investment Advisers Care Obligations,* (2023), *https://www.sec.gov/tm/standards-conduct-broker-dealers-and-investment-advisers.* and SEC, *SEC Staff Bulletin: Standards of Conduct for Broker Dealers and Investment Advisers Conflicts of Interest,* (2023), *https://www.sec.gov/tm/iabd-staff-bulletin-conflicts-interest*.

[391] *See generally* SEC, *Staff Bulletin: Standards of Conduct for Broker Dealers and Investment Advisers Care Obligations,* (2023), *https://www.sec.gov/tm/standards-conduct-broker-dealers-and-investment-advisers*.

As a practical matter, the most significant difference between the standards between advisers subject to the Advisers Act fiduciary standard and broker-dealers subject to Regulation Best Interest is that advisers generally have a baseline obligation to monitor their clients' accounts on an ongoing basis. In this respect, ERISA's fiduciary obligations are closer to the standards applicable to broker-dealers because, under ERISA's functional test of fiduciary status, a person is a fiduciary only ''to the extent'' they give the requisite advice, and there is no baseline obligation to act as a fiduciary adviser on an ongoing basis. Instead, the determination of fiduciary status under the definition set forth in ERISA Section 3(21)(a)(ii) is transactional.

exacerbated by different regulatory regimes referencing a ''best interest standard'' while defining what that means and the protections that entails differently.

The amendments to PTEs 2020–02 and 84–24 will enhance disclosures of conflicts of interest, while utilizing existing disclosure requirements from the SEC and State insurance commissions in order to mitigate burden. Nevertheless, the Department stresses that disclosure alone is limited in its effectiveness at protecting investors from the dangers posed by conflicts of interest. Merely disclosing a conflict of interest does not give the investor a working model on how to determine the impact of the conflict of interest on the advice they are receiving or of how to use the disclosure to make a better investment decision. While the disclosure puts the investor on notice of the conflict, the inexpert investor remains dependent on the expert's advice and may in fact interpret the disclosure as a sign of honesty, rather than a warning that the advice they're receiving may be influenced by their adviser's self-interest.[392] By mitigating or removing conflicts, requiring the adviser to adhere to a strong conduct standard, and requiring the adviser to establish a mechanism for overseeing and enforcing compliance, the rulemaking creates a strong infrastructure for compliance addressing the problems posed by conflicted and imprudent advice.

The growing body of evidence underscores that best interest fiduciary standards play an important role in protecting Retirement Investors.[393] One of the Department's objectives in issuing this rulemaking is to abate these and similar harms in areas outside of the SEC's jurisdiction, to ensure that Retirement Investors' assets outside the securities space are also protected from conflicted advice. This rulemaking will extend the fiduciary best interest standard to additional individuals, firms, markets, and investment products, including annuities and other non-securities. This rulemaking will apply to advice given to plan fiduciaries as well as plan participants.

In addition, for Retirement Investors who already receive the protections in the Advisers Act, Regulation Best Interest, and PTE 2020–02 under the regulatory baseline, this rulemaking will provide even stronger protections. Standards for mitigating conflicts under this rulemaking will be more rigorous and well-defined.

3. Baseline

Since the Department first took on the issues of fiduciary advice and conflicts of interest, there have been numerous developments in the regulatory environment overseeing retirement investments and the financial markets in which they operate.

Market Baseline

This rulemaking will expand the fiduciary standard to individuals, firms, and markets not currently held to a fiduciary or best interest standard. This will in turn impact how advisers make recommendations to Retirement Investors and potentially the types of investments they recommend and how they are compensated. As such, it is helpful to understand the regulatory and market baselines for retirement investments, including which sectors will be most significantly impacted by this rulemaking.

The Department has, in response to a commenter, estimated the current market size of a selected set of commonly held assets and sales of financial products for retail and institutional investors, as well as for Retirement Investors, as summarized in the table below. The Department estimates the total value of these assets at over $168 trillion, of which approximately $62 trillion is attributable to retail investors.[394] As seen below, investments in securities, which are currently covered by Regulation Best Interest and the Advisers Act, account for the majority of the retail market.

This rulemaking will specifically apply to invested assets subject to ERISA, including non-securities not covered by Regulation Best Interest and the Advisers Act. Where possible, the Department has provided the amount of assets in retirement accounts. In 2022, there were $0.74 trillion of fixed and variable annuities reported invested in IRA accounts.[395] The Department does not have data on assets invested in annuities in pension accounts, nor does it have a breakdown of how many assets are invested in fixed and variable annuities in IRA accounts.

TABLE 1—MARKET DESCRIPTION OF SELECTED COMMONLY HELD ASSETS, 2022

[In USD billions]

	Securities					Non-securities		Total
	Equities [1]	Bonds [2]	Money market funds [3]	Mutual funds [3]	Variable annuities [4]	Fixed annuities [4]	Bank deposits	
Total Assets	$64,723	$53,890	$5,223	$17,333	$2,016	$1,740	$23,597	$168,522
Retail Investor	$26,505	$4,593	$3,080	$9,749	$2,016	$1,740	$14,809	$62,491
Institutional Investor	$38,218	$49,297	$2,143	$7,584	.....	.....	$8,788	$106,030
Private Pension Investor	$2,929	$1,688	$228	$4,386	([5])	([5])	$42	
Public Pension Investor	$3,390	$3,755	$23	$230	([5])	([5])	$33	
10-Year Asset Growth	9.20%	3.70%	5.70%	2.60%	3.00%	6.00%	6.70%	5.80%
Retail Investor	10.80%	¥0.50%	5.80%	2.90%	3.00%	6.00%	6.80%	6.40%
Institutional Investor	8.20%	4.20%	5.60%	2.30%	.....	.....	6.60%	5.50%
Private Pension Investor	4.50%	4.50%	4.90%	5.30%	([5])	([5])	¥0.60%	
Public Pension Investor	4.80%	5.20%	¥8.00%	¥3.50%	([5])	([5])	¥0.90%	

Source: Board of Governors of the Federal Reserve System, *Financial Accounts of the United States,* December 7, 2023.

Notes: Retail investors include households and non-profits.

[1] Includes shares of exchange-traded funds, closed-end funds, and real estate investment trusts.

[2] Includes open market paper, treasuries, agency and GSE-backed securities, municipal securities, and corporate bonds.

[3] Money market funds and mutual funds include approximately $1.66 trillion in variable annuity mutual fund assets.

[4] Variable and fixed annuities of Retirement Investors include some annuities held in IRAs, totaling some $0.74 trillion.

[5] The Department does not have data to indicate the total value of fixed and variable annuity assets held by Retirement Investors, only those held by retail investors or in IRAs.

[392] George Loewenstein, Daylian M. Cain & Sunita Sah, *The Limits of Transparency: Pitfalls and Potential of Disclosing Conflicts of Interest,* 101(3) American Economic Review 423–28, (May 2011).

[393] For more information on the relationship of best interest fiduciary standards and the protection of Retirement Investors, refer to the Benefits section of the regulatory impact analysis.

[394] EBSA tabulations based on The Board of Governors of the Federal Reserve System, *Financial Accounts of the United States,* December 7, 2023.

[395] *Ibid.*

This rulemaking will affect assets owned by private pension investors shown in the table above. As noted above, the Department does not have data on how many of the assets in variable and fixed annuities are owned by private pension investors but believes it to be a significant amount.

Market Developments, the Annuity Market

Before it was vacated, the 2016 Final Rule had begun exerting substantial influence on financial advice and products in the insurance market, particularly with regard to annuities. There are three common types of annuities offered by insurance companies.

- In a variable annuity, an insurance company invests in an investment option chosen by the investor, which is often a mutual fund.[396] The return of the variable annuity reflects the return on the underlying investments. Variable annuities have often been referred to as ''mutual funds in an insurance wrapper.'' [397]
- In a fixed annuity, an insurance company agrees to pay the investor no less than a specified rate of interest during the asset accumulation phase and to pay a specified amount per dollar in the decumulation phase.[398] [399]
- In an indexed annuity, an insurance company agrees to pay the investor returns linked to the performance of a market index. However, unlike a variable annuity, the terms in the contract and the method used to calculate gains and losses may result in actualized gains or losses that differ from the gains and losses experienced by the index.[400]

Annuity regulators also vary by type. While all annuity products are subject to State regulation, variable annuities and some indexed annuities are considered securities, and therefore are also subject to SEC and FINRA regulations.[401] As the financial structure of each type of annuity varies, so does the risk of conflicted advice. Variable and fixed-indexed annuity commissions tend to be similar, while fixed rate income and immediate annuity commissions are generally lower.[402]

In recent years, the mix in demand for annuities has changed dramatically. While variable annuities accounted for 56 percent of the annuities market in 2016 (with fixed annuities accounting for the remaining 44 percent),[403] variable annuities only accounted for 26 percent in 2023 with fixed annuities now accounting for 74 percent of the market.[404] Driving much of the shift, in addition to changes in how fees are structured in the variables annuities space and recent increases in interest rates, is the growth in share of the population approaching retirement age. The population age 65 and older was 13 percent in 2010 and had risen to 17 percent by 2022.[405] Moreover, the proportion of the population over age 65 is expected to reach more than 20 percent by 2030.[406]

The aging population has shifted their demand to annuities that provide protection against market downturns as they approach retirement and the spenddown phase of their retirement planning, but purchasing such products also requires them to consider multiple sources of uncertainty (mortality, inflation, performance) when making their investment decisions. At the same time, annuity contracts are becoming increasingly complicated. Ninety-four percent of fixed indexed annuities now involve hybrid indexes which may utilize alternative or non-traditional investment strategies and complex features such as volatility or risk controls that rely on derivative instruments and algorithms that are increasingly complex and lack historical performance data.[407]

Research has shown that a person's financial decision-making ability peaks in their early 50s, thereby putting them at risk in later years as the ability of older individuals to recover from financial mistakes may be negatively impacted by declines in physical health and cognition and related difficulties reentering the labor force.[408] Angrisani and Lee (2019) demonstrated this, when analyzing data for individuals 50 and older in the Health and Retirement Survey. Angrisani and Lee (2019) observed significant declines in wealth among households whose financial decision-maker experienced cognitive decline. Households that received pension or annuity income or had assistance with their finances from children did face smaller wealth reductions, but the researchers did not distinguish between pension or annuity income, or when an annuity might have been purchased.[409] However, given that the median age of owners when they first purchase an annuity is 51, roughly half of annuity purchases would be made after an individual's financial decision-making ability has, according to research, begun to decline.[410]

These market trends suggest that, unless the Department acts, in the coming years an increasing number of retiring Americans will pursue more complex investment options in markets where advisers are held to a lower advice standard.

Regulatory Baseline

The problems of conflicted advice and supervisory structures for advice have received increased regulatory attention, resulting in action from the Department, the SEC, individual States, and the

[396] SEC, *Annuities,* (2021), *https://www.investor.gov/introduction-investing/investing-basics/glossary/annuities.*

[397] Frank Fabozzi, *The Handbook of Financial Instruments,* 596–599 (2002).

[398] SEC, *Annuities,* (2021), *https://www.investor.gov/introduction-investing/investing-basics/glossary/annuities.*

[399] The initial contract of a fixed annuity establishes an initial credited rate, a minimum guaranteed rate, and a bailout rate. The invested premiums grow at the specified credited rate and are added to the cash value of the annuity. The credited rate may be changed by the insurance company at a specified frequency. However, the interest rate is guaranteed to be no lower than the specified minimum guaranteed rate. If the credited rate falls below the bailout rate, the investor is able to withdraw all the funds without paying a surrender charge. *See* Frank Fabozzi, *The Handbook of Financial Instruments,* 599–601 (2002).

[400] SEC, *Updated Investor Bulletin: Indexed Annuities,* (July 2020), *https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-bulletins/updated-13.* See also FINRA Rule 2330.

[401] SEC, *Annuities,* (2021), *https://www.investor.gov/introduction-investing/investing-basics/glossary/annuities.*

[402] Constantijn Panis & Kathik Padmanabhan, *Literature Review of Conflicted Advice in Annuities Markets,* Internal Report for Department of Labor (February 2023).

[403] LIMRA Secure Retirement Institute, U.S, Individual Annuity Sales Survey (2016, 4th Quarter) *https://www.limra.com/siteassets/newsroom/fact-tank/sales-data/2016/q4/annuity-estimates-fourth-quarter-2016.*

[404] LIMRA, Preliminary U.S. Individual Annuity Sales Survey (2023, 4th Quarter) *https://www.limra.com/siteassets/newsroom/fact-tank/sales-data/2023/q4/4q-annuity-sales.pdf*

[405] World Bank, Population ages 65 and above for the United States [SPPOP65UPTOZSUSA], retrieved from FRED, Federal Reserve Bank of St. Louis; *https://fred.stlouisfed.org/series/SPPOP65UPTOZSUSA,* February 17, 2024.

[406] Vespa, Jonathan, Lauren Medina, and David M. Armstrong, ''Demographic Turning Points for the United States: Population Projections for 2020 to 2060,'' Current Population Reports, P25–1144, U.S. Census Bureau, Washington, DC, 2020.

[407] John Hilton, *Kings of the Hill: Indexed products spur life, annuity sales,* InsuranceNewsNet Magazine (July 1, 2022), *https://insurancenewsnet.com/innarticle/kings-of-the-hill.*

[408] *See* Agarwal, Sumit, John C. Driscoll, Xavier Gabaix, and David Laibson. The Age of Reason: Financial Decisions over the Life Cycle and Implications for Regulation,'' Brookings Papers on Economic Activity, Fall 2009. *https://www.brookings.edu/wp-content/uploads/2016/07/2009b_bpea_agarwal.pdf.*

[409] Agrisani, Marco and Jinkook Lee. ''Cognitive Decline and Household Financial Decisions at Older Ages,'' *Journal of the Economics of Ageing* (May 2019). *https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6768425/.*

[410] The Committee of Annuity Insurers, *Survey of Owners of Individual Annuity Contract.* (July 2022) *https://www.annuity-insurers.org/wp-content/uploads/2023/07/Gallup-Survey-of-Owners-of-Individual-Annuity-Contracts-2022.pdf.*

NAIC. The major actions are summarized below.

Regulatory Baseline, the Department of Labor

Many Financial Institutions undertook efforts to adapt to the Department's 2016 Final Rule. As such, the intended improvements in Retirement Investor outcomes appear to have been on track prior to the Fifth Circuit's vacatur of the 2016 Final Rule.[411] Research suggests that the Department's prior efforts produced positive changes in advice markets, even without fully taking effect, which were then reinforced by the SEC's actions. For instance, several studies found that the Department's 2016 Final Rule had a positive effect on conflicts of interest and that some categories of conflicts, such as bundled share classes of mutual funds and high-expense variable annuities, were reduced even after the 2016 Final Rule was struck down.[412] The nature of the conflicts associated with bundled share classes and high-expense variable annuities are discussed later in this document.

In 2020, the Department issued a technical amendment to the CFR to reinsert the 1975 rule and published PTE 2020–02. The exemption is available to registered investment advisers, broker-dealers, banks, and insurance companies and their individual employees, agents, and representatives that provide fiduciary investment advice to Retirement Investors. However, the exemption explicitly excluded investment advice solely generated by an interactive website, referred to as ''pure robo-advice.'' [413] Under the exemption, Financial Institutions and Investment Professionals can receive a wide variety of payments that would otherwise violate the prohibited transaction rules. The exemption's relief extends to prohibited transactions arising as a result of investment advice to roll over assets from a plan to an IRA, under certain conditions.

This exemption conditions relief on the Investment Professional and Financial Institution investment advice fiduciaries providing advice in accordance with the Impartial Conduct Standards. The Impartial Conduct Standards include a best interest standard, a reasonable compensation standard, and a requirement to make no misleading statements about investment transactions and other relevant matters. The best interest standard in the exemption is broadly aligned with the Federal securities laws. In addition, the exemption requires Financial Institutions to acknowledge in writing the institution's and their Investment Professionals' fiduciary status under Title I and the Code, as applicable, when providing investment advice to the Retirement Investor, and to describe in writing the services to be provided and the Financial Institutions' and Investment Professionals' material conflicts of interest. Financial Institutions must document the reasons for a rollover recommendation and provide that documentation to the Retirement Investor.[414] Financial Institutions are required to adopt policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards and conduct a retrospective review of compliance.

In order to ensure that Financial Institutions provide reasonable oversight of Investment Professionals and adopt a culture of compliance, the exemption provides that Financial Institutions and Investment Professionals will be ineligible to rely on the exemption for 10 years if they are convicted of certain crimes arising out of their provision of investment advice to Retirement Investors. They can also become ineligible if they engage in a systematic or intentional violation of the exemption's conditions or provided materially misleading information to the Department in relation to their conduct under the exemption.

At the time PTE 2020–02 was finalized, the Department left in place other administrative exemptions that could be used to provide investment advice in place of PTE 2020–02, including the other PTEs being amended in this rulemaking. Leaving the other PTEs in place allowed for significant variation in the conditions and compliance obligations of Financial Institutions when they provide investment advice for different types of assets and financial products. Those variations create opportunities for regulatory arbitrage where investment advice providers can use more favorable rules in one market to circumvent less favorable regulations elsewhere.

Regulatory Baseline, the Securities and Exchange Commission

For investment advisers subject to the Advisers Act and broker-dealers subject to Regulation Best Interest, there is substantial overlap between SEC requirements and the obligations imposed by ERISA, the Code, and this rulemaking.

The Advisers Act, ''establishes a fiduciary duty for [investment advisers] roughly analogous to the fiduciary duties of care and loyalty established by ERISA for investment advisers to plans and plan participants.'' [415] This means the adviser must, at all times, serve the best interest of its client and not subordinate its client's interest to its own.[416] The SEC's Regulation Best Interest established a standard of conduct for broker-dealers and associated persons, requiring a broker-dealer to act in the best interest of a retail customer when making a recommendation of any securities transaction or investment strategy involving securities.[417]

The SEC also covers robo-advice, and robo-advisers that meet the definition of ''investment adviser'' are regulated under the Advisers Act. Regulations and guidance included the need for adequate disclosure about the robo-adviser and the services it provides, the need to ensure that the robo-adviser is

[411] *See Chamber,* 885 F.3d 360 (5th Cir. 2018).

[412] Aron Szapiro & Paul Ellenbogen, *Early Evidence on the Department of Labor Conflict of Interest Rule: New Share Classes Should Reduce Conflicted Advice, Likely Improving Outcomes for Investors,* Morningstar, (April 2017); Jasmin Sethi, Jake Spiegel, & Aron Szapiro, *Conflicts of Interest in Mutual Fund Sales: What Do the Data Tell Us?,* 6(3) The Journal of Retirement 46–59, (2019); Lia Mitchell, Jasmin Sethi, & Aron Szapiro, *Regulation Best Interest Meets Opaque Practices: It's Time to Dive Past Superficial Conflicts of Interest,* Morningstar, (November 2019), *https://ccl.yale.edu/sites/default/files/files/wp_Conflicts_Of_Interest_111319%20FINAL.pdf;* Mark Egan, Shan Ge, & Johnny Tang, *Conflicting Interests and the Effect of Fiduciary Duty — Evidence from Variable Annuities,* 35(12) Review of Financial Studies 5334–5386 (December 2022).

[413] ''Hybrid robo-advice,'' or advice that combines combine features of robo-advice and traditional investment advice, is included under the existing PTE 2020–02. 85 FR 82798, 82830 (Dec. 18, 2020).

[414] The PTE 2020–02 preamble says: ''This requirement extends to recommended rollovers from a Plan to another Plan or IRA as defined in Code section 4975(e)(1)(B) or (C), from an IRA as defined in Code section 4975(e)(1)(B) or (C) to a Plan, from an IRA to another IRA, or from one type of account to another (*e.g.,* from a commission-based account to a fee-based account). The requirement to document the specific reasons for these recommendations is part of the required policies and procedures, in Section II(c)(3).''

[415] EBSA, *Regulating Advice Markets Definition of the Term ''Fiduciary'' Conflicts of Interest — Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions,* pp. 30 (Apr. 2016), *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.*

[416] Commission Interpretation Regarding Standard of Conduct for Investment Advisers, 84 FR 33669 (July 12, 2019).

[417] SEC Regulation Best Interest defines retail customer to include ERISA plan participants and beneficiaries, including IRA owners, but not ERISA fiduciaries. *See* 84 FR 33343–44 (July 12, 2019). This subject is further addressed in the Affected Entities section below. The SEC's Regulation Best Interest was adopted pursuant to the express and broad grant of rulemaking in Section 913(f) of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

providing appropriate advice to its customers, and the need to adopt and implement appropriate compliance programs tailored to the automated nature of the robo-adviser's services.[418]

Broker-dealers under Regulation Best Interest and investment advisers under the Advisers Act must consider costs, the level of services available, and features of existing accounts. This approach is consistent with this rulemaking. Regulation Best Interest applies to recommendations by broker-dealers to rollover or transfer assets from workplace retirement plan accounts to an IRA and recommendations to take a plan distribution, which are also covered by this rulemaking. In Regulation Best Interest, the SEC instructed that, when making a rollover recommendation:

> [B] roker-dealers should consider a variety of additional factors specifically salient to IRAs and workplace retirement plans, in order to compare the retail customer's existing account to the IRA offered by the broker-dealer. These factors should generally include, among other relevant factors: Fees and expenses; level of service available; available investment options; ability to take penalty-free withdrawals; application of required minimum distributions; protection from creditors and legal judgments; holdings of employer stock; and any special features of the existing account.[419]

Similarly, in its 2019 Fiduciary Interpretation, the SEC clarified that for registered investment advisers:

> An adviser's fiduciary duty applies to all investment advice the investment adviser provides to clients, including advice about investment strategy, engaging a sub-adviser, and account type. Advice about account type includes advice about whether to open or invest through a certain type of account (*e.g.,* a commission-based brokerage account or a fee-based advisory account) and advice about whether to roll over assets from one account (*e.g.,* a retirement account) into a new or existing account that the adviser or an affiliate of the adviser manages. In providing advice about account type, an adviser should consider all types of accounts offered by the adviser and acknowledge to a client when the account types the adviser offers are not in the client's best interest.[420]

Further, the SEC staff issued guidance stating that ''it would be difficult to form a reasonable basis to believe that a rollover recommendation is in the retail investor's best interest and does not place your or your firm's interests ahead of the retail investor's interest, if you do not consider the alternative of leaving the retail investor's investments in their employer's plan, where that is an option.'' [421]

With respect to these areas of overlap, the potential costs and benefits of this rulemaking are more limited, because the SEC actions and this rulemaking share many similarities and many firms have already built compliance structures based on SEC actions, PTE 2020–02 and initial compliance before vacatur of the Department's 2016 Final Rule. Outside this area of overlap, however, current standards generally are lower, so the potential costs—and benefits—of this rulemaking are likely to be more significant.

For example, this rulemaking will apply to State-licensed insurance agents and State-registered brokers, who are not uniformly regulated by the SEC, when they provide investment advice to IRA or ERISA plan investors. It will also apply to broker-dealers who give fiduciary advice to ERISA plan fiduciaries, who are not included within Regulation Best Interest's definition of a retail customer. Recommendations regarding plan and IRA investments in real estate, certain certificates of deposit, other bank products and fixed indexed annuities that are not considered securities under the Federal securities laws are also not generally regulated by the SEC.

Regulatory Baseline, State Legislative and Regulatory Developments

The appropriate baseline for this analysis is also informed by certain recent legislative and regulatory developments involving conduct standards at the State level.

TABLE 2—STATES THAT HAVE ENACTED LEGISLATION OR FINALIZED REGULATION

State	Legislation or regulation	Title of legislation or regulation	Affected entities
Alabama	Regulation	Suitability in Annuity Transactions	Insurers, Broker-Dealers, and Independent Producers.
Alaska	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers.
Arizona	Legislation	An Act Relating to Annuity Transactions	Insurers and Independent Producers.
	Regulation	Article 2—Transaction of Insurance	Insurers and Independent Producers.
Arkansas	Regulation	Stability in Annuity Transactions	Insurers and Independent Producers.
California	Legislation	An Act Relating to Annuities and Life Insurance Policies.	Insurers and Independent Producers.
Colorado	Regulation	Colorado Securities Act: Dishonest and Unethical Conduct.	Investment Advisers, Investment Adviser Representatives, and Federal Covered Advisers.
	Regulation	Concerning Best Interest Obligations and Supervision in Annuity Transactions.	Insurers and Independent Producers.
Connecticut	Legislation	Consumers Doing Business with Financial Planners.	Financial Planners.
	Legislation	An Act Requiring Administrators of Certain Retirement Plans to Disclose Conflicts of Interest.	Administrators to Municipal 403(b) Plans.
	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers.
Delaware	Regulation	Stability in Annuity Transactions	Insurers and Independent Producers.
Florida	Legislation	Consumer Protection	Insurers and Insurance Agents.
Georgia	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers.
Hawaii	Legislation	An Act Relating to Insurance	Insurers and Independent Producers.
Idaho	Legislation	Annuity Consumer Protections Act	Insurers and Independent Producers.
Illinois	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers.

[418] U.S. Securities and Exchange Commission Division of Investment Management, *Robo Advisers,* IM Guidance Update No. 2017–02, (February 2017), *https://www.sec.gov/investment/im-guidance-2017-02.pdf.*

[419] Regulation Best Interest, 84 FR 33318, 33383 (July 12, 2019).

[420] Commission Interpretation Regarding Standard of Conduct of Investment Advisers, 84 FR 33669, 33674 (July 12, 2019).

[421] SEC, *Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Account Recommendations for Retail Investors,* (March 30, 2022), *https://www.sec.gov/tm/iabd-staff-bulletin.*

TABLE 2—STATES THAT HAVE ENACTED LEGISLATION OR FINALIZED REGULATION—Continued

State	Legislation or regulation	Title of legislation or regulation	Affected entities
Indiana	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers.
Iowa	Regulation	Rulemaking Related to Best Interest Standard for Insurance Professionals.	Insurers and Independent Producers.
Kansas	Regulation	Policy and Procedure on Suitability in Annuity Transactions.	Insurers and Independent Producers.
Kentucky	Regulation	Stability in Annuity Transactions	Insurers and Independent Producers.
Louisiana	Legislation	Provides Relative to Venue for Direct Actions by Third Parties Against Insurers.	Insurance Commissioner.
Maine	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers.
Maryland	Legislation	Financial Consumer Protection Act of 2018	N/A.
	Regulation	Suitability in Annuity Transaction	Insurers and Independent Producers.
Massachusetts [422]	Regulation	Suitability in Annuity Transactions	Investment Advisers, Financial Planners, Broker-Dealers, Insurers, and Independent Producers.
	Regulation	Amendments to Fiduciary Conduct Standards	Broker-Dealers and Agents.
	Regulation	Amendments to Investment Adviser Disclosure Regulations.	Investment Advisers.
Michigan	Legislation	Amendments to An Act to Revise, Consolidate, and Classify the Law Relating to the Insurance and Surety Business.	Insurers and Independent Producers.
Minnesota	Legislation	Annuity Suitability Regulation Modification	Insurers and Independent Producers.
	Regulation	Insurance Industry Trade Practices	Insurers and Independent Producers.
Mississippi	Regulation	Annuity Transactions Model	Insurers and Independent Producers.
Montana	Legislation	An Act to Revise Insurance Laws Related to Annuities.	Insurers and Independent Producers.
	Regulation	Securities Regulation	Investment Advisers, Investment Adviser Representatives, and Federal Covered Advisers.
Nebraska	Legislation	An Act relating to the Nebraska Protections in Annuity Transactions Act.	Insurers and Independent Producers.
Nevada	Legislation	An Act Relating to Financial Planners; Imposing a Fiduciary Duty on Broker-Dealers, Sales Representatives and Investment Advisers Who for Compensation Advise Other Persons Concerning the Investment of Money.	Broker-Dealers, Sales Representatives, Investment Advisers, and Investment Adviser Representatives.
New Hampshire	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers.
New Mexico	Regulation	Suitability and Annuity Transactions	Insurers and Independent Producers.
New York	Regulation	Suitability and Best Interests in Life Insurance and Annuity Transactions.	Insurers and Independent Producers.
North Carolina	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers.
North Dakota	Legislation	An Act Relating to Annuity Transaction Practices.	Insurers and Independent Producers.
Ohio	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers.
Oklahoma	Regulation	Standards of Ethical Practices	Investment Advisers and Investment Adviser Representatives.
	Regulation	Standards of Ethical Practices for Broker-Dealers and Their Agents.	Broker-Dealers and Agents.
Oregon	Legislation	An Act Relating to Annuities	Insurers and Independent Producers.
Pennsylvania	Legislation	An Act amending the Insurance Company Law of 1921.	Insurers and Independent Producers.
Rhode Island	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers.
South Carolina	Regulation	Suitability in Annuity Transactions	Independent Producers, Broker-Dealers, Agents, and Plan Fiduciaries.
South Dakota	Legislation	An Act to Revise Annuity Sales Standards	Broker-Dealers, Investment Advisers, Insurers, and Independent Producers.
Tennessee	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers.
Texas	Legislation	Relating to Disclosures and Standards Required for Certain Annuity Transactions and Benefits Under Certain Annuity Contracts.	Insurers and Agents.
Utah	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers.
Vermont	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers.
Virginia	Regulation	Rules Governing Suitability in Annuity Transactions.	Insurers and Independent Producers.
Washington	Legislation	Concerning the Best Interest Standard for Annuity Transactions.	Insurers and Independent Producers.
	Regulation	Suitability Standard for Annuity Transactions	Insurers and Independent Producers.
West Virginia	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers.
Wisconsin	Legislation	An Act Relating to Best Interest in Annuity Transactions.	Insurers, Independent Producers, Investment Advisers, and Broker-Dealers.

TABLE 2—STATES THAT HAVE ENACTED LEGISLATION OR FINALIZED REGULATION—Continued

State	Legislation or regulation	Title of legislation or regulation	Affected entities
Wyoming	Regulation	Regulation Governing Suitability in Annuity Transactions.	Insurers and Independent Producers.

Summary of State Legislative and Regulatory Developments

In a list compiled in March 2024, the Department identified 47 States that have enacted legislation, finalized regulations, or both that impose conduct standards and disclosure requirements on various Financial Institutions.[423] The table below summarizes the enacted legislation and finalized regulation in each State, as well as the type of Financial Institution each regulation pertains to. This list includes States that have adopted the NAIC Model Regulation,[424] in addition to States that have adopted conduct standards and disclosure requirements outside of the NAIC Model Regulation.

In addition, two States that have not yet enacted legislation or finalized regulations have introduced legislation or proposed regulations that would impose conduct standards and disclosure requirements on various Financial Institutions.[425]

NAIC Annuity Transactions Model Regulation

As shown in the table above, much of the legislative and regulatory action among States focuses on insurers and Independent Producers. In February 2020, the NAIC membership approved revisions to its Suitability in Annuity Transactions Model Regulation to include a ''best interest'' standard of conduct. When the Department conducted its analysis of States in July 2023, 39 States had adopted the NAIC Model Regulation.[426] Since then, additional States have adopted the NAIC Model Regulation. In March 2024, the NAIC reported that 45 States had adopted it, with the recent addition of California, Indiana, New Hampshire, Oklahoma, Utah, and Vermont.[427]

The revisions were in response to both the SEC's and the Department's work in the regulatory space and reflected some movement in the direction of greater uniformity, although significant differences remain, as partially discussed below.[428] The NAIC Model Regulation includes a best interest obligation comprised of a Care Obligation, a disclosure obligation, a conflict of interest obligation, and a documentation obligation, applicable to an insurance producer.[429] If these obligations are met, the producer is treated as satisfying the best interest standard. The Care Obligation states that the producer, in making a recommendation, must exercise reasonable diligence, care and skill to:

- Know the consumer's financial situation, insurance needs and financial objectives;
- Understand the available recommendation options after making a reasonable inquiry into options available to the producer;
- Have a reasonable basis to believe the recommended option effectively addresses the consumer's financial situation, insurance needs and financial objectives over the life of the product, as evaluated in light of the consumer profile information; and
- Communicate the basis or bases of the recommendation.

The NAIC Model Regulation's requirements regarding mitigation of material conflicts of interest is not as stringent as either the Department's approach under ERISA or the SEC's approach. The conflict of interest obligation under the NAIC Model Regulation requires the producer to ''identify and avoid or reasonably manage and disclose material conflicts of interest, including material conflicts of interest related to an ownership interest.'' However, the NAIC Model Regulation expressly carves out all ''cash compensation or non-cash compensation'' from treatment as sources of material conflicts of interest.[430] ''Cash compensation'' that is excluded from the definition of a material conflict of interest is broadly defined to include ''any discount, concession, fee, service fee, commission, sales charge, loan, override, or cash benefit received by a producer in connection with the recommendation or sale of an annuity from an insurer, intermediary, or directly from the consumer,'' and ''non-cash compensation'' is also broadly defined to include ''any form of compensation that is not cash compensation, including, but not limited to, health insurance, office rent, office support and retirement benefits.'' [431]

This limited regulation of conflicts of interest departs substantially from both ERISA's treatment of such conflicts as giving rise to prohibited transactions

[422] The Massachusetts Supreme Judicial Court recently upheld the validity of the Commonwealth's fiduciary duty rule, holding that the Secretary of the Commonwealth had authority to promulgate it, that the Secretary's authority was not an impermissible delegation of legislative power, that the rule did not override the common-law protections available to investors, and that the rule was not preempted by the SEC's imposition of the Regulation Best Interest. Robinhood Fin. LLC v. Sec'y of Commonwealth, No. SJC–13381, 2023 WL 5490571, at *1, *6–15 (Mass. Aug. 25, 2023).

[423] States that have enacted legislation include Arizona, California, Connecticut, Florida, Hawaii, Idaho, Louisiana, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, North Dakota, Oregon, Pennsylvania, South Dakota, Texas, Washington, and Wisconsin. States that have finalized regulation include Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Montana, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, West Virginia, Washington, and Wyoming.

[424] For more information on the NAIC's Suitability in Annuity Transactions Model Regulation, or NAIC Model Regulation, refer to the section entitled ''NAIC Annuity Transactions Model Regulation'' in this RIA.

[425] Missouri and New Jersey have introduced legislation and/or regulation.

[426] Based on internal Department analysis, the modified NAIC Model Regulation, including a best interest standard, was adopted by Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

[427] NAIC, *Implementation of 2020 Revision to Model #275: Suitability in Annuity Transaction Model Regulations,* (March 2024), *https://content.naic.org/sites/default/files/inline-files/275%20Final%20Map_2020%20Changes_March%2011%202024.pdf*.

[428] NAIC, *Suitability in Annuity Transactions Model Regulation (#275) Best Interest Standard of Conduct Revisions Frequently Asked Questions,* (May 10, 2021), *https://content.naic.org/sites/default/files/inline-files/Final%20FAQ%20July%202021.pdf*.

[429] A producer is defined in section 5.L. of the model regulation as ''a person or entity required to be licensed under the laws of this state to sell, solicit or negotiate insurance, including annuities.'' Section 5.L. further provides that the term producer includes an insurer where no producer is involved.

[430] *Id.* at section 5.I.

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

and from the SEC's more robust regulation of conflicts of interest. For example, recent guidance from the SEC staff on broker-dealer and investment adviser conflicts of interest makes clear that conduct standards in the securities market require a ''robust, ongoing process that is tailored to each conflict.'' [432] The SEC staff guidance provides a detailed list of types of compensation that the SEC staff believes are examples of common sources of conflicts of interest, as follows:

- compensation, revenue or other benefits (financial or otherwise) to the firm or its affiliates, including fees and other charges for the services provided to retail investors (for example, compensation based on assets gathered and/or products sold, including but not limited to receipt of assets under management (''AUM'') or engagement fees, commissions, markups, payment for order flow, cash sweep programs, or other sales charges) or payments from third parties whether or not related to sales or distribution (for example, sub-accounting or administrative services fees paid by a fund or revenue sharing);
- compensation, revenue or other benefits (financial or otherwise) to financial professionals from their firm or its affiliates (for example, compensation or other rewards associated with quotas, bonuses, sales contests, special awards; differential or variable compensation based on the product sold, accounts recommended, AUM, or services provided; incentives tied to appraisals or performance reviews; forgivable loans based upon the achievement of specified performance goals related to asset accumulation, revenue benchmarks, client transfer, or client retention);
- compensation, revenue or other benefits (financial or otherwise) (including, but not limited to, gifts, entertainment, meals, travel, and related benefits, including in connection with the financial professional's attendance at third-party sponsored trainings and conferences) to the financial professionals resulting from other business or personal relationships the financial professional may have, relationships with third parties that may relate to the financial professional's association or affiliation with the firm or with another firm (whether affiliated or unaffiliated), or other relationships within the firm; and
- compensation, revenue or other benefits (financial or otherwise) to the firm or its affiliates resulting from the firm's or its financial professionals' sales or offer of proprietary products or services, or products or services of affiliates.[433]

The NAIC expressly disclaimed that its standard creates fiduciary obligations, and specifically provides that it does not apply to transactions involving contracts used to fund an employee pension or welfare plan covered by ERISA. The obligations in the NAIC Model Regulation differ in significant respects from those in Regulation Best Interest. For example, in addition to disregarding compensation as a source of conflicts of interest, the specific care, disclosure, conflict of interest, and documentation requirements, do not expressly incorporate the obligation not to put the producer's interests before the customer's interests, even though compliance with their terms is treated as meeting the ''best interest'' standard. The care obligation in the NAIC Model Regulation only requires that the adviser ''[h]ave a reasonable basis to believe the recommended option *effectively addresses the consumer's financial situation*.'' [434] This is comparable to the suitability obligation imposed on broker-dealers under the federal securities laws prior to Regulation Best Interest, which the SEC replaced with more stringent and protective standards.

Here too, the Department's rulemaking is much more closely aligned with Regulation Best Interest than to the NAIC Model Regulation. In contrast to the NAIC Model Regulation, Regulation Best Interest requires that, when making a recommendation, the broker-dealer ''exercises reasonable diligence, care, and skill to . . . [h]ave a reasonable basis to believe that the *recommendation is in the best interest of a particular retail customer,*'' [435] and the exemptions, consistent with ERISA's text, require that advice reflect the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor.

In recent insurance industry litigation against the Department, the plaintiffs described the differences between ''the requirements of an ERISA fiduciary and an insurance agent operating under the NAIC model regulation [as] extensive.'' [436] Among the numerous differences they identified is the fact that ''the NAIC model regulation does not define conflicts of interest or the requirements pertaining to such conflicts as broadly as ERISA.'' [437] Additionally, they asserted that ''the NAIC model regulation does not contain a 'prudence' standard'' [438] and characterized ''these best interest requirements . . . [as] a far cry from the obligations imposed on an ERISA fiduciary.'' [439]

The NAIC Model Regulation has come under additional criticism. The Certified Financial Planner Board of Standards noted in a comment that the regulation ''allows a producer to recommend products that other insurance professionals would determine effectively address a consumer's financial situation, insurance needs and financial objectives, even if a prudent professional would not recommend the product'' and ''allows a producer to recommend an annuity from a limited menu of products, without consideration of what is generally available in the marketplace.'' [440] This assessment is consistent with comments made by New York's Insurance Superintendent Lacewell during the NAIC 2020 Proceedings where she noted that while the New York standard is the ''best interest of the consumer without consideration of the producer's financial or other interest in the matter,'' that is not the standard of the NAIC Model Regulation.[441] New York voted against adopting the Model Regulation revisions, instead adopting its own rule, Regulation 187, whose standard generally aligns with this rule.

The Department is especially concerned about the proper regulation of fixed annuities, as sales totaled an estimated $286 billion in 2023, or 74 percent of the retail annuity market, an

[432] Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Conflict of Interest, *https://www.sec.gov/tm/iabd-staff-bulletin-conflicts-interest.*

[433] *Id.*

[434] *Id.* at § 6(A)(1)(a)(iii) (emphasis added). Members of the insurance industry have noted that ''[t]here is a world of difference'' between the NAIC model rule and ERISA's fiduciary regime. *See* Brief of Plaintiffs at 39–40, *FACC,* No. 3:22-cv-00243–K–BN (Nov. 7, 2022), ECF No.48 (comparing ERISA's best interest requirement to the NAIC Model Regulation, Sections 2.B and 6.A.(1)(d)).

[435] 84 FR 33318, 33458, 33491 (July 12, 2019) (emphasis added).

[436] Brief of Plaintiffs, *FACC,* No. 3:22–CV–00243–K–BT (Nov. 7, 2022), ECF No. 48 at 45 n.15.

[437] *Id.* at 45–46 n.15.

[438] *Id.* at 45 n. 15.

[439] *Id.* at 45.

[440] Comment letter received from the Certified Financial Planning Board of Standards on the *Notification of Proposed Rulemaking: Retirement Security Rule: Definition of an Investment Advice Fiduciary,* (January 2024).

[441] National Association of Insurance Commissioners. *Minutes of the Executive and Plenary Meetings February 13, 2020.* NAIC Proceedings, Summer 2020, pp. 3–15 to 3–17.

increase of 36 percent from 2022, as investors responded to rising interest rates.[442] This growth in fixed annuity investments has increased the share of retirement savings residing in a less secure environment with fewer protections against conflicted advice compared to direct investors in mutual funds and securities. The Department, uniquely among the regulators, can impose uniform standards for the provision of investment advice to Retirement Investors. It is neither limited to the regulation of securities, nor to insurance products, but rather can set a uniform fiduciary standard for the regulation of conflicts of interest with respect to any advice on any investment products recommended to Retirement Investors. The Department believes that Retirement Investors and the regulated community are best served by a consistent, protective, and understandable fiduciary standard.

Summary

The recent regulatory and market developments, combined with the judicial vacatur of the 2016 Final Rule, provide for a different baseline than the pre-2016 Final Rule baseline. While some reforms and improvements in the delivery of advice have endured despite the vacatur, without new regulatory action, gains made to some products and markets that are not covered by recent regulatory actions by the Department, SEC, or States, could be derailed. Other regulatory agencies have worked to reduce conflicts of interest, but this has resulted in a ''patchwork'' approach to regulating advice arrangements of retirement investments,[443] which has already resulted in the most conflicted advisers moving to markets with the least oversight.[444]

This rulemaking, in accordance with ERISA, will extend important and effective protections broadly to Retirement Investors. Specifically, the rulemaking will replace the 1975 regulation's five-part test with a new fiduciary status test, which, consistent with ERISA's text, purpose and focus on relationships of trust and confidence, will capture more retirement investment transactions in which the investor is reasonably relying on the advice individualized to the investor's financial needs and best interest. This rulemaking will also increase the number of rollover recommendations being considered as fiduciary advice in the context of a relationship of trust and confidence between the investor and adviser, which will enhance protections to Retirement Investors, particularly in regard to recommendations regarding annuities.

4. Accounting Table and Discussion

In accordance with OMB Circular A–4, Table 3 depicts an accounting statement summarizing the Departments' assessment of the benefits, costs, and transfers associated with this regulatory action. The Department is unable to quantify all benefits, costs, and transfers of the rulemaking but has sought, where possible, to describe these non-quantified impacts. The effects in Table 3 reflect non-quantified impacts and estimated direct monetary costs resulting from the provisions of the rulemaking.

The quantified costs are significantly lower than costs in the 2016 regulatory impact analysis due to the narrower scope of the rulemaking relative to the 2016 Final Rule as well as compliance structures adopted by the industry to reduce conflicted advice in response to State regulations, Regulation Best Interest, existing PTE 2020–02, and the Department's 2016 Rulemaking. The methodology for estimating the costs of the amendments to the rule and PTEs is consistent with the methodology and assumptions used in the 2020 analysis for the current PTE 2020–02.

[442] LIMRA, *U.S. Annuity Sales Post Another Record Year in 2023,* (January 24, 2024), *https://www.limra.com/en/newsroom/news-releases/2024/limra-u.s.-annuity-sales-post-another-record-year-in-2023/.*

[443] Eversheds Sutherland. ''Getting the Full Picture: The Emerging Best Interest and Fiduciary Duty Patchwork.'' (August 2020), *https://www.jdsupra.com/legalnews/the-emerging-patchwork-of-fiduciary-54761/.*

[444] Colleen Honigsberg, Edwin Hu, & Robert J. Jackson, Jr., *Regulatory Arbitrage and the Persistence of Financial Misconduct,* 74 Stanford Law Review 797 (2022).

TABLE 3—ACCOUNTING STATEMENT

Benefits:
Non-Quantified (please also see the Transfers section of this table):
- Increase uniformity in the regulation of financial advice for Retirement Investors, across different market segments and market participants to ensure that this advice adheres to a stringent professional standard of care.
- Protect consumers from losses that can result from advisory conflicts of interest (without unduly limiting consumer choice or adviser flexibility).
- Better align investors' portfolio with their risk preferences and savings horizons as advisers provide individualized advice based on their individual circumstances.
- Facilitate Retirement Investors' trust in advisers.

Costs:	Estimate	Year dollar	Discount rate (percent)	Period covered
Annualized Monetized ($million/Year)	$359.9	2024	7	2024–2033
	356.0	2024	3	2024–2033

Quantified Costs:
The Department expects that entities will not incur additional costs from the amendments to PTE 77–4, PTE 80–83, and PTE 83–1. However, the Department expects that entities will incur costs directly from the amendments to the following PTEs:
- The annualized cost estimates in PTE 2020–02 reflect estimated costs associated with reviewing the rulemaking, preparing written disclosures for investors, reviewing and updating policies and procedures, reviewing and updating the retrospective review, and preparing rollover documentation.
- The annualized cost estimates in PTE 84–24 reflect estimated costs associated with reviewing the rulemaking, providing disclosures to Retirement Investors, establishing written policies and procedures, conducting a retrospective review, and maintaining recordkeeping.

Transfers:
Non-Quantified:
The Benefits section provides a qualitative description of the expected gains to investors; however, the available data do not allow the Department to break down those gains into component social welfare ''benefits'' and ''transfers.'' Transfers identified in this analysis include:
- Lower fees and expenses for participants paid to Financial Institutions.
- Reallocation of investment capital to different asset classes, share classes, or investment products that better meet the individual Retirement Investor's goals.
- Shifts in the assets in plans and IRAs.

Implications for Retirement Savings Estimates

While the Department is confident that the savings to Retirement Investors will exceed the costs of this rulemaking, the Department acknowledges that it has limited data to assess the magnitude of savings that would result for Retirement Investors as a result of the rulemaking.

The SEC's Regulation Best Interest extended new protections to recommendations made by broker-dealers to retail customers on securities transactions. According to the SEC, the Conflict of Interest Obligation under Regulation Best Interest is ''intended to reduce the agency costs that arise when a broker-dealer and its associated persons provide a recommendation to a retail customer by addressing the effect of the associated person's or broker-dealer's conflicts of interest on the recommendation.'' [445] In its Economic Analysis, the SEC explored the market mechanisms by which this and other provisions would benefit retail investors. The SEC estimated that the present value of potential future mutual fund fee reductions after Regulation Best Interest would be between $14 billion to $76 billion.[446] The SEC separately estimated that the potential present value of improved future mutual fund performance net of fees (which would overlap with fee reductions) would be between $7 billion to $35 billion. The SEC noted that these estimates represented only ''some of the potential benefits'' and that more benefits were expected. It also noted that while its estimates focused on mutual funds, it expected that ''the same or similar dynamics could apply to other financial products.'' [447]

The preliminary evidence that is available for the mutual fund and annuity markets following the 2016 Final Rule and SEC's Regulation Best Interest reinforces the Department's view that well-designed reforms that raise advisory conduct standards and mitigate advisory conflicts of interests will benefit Retirement Investors.[448]

The Department believes that this rulemaking, by requiring advisers to provide Retirement Investors with information about the basis of their recommendations, fees, and potential conflicts, will better align incentives to ensure advisers act in the long-term interests of investors and reduce information asymmetries between advisers and investors. In doing so, Retirement Investors' assets may be invested more efficiently and consistent with investors' savings goals, while protecting them from potential costs associated with advisory conflicts.

Many commenters expressed concern that the Department did not quantify the benefits of the proposal. The Department is unable to quantify benefits and transfers of the rulemaking across all asset classes and investor types. The Department has, however, laid out evidence supporting its claims that this rulemaking will create significant benefits that justify the associated compliance costs. In response to the proposal, some commenters provided estimates of the benefits and costs. The Department has considered these estimates, many of which are discussed later in this document and in Table 4 below. These estimates provide strong additional support for the rulemaking.

Benefits and Transfers Scenario Analysis

This rulemaking fits into a complicated system of regulatory

[445] Regulation Best Interest, 84 FR 33318, 33447 (July 12, 2019).

[446] Regulation Best Interest, 84 FR 33318, 33491 (July 12, 2019).

[447] Regulation Best Interest, 84 FR 33318, 33458 (July 12, 2019).

[448] For more information, refer to the Benefits of a Fiduciary or Best Interest Standard section.

regimes, differing by the types of investment products being sold and the type of Investment Professionals selling the products. As such, the benefits, transfers, and costs from the rulemaking will be more prominent in some markets than others. While the Department believes that a uniform standard of care across investment products and investment advice professionals will benefit Retirement Investors, the magnitude of benefits and transfers will be more significant in markets not under a fiduciary or best interest standard. More specifically, the Department expects Retirement Investors investing in annuities to see the greatest benefits or transfers. The table below summarizes the estimates quantified by the Department and by commenters which expand on and confirm the Department's views of the benefits, costs and transfers of the rulemaking. It is difficult to separate the impacts into benefits or transfers. However, the benefits and transfers are both goals of the rulemaking. These impacts include transfers from Investment Advisers to Retirement Investors in the form of reduced fees and expenses and improved asset allocations.

TABLE 4—SUMMARY OF QUANTIFIED BENEFIT OR TRANSFER ESTIMATES

Market segment	Source	Average annual benefit or transfer: first 10 years (billion)	Estimate
Plan Participants	Comment Letter from Morningstar [449].	$5.5	The rule would result in participants saving $55.0 billion in plan fees in the first 10 years, with small plan participants receiving the largest benefit, estimated as $47.3 billion in the first 10 years.
Annuities	Comment Letter from Morningstar [450].	3.3	The rule would result in Retirement Investors rolling retirement funds into fixed index annuities saving $32.5 billion in the first 10 years.
	Council of Economic Advisers [451].	7.0	CEA provided an illustration of how to try to quantify the benefits and costs of a fixed index annuity, using the fair market price of the options. Using options on the S&P 500 index for a specified day in 2023, CEA estimated that investors may be paying 1.2 percent of the assets invested for the downside risk protection in fixed index annuities.[452] If total assets invested in fixed index annuities in 2021 had paid 1.2 percent of assets for the protection of an annuity, forgone returns could be as high as $7 billion. CEA noted that that this illustration demonstrates how, under the current system, a retirement saver could end up with lower returns than they would under the rule.
	Vivek Bhattacharya, Gaston Illanes, & Manisha Padi (2024) [453].		Bhattacharya et al. (2024) found that a common law fiduciary duty increased risk-adjusted returns by 25 basis points in annuity investments.
	Department of Labor Illustration, based on Bhattacharya et al. (2024).	5.3	If $3.8 trillion dollars are invested in annuities, 70 percent of the market is not currently subject to a fiduciary standard, and 80 percent of the market is covered by ERISA, then the rulemaking could affect 2.1 trillion in annuity assets. If, consistent with Bhattacharya et al. (2024), this segment of the market sees an increase in average returns of 25 basis points, the expansion of fiduciary duty would lead to gains for investors (a mix of societal benefits and transfers) of $5.3 billion annually.[454]

Based on these estimates, the rulemaking could result in benefits and transfers amounting to $5.5 billion annually for plan participants and amounting to between $3.3 billion and $7.0 billion annually for Retirement Investors, due to just reduced price spreads in the fixed index annuities market, with potential additional benefits stemming from reduced spreads in other fixed annuities and reductions in surrender fees paid as investors purchase. This implies that if just looking at the benefits and transfers to plan participants and to Retirement Investors investing in fixed index annuities, the rulemaking could result in estimated benefits and transfers ranging from $8.8 billion to $12.5 billion annually.

Cost Scenario Analysis

The Department estimated that the costs associated with the proposal would be $253.2 million in the first year and $216.2 million in subsequent years. In response to comments received in the proposal, the Department has increased the cost estimates to $536.8 million in the first year and $332.7 million in

[449] NPRM #290 (Morningstar).

[450] *Id.*

[451] Council of Economic Advisers, *The Retirement Security Rule – Strengthening Protections for Americans Saving for Retirement,* (October 2023), *https://www.whitehouse.gov/cea/written-materials/2023/10/31/retirement-rule/#_ftnref1.*

[452] CEA's estimate was calculated using August 1, 2023 end-of-day prices, using the historic volatility of the S&P 500 price index on Bloomberg's options pricing calculator, with the put option's strike price at the current index price, the call option's strike price at 6.75% above the index's price on August 1, and the maturity of the option at 1 year.

[453] Vivek Bhattacharya, Gaston Illanes, & Manisha Padi, *Fiduciary Duty and the Market for Financial Advice,* Working Paper, (February 27, 2024), *https://www.dropbox.com/scl/fi/gj5skfflsip2nhee1662c/Draft.pdf?rlkey=msd12c734n8ddrct8uzqg0qut&dl=0.* This is an updated version of the working paper cited in the proposal. (*See* Vivek Bhattacharya, Gaston Illanes, & Manisha Padi, *Fiduciary Duty and the Market for Financial Advice,* Working Paper, (May 20, 2020), *https://www.nber.org/papers/w25861.*

[454] This is estimated as: $3.8 trillion in assets × 70% of the assets not covered by a fiduciary standard × 80% covered by ERISA × 0.25% increase in returns = $5.3 billion.

subsequent years. The largest contributions to the change in cost estimates from the proposal to the final rulemaking are an increase in time to review the rule as well as an increase in the number of Independent Producers and transactions by Independent Producers affected by the rulemaking. The justification for the change in costs is discussed in greater detail in the cost section below.

It is worth noting that in many cases the Department likely over-estimated the number of affected entities. This includes simplifying assumptions such as:

- the inclusion of non-ERISA rollovers in its count of rollovers,
- the inclusion of insurance companies that do not sell IRA or Title I Plans,
- the inclusion of insurance companies domiciled or conducting business in New York which enforces a higher standard of care on annuity sales that is comparable to the standards set forth in this rulemaking,
- the inclusion of Independent Producers that do not sell annuity products,
- inclusion of insurance companies and captive agents under PTE 84–24 that will rely instead of PTE 2020–02,
- that all eligible entities use PTE 2020–02 or PTE 84–24 for transactions instead of other existing exemptions, and
- that all affected entities incur the costs directly, rather than utilizing a third-party that is able to perform these services at a lower rate.

As a result, the Department's total costs reported in this rulemaking are likely overstated.

Moreover, it is important to note that many of the costs incurred under this rulemaking are due to the Department formalizing best practices for those providing individualized investment recommendations to investors for whom they have a relationship of trust and confidence. The requirements to describe the services provided, explain fees and disclose any conflicts as well as document the basis for an investment recommendation simply ensures that advisers are providing all necessary information that investors should have access and are entitled to. Similarly, conducting an annual review to identify potential violations and ensure that an entity is in compliance with the guiding laws and regulations should be standard practice. Given similar disclosures and reviews are already required by other financial regulators, the Department expects that many of the affected entities are already performing these actions for at least some part of their current business, and so extending the same or similar requirements to their remaining clients in practice will be less costly than the Department's estimate.

In its comment letter, the Financial Services Institute cited findings from a survey conducted by the Oxford Economics. This survey interviewed members of the Financial Services Institute and was commissioned by the Financial Services Institute. The survey estimated that the costs of the proposal imposed on broker-dealers would be approximately $2.8 billion in the first year and $2.5 billion in subsequent years, 11 and 12 times the Department's estimate in the proposal, respectively. They noted that their estimates include costs to upgrade software systems and incremental time of staff and broker-dealers.[455] The Department has revised this rulemaking, however, to make PTE 2020–02 largely consistent with the requirements of Regulation Best Interest, even more so in this final rulemaking than in the proposal. As most broker-dealers surveyed for these estimates would already be subject to Regulation Best Interest, the Department questions the magnitude of additional burden on broker-dealers for complying with the closely aligned requirements of Regulation Best Interest.

In its comment letter, the ICI stated that the Department had underestimated cost. They provided a sensitivity analysis on the first-year cost estimates for PTE 2020–02, estimating that the costs would exceed $2.9 billion. This is 12.1 times higher than the first-year cost estimates in the proposal. Notably, 98 percent of the difference between the proposal and ICI estimates is associated with costs to review the rule. Excluding this difference, the ICI estimates for disclosure, retrospective review, and policy and procedure costs are only 1.2 times higher than the estimates in the proposal.[456]

As discussed above, the Department questions the validity of some assumptions made by the commenters. However, both commenters noted that the Department's estimates in the proposal were off by a factor of 12. For illustrative purposes, if a multiplier of 12 were applied to the Department's estimate in the proposal, the rulemaking would result in an annualized cost of $2.7 billion. The Department has revised its estimates since the proposal to reflect feedback from commenters, resulting in a total cost estimate that is more than double its proposal cost estimate. This estimate is still significantly below the estimates provided from these commenters.

The table below summarizes the Department estimates calculated by the Department and by commenters.

TABLE 5—SUMMARY OF QUANTIFIED COST ESTIMATES

Focus	Source	First-year	Subsequent years	Annualized, 7% discount rate [457]
Total	Department of Labor: Final	$536.8 million	$332.7 million	$359.9 million.
	Department of Labor: NPRM	$253.2 million	$216.2 million	$316.7 million.
	Adjusted NPRM Estimate: Multiplied by 12	$3.0 billion	$2.6 billion	$2.7 billion.
Total: Broker-Dealers	Department of Labor: Final	$37.5 million	$28.9 million	$21.2million.
	Comment Letter from Financial Services Institute [458].	$2.8 billion	$2.5 billion	$2.5 billion.
PTE 2020–02	Department of Labor: Final	$248.1 million	$165.5 million	$176.5 million.
	Department of Labor: NPRM	$231.5 million	$197.3 million	$201.9 million.
	Comment Letter from Investment Company Institute [459].	$2.9 billion	N/A	N/A.
PTE 84–24	Department of Labor: Final	$288.7 million	$167.2 million	$183.4 million.

[455] NPRM #342 (Financial Services Institute).

[456] NPRM #395 (Investment Company Institute).

[457] The annualized benefits, costs, and transfers spread the effects equally over each period, taking account of the discount rate. The annualized value equals the present value divided by the sum of discount factors.

[458] Comment letter received from the Financial Services Institute on the *Notification of Proposed Rulemaking: Retirement Security Rule: Definition of an Investment Advice Fiduciary,* (January 2024).

[459] Comment letter received from the Investment Company Institute on the *Notification of Proposed Rulemaking: Retirement Security Rule: Definition of an Investment Advice Fiduciary,* (January 2024).

TABLE 5—SUMMARY OF QUANTIFIED COST ESTIMATES—Continued

Focus	Source	First-year	Subsequent years	Annualized, 7% discount rate [457]
Mass Amendments [1]	Department of Labor: NPRM	$18.1 million	$15.3 million	$15.7 million.
	Department of Labor: Final	$0	$0	$0.
	Department of Labor: NPRM	$3.6 million	$3.6 million	$3.6 million.

[1] As finalized, the amendments to the Mass Amendment do not impose an additional burden on entities continuing to rely on those exemptions. However, the amendments will require entities to rely on PTE 84–24 and PTE 2020–02 for exemptive relief covering transactions involving the provision of fiduciary investment advice. These costs are accounted for in the cost estimates for PTE 84–24 and PTE 2020–02.

Summary

Due to data limitations, a changing regulatory environment, and the scope of the entities affected by the rulemaking, the Department is unable to calculate a comprehensive estimate for the benefits and transfers across all asset classes and account types. However, the estimates discussed above attempt to make clear the estimated benefits and transfers (particularly those from Investment Advisers to Retirement Investors in the form of reduced fees and expenses and improved asset allocation), and the total expected costs are discussed below.

5. Affected Entities

The table below summarizes the estimated number of entities that will be affected by the amendments to the Rule and each of the PTEs. These estimates are discussed in greater detail below.

TABLE 6—AFFECTED FINANCIAL ENTITIES

	Prohibited transaction exemptions					
	2020–02	75–1	77–4	80–83	86–128	84–24
Retirement Plans	765,124	765,124	277,390	6,312	1,000	1,722
Individual Retirement Account owners	67,781,000				210	500,000
Broker-Dealers	1,920	1,920				
Discretionary Fiduciaries					251	
Registered Investment Advisers	16,398					
Pure Robo-Advisers	200					
Insurance Companies	84					358
Captive Insurance Agents and Brokers	1,577					1,577
Insurance Producers						86,410
Banks		2,025		25		
Mutual Fund Companies			812			
Non-Bank Trustees	31					
Investment Company Principal Underwriters	([1])					20
Pension Consultants	([1])					1,011

[1] Pension consultants and investment company principal underwriters who were relying on PTE 84–24 for investment advice will no longer be able to rely on the exemption as amended for receipt of compensation as a result of providing investment advice. However, these pension consultants and investment company principal underwriters can rely on PTE 2020–02 when they are part of a Financial Institution, such as a registered investment adviser, broker-dealer, insurance company, or bank, which are already accounted for.

In the preamble to the proposed rulemaking, the Department requested input from commenters on its estimates of the entities affected by the proposed amendments. The Department asked commenters for information on how many entities currently rely on each of the exemptions, how many entities currently rely on each of the exemptions for investment advice, and how many entities would continue to rely on each of the exemptions, as amended. The Department also asked for information on how retirement plans, IRAs, and Retirement Investors at large would be affected by the proposed amendments. The Department has considered the comments received and revised its estimates where appropriate. These considerations are discussed more fully below.

Plans and Participants

The amendments to the rule and related PTEs will affect plans that receive investment advice from a Financial Institution. Participants may be affected by advice they receive directly and by advice that is received by their plan's administrators and fiduciaries. As of 2021, there were approximately 765,000 private sector retirement plans with 146 million participants and $13.2 trillion in assets that will be affected by these amendments. Approximately 46,000 of these plans are defined benefit plans, covering 31 million participants and $3.7 trillion in assets, and approximately 719,000 are defined contribution plans with 115 million participants and $9.5 trillion in assets.[460] The Department recognizes that some plans, such as simplified employee pension (SEP) plans and Savings Incentive Match Plan for Employees IRA (SIMPLE IRA) plans, are exempt from filing and are not included in these estimates but will typically be affected by the amendments.

The Department expects that participants, in general, will benefit from the stronger, uniform standards imposed by the amendments to the rule and PTEs. Participants who receive

[460] Private Pension Plan Bulletin: Abstract of 2021 Form 5500 Annual Reports, Employee Benefits Security Administration (2023; forthcoming), Table A1. Table A1 reports that there were 765,124 pension plans, consisting of 46,388 defined benefit plans and 718,736 defined contribution plans. Due to a rounding discrepancy, the sum of defined benefit and defined contribution plans does not equal the aggregate of the plans. Additionally, some individuals participate in two or more plans, so the number of individuals covered is lower than the number of gross participants.

investment advice will be directly affected by the amendments, particularly participants receiving one-time advice as to whether they should roll over their retirement savings. These participants are discussed in the section on IRA owners, below.

Similarly, plans receiving fiduciary investment advice will also be directly affected by the amendments.

In the proposal, the Department requested comment on how plans would be affected. Some commenters stated that the amendment would create a significant burden on advice providers because more transactions would be fiduciary investment advice and Financial Institutions would need to satisfy an exemption. Other commenters remarked that plan and plan participants, particularly in small plans, would benefit significantly from the proposal because the advice would be held to a fiduciary standard. As discussed elsewhere, the Department has revised its estimate of compliance burden for Financial Institutions providing fiduciary investment advice accordingly. Additionally, the Department has included a discussion of the benefits plans and plan participants may experience as a result of the rulemaking.

Several commenters remarked that the proposal was unclear on whether education and ''hire me'' conversations would be considered fiduciary advice. Many of these commenters noted that this would disincentivize such communications with plans which could result in significant costs. The Department has clarified in the preamble for the final rule that such conversations would not constitute advice, absent a recommendation.

Some commenters expressed concern that by not providing a specific carve-out from fiduciary status for advice to sophisticated advice recipients, plans would have access to fewer investment opportunities. For example, one commenter suggested plans would have fewer investment opportunities in private equity and that this would decrease investment returns and diversification in plans. As discussed in greater detail in the preamble, the Department has decided not to exclude plan sponsor fiduciaries from the protections of the final rule when they receive advice from trusted advisers, with the view that it is preferable to retain a facts and circumstances test for recommendations to plan sponsor fiduciaries absent an acknowledgment of fiduciary status with respect to the recommendation. However, the Department made a number of changes and clarifications in the final rule, including a new paragraph (c)(1)(iii) that confirms how sales recommendations can occur without fiduciary status attaching.

In addition to PTE 2020–02, the Department is amending several other Prohibited Transactions Exemptions. PTE 84–24 is being amended to provide relief for compensation received for investment advice only for independent insurance producers that recommend annuities from multiple unaffiliated insurance companies to Retirement Investors, subject to conditions similar to those in PTE 2020–02. Additionally, PTEs 75–1 Parts III and IV, 77–4, 80–83, 83–1, and 86–128 are being amended to eliminate relief for the receipt of compensation resulting from fiduciary investment advice, as defined under ERISA. As amended, PTE 86–128, PTE 84–24, PTE 77–4, and PTE 80–83 will directly affect subsets of plans, described below.

The amendments to PTE 86–128 will limit the scope of the amendment to transactions in which a fiduciary uses its fiduciary authority to cause the plan or IRA to pay a fee to such trustee for effectuating or executing securities transactions as an agent for the plan. Using 2021 Form 5500 data, the Department estimates that 1,257 unique plans hired service providers that indicated on the Schedule C that they were a discretionary trustee. Further, among these plans, 801 plans also reported that the discretionary trustee provided investment management services or received investment management fees paid directly or indirectly by the plan.[461] Based on the range of values (801 and 1,257), the Department assumes on average, 1,000 plans have discretionary fiduciaries with full discretionary control. As small plans do not file the Schedule C, this estimate may be an underestimate.

The Department requested comment on how many plans have discretionary fiduciaries with full discretionary control and how many would continue to rely on PTE 86–128 under the proposed amendments and did not receive any which directly discussed plan reliance on PTE 86–128.

The Department estimates that of the 1,000 plans discussed above, 7.5 percent are new accounts or new financial advice relationships.[462] Based on these assumptions, the Department estimates that 75 plans will be affected by the amendments to PTE 86–128.[463]

For PTE 84–24, the Department estimates that 7.5 percent of plans are new accounts or new financial advice relationships [464] and that 3 percent of plans will use the exemption for covered transactions.[465] Based on these assumptions, the Department estimates that 1,722 plans will be affected by the amendments to PTE 84–24.[466]

In response to its request for comment in the proposal, the Department received one comment noting that Financial Institutions have relied on PTE 77–4 for both investment advice and discretionary programs. This commenter did not indicate the proportion of these Financial Institutions that would continue to use PTE 77–4 as a result of the proposed amendments.

To estimate the number of plans affected by the amendments to PTE 77–4, the Department estimated the number of plans relying on a mutual fund company. The Department does not have data on what percentage of plans receive fiduciary advice through mutual fund companies. A 2013 Deloitte/ICI survey found that 37 percent of 401(k) plans have a mutual fund company as their service provider.[467] Based upon ICI analyses and Form 5500 data that examines the percentage of plans that are invested in registered investment companies, the Department estimates that 24.7 percent of defined benefit plans have mutual fund companies as money managers.[468] Applying these percentages to the universe of pension plans that filed a Form 5500 in 2021 yields a total of approximately 277,390

[461] Estimates based on 2021 Form 5500 data.

[462] EBSA identified 57,575 new plans in its 2021 Form 5500 filings, or 7.5 percent of all Form 5500 pension plan filings.

[463] The number of new plans is estimated as: 1,000 plans × 7.5 percent of plans are new = 75 new plans. The number of new IRAs is estimated as: 10,000 IRAs × 2.1 percent of IRAs are new = 210 new IRAs.

[464] EBSA identified 57,575 new plans in its 2021 Form 5500 filings, or 7.5 percent of all Form 5500 pension plan filings.

[465] In 2020, 7 percent of traditional IRAs were held by insurance companies. *See* Investment Company Institute, *The Role of IRAs in US Households' Saving for Retirement, 2020,* 27(1) ICI Research Perspective (2021), *https://www.ici.org/system/files/attachments/pdf/per27-01.pdf.* This number has been adjusted downward to 3 percent to account for the fact that some transactions are not covered by this exemption.

[466] 765,124 plans × 7.5 percent of plans are new × 3 percent of plans with relationships with insurance agents or pension consultants = 1,722 plans.

[467] The Department uses this estimate as a proxy for the percent of defined contribution plans that have service provider relationships with mutual fund companies. *See* Deloitte & Investment Company Institute, *Defined Contribution/401(k) Fee Study,* (August 2014).

[468] Based on Form 5500 Data 2000–2010, defined benefit plans are approximately 33 percent less likely than defined contribution plans to be invested in a registered investment company. *See* Sarah Holden, *The Economics of Providing 401(k) Plans: Services, Fees, and Expenses,* Investment Company Institute (September 2010).

plans with service provider relationships with mutual fund companies.[469] Thus, the Department estimates that 277,390 plans will be affected by the amendments to PTE 77–4. The Department acknowledges that this estimate likely overestimates the number of plans affected by the amendments.

The Department estimates that 6,312 plans are affected by PTE 80–83 based on the number of new plans relying on a broker-dealer.[470]

IRA Owners

In addition to the specific requests for comment discussed below, the Department requested comments on how IRAs and rollovers are likely to be affected by the amendments. The Department also welcomed comment on the number of IRAs and rollovers that might be affected by the rulemaking. Several commenters provided data, surveys, or studies on the IRA and rollover markets. The Department has considered this information and adjusted its estimates as appropriate. Some commenters stated that increased costs resulting from the rollover documentation imposed by the rulemaking would decrease the number of rollovers. In response to these concerns, the Department is narrowing the required rollover disclosure to only apply to rollovers from Title I Plans to IRAs. One commenter cautioned that the rulemaking's definition of an IRA would include health savings accounts (HSAs) and expressed concern about this inclusion. The Department has decided to include HSA owners in the definition of Retirement Investor. The data sources used below to estimate the number of IRA owners already include HSA owners.

According to Cerulli Associates, there were 67.8 million IRA owners holding $11.5 trillion in assets in 2022.[471] The amendments to the rule and PTE 2020–02 will affect Retirement Investors who roll over money from a plan into an IRA. A 2020 survey found that 46 percent of recent retirees who had at least $30,000 in retirement savings had rolled at least some of their savings into an IRA.[472]

In 2022, almost 4.5 million defined contribution plan accounts with $779 billion in assets were rolled over into an IRA. Additionally, 0.7 million defined contribution plan accounts with $66 billion in assets were rolled over to other employment-based plans.[473] The Department used IRS data from 2020 to estimate overall rollovers into IRAs and arrived at estimates of 5.7 million taxpayers and $618 billion.[474] Adding in the figures for plan-to-plan rollovers, the Department estimates the total number of rollovers at 6.4 million accounts with $684 billion in assets.[475]

As amended, PTE 2020–02 requires rollover disclosure only for rollovers from a Title I Plan and recommendation to a participant or beneficiary as to the post-rollover investment of assets currently held in a Title I Plan. According to Cerulli Associates, in 2022, financial advisers intermediated 49 percent of defined contribution rollovers.[476] The Department estimates that 2.2 million rollovers and $535 billion in assets will be affected by the rollover disclosure in the amendments to PTE 2020–02.[477] These figures are overestimates because they include some rollovers from non-ERISA plans and because they are based on the assumption that all of the advisers intermediating rollovers are ERISA fiduciaries.

As amended, PTE 86–128 and PTE 84–24 will each affect subsets of the number of IRAs discussed above. The Department's estimates of the IRAs that will be affected by the amendments to PTE 86–128 and PTE 84–24 are discussed below.

PTE 84–24, as amended, only requires rollover disclosure for recommendations to rollover from a Title I Plan. The Department requested, but did not receive, comments on the assumptions used in the proposal regarding annuity contracts affected by the rulemaking. However, in conjunction with updating its estimate of the number of independent agents the Department has revised its estimate of annual annuity transactions affected by the amendments to PTE 84–24, increasing the estimate from 52,449 to 500,000.

While there are several sources of information regarding total sales or size of the annuity market that are generally consistent, the same is not true for transaction activity, which can vary dramatically across quarters and between sources. To improve its estimate of annual annuity transactions affected by the amendments to PTE 84–24, the Department tried two approaches which both relied on LIMRA total fixed annuity sales data. LIMRA data from 2023 indicates that 34 percent of fixed annuity sales were fixed-indexed annuities.[478] Assuming sales are proportionate to transactions and using data from the Retirement Income Journal which reported roughly 109,863 fixed-indexed annuity products were sold in the fourth quarter of

[469] Private Pension Plan Bulletin: Abstract of 2021 Form 5500 Annual Reports, Employee Benefits Security Administration (2023; forthcoming), Table A1. There are 765,124 pension plans, of which 718,736 are defined contribution plans and 46,388 are defined benefit plans. The number of plans with service provider relationships with mutual fund companies is estimated as: 718,736 defined contribution plans × 37% = 265,932; 46,388 defined benefit plans × 24.7% = 11,458.

[470] EBSA identified 57,575 new plans in its 2021 Form 5500 filings, or 7.5 percent of all Form 5500 pension plan filings. Additionally, the Department estimates that 12 percent of plans have a relationship with a broker-dealer. This is a weighted average of the Department's estimates of the share of defined benefit plans and defined contribution plans with broker-dealer relationships. The Department assumes that approximately 20 percent of defined benefit plans have relationships with broker-dealers. As a proxy for the share of defined contribution plans with broker-dealer relationships, the Department uses the sum of the percent of load mutual funds in 401(k) plans (6 percent) and the percent of 401(k) stock mutual fund assets paying 12b–1 fees between >.0 to 0.25 (5 percent). Both data are published by the 2021 Investment Company e Institute report. (See *The Economics of Providing 401(k) Plans: Services, Fees, and Expenses, 2021,* Investment Company Institute, June 2022. *https://www.ici.org/system/files/2022-06/per28-06.pdf*). The number of plans is estimated as: 765,124 plans × 7.5 percent of plans are new × 11 percent of plans with broker-dealer relationships = 6,312 new plans.

[471] Cerulli Associates, *U.S. Retirement End-Investor 2023: Personalizing the 401(k) Investor Experience,* Exhibits 5.03 and 5.12. The Cerulli Report.

[472] Pew Charitable Trusts. ''Pew Survey Explores Consumer Trend to Roll Over workplace Savings Into IRA Plans.'' Issue Brief. (October 2021), *https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2021/09/pew-survey-explores-consumer-trend-to-roll-over-workplace-savings-into-ira-plans.*

[473] According to Cerulli, in 2022, there were 4,485,059 defined contribution plan-to-IRA rollovers and 707,104 plan-to-plan rollovers. The Department was unable to find any data on the number of IRA to IRA or defined benefit to IRA rollovers. *See* Cerulli Associates, *U.S. Retirement End-Investor 2023: Personalizing the 401(k) Investor Experience,* Exhibit 6.04. The Cerulli Report.

[474] Internal Revenue Service, *SOI Tax Stats — Accumulation and Distribution of Individual Retirement Arrangement (IRA),* Table 1: Taxpayers with Individual Retirement Arrangement (IRA) Plans, By Type of Plan, Tax Year 2020, (2023).

[475] Estimates for the number of IRAs may include some non-retirement accounts such as HSAs, Archer medical savings accounts, and Coverdell education savings accounts. See the discussion on Code section 4975 in the Background section of the preamble for more details. The final rulemaking has clarified that HSAs are covered by the amendments; however, other non-retirement accounts may not be.

[476] Rollovers from defined contribution plans are 49% adviser-mediated rollovers into IRAs, 37% self-directed rollovers into IRAs, and 14% plan-to-plan rollovers. *See* Cerulli Associates, *U.S. Retirement End-Investor 2023: Personalizing the 401(k) Investor Experience,* Exhibit 6.04. The Cerulli Report.

[477] In 2022, 4,485,059 defined contribution plan accounts were rolled over into IRAs. The rollovers were mediated by a financial adviser and destined for an IRA in 49% of cases. (4,485,059 × 49%) = 2,17,679. Additionally, in 2022, $535 billion assets were advisor intermediated. *See* Cerulli Associates, *U.S. Retirement End-Investor 2023: Personalizing the 401(k) Investor Experience,* Exhibit 6.04. The Cerulli Report.

[478] LIMRA, Preliminary U.S. Individual Annuity Sales Survey, Fourth Quarter 2023, (2023), *https://www.limra.com/siteassets/newsroom/fact-tank/sales-data/2023/q4/4q-annuity-sales.pdf.*

2021,[479] annualizing this number to 439,452 the Department estimates that roughly 838,000 other fixed-rate annuity products were sold over the same period, for a total of 1.3 million fixed annuity transactions in 2021 using this approach.

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

Using the average of these estimates, the Department then applied the following assumptions to arrive at its final estimate. Using McKinsey data on annuity distribution channels, the Department assumes that third-party distribution channels account for 81 percent of the annuity sales volume.[480] The Department further assumes that 80 percent of these annuities are held in ERISA-covered accounts or purchased with ERISA plan assets [481] and that 49 percent of transactions will rely on investment advice.[482] This results in an estimate of roughly 500,000 ERISA-covered fixed annuity transactions involving an Independent Producer providing advice to an investor.[483]

The amendments to PTE 86–128 will limit the scope of the amendment to transactions in which a fiduciary uses its fiduciary authority to cause the plan or IRA to pay a fee to such trustee for effectuating or executing securities transactions as an agent for the plan, without providing investment advice. The Department lacks reliable data on the number of managed IRAs that will experience such a transaction in a given year. For the purpose of this analysis, the Department assumes that there are 10,000 managed IRAs. To err on the side of caution, the Department assumes that all managed IRAs will have a relationship with a discretionary fiduciary. As discussed above for PTE 84–24, the Department assumes 2.1 percent of IRA accounts are new each year. This results in an estimate of 210 managed IRAs that are new accounts or new financial advice relationships.[484] In the proposal, the Department requested comment on the assumption of managed IRA accounts but did not receive any comment directly addressing this estimate.

These estimates likely overestimate the number of IRA owners that will be affected by the amendments, since IRA owners will only be affected by the amendments to the rule and PTEs when they have a relationship with certain financial entities and are conducting certain financial transactions, as defined by the revised fiduciary definition and the conditions for exemptive relief of each PTE.

Summary of Affected Financial Entities

In the proposal, the Department received several comments regarding its estimate of the number of financial entities that would be affected. Commenters expressed concern about the Department's assumption that all eligible entities already rely on PTE 2020–02, as some entities did not consider their conduct to trigger fiduciary status. This commenter noted that under the amended definition of a fiduciary, these entities would consider themselves fiduciaries for the first time and incur significant costs, accordingly. In response to this comment, the Department has revised its estimate to assume that 30 percent of broker-dealers, registered investment advisers, and insurance companies were not previously complying with PTE 2020–02 and will incur the full cost under this rulemaking.

This rulemaking expands the definition of a fiduciary such that an advice provider will be a fiduciary if they make a covered investment recommendation to a Retirement Investor for a fee or compensation and either (1) or (2) is satisfied: (1) the person either directly or indirectly (*e.g.,* through or together with any affiliate) makes professional investment recommendations to investors on a regular basis as part of their business and the recommendation is made under circumstances that would indicate to a reasonable investor in like circumstances that the recommendation is based on review of the Retirement Investor's particular needs or individual circumstances, reflects the application of professional or expert judgment to the Retirement Investor's particular needs or individual circumstances, and may be relied upon by the Retirement Investor as intended to advance the Retirement Investor's best interest, or (2) the person represents or acknowledges that they are acting as a fiduciary under Title I of ERISA, Title II of ERISA, or both, with respect to the recommendation.

Registered Investment Advisers

Registered investment advisers providing investment advice to retirement plans or Retirement Investors and registered investment advisers acting as pension consultants will be directly affected by the amendments to PTE 2020–02. Generally, investment advisers must register with either the SEC or with State securities authorities, as appropriate.[485]

Investment advisers registered with the SEC are generally larger than State-registered investment advisers, both in staff and in regulatory assets under management.[486] For example, according

[479] Pechter, K., Moore, S., Fixed Indexed Annuities: What's Changed (or Not) in Ten Years, (June, 2022), *https://retirementincomejournal.com/article/fixed-indexed-annuities-a-retrospective/.*

[480] McKinsey & Company, Redefining the future of life insurance and annuities distribution, (January, 2024), *https://www.mckinsey.com/industries/financial-services/our-insights/redefining-the-future-of-life-insurance-and-annuities-distribution.*

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

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

[483] The final estimate is the rounded average of the two approaches described above. The calculations are as follows:

[{[(109,863 fixed-indexed contracts written × 4 quarters) ÷ 34% as the percentage of fixed-indexed to all fixed-rate contracts] × 81% sold by Independent Producers × 49% sold using investment advice × 80% ERISA-covered transactions} + {[(148,860 avg. contract size ÷ 95.6 billion in annual fixed-indexed sales) ÷ 34% as the percentage of fixed-indexed to all fixed-rate contracts] × 81% sold by Independent Producers × 49% sold using investment advice × 80% ERISA-covered transactions} ÷ 2] ≈ 501,013, rounded to 500,000.

[484] (10,000 managed IRAs × 2.1 percent of IRAs are new) ≈ 210 IRAs.

[485] Generally, a person that meets the definition of ''investment adviser'' under the Advisers Act (and is not eligible to rely on an enumerated exclusion) must register with the SEC, unless they are prohibited from registering under Section 203A of the Advisers Act or qualify for an exemption from the Advisers Act's registration requirement. An adviser precluded from registering with the SEC may be required to register with one or more state securities authorities.

[486] After the Dodd-Frank Wall Street Reform and Consumer Protection Act, an investment adviser with $110 million or more in regulatory assets under management generally registers with the SEC, while an investment adviser with less than $110 million registers with the State in which it has its principal office, subject to certain exceptions. For more details about the registration of investment advisers, *see* SEC, *General Information on the Regulation of Investment Advisers,* (March 11, 2011), *https://www.sec.gov/investment/divisionsinvestmentiaregulationmemoiahtm;* North

Continued

to one report, 64 percent of State-registered investment advisers manage assets under $30 million while investment advisers must register with the SEC if they manage assets of $110 million or more.[487] In addition, according to one survey of SEC-registered investment advisers, about 47 percent of SEC-registered investment advisers reported 11 to 50 employees.[488] In contrast, an examination of State-registered investment advisers reveals about 80 percent reported less than two employees.[489]

As of December 2022, there were 15,289 SEC-registered investment advisers, of which 9,627 provided advice to retail investors while 5,662 provided advice only to non-retail investors. Of the 15,289 SEC-registered investment advisers, 317 were dual-registered as broker-dealers.[490] To avoid double counting when estimating compliance costs, the Department counted dually registered firms as broker-dealers and excluded them from the count of registered investment advisers.[491] Therefore, the Department estimates there to be 14,972 SEC-registered investment advisers.

Additionally, as of December 2022, there were 15,478 State-registered investment advisers, of which 139 are dually registered as a broker-dealer and 133 are also registered with the SEC.[492] To avoid double counting, the Department counted dually registered firms as broker-dealers and excluded them from the count of State-registered investment advisers. Similarly, the Department counted investment advisers registered with the SEC and a State as SEC-registered investment advisers. Accordingly, for the purposes of this analysis, the Department considers 15,206 State-registered investment advisers.

In 2023, 55 percent of registered investment advisers provided employer-sponsored retirement benefits consulting.[493] Based on this statistic, the Department estimates there to be approximately 16,598 registered investment advisers.[494]

As discussed in the Baseline section, PTE 2020–02 historically excluded investment advisers providing pure robo-advice. The amendments will include these entities, however, pure robo-advisers will have a different baseline from registered investment advisers currently under PTE 2020–02. As discussed below, the Department estimates that there are 200 pure robo-advisers.[495] Accordingly, the Department estimates that 16,398 registered investment advisers who do not provide pure robo-advice are currently eligible for relief under PTE 2020–02.[496]

The Department does not have data on how many of these firms provide advice only to Retirement Investors that are plan participants, plan beneficiaries, or IRA owners, rather than the workplace retirement plans themselves. These firms are fiduciaries under the Advisers Act and already operate under standards broadly similar to those required by PTE 2020–02.[497]

Robo-Advisers

The changes to PTE 2020–02 make investment advice providers providing pure robo-advice eligible for relief under the exemption. In the proposal, the Department requested comment on how the number of robo-advisers in the market has evolved in recent years. The Department specifically inquired about what proportion of robo-advisers provide pure versus hybrid robo-advice, what proportion of pure robo-advisers are likely to rely on the amended PTE 2020–02, and whether robo-advisers operate as registered investment advisers or broker-dealers. Several commenters noted that they supported the inclusion of robo-advice in PTE 2020–02.

Robo-advisers offer varying services and different degrees of hands-on assistance.[498] The most basic models use computer algorithms to offer investments deemed appropriate in terms of asset allocation and diversification based on the information supplied by the client upon opening an account. These investments typically include low-cost mutual funds and exchange traded funds (ETFs), and automatically invest and rebalance funds based on a specified objective or risk tolerance. Most robo-advisers offer advice concerning taxable accounts and IRA accounts. The nature of robo-advice appeals to different investors than traditional investment advice does. While traditional advisers often target older investors with high net worth, robo-advice providers or other low-cost investment firms tend to attract young, technology-savvy investors with low balances.[499]

Robo-advisers were initially expected to revolutionize investment advice, as robo-advisers saw steep growth initially.[500] The expectation of continued rapid growth has been tempered as players in the space have struggled to find the appropriate role for robo-advice. A 2023 study by Morningstar evaluated 18 providers of robo-advice. The findings suggest that pure robo-advisers have had challenges in reaching a profitable scale.[501] In turn, many of these pure robo-advisers have been acquired by larger investment advice firms, including banks, broker-dealers, technology firms, and asset managers, adopting hybrid robo-advice systems.[502] Hybrid robo-advisers can

American Securities Administrators Association, *A Brief Overview: The Investment Adviser Industry,* (2019), *www.nasaa.org/industry-resources/investment-advisers/investment-adviser-guide/.*

[487] North American Securities Administrators Association, *2018 Investment Adviser Section Annual Report,* (May 2018), *www.nasaa.org/wp-content/uploads/2018/05/2018–NASAA–IA-Report-Online.pdf.*

[488] Investment Adviser Association, *2019 Investment Management Compliance Testing Survey,* (June 18, 2019), *https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/about/190618_IMCTS_slides_after_webcast_edits.pdf.*

[489] North American Securities Administrators Association, *NASAA 2019 Investment Adviser Section Annual Report,* (May 2019), *www.nasaa.org/wp-content/uploads/2019/06/2019–IA-Section-Report.pdf.*

[490] Estimates are based on the SEC's FOCUS filings and Form ADV filings.

[491] The Department applied this exclusion rule across all types of investment advisers, regardless of registration (SEC-registered versus State only) and retail status (retail versus nonretail).

[492] Estimates are based on the SEC's FOCUS filings and Form ADV filings.

[493] Cerulli Associates, *U.S. RIA Marketplace 2023: Resiliency in the Pursuit of Scale,* Exhibit 5.10. The Cerulli Report.

[494] The number of registered investment advisers is estimated as: [(14,972 SEC-registered investment advisers + 15,206 State-registered investment advisers) × 55%] = 16,598 registered investment advisers.

[495] For more information on this estimate, refer to the Robo-Advisers discussion in the Affected Entities section.

[496] As discussed below, the Department estimates that there are 200 pure robo-advisers. Accordingly, the Department estimates that 16,398 registered investment advisers would be affected by the amendments and are not pure robo-advisers. The number of registered investment advisers is estimated as: [(14,972 SEC-registered investment advisers + 15,206 State-registered investment advisers) × 55%]−200 robo-advisers = 16,398 registered investment advisers.

[497] Investment Adviser Association, *SEC Standards of Conduct Rulemaking: What It Means for RIAs,* IAA Legal Staff Analysis (July 2019), *https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/resources/IAA-Staff-Analysis-Standards-of-Conduct-Rulemaking2.pdf.*

[498] SEC, *Investor Bulletin: Robo-Advisers,* (February 23, 2017), *https://www.sec.gov/oiea/investor-alerts-bulletins/ib_robo-advisers.*

[499] Jonathan W. Lam, *Robo-Advisors: A Portfolio Management Perspective,* (April 2016). *https://economics.yale.edu/sites/default/files/2023-01/Jonathan_Lam_Senior%20Essay%20Revised.pdf.*

[500] Deloitte. ''The Expansion of Robo-Advisory in Wealth Management.'' (2016).

[501] Morningstar, *2023 Robo-Advisor Landscape: Our Take on the Digital Advice Industry and the Best Options for Individual Investors,* (June 2023), *https://institutional.vanguard.com/content/dam/inst/iig-transformation/insights/pdf/Robo-Advisor_Landscape_2023-Vanguard.pdf.*

[502] Morningstar, *2023 Robo-Advisor Landscape: Our Take on the Digital Advice Industry and the*

charge lower fees by automating some of the services offered, while still offering access to a human adviser if desired.[503] Among firms that have acquired robo-advice firms, integration has been a continuing challenge.[504] A 2023 article remarked that some of the challenges faced by firms offering robo-advice face include competing with traditional investment advisers on value-added services and cost efficiency and finding the correct customer base. Some firms have pulled back their robo-advice offerings in recent years.[505]

Investor preference may also be playing a role. For instance, one survey found that only 45 percent of investors were comfortable using online only advice services.[506] Since 2016, the Plan Sponsor Council of America has asked plans whether they provide a robo-adviser to participants. In 2016, 10.1 percent of all plans offered robo-advice, while 14.0 percent were considering it.[507] By 2020, 12.8 percent of plans offered robo-advice with 8.3 percent considering it, and by 2022,[508] 15.8 percent of plans offered robo-advice with 7.9 percent considering.[509] The Department does not have access to data on how many plan participants rely on the robo-advice offered in their plan. However, this gradual increase in the number of plans offering robo-advice may signal that plans see robo-advice as a valuable tool for its participants.

The Department acknowledges that robo-advice has limitations and that investors with complex situations or questions about financial planning beyond investing may be better served by a traditional investment adviser. The Department further acknowledges that the robo-advice market is evolving quickly. Nevertheless, the Department believes that service offered by robo-advisers can play a significant role in increasing access to investment advice and improving retirement security.

According to one source, there were 200 robo-advisers in the United States in 2017.[510] For the purposes of this analysis, the Department estimates that there are 200 pure robo-advisers that will be subject to the amended PTE 2020–02 that are not subject to the current PTE 2020–02.

Broker-Dealers

The amendments will modify PTE 75–1 Parts III and IV such that broker-dealers will no longer be able to rely on the exemption for investment advice. The Department does not have information about how many of these firms provide investment advice to plan fiduciaries, plan participants and beneficiaries, and IRA owners.

Under amended PTE 75–1 Part V, broker-dealers will be able to receive reasonable compensation for extending credit to a plan or IRA to avoid a failed purchase or sale of securities involving the plan or IRA if the terms of the extension of credit are at least as favorable to the plan or IRA as the terms available in an arm's length transaction between unaffiliated parties. Any broker-dealers seeking relief for investment advice, however, will be required to rely on the amended PTE 2020–02.

According to Financial and Operational Combined Uniform Single (FOCUS) filing data, there were 3,490 registered broker-dealers as of December 2022. Of those, approximately 69 percent, or 2,399 broker-dealers, reported retail customer activities, while approximately 31 percent, or 1,091 broker-dealers, were estimated to have no retail customers.[511]

Not all broker-dealers perform services for employee benefit plans. In 2023, 55 percent of registered investment advisers provided employer-sponsored retirement benefits consulting.[512] Assuming the percentage of broker-dealers providing advice to retirement plans is the same as the percent of registered investment advisers providing services to plans, the Department assumes 55 percent, or 1,920 broker-dealers, will be affected by the amendments.[513]

Discretionary Fiduciaries

The amendments to PTEs 75–1 Parts III & IV, 77–4, 80–83, 83–1, and 86–128 will exclude the receipt of compensation from transactions that result from the provision of investment advice. Therefore, fiduciaries will have to rely on another exemption to receive compensation for investment advice, such as PTE 2020–02. Fiduciaries that exercise full discretionary authority or control could continue to rely on these exemptions as long as they comply with all of the applicable exemption's conditions.

The Department lacks reliable data on the number of fiduciaries of employee benefits plans that affect or execute securities transactions (''transacting fiduciaries'') and the independent plan fiduciaries authorizing the plan or IRA to engage in the transactions with an authorizing fiduciary (''authorizing fiduciaries'') that will rely on the amended exemption. In the proposal, the Department assumed that the number of transacting and authorizing fiduciaries relying on the exemption would be no larger than the number of broker-dealers estimated to be affected by the amendments to PTE 2020–02, or 1,919 fiduciaries. The Department acknowledged that this was likely a significant overestimate [514] and requested comments or data on what types of entities would be likely to rely on the amended exemption. The Department did not receive any comments.

Upon further review, the Department believes that in trying to capture financial entities engaging in cross trades with discretionary control, the number of dual-registered broker-dealers that provide services to

Best Options for Individual Investors, (June 2023), *https://institutional.vanguard.com/content/dam/inst/iig-transformation/insights/pdf/Robo-Advisor_Landscape_2023-Vanguard.pdf.* & Jill E. Fisch, Marion Laboure, & John A. Turner, *The Emergence of the Robo-Advisor,* Wharton Pension Research Council Working Papers (2018). & Andrew Welsch, *Robo-Advisors Changed Investing. But Can They Survive Independently,* Barron's (February 2022), *https://www.barrons.com/articles/robo-advisors-changed-investing-but-can-they-survive-independently-51645172100.*

[503] Jill E. Fisch, Marion Laboure, & John A. Turner, *The Emergence of the Robo-advisor,* Wharton Pension Research Council Working Papers (2018).

[504] Morningstar, *2023 Robo-Advisor Landscape: Our Take on the Digital Advice Industry and the Best Options for Individual Investors,* (June 2023), *https://institutional.vanguard.com/content/dam/inst/iig-transformation/insights/pdf/Robo-Advisor_Landscape_2023-Vanguard.pdf.*

[505] FinTech Global, *Is the Era of Robo-Advisors Over?* (May 2023), https://fintech.global/2023/05/16/is-the-era-of-robo-advisors-over/. Nearl, Ryan, *Robo-advisers Struggling to Retain Investors in 2022, Research Finds,* InvestmentNews (October 2022), *https://www.investmentnews.com/fintech/news/robo-advisers-struggling-retain-investors-in-2022-research-finds-227476.*

[506] Cerulli Associates, *U.S. Retail Investor Advice Relationships 2022: Rethinking the Advice Continuum,* Exhibit 3.02. The Cerulli Report.

[507] Plan Sponsor Council of America, *60th Annual Survey of Profit Sharing and 401(k) Plans,* (2018).

[508] Plan Sponsor Council of America, *64th Annual Survey of Profit Sharing and 401(k) Plans,* (2021).

[509] Plan Sponsor Council of America, *66th Annual Survey of Profit Sharing and 401(k) Plans,* (2023).

[510] Facundo Abraham, Sergio L. Schmukler, & Jose Tessada, *Robo-advisors: Investing Through Machines,* World Bank Research and Policy Briefs 134881 (2019).

[511] Estimates are based on the SEC's FOCUS filings and Form ADV filings.

[512] Cerulli Associates, *U.S. RIA Marketplace 2023: Expanding Opportunities to Support Independence,* Exhibit 5.10. The Cerulli Report.

[513] The estimated of retail broker-dealers affected by this exemption is estimated as: (2,399 retail broker-dealers × 55%) = 1,319 retail broker-dealers. The estimated number of non-retail broker-dealers affected by this exemption is estimated as: (1,091 non-retail broker-dealers × 55%) = 600 non-retail broker-dealers. The estimated number of total broker-dealers is 1,919 (1,319 + 600).

[514] SEC Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion From the Definition of Investment Adviser, 84 FR 33681, 33685–86 (July 12, 2019).

retirement plans is a more accurate estimate. As of December 2022, there were 456 broker-dealers registered as SEC- or State-registered investment advisers.[515] Consistent with the assumptions made about broker-dealers affected by the amendments to PTE 2020–02, the Department estimates that 55 percent, or 251 broker-dealers will be affected by the amendments to PTE 86–128.[516]

Insurance Companies and Non-Independent Agents

The amendments to PTE 2020–02 and PTE 84–24 will affect insurance companies and non-independent agents. The Department requested comments on the extent to which entities relying on PTE 84–24 would continue to rely on the exemption if amended as proposed. The Department also requested comments on how many insurance companies sell annuities through independent distribution channels and whether insurance companies rely on both independent and non-independent methods of distribution. The Department did not receive any comments responsive to these inquiries.

The existing version of PTE 84–24 granted relief for all insurance agents, including insurance agents who are overseen by a single insurance company; however, the amendments exclude insurance companies and agents that are not selling through an independent distribution method (''captive agents'') that are currently relying on the exemption for investment advice. These entities will be required to comply with the requirements of PTE 2020–02 for relief involving investment advice. As a result, the estimates for PTE 84–24 discussed below likely overestimate the reliance on the exemption.

Insurance companies are primarily regulated by States and no single regulator records a nationwide count of insurance companies. Although State regulators track insurance companies, the total number of insurance companies cannot be calculated by aggregating individual State totals, because individual insurance companies often operate in multiple States. In the Department's 2016 regulatory impact analysis, it estimated that 398 insurance companies wrote annuities.[517] The Department also relied on this estimate in the proposal, acknowledging that the number may have changed during the intervening years. Furthermore, this may be an overestimate because some of these insurance companies may not sell annuity contracts in the IRA or Title I retirement plan markets. The Department requested information on the number of insurance companies underwriting annuities that would be affected by the rulemaking. While one commenter expressed concern that the Department was using a number from 2016 without considering changes in the annuity market since, the Department did not receive any data or information from other commenters.

To form a basis for its assumption of insurance companies affected by the rule, the Department looked at the estimate of 398 insurance companies writing annuities used in the 2016 regulatory impact analysis. This assumption was based on data of insurance companies that reported receiving either individual or group annuity considerations in 2014.[518] Comparatively, there were 710 firms in the direct life insurance carrier industry in 2014.[519] By these measures, in 2014, insurance companies writing annuities accounted for 56 percent of the direct life insurance carrier industry.

To gain more insight into annuity underwriting, as it pertains to the life insurance industry, the Department looked to the evolution of premiums. In 2014, annuity premiums accounted for 55 percent of life and annuity insurance premiums.[520] By 2020, annuities had fallen to 48 percent of life and annuity insurance premiums. Between 2020 and 2022, the percentage remained constant around 48 percent.[521]

While premiums are not directly related to the number of firms, the Department thinks it is reasonable to assume that the percent of life insurance companies underwriting annuities may have declined slightly since 2014. For the purposes of this analysis, the Department assumed that approximately half of life insurance companies underwrite annuities. According to the 2021 Statistics of U.S. Businesses release, the most recent data available, there were 883 firms in the direct life insurance carrier industry.[522] The Department estimates that 442 life insurance companies underwrite annuities and will be affected by the amendments.

Recent legislative developments may lead to an expansion in this market. A 2021 survey asked insurers what impacts they expected to see from the SECURE Act. It found that 58 percent of insurers thought the SECURE Act would result in a significant increase in the number of plan sponsors offering in-plan annuities, and 63 percent of insurers thought the SECURE Act would lead to a significant increase in the number of plan participants allocating a portion of their plan balances to an annuity option.[523] With increasing usage of annuities in plans, the future impact on plans, participants, assets, and insurance companies will be greater. It also increases the need for plan fiduciaries to receive advice that is subject to a best interest standard.

Insurance companies primarily sell insurance products through (1) their employees or captive insurance agents, and/or (2) independent agents that sell multiple insurance companies' products. In recent years, the market has seen a shift away from captive distribution towards independent distribution.[524]

[515] Estimates are based on the SEC's FOCUS filings and Form ADV filings.

[516] In 2023, 55 percent of registered investment advisers provided employer-sponsored retirement benefits consulting. (*See* Cerulli Associates, *U.S. RIA Marketplace 2023: Expanding Opportunities to Support Independence,* Exhibit 5.10. The Cerulli Report.) The Department assumes the percentage of broker-dealers provide advice to retirement plans is the same as the percent of investment advisers providing services to plans. This is calculated as 456 hybrid broker-dealers × 55% = 251 affected entities.

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

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

[519] United States Census Bureau, *2014 SUSB Annual Data Tables by Establishment Industry,* (December 2016).

[520] Insurance Information Institute, *Life/Annuity Insurance Income Statement, 2014–2018, https://www.iii.org/table-archive/222464/file.*

[521] Insurance Information Institute, *Facts + Statistics: Life Insurance,* (2024), *https://www.iii.org/fact-statistic/facts-statistics-life-insurance#Direct%20Premiums%20Written%20By%20Line,%20Life/Annuity%20Insurance,%202020-2022.*

[522] United States Census Bureau, *2021 SUSB Annual Data Tables by Establishment Industry,* (December 2023).

[523] Cerulli Associates, *U.S. Annuity Markets 2021: Acclimating to Industry Trends and Changing Demand,* Exhibit 1.06. The Cerulli Report.

[524] *See* Ramnath Balasubramanian, Rajiv Dattani, Asheet Mehta, & Andrew Reich, *Unbundling Value: How Leading Insurers Identify Competitive Advantage,* McKinsey & Company (June 2022), *https://www.mckinsey.com/industries/financial-services/our-insights/unbundling-value-how-leading-insurers-identify-competitive-advantage;* Sheryl Moore, *The Annuity Model Is Broken,* Wink Intel (June 2022), *https://www.winkintel.com/2022/06/the-annuity-model-is-broken-reprint/;* Ramnath Balasubramanian, Christian Boldan, Matt Leo,

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

One recent source stated that 81 percent of individual annuities sales are conducted through an independent distribution channel.[525] The Department uses this statistic to update its estimate of the number of sales through the independent distribution channel. The Department assumes that the percent of companies selling annuities through an independent distribution channel is proportionate to the percent of sales conducted through an independent distribution channel. The Department recognizes that the distribution of sales by distribution channel is likely different from the distribution of insurance companies by distribution channel.

Also, the Department recognizes that some insurance companies use multiple distribution channels, though the Department did not receive any comment on how common the use of multiple distribution channels is. Looking at the 10 insurance companies with highest annuity sales in 2022, one relied on captive distribution channels, seven relied on independent distribution channels, and two relied on both.[526] Accordingly, most insurance companies appear to primarily use either captive distribution or independent distribution. However, any entity using a captive insurance channel, or using both captive and independent channels, likely has already incurred most of the costs of this rulemaking under PTE 2020–02. Costs are estimated by assuming that entities using a third-party distribution system, even if they also use captive agents, will incur costs for the first time under amended PTE 84–24. This assumption leads to an overestimation of the cost incurred by insurance companies.

Following from the revised assumption that 81 percent of activity being associated with independent, or third party, channels, the Department estimates that 84 insurance companies distribute annuities through captive channels and will rely on PTE 2020–02 for transactions involving investment advice. Further, the Department estimates that 358 insurance companies distribute annuities through independent channels and will rely on PTE 84–24 for transactions involving investment advice.[527]

The Department estimates that 70 of the 442 insurance companies are large entities.[528] In the proposal, the Department requested data on how distribution channels differed by size of insurance company but did not receive any comments. In the absence of data relating to the distribution channel differences by firm size, the Department uses the aggregate rate in its estimates. That is, the Department assumes that 19 percent of large insurance companies (13 insurance companies) sell annuities through captive distribution channels, while the remaining 71 of the 84 insurance companies that distribute annuities through captive channels are assumed to be small.[529] Additionally, 81 percent of large insurance companies (57 insurance companies) sell annuities through independent distribution channels, while the remaining 301 of the 358 insurance companies that sell annuities through independent distribution channels are assumed to be small.[530]

Independent Producers

The amendments will also affect independent insurance producers that recommend annuities and other covered products from unaffiliated Financial Institutions to Retirement Investors, as well as the Financial Institutions whose products are recommended.[531] While captive insurance agents are generally treated as employees of an insurance company, other insurance agents are ''independent'' and work with multiple insurance companies. Though these independent insurance producers may rely on PTE 2020–02, the Department believes they are more likely to rely on PTE 84–24, which is tailored to the insurance industry. For this reason, the Department only considers captive insurance agents in the analysis for PTE 2020–02.

The Department estimates that the independent agent distribution channel has sales of about $69 billion since this channel is 18 percent of individual annuity sales and total U.S. annuity sales reached $385.0 billion in 2023.[532]

In the proposal, the Department estimated 4,000 Independent Producers sold annuities and requested comments on this assumption as well as how captive insurance agents and independent insurance producers would be affected by the proposed

David Schiff, & Yves Vontobel, *Redefining the Future of Life Insurance and Annuities Distribution,* McKinsey & Company (January 2024), *https://www.mckinsey.com/industries/financial-services/our-insights/redefining-the-future-of-life-insurance-and-annuities-distribution.*

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

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

[527] The number of insurance companies using captive distribution channels is estimated as 442 × 81% = 358 insurance companies. The number of insurance companies using independent distribution channels is estimated as 442 − 358 = 84 insurance companies.

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

[529] The number of large insurance companies using a captive distribution channel is estimate as: 70 large insurance companies × 19% = 13 insurance companies. The number of small insurance companies using a captive distribution channel is estimated as: 84 insurance companies − 13 large insurance companies = 71 small insurance companies.

[530] The number of large insurance companies using an independent distribution channel is estimate as: 70 large insurance companies × 81% = 57 insurance companies. The number of small insurance companies using a captive distribution channel is estimated as: 358 insurance companies − 57 large insurance companies = 301 small insurance companies.

[531] The Department does not have an estimate of the number of plans purchasing certain life insurance policies. However, the Department's estimates of affected independent producers and insurance companies likely include many independent producers and insurance companies selling affected life insurance policies as they also sell annuities. Therefore, many of the costs of compliance for these independent producers and insurance companies are included in the regulatory impact analysis cost estimates.

[532] Insurance Information Institute, *Facts + Statistics: Distribution Channels – Sales of Individual Annuities By Distribution Channels, 2018 and 2022, https://www.iii.org/fact-statistic/facts-statistics-distribution-channels. LIMRA: U.S. Annuity Sales Post Another Record Year in 2023,* (January 24, 2024). *https://www.limra.com/en/newsroom/news-releases/2024/limra-u.s.-annuity-sales-post-another-record-year-in-2023/.*

amendments to PTE 2020–02 and PTE 84–24. The Department received several comments suggesting that its estimate for the number of Independent Producers was too low. While commenters provided significantly larger estimates, between 80,000 and 100,000, they did not provide data to support their estimate nor clarify whether their number was limited to Independent Producers selling annuity products. In response, the Department analyzed employment data from the March 2023 Current Population Survey to identify the number of self-employed workers in the ''Finance and Insurance'' industry whose occupation was listed as ''Insurance Sales Agents.'' This identified 86,410 self-employed insurance sales agents in the Finance and Insurance industry which the Department uses as the assumed number of Independent Producers for the analyses presented.[533] This data point likely contains a substantial number of workers who do not sell annuities or would otherwise not be impacted by the rulemaking; therefore, the Department believes this results in an overestimate of costs associated with Independent Producers.[534]

The amendments will not impose any conditions on insurance intermediaries, such as Independent Marketing Organizations (IMOs), Field Marketing Organizations (FMOs), or Brokerage General Agencies (BGAs). These entities do not have supervisory obligations over independent insurance producers under State or Federal law that are comparable to those of the other entities, such as insurance companies, banks, and broker-dealers, nor do they have a history of exercising such supervision in practice. They are generally described as wholesaling and marketing and support organizations that are not tasked with ensuring compliance with regulatory standards. In addition, they are not subject to the sort of capital and solvency requirements imposed on State-regulated insurance companies and banks.

Pension Consultants

The Department expects that pension consultants will continue to rely on the existing PTE 84–24. Based on 2021 Form 5500 data, the Department estimates that 1,011 pension consultants serve the retirement market.[535]

The amendments will exclude compensation received by pension consultants as a result of providing investment advice from relief under the existing PTE 84–24. As such, any pension consultants relying on the existing exemption for investment advice will be required to work with a Financial Institution under PTE 2020–02 to receive compensation for fiduciary investment advice. In this analysis, the Department includes pension consultants in the affected entities for continued relief for the existing provisions of PTE 84–24 and as a part of registered investment advisers for the amended PTE 2020–02. The Department acknowledges that by doing so it may overestimate the entities and related costs to complying with the exemptions. In the proposal, the Department requested comment on whether pension consultants would continue to rely on the existing provisions of PTE 84–24 or would rely on the amended PTE 2020–02 but did not receive any comments.

Principal Company Underwriter

The Department expects that some investment company principal underwriters for plans and IRAs rely on the existing PTE 84–24 for advice. The Department does not have data allowing it to estimate how many investment company principal underwriters will choose to rely on the exemption, however the Department expects investment company principal underwriters relying on PTE 84–24 to be rare. A few commenters on the proposal noted that entities, such as principal company underwriters, do currently rely on Section III(f) of the PTE 84–24. None of these commenters remarked on the Department's estimate of the number of principal company underwriters. For the purposes of this analysis, the Department continues to assume that 10 investment company principal underwriters for plans and 10 investment company principal underwriters for IRAs will use PTE 84–24 once with one client plan.

The amendments will exclude compensation received by investment company principal underwriters as a result of providing investment advice from relief under existing PTE 84–24. As such, any principal company underwriter relying on the existing exemption for investment advice will be required to work with a Financial Institution under amended PTE 2020–02 to receive compensation for fiduciary investment advice.

The Department acknowledges that this approach likely overestimates the entities and related costs to complying with the exemptions. The Department requested comment on whether principal company underwriters would continue to rely on the existing provisions of PTE 84–24 or would rely on the amended PTE 2020–02 but did not receive any comments on this topic.

Banks and Credit Unions

The amendments to PTE 75–1, PTE 80–83, and PTE 2020–02 may affect banks and credit unions. There are 4,614 federally insured depository institutions in the United States, consisting of 4,049 commercial banks and 565 savings institutions.[536] Additionally, there are 4,645 federally insured credit unions.[537] In 2017, the GAO estimated that approximately two percent of credit unions have private deposit insurance.[538] Based on this estimate, the Department estimates that there are approximately 95 credit unions with private deposit insurance and 4,740 credit unions in total.[539]

In the proposal, the Department requested comment on how many banks and credit unions currently rely on PTE 2020–02, PTE 75–1, and PTE 80–83 for

[533] EBSA Tabulations based on the March 2023 Current Population Survey. Note that this number includes insurance agents that do not sell annuity products and therefore overestimates the number of Independent Producers.

[534] When revising its estimate of Independent Producers for the final rulemaking, the Department considered using the proportion of premiums attributable to life insurance activity as a proxy for the share of insurance agents that sell annuities. Data from the U.S. Department of the Treasury, Federal Insurance Office, ''Annual Report on the Insurance Industry,'' indicates that roughly 23 percent of insurance premiums in 2023 were from life insurance activity. Assuming that this translates into 23 percent of insurance agents selling life insurance products would reduce the number of estimated independent life insurance producers affected from 86,410 to 20,185. Using this level of Independent Producers would result in a lower total estimated cost associated with the PTE 84–24 rulemaking of $144.1 million in the first year and $111.3 million in subsequent years. By not adjusting for the share of insurance agents that sell annuities, the Department believes that it significantly overstates the number of Independent Producers affected by this rulemaking.

[535] Internal Department calculations based on the number of unique service providers listed as pension consultants on the 2021 Form 5500 Schedule C. This could be an underestimate as only plans with 100 or more participants need to file a Schedule C and then only for service providers paid more than $5,000 during the plan year. To the extent small plans use different pension consultants the number would be underestimated.

[536] Federal Insurance Deposit Corporation, *Statistics at a Glance – as of September 30, 2023, https://www.fdic.gov/analysis/quarterly-banking-profile/statistics-at-a-glance/2023mar/industry.pdf.*

[537] National Credit Union Administration, *Quarterly Credit Union Data Summary 2023 Q3, https://ncua.gov/files/publications/analysis/quarterly-data-summary-2023-Q3.pdf.*

[538] GAO, *Private Deposit Insurance: Credit Unions Largely Complied with Disclosure Rules, But Rules Should be Clarified,* (March 29, 2017), *https://www.gao.gov/products/gao-17-259.*

[539] The total number of credit unions is calculated as: 4,645 federally insured credit unions/(100%¥2% of credit unions that are privately insured) = 4,740 total credit unions. The number of private credit unions is estimated as: 4,740 total credit unions¥4,645 federally insured credit unions = 95 credit unions with private deposit insurance.

investment advice and also on what proportion of credit unions offer IRAs or sell share certificate products. The Department did not receive any comments on these questions.

The amendments will exclude entities currently relying on the existing PTE 75–1 and PTE 80–83 for investment advice. The Department does not have a reliable data source on how many banks or credit unions currently rely on these exemptions for investment advice. PTE 75–1 allows banks to engage in certain classes of transactions with employee benefit plans and IRAs. The Department assumes that half of the 4,049 commercial banks, or 2,025 banks, will use PTE 75–1.

As amended, PTE 80–83 allows banks to purchase, on behalf of employee benefit plans, securities issued by a corporation indebted to the bank that is a party in interest to the plan. The Department assumes that 25 fiduciary-banks with public offering services will rely annually on the amended PTE 80–83.

The Department acknowledges that some credit unions may rely on PTE 75–1 and PTE 80–83 as amended. However, the Department does not have data, and did not receive any comment on the proposal, to suggest how many credit unions current rely on these exemptions or will continue to rely on these exemptions as amended.

Banks and credit unions relying on the existing exemptions for investment advice will be required to comply with PTE 2020–02 for prohibited transaction relief for investment advice. Banks and credit unions will be permitted to act as Financial Institutions under PTE 2020–02 if they or their employees are investment advice fiduciaries with respect to Retirement Investors.

The Department understands that banks most commonly use ''networking arrangements'' to sell retail non-deposit investment products, including equities, fixed-income securities, exchange-traded funds, and variable annuities.[540] Under such arrangements, bank employees are limited to performing only clerical or ministerial functions in connection with brokerage transactions. However, bank employees may forward customer funds or securities and may describe, in general terms, the types of investment vehicles available from the bank and broker-dealer under the arrangement. Similar restrictions on bank employees' referrals of insurance products and State-registered investment advisers exist. The Department believes that, in most cases, such referrals will not constitute fiduciary investment advice.

In the proposal, the Department estimated that no banks or credit unions would be impacted by the amendments to PTE 2020–02 but requested comment on what other types of activities banks or credit unions may engage in that would require reliance on PTE 2020–02. The Department did not receive any comments on this topic. However, the Department revisited a comment it received on PTE 2020–02 in 2020. This comment suggested that banks may be providing investment advice outside of networking arrangements, such as recommendations to roll over assets from a plan or IRA or advice to invest in deposit products.[541] The Department agrees that, if the recommendation meets the facts and circumstances test for individualized best interest advice, or the adviser acknowledges ERISA fiduciary status, and the remaining provisions of the final rule are satisfied, such transactions will require banks to comply with PTE 2020–02 for relief from the prohibited transactions provisions.

Banks may act as investment advisers to registered investment companies, often through a separately identifiable department or division within the bank. In such cases, the banks, or their separately identifiable department or division, would be registered investment advisers and already included in our estimate of affected entities. The Department acknowledges that some banks may provide investment advice outside such arrangements and requested comments in the proposal on the frequency with which bank employees recommend their products to Retirement Investors and how they currently ensure such recommendations are prudent to the extent required by ERISA. The Department also requested comments on the magnitude of any such costs and data that would facilitate their quantification. The Department did not receive any comments in response. The Department does not know how frequently these entities use their own employees to perform activities that will otherwise be covered by the prohibited transaction provisions of ERISA and the Code. Similarly, the Department does not know how often credit unions engage in such activities.

The Department acknowledges that some banks and credit unions may need to comply with PTE 2020–02. However, the Department believes that in such cases, the banks, or their separately identifiable department or division, would be registered investment advisers and already included in the estimate of affected entities.

Mutual Fund Companies

The amendments will modify PTE 77–4 such that mutual fund companies providing services to plans can no longer rely on the exemption when giving investment advice. Under the amendments, these mutual funds will need to rely on PTE 2020–02 for relief concerning investment advice.

According to the ICI, in 2022, there were 812 mutual fund companies.[542] The Department assumes that all of these companies are service providers to pension plans, providing investment management services.

Non-Bank Trustees

In the proposal, the Department received several comments concerning how the rulemaking would affect IRS-approved non-bank trustees and custodians and HSAs. These comments are discussed in greater detail in the preamble. The Department has decided not to exclude HSAs as Retirement Investors under the final rule and to include IRS-approved non-bank trustees and custodians as Financial Institutions in the final amendment to PTE 2020–02, but only to the extent they are serving in these capacities with respect to HSAs. In 2022, there were 70 approved non-bank trustees.[543] Many of these entities are already covered by other affected Financial Institution categories under PTE 2020–02. The Department considered the entities on the approved non-bank trustee list. The Department estimates that there are 31 entities that are not captured in other categories of Financial Institutions under PTE 2020–02.

[540] For more details about ''networking arrangements,'' see Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term ''Fiduciary'' Conflicts of Interest – Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions,* (April 2016). *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.*

Financial Institutions that are broker-dealers, investment advisers, or insurance companies that participate in networking arrangements and provide fiduciary investment advice would be included in the counts in their respective sections.

[541] Comment letter received from the American Bankers Association on the *Notification of Proposed Class Exemption: Improving Advice for Workers & Retirees,* (August 2020).

[542] Investment Company Institute, *2023 Investment Company Fact Book: A Review of Trends and Activities in the Investment Company Industry,* (2023), *https://www.ici.org/system/files/2023-05/2023-factbook.pdf.*

[543] Internal Revenue Service, *Nonbank Trustees Approved as of October 1, 2022,* (October 2022), *https://www.irs.gov/pub/irs-tege/nonbank-trustee-list.pdf.*

Mortgage Pool Sponsors

PTE 83–1 provides relief for the sale of certificates in an initial issuance of certificates by the sponsor of a mortgage pool to a plan or IRA when the sponsor, trustee, or insurer of the mortgage pool is a fiduciary with respect to the plan or IRA assets invested in such certificates. The amendments will modify PTE 83–1 to exclude exemptive relief for investment advice. As amended, mortgage pool sponsors operating as or under a Financial Institution will be able to rely on PTE 2020–02 for relief concerning investment advice. In the proposal, the Department requested comment on how many of these entities currently rely on PTE 83–1 and how many of these entities rely on PTE 83–1 for investment advice. The Department did not receive any comments.

6. Benefits and Transfers

The Department believes that, as a result of this rulemaking, Retirement Investors will achieve greater retirement security by selecting investments that are more appropriate for their retirement goals and that reflect an appropriate level of risk for their situation. Additionally, the Department expects that Retirement Investors will avoid losses resulting from advisory conflicts of interest. More specifically, this rulemaking will generate economic gains for Retirement Investors by:

- increasing uniformity in the regulation of financial advice for Retirement Investors, across different market segments and market participants,
- protecting consumers from losses that can result from advisory conflicts of interest (without unduly limiting consumer choice or adviser flexibility),
- ensuring that advice for Retirement Investors adheres to a stringent professional standard of care (*i.e.,* is prudent),
- giving Retirement Investors increased trust and confidence in their advisers and in the reliability of their advice, and
- better aligning investors' portfolio with their risk preferences and savings horizons as advisers provide individualized advice based on their individual circumstances.

These represent gains to investors, which may manifest as pure social welfare ''benefits,'' as some resources that were previously inefficiently used to acquire financial products and services are now available for more valuable uses. Other improvements may take the form of ''transfers'' of social welfare to Retirement Investors from other entities in society. The available data do not allow the Department to quantify the gains to investors or the components of social welfare ''benefits'' and ''transfers.'' These transfers represent a gain to Retirement Investors and are one of the primary objectives of the final rule and amended PTEs.

If some transactions have increased net returns for certain parties and decreased returns of equal magnitude for other parties, that would represent a transfer. If the increase in net returns for the first group is larger than the corresponding decrease for the second group, then only the equivalent portion would be transfers and the amount of the additional net returns would represent benefits. For example, non-Retirement Investors may have previously experienced lower prices and higher returns resulting from timing errors of Retirement Investors due to conflicted advice. As those conflicts are removed, those transactions may not occur, leading to a transfer from non-Retirement Investors to Retirement Investors. Moreover, it is possible that the financial industry would forgo profits (*e.g.,* as a result of conflicted advisers charging Retirement Investors lower fees), resulting in a transfer from investment advisers and associated service providers to Retirement Investors.

As detailed later in this regulatory impact analysis, the magnitude of the gains to Retirement Investors is uncertain. As noted earlier, advisory conflicts—which this rulemaking, in harmony with Federal securities laws, will mitigate—are very costly for Retirement Investors. The cost is high both on aggregate and for individual Retirement Investors, such as when a new retiree adheres to conflicted advice to transfer a career's-worth of 401(k) savings into an imprudent or over-priced annuity or other investment.

Investors stand to gain much from the mitigation of advisory conflicts. In the proposal, the Department invited comments and data related to how it might quantify these benefits as part of the regulatory impact analysis of any final rule. The Department received multiple comments that quantified benefits of the rulemaking, and the Department has considered those analyses and discussed them in the section titled Implications for Retirement Savings Estimates.

Benefits of a Fiduciary or Best Interest Standard

In response to the proposal, several commenters asserted that parts of the economic analysis relied on outdated studies that do not reflect recent regulatory changes and their impact on the behavior of market actors. These commenters focused specifically on the Department's discussion of mutual fund load fees and variable annuities, suggesting that they were irrelevant to this rulemaking. While the Department acknowledges that some of the conflicts of interest it discussed in its 2016 regulatory impact analysis have been addressed by actions of other regulatory bodies, it believes that the experience following its 2016 rulemaking and SEC's Regulation Best Interest is instructive in identifying harm caused by conflicted advice, how a fiduciary or best interest standard can reduce those harms, and the potential benefit to Retirement Investors of this rulemaking. The discussion below highlights studies concerning market segments that have benefited from the imposition of higher standards of care. This discussion does not attribute these benefits to this rulemaking, but rather illustrates why the Department expects that extending a higher standard of conduct to other sectors will benefit Retirement Investors.

Evidence in Mutual Funds

The 2016 Rule and recent SEC actions highlighted inherent conflicts of interest in how broker-dealers or registered investment advisers are compensated for recommending certain share classes of mutual funds. In the 2016 regulatory impact analysis, the Department estimated that, at that time, broker-sold mutual funds underperformed direct-sold mutual funds by approximately 50 basis points per year.[544] In response to this estimate, Morningstar opined that transparency improvements associated with such shares ''should encourage advisors to provide high quality advice to remain competitive'' and that ''50 basis points is a reasonable estimate of savings to investors from reducing conflicted advice.'' [545] Their support of the Department's estimate was based on a study looking at mutual fund T shares. However, this share class has faded following the revocation of the 2016 Final Rule.[546] As a result, it is largely

[544] EBSA, *Regulating Advice Markets Definition of the Term ''Fiduciary'' Conflicts of Interest — Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions,* pp. 162, (April 2016), *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.*

[545] Aron Szapiro & Paul Ellenbogen, *Early Evidence on the Department of Labor Conflict of Interest Rule: New Share Classes Should Reduce Conflicted Advice, Likely Improving Outcomes for Investors,* Morningstar Policy Research (April 2017).

[546] Greg Iacurci, *T Shares Are Dead,* InvestmentNews (December 20, 2018), *https://www.investmentnews.com/t-shares-are-dead-77482.*

uncertain how many Retirement Investors would have adopted the new share class had it been permitted to go fully into effect.

Despite the decline of T shares following the revocation of the 2016 Final Rule, mutual fund sales continued to shift away from more conflicted share classes. Sethi, Spiegel, and Szapiro (2019) found that the Department's 2016 Final Rule reduced flows into funds with excess loads or loads that were higher than would otherwise be expected based on the fund's characteristics.[547] Mitchell, Sethi, and Szapiro (2019) found while mutual funds with excess loads have historically received greater inflows, since 2010 the correlation between excess loads and inflows has been lower. The authors attribute this change to an ''increased focus on broker practices'' and ''a culture of accountability.'' [548] Additionally, Christoffersen, Evans, and Musto (2013) found that as the size of the load-share increased, mutual fund returns decreased. This suggests that the greater the adviser's conflict of interest, the worse off the IRA investor can expect to be.[549] [550]

Meanwhile, other types of share classes have emerged and grown more prevalent, including unbundled and semi-bundled share classes. The different compensation arrangements for each of the types of share classes create different types and magnitudes of conflicts for financial professionals. In a traditional, bundled share class, the investor pays the mutual fund a load or 12b-1 fee, and the mutual fund pays a portion back to an intermediary, such as the intermediary that sold the fund to the investor. Semi-bundled share classes use revenue sharing or sub-accounting fees. In an unbundled or ''clean'' share class, the investor pays any intermediaries directly, while in a semi-bundled share class, the fund pays sub-accounting fees for recordkeeping services and uses revenue sharing for other services, such as distribution.[551]

Adoption of these new share classes has spread quickly. Mitchell, Sethi, and Szapiro (2019) found that between July 2018 to August 2019, relatively few bundled share classes were launched into the market and that more bundled share classes closed in that time frame than semi-bundled and unbundled combined. Additionally, they found that unbundled share classes received almost five times as much new money as semi-bundled share classes. While flows to semi-bundled share classes fluctuated, they received net positive flows overall during this period.[552]

This trend is confirmed by other data sources. For instance, data published by the ICI in 2023 show that no-load mutual funds, or mutual funds without commissions, accounted for 46 percent of long-term mutual fund gross sales in 2000, 79 percent in 2015, and 91 percent in 2022. ICI attributed the increase in no-load funds to two growing trends: investors paying intermediaries for advice through direct fees rather than indirectly through funds, and the popularity of retirement accounts that invest in institutional, no-load share classes.[553] Morningstar similarly finds that unbundled and semi-bundled shares accounted for 58 percent of fund assets in 2003 but had grown to 86 percent by the end of 2022.[554] This trend is also observable in 401(k) plans. In 2021, 95 percent of 401(k) mutual fund assets were invested in no-load funds, compared to 66 percent in 2000.[555]

These trends were highlighted by commenters. One commenter remarked that fees paid by plans and IRA owners had started to decline independent of the rule and would likely continue to decline absent the amendments in the proposal. This commenter also argued that the results from Sethi, Spiegel, and Szapiro (2019) could not have accounted for the effects of the 2016 Final Rule because the study only analyzed data through 2017. While data does indicate that load sharing began to decline in 2010 after the passage of the Dodd-Frank Act and that it is difficult to detangle the changes directly attributable to the 2016 Final Rule from changes attributable to existing trends, there is reason to believe that the 2016 Final Rule did play a significant role.

As written by Sethi, Spiegel, and Szapiro (2019), ''flows into mutual funds paying unusually high excess loads declined after the DOL proposed its fiduciary rule in 2015, and this shift was statistically significant. This reduction in the distortionary effect of conflicted payments suggests that firms put in place effective policies and procedures to mitigate conflicts of interest in response to the DOL rule.'' [556]

Bullard, Friesen, and Sapp (2008) found that the difference in performance between load and no-load funds has two components: the difference in prospectus returns across share classes and the difference in investor returns resulting from differences in investor timing.[557] In the 2016 regulatory impact analysis, the Department had also considered how conflicts of interest in compensation structures may incentivize excessive trading. Good advice can help investors avoid timing errors when trading by reducing panic-selling during large and abrupt downturns. However, conflicted advice providers may profit by encouraging investors' natural inclination to trade more and ''chase returns,'' an activity that tends to produce harmful timing errors.[558]

The Department sponsored research studies by Padmanabhan et al. (2017) and Panis and Padmanabhan (2023) to analyze recent trends in how investors timed the purchase and sale of mutual funds.[559] Padmanabhan et al. (2017) found that during the decade from 2007 to 2016, investors in load funds had

[547] This study updated the analysis performed by Christoffersen, Evans, and Musto (2013) and examined the period from 1993 to 2017 in order to look at the impact of the Department's Final Rule, taking into consideration preexisting marketplace trends, anticipatory effects, the April 2015 Proposal, and the April 2016 Final Rule. The study calculates the excess load as ''the difference between loads predicted by a regression and actual load, given a number of other control variables.'' *See* Jasmin Sethi, Jake Spiegel, & Aron Szapiro, *Conflicts of Interest in Mutual Fund Sales: What Do the Data Tell Us?,* 6(3) The Journal of Retirement 46–59 (Winter 2019).

[548] Lia Mitchell, Jasmin Sethi, & Aron Szapiro, *Regulation Best Interest Meets Opaque Practices: It's Time to Dive Past Superficial Conflicts of Interest,* Morningstar (November 2019).

[549] Susan Christoffersen, Richard Evans, & David Musto, *What Do Consumers' Fund Flows Maximize? Evidence From Their Broker's Incentives,* 68 Journal of Finance 201–235 (2013), *https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1540-6261.2012.01798.x.*

[550] The performance reduction presented in Christoffersen, Evans and Musto (2013) does not include loads paid by investors in front-end-load funds.

[551] *Ibid.*

[552] *Ibid.*

[553] Investment Company Institute, *Trends in the Expenses and Fees of Funds, 2022,* 29(3) ICI Research Perspective (March 2023).

[554] Morningstar, *2022 U.S. Fund Fee Study,* Exhibit 15 (2022), *https://www.morningstar.com/lp/annual-us-fund-fee-study.*

[555] Investment Company Institute, *The Economics of Providing 401(k) Plans: Services, Fees, and Expenses, 2022,* 29(6) ICI Research Perspective Figure 5. (June 2023), *https://www.ici.org/system/files/2023-07/per29-06.pdf.*

[556] Jasmin Sethi, Jake Spiegel, & Aron Szapiro, *Conflicts of Interest in Mutual Fund Sales: What Do the Data Tell Us?,* 6(3) The Journal of Retirement 46–59 (Winter 2019).

[556] Lia Mitchell, Jasmin Sethi, & Aron Szapiro, *Regulation Best Interest Meets Opaque Practices: It's Time to Dive Past Superficial Conflicts of Interest,* Morningstar (November 2019).

[557] Mercer Bullard, Geoffrey C. Friesen, & Travis Sapp, *Investor Timing and Fund Distribution Channels,* Social Science Research Network (2008).

[558] YiLi Chien, *The Cost of Chasing Returns, 18 Economic Synopses* (2014), *https://doi.org/10.20955/es.2014.18.*

[559] Constantijn W.A. Panis & Karthik Padmanabhan, *Buy Low, Sell High: The Ability of Investors to Time Purchases and Sales of Mutual Funds,* Intensity, LLC. (August 14, 2023). *https://www.dol.gov/sites/dolgov/files/ebsa/researchers/analysis/retirement/buy-low-sell-high-the-ability-of-investors-to-time-purchases-and-sales-of-mutual-funds.pdf.*

worse timing than investors in no-load funds, with an excess performance gap, comparing measures of the impact of purchase and sales timing, of 1.12 percent per year for U.S. equity funds and 0.63 percent for all funds.[560]

After Regulation Best Interest took effect, there appears to have been a dramatic improvement in the timing of trades. Panis and Padmanabhan (2023) found that between July of 2020 and June of 2023, the excess performance gap was only 0.13 percent for U.S. equity funds and was negative, ¥0.11 percent, overall.[561] This means that in the later period, looking across all funds in the aggregate, investors in load funds timed their transactions slightly better than investors in no-load funds. While brokers in the earlier period were associated with customers making more timing errors, in the later period brokers were apparently persuading customers to chase returns a little bit less. It is not certain what factors underlie the reduction in timing errors, but it is consistent with an interpretation that Regulation Best Interest enhanced the standard of conduct for broker-dealers to act in the best interest of retail customers.

Evidence in Variable Annuities

The 2016 Final Rule and the SEC's Regulation Best Interest also addressed conflicts of interests in variable annuities. Similar to mutual funds, insurance agents and brokers are often compensated through load fees for selling variable annuities.[562] The commission paid varies significantly, from as little as 0 percent to as much as 10 percent of the investment with the most common amount being 7 percent.[563] This creates a strong incentive for brokers to sell some variable annuities over others. Egan, Ge, and Tang (2022) showed that variable annuity sales were four times more sensitive to brokers' financial interests than to investors' financial interests.[564]

The 2016 Final Rule discouraged sales of the typical load funds. Between 2016 and 2018, the sale of fee-based variable annuities, or I-share class variable annuities, increased by 52 percent.[565] Following the vacatur of the 2016 Final Rule in 2018, fee-based variable annuity sales decreased, falling by 28 percent between 2018 and 2020. More recently, sales have rebounded, increasing 76 percent between 2020 and 2021.[566] The significant increases in I-share class variable annuities have been driven by demand for fee-based products among fee-based advisers. They have been the second most popular variable annuity contract type since 2016, though they still only comprised 9.5 percent of retail variable annuity sales in 2021.[567]

According to Egan, Ge, and Tang (2022), after the Department issued its 2016 Final Rule, total variable annuity sales fell significantly—primarily driven by a 52 percent decrease in annuities with expenses in the highest quartile, suggesting that broker-dealers responded to the 2016 Final Rule by placing greater weight on investor interests. In fact, the authors stated that the ''regulatory change improved the distribution of products available to investors along the extensive margin, in terms of the annuities available for sale, as well as the intensive margin, in terms of the actual annuities sold by brokers.'' Thus, the authors concluded, the 2016 Final Rule resulted in improved investor welfare, increasing risk-adjusted returns of investors by up to 30 basis points per year, with two-thirds of the effect associated with investors moving into lower-expense products and the remainder from sales of annuities with more desirable investment options and characteristics.[568]

It is uncertain what the long-run effects of the 2016 Final Rule on variable annuities would have been because it was vacated. One approach the Department can use to illustrate the possible long-run impact of such a regulation is to apply the 30 basis point figure to the assets held in variable annuities in 2018, which was $2.2 trillion, yielding a total annual increase in risk-adjusted returns of approximately $6.6 billion.[569]

Critics of the Department's 2016 Final Rule often refer to a decline in variable annuity sales as evidence of the 2016 Final Rule having negative effects. Egan, Ge, and Tang (2022) conclude, however, that investors on average experienced a net benefit from the Rule, even taking into account the fact that some investors were no longer participating in the annuity market.[570] A few commenters argued that the Egan, Ge, and Tang (2022) study does not account fully for the benefits annuities may provide or give context for why some annuities may be more expensive than others. The Department agrees that annuities are an important investment option for Retirement Investors, which is why it is important to ensure that the products being sold are in the best interests of Retirement Investors. It is possible that a reduction in investors' access to certain products or services occurred because those products and services were high cost or low quality. While it is challenging for a research study to capture all aspects of a complex market during a changing policy environment, Egan, Ge, and Tang (2022) have performed a rigorous analysis that the Department can incorporate into its assessment of the likely impact and magnitude of how a fiduciary standard will affect the types of products sold and how these products are sold.

[560] Karthik Padmanabhan, Constantijn W.A. Panis & Timothy J. Tardiff, *The Ability of Investors to Time Purchases and Sales of Mutual Funds,* Advanced Analytical Consulting Group, Inc. (November 1, 2017). *https://www.dol.gov/sites/dolgov/files/EBSA/researchers/analysis/retirement/the-ability-of-investors-to-time-purchases-and-sales-of-mutual-funds.pdf.*

[561] Panis & Padmanabhan, *Buy Low, Sell High,* 2023.

[562] Frank Fabozzi, *The Handbook of Financial Instruments* 596–599 (2002).

[563] Mark Egan, Shan Ge, & Johnny Tang, *Conflicting Interests and the Effect of Fiduciary Duty – Evidence from Variable Annuities,* 35(12) The Review of Financial Studies 5334–5486 (December 2022), *https://academic.oup.com/rfs/article-abstract/35/12/5334/6674521.*

[564] *Id.*

[565] Cerulli Associates, *U.S. Annuity Markets 2022: Acclimating to Industry Trends and Changing Demand,* Exhibit 4.09. The Cerulli Report.

[566] *Ibid.* Data excludes sales of fee-only independent RIAs.

[567] Cerulli Associates, *U.S. Annuity Markets 2022: Acclimating to Industry Trends and Changing Demand,* Exhibit 2.07. The Cerulli Report.

[568] Mark Egan, Shan Ge, & Johnny Tang, *Conflicting Interests and the Effect of Fiduciary Duty – Evidence from Variable Annuities,* 35(12) *The Review of Financial Studies* 5346 (December 2022), *https://academic.oup.com/rfs/article-abstract/35/12/5334/6674521.*

[569] This estimate is based on variable annuity assets in 2018 of $2.2 trillion, as reported in the referenced study. *See* Mark Egan, Shan Ge, & Johnny Tang, *Conflicting Interests and the Effect of Fiduciary Duty – Evidence from Variable Annuities,* 35(12) *The Review of Financial Studies* 5346 (December 2022), *https://academic.oup.com/rfs/article-abstract/35/12/5334/6674521.*

[570] Mark Egan, Shan Ge, & Johnny Tang, *Conflicting Interests and the Effect of Fiduciary Duty – Evidence from Variable Annuities,* 35(12) The Review of Financial Studies 5334–5486 (December 2022), *https://academic.oup.com/rfs/article-abstract/35/12/5334/6674521.*

Another study, examining the variation in fiduciary duties between broker-dealers and registered investment advisers as well as the variation between States as to whether broker-dealers are subject to a common-law fiduciary duty, similarly found that fiduciary protections in the annuity markets lead to better outcomes for investors. By analyzing deferred annuity sales at a large financial services provider during 2013 to 2015, Bhattacharya et al. (2024) found that fiduciary duty increased risk-adjusted returns by 25 basis points.[571]

Summary

When the Department first started looking at conflicts of interest, compensation practices with mutual funds and variable annuities were a source of measurable harm. As evidenced above, many of those harms abated in these asset classes once they were subject to a higher standard of care. This evidence supports the belief that Retirement Investors benefit from imposing a higher standard of care on advisers.

Further, it underscores the premise of this rulemaking, that Retirement Investors will benefit from the expansion of a higher standard of care to other asset classes. The benefits for Retirement Investors of a fiduciary or best interest standard in the mutual fund and variable annuity space have been well established. As discussed in the Baseline section of this analysis, there are significant segments of the investment advice market for Retirement Investors that do not have such protections. In these markets, many of the practices identified as sources of conflicts of interest in mutual funds and variable annuities continue to be common business practice. With the expansion of a higher standard of care to these markets, namely non-security annuities, the Department expects that there will be significant benefits to Retirement Investors and that the findings discussed above provide insight into the magnitude of these benefits.

Regulatory Uniformity

This rulemaking will make the rules that govern fiduciary advice to plan and IRA investors across all markets more consistent with Federal securities laws, and thereby promote clarity and efficiency. Under the current regulatory regime, bad actors are drawn to those markets with the least regulated products, where they are not required to prioritize Retirement Investors' interest over their own when they make investment recommendations. By harmonizing advice regulations across all markets that are used by Retirement Investors, the Department can ensure that advisers all face the same regulatory standard. It will also remove incentives for advisers to steer recommendations in ways that customers cannot monitor and that run counter to the customers' best interest.

The Department received several comments supporting the Department's approach to creating broader regulatory uniformity for Retirement Investors. Some commenters expressed concern that limitations in other regulators' approaches leave Retirement Investors at risk. These commenters confirmed concerns expressed by the Department with respect to uneven regulatory standards across products and types of investors. One commenter noted that IRA agreements are sometimes used to specify that advice is not being provided on a regular basis or that the advice is not the primary basis for investment decisions.

The Department also received comments suggesting that the proposal would further complicate the regulatory environment. Another commenter suggested that the Department's analysis did not identify the extent of the regulatory gap and remaining conflicts. But, as detailed by another commenter,

> [T]he applicable regulations governing the investment advice will vary based on the role of the individual providing advice and the type of investment recommended. For example, an investment adviser who gives advice in connection with an IRA may be subject to the Investment Advisers Act of 1940. A broker giving securities investment advice in connection with an IRA may be subject to Regulation Best Interest. An insurance broker who recommends that a Retirement Investor rollover their 401(k) into an IRA and then invest in an indexed annuity may be subject to the NAIC's Suitability in Annuity Transactions Model Regulation, if their state has adopted the regulation. A professional who gives advice to invest in a bank CD or real estate may not be subject to any of these regulations.'' [572]

In describing the limitations of the NAIC's Model Regulation for ensuring that brokers and insurance producers act in a Retirement Investor's best interest, acknowledging that the Regulation Best Interest only applies to retail investments in securities, and highlighting that Regulation Best Interest rules do not cover an Investment Professional's recommendations made to plan fiduciaries regarding the investment of plan assets, the Department has, in fact, identified those remaining regulatory gaps that this rulemaking addresses.

When contemplating a potential ''Financial Adviser Reform Act'' that would ''be uniform in its application of the fiduciary duties of loyalty and care across all financial advisers,'' Smith (2017) noted that, ''this uniformity would eliminate the 'false distinction' between investment service providers by recognizing the overlapping services they offer.'' [573] Smith argued that creating a uniform standard ''would both reduce consumer confusion as to what constitutes advice or recommendations and ensure that the uniform fiduciary duty is consistently applied in the investor's favor by taking a broad approach to what constitutes investment advice and recommendations.'' [574] Simply put, requiring that only some professionals advising Retirement Investors adhere to an ERISA fiduciary standard promotes recommendations that are driven by differences in the regulatory regime rather than by the products or investors' interests.

Research suggests that the problems resulting from differing regulatory regimes are not unique to the United States. For instance, Anagol et al. (2017) found that when agents selling life insurance in India were required to disclose commissions for one particular product, they were much less likely to recommend it to clients. Instead, the agents recommended products that did not have this requirement, but which had higher and opaque commissions.[575] The authors conclude, ''These results suggest that the disclosure requirements for financial products need to be consistent across the menu of substitutable products.'' This

[571] Vivek Bhattacharya, Gaston Illanes, & Manisha Padi, *Fiduciary Duty and the Market for Financial Advice,* Working Paper, at 2 (February 27, 2024), *https://www.dropbox.com/scl/fi/gj5skfflsip2nhee1662c/Draft.pdf?rlkey=msd12c734n8ddrct8uzqg0qut&dl=0.* This is an updated version of the working paper cited in the proposal. (*See* Vivek Bhattacharya, Gaston Illanes, & Manisha Padi, *Fiduciary Duty and the Market for Financial Advice,* Working Paper, (May 20, 2020), *https://www.nber.org/papers/w25861.*

[572] Comment letter received from St. John's University on the *Notification of Proposed Rulemaking: Retirement Security Rule: Definition of an Investment Advice Fiduciary,* (January 2024).

[573] Alec Smith, *Advisers, Brokers, and Online Platforms: How a Uniform Fiduciary Duty Will Better Serve Investors,* 2017(3) Colum. Bus. L. Rev. 1200–1243, at 1233–34 (2017), *https://doi.org/10.7916/cblr.v2017i3.1730.*

[574] *Ibid.*

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

underscores that regulatory regimes that are not uniform allow advisers to engage in regulatory arbitrage, leaving their clients vulnerable to conflicts of interest.

This rulemaking will help create a uniform standard, as it will apply to all retirement investment advice. This will address concerns the Department has about lower standards for advice related to insurance products and other investments that are not securities, advice that broker-dealers render to ERISA plan fiduciaries, and robo-advice.[576] The rulemaking's broad application to all retirement investment advice will help different market participants and different financial products compete on similar terms for IRA and plan business. This will reduce the risk to Retirement Investors. Uniform, well-designed rules can make markets fairer for competitors and friendlier for customers, leading to more efficient market outcomes. They can also promote efficiency by allowing firms that offer multiple products or make recommendations in both the retail and non-retail market to utilize a common compliance structure.

Financial services firms are already moving toward new approaches in how they offer advice, including more fee-based advice models, flatter compensation models, and integrating technology. The rulemaking will help ensure that these new approaches evolve toward less conflicted and more innately impartial business models. The Department expects that these types of technology-enhanced models—whether pure robo-adviser or hybrid models—will contain the overall costs associated with providing investment advice and strategies and will help low-balance account holders obtain investment advice at an affordable cost.

This rulemaking will generate additional economic benefits and transfers by extending important and effective protections broadly to cover all advice given to Retirement Investors. In this analysis, the Department identifies three specific areas in which Retirement Investors will benefit from an extension of protections: one-time advice regarding the rollover of assets, advice on non-security annuity products, and advice given to ERISA plan fiduciaries. These types of advice are discussed in the following sections.

[576] The Department identifies these areas as areas of concern because non-security investments and investment advice from broker-dealers to ERISA plan fiduciaries are not covered by recent SEC actions and pure robo-advice, while included in the SEC's actions was excluded from the current PTE 2020–02. For more information, refer to the Baseline discussion.

Protections Concerning Rollover Investment Advice

The rulemaking will generate benefits for, and transfers to, Retirement Investors by reducing conflicts related to one-time advice concerning rollovers. Frequently, participants are better off leaving their 401(k) account in the retirement plan rather than rolling it over to an IRA, particularly if the 401(k) plan has low fees and high-quality investment options. The final rule and amended PTEs will require those providing advice to consider the higher fees along with other benefits and costs when determining whether a rollover is in a Retirement Investor's best interest and making a recommendation.

Large 401(k) plans often have lower fees than IRAs, though smaller 401(k) plans sometimes find it difficult to keep fees low.[577] However, one commenter argued that this rulemaking would result in plan fiduciaries examining their investment lineups and the fees that plans pay, resulting in average costs for small plan participants decreasing from 93 basis points down to 75 basis points, while there would be minimal changes for most other plans. IRAs often utilize retail shares in mutual funds with substantially higher fees than the institutional share classes that employer-sponsored plans typically utilize. A 2022 Pew Charitable Trusts study analyzed the difference between median institutional and retail share class expense ratios across all mutual funds that offered at least one institutional share and one retail share in 2019. They found that the median retail shares of equity funds had annual expenses that were 37 percent higher than institutional shares. Over the course of saving for retirement, the impact of even small differences in fees was significant.[578]

Some commenters suggested that under the amendments, fewer rollovers would occur due to higher burdens associated with making rollover recommendations. These commenters expressed concerns that fewer rollovers from employment-based retirement plans would prevent the consolidation of individual retirement accounts, making it difficult for individuals to keep track of their retirement savings. The Department agrees that account consolidation is an important consideration for retirement savers but disagrees that this rulemaking will prevent rollovers that are in a retirement saver's best interest.

SECURE 2.0 codified the option for recordkeepers to offer an automatic portability feature to employer-sponsored plans they service, which allows for automatic consolidation of certain IRA accounts with modest balances into the saver's new employer-sponsored retirement plan. Significant growth in low-cost automatic portability transactions is expected which will result in the retention of retirement savings in retirement plans.[579] For a broader discussion related to the burden to provide advice for rollover transactions, see the Costs Associated with Rollover Documentation and Disclosure for Financial Institutions section.

The investment fiduciaries of 401(k) plans have responsibilities under ERISA to act in the best interests of, and solely for the benefit of, the plan participants, whereas IRA providers have not had such responsibilities under ERISA.[580] Turner and Klein (2014) suggested that the services and investment performance associated with higher fees paid in an IRA are not necessarily justified,[581] meaning a plan participant would be able to obtain similar investment performance and services in a lower cost 401(k) plan.

If fewer participants roll over their 401(k) plan account balances into IRAs, and instead keep their account balances in plans sponsored by former or new employers, this will result in transfers between different segments of the market. To consider one example, there may be a transfer from service providers who specialize in serving IRAs to service providers who specialize in serving defined contribution plans. As a second example, Retirement Investors often pay lower fees in plans where they can access institutional share classes than they do in IRAs where they use retail share classes. This represents a transfer from actors in the financial industry to Retirement Investors.

Protections Concerning Annuity Investment Advice

The rulemaking will generate additional benefits by extending

[577] BrightScope and Washington, DC: Investment Company Institute. *The BrightScope/ICI Defined Contribution Plan Profile: A Close Look at 401(k) Plans, 2019* (San Diego, CA: 2022). Available at *www.ici.org/files/2022/22-ppr-dcplan-profile-401k.pdf.*

[578] Pew Charitable Trusts, *Small Differences in Mutual Fund Fees Can Cut Billions from Americans' Retirement Savings,* Pew Charitable Trusts Issue Brief, at 4–9 (June 2022), *https://www.pewtrusts.org/-/media/assets/2022/05/smalldifferenceinmutualfunds_brief_v1.pdf.*

[579] 89 FR 5624.

[580] *Ibid.*

[581] John Turner & Bruce W. Klein, *Retirement Savings Flows and Financial Advice: Should You Roll Over Your 401(k) Plan?,* 30(4) Benefits Quarterly 42–54 (2014), *https://www.iscebs.org/Documents/PDF/bqpublic/bq414f.pdf.*

protections to investment advice from insurance agents or Independent Producers to IRA investors.

In response to the proposal, the Department received several comments on how annuities are sold. One commenter remarked that it takes sales agents a significant amount of time to learn about the annuities they recommend and how to explain these products to investors. This commenter stated that fee-based advisers would not be incentivized to spend as much time learning about products as those earning a commission and that fee-based advisers may face conflicts of interest to maintain their assets under management. Another commenter stated that fee-based advice models serve more affluent individuals, while commission-based models work better for ''average Americans'' though this was countered by another commenter that specifically provides fiduciary advice, primarily with moderate income clients, using either a fixed fee or hourly rate.

In response to concerns by commenters that this rulemaking will require that advisers change their payment model, the Department notes that it does not require the elimination of sales commissions or other payment methods; rather, it requires that when presenting an individualized financial recommendation to a Retirement Investor who is expected to act on that recommendation, the adviser must uphold their duty of care and loyalty and place the investor's interest before their own. Similarly, it requires that Insurers adopt and oversee protective policies and procedures to ensure that adviser's recommendations adhere to these stringent fiduciary standards.

The Department also received comments that annuities, as an insurance product, are essentially different from investment products and thus comparisons between annuities and investments otherwise held in retirement accounts are not appropriate. These commenters stressed that the insurance element of annuities provide a guarantee to investors and protect investors from risk. Many of these commenters remarked that the guarantees of risk mitigation come at an expense, particularly with regard to solvency rules that require insurance companies to meet reserve and capital requirements. Another commenter noted that expense ratios and commissions of annuities are linked to the type of benefit offered and that the products with more benefits to investors have higher costs. The Department agrees that there are important differences in the nature of annuities and investments and that annuities serve an important role in preparing for retirement for many.

However, when Retirement Investors are considering what products to put their savings in, they must evaluate how much to invest in traditional investments and how much to put into products, such as annuities. One commenter expressed support for the Department's rulemaking, in light of significant increases in annuity sales in recent years. The increase in sales coupled with the increasing complexity of annuity products described later in this section, makes it imperative that a Retirement Investor can trust an Investment Professional to be offering advice in their best interest.

The annuity products offered by insurance companies are notoriously complex, leaving Retirement Investors reliant on advice from the insurance agent, broker, or Independent Producer selling the annuity. The fees and adviser incentives are similarly complex, often in a way that can conceal the full magnitude of the fees, and the fact that investors can face high surrender fees when attempting to leave inappropriate annuity contracts early. Other regulators have highlighted the complexity of many annuity products. For example, FINRA stated:

> Annuities are often products investors consider when they plan for retirement—so it pays to understand them. They also are often marketed as tax-deferred savings products. Annuities come with a variety of fees and expenses, such as surrender charges, mortality and expense risk charges and administrative fees. Annuities also can have high commissions, reaching seven percent or more.[582]

Given their current complexity and the likelihood that investors may end up with annuities that are inconsistent with their individual circumstances, one commenter posited that if the rulemaking results in products sold being more consistent with the needs of Retirement Investors, there would be a decline in surrender fees.

As discussed above, fixed annuities, variable annuities, and indexed annuities differ significantly in risk. For instance, while the insurer carries the investment risk for fixed annuities, the investor carries the investment risk for variable annuities and indexed annuities.[583] Additionally, they differ in regulatory standards and the required protections owed to customers. While variable annuities and some indexed annuities are considered securities, such that their sale is subject to SEC and FINRA regulation,[584] the standard of care owed to a customer for other types of annuities depends on the State regulation.

Further, the compensation structures used by financial entities selling annuities can encourage investment advice professionals to recommend annuities that are not in the Retirement Investor's best interest. According to the 2015 Warren Report, which examined 15 of the largest annuity companies in the United States, 87 percent of the annuity companies offered ''kickbacks''—luxurious, all expenses-paid vacations, golf outings, iPads and other electronics, expensive dinners, theatre or professional sports tickets, and sports memorabilia—to their agents in exchange for sales to retirees.[585]

Insurance agents, brokers, and Independent Producers are often compensated through commissions for selling variable and fixed annuities. As discussed earlier in this analysis, research has found load fees create a conflict of interest in investment advice, leading to decreased returns.[586] While the conflicts, including load fees, previously identified in variable annuities have improved, the industry's practices relating to commissions in other product lines remain a concern. The insurance industry has started to increase their focus on-fee-based annuities; however, they still constitute a small portion of annuity sales.[587] Though fee-based annuities do not have transaction-based conflicts of interest often associated with commissions, the products themselves are not conflict free. Retirement Investors invested in fee-based annuities are not protected from other conflicts of interest, so a duty of care and loyalty on the Investment Professional would be necessary.

The Department also has concerns about sales tactics of insurance agents, brokers, and Independent Producers for

[582] Financial Industry Regulatory Authority, *Annuities,* Financial Industry Regulatory Authority, *https://www.finra.org/investors/investing/investment-products/annuities.*

[583] Frank Fabozzi, *The Handbook of Financial Instruments* 579, (2002), *https://seekingworldlywisdom.files.wordpress.com/2011/08/the-handbook-of-financial-instruments-fabozzi.pdf.*

[584] Securities and Exchange Commission, *Annuities,* Securities and Exchange Commission, *https://www.investor.gov/introduction-investing/investing-basics/glossary/annuities.*

[585] Office of Senator Elizabeth Warren, *Villas, Castles, and Vacations: Americans' New Protections from Financial Adviser Kickbacks, High Fees, & Commissions are at Risk* (2017), *https://www.warren.senate.gov/files/documents/2017-2-3_Warren_DOL_Rule_Report.pdf.*

[586] Susan Christoffersen, Richard Evans & David Musto, *What Do Consumers' Fund Flows Maximize? Evidence from Their Broker's Incentives,* 68(1) Journal of Finance 201–235 (February 2013), *https://doi.org/10.1111/j.1540-6261.2012.01798.x.*

[587] Cerulli Associates, *U.S. Annuity Markets 2021: Acclimating to Industry Trends and Changing Demand,* The Cerulli Report, (2022).

annuity products. This concern was echoed by several commenters, remarking that sales tactics are used to scare investors into buying complex products with features that even experienced investors may have difficulty comprehending. Additionally, commenters noted that marketing materials often suggest a relationship of trust and confidence. One commenter remarked that when faced with legal action for imprudent recommendations or mismanaged accounts, firms will argue that ''non-security investment products, such as equity indexed and fixed annuities, are not securities and therefore the brokers were 'merely' acting as an insurance agent with a minimal duty of care, not even subject to the suitability rule.'' [588]

A number of State regulators have issued website alerts regarding deceptive sales practices to sell annuities to seniors, including ''high-pressure sales pitch[es]'' and ''quick-change tactics'' in which an agent tries to convince an investor to change coverage quickly without time for adequate research. State regulators also warned that a licensed agent will be more than willing to show credentials and to question an agent's ''[unwillingness or inability] to prove credibility'' to prospective customers.[589] One regulator noted, ''With billions of dollars in sales to be made, insurance companies may offer commissions as high as 10 percent to agents to sell products like long-term deferred annuities to senior citizens.'' [590] As described by the regulator:

> Some unscrupulous sellers use high-pressure sales pitches, seminars, and telemarketing. Beware of agents who ''cold call'' you, contact you repeatedly, offer ''limited time offers,'' show up without an appointment, or won't meet with you if your family is present. Beware of estate planning ''seminars'' that are actually designed to sell annuities. Beware of seminars that offer free meals or gifts. In the end, they are rarely free. Beware of agents who give themselves fake titles to enhance their credibility.[591]

Supporting this call for caution, Egan et al. (2019) found substantial amounts of misconduct disputes in the sales of annuities between 2005 and 2015.[592] In another example of conflicted advice, the SEC barred an adviser for fraudulently ''[persuading] hundreds of current and former Federal employees to liquidate their Thrift Savings Plan accounts in order to purchase high-fee variable annuities that netted Cooke and three other defendants in the case nearly $2 million in commissions.'' [593]

Barbu (2022) strengthens these findings with their analysis of ''1035 Exchanges,'' which allow an annuity owner to transfer funds from one annuity contract to another on a tax-free basis.[594] These transactions can involve any annuity, but they frequently involve policies originated before the financial reforms and low interest rate environment of the late 2000s and early 2010s, which tended to have more generous benefits, particularly regarding minimum benefit guarantees.[595] Following the Great Financial Crisis of 2008, annuity providers sought to encourage consumers to forfeit these generous contracts and exchange them for newer, less generous contracts and often offered additional, discretionary compensation to brokers to encourage such transactions. Barbu found that for each one percent increase in discretionary compensation from annuity providers, there is a corresponding 0.85 percent increase in the intensity of these exchanges.[596]

Barbu (2022) also found that customers initiating these 1035 Exchanges are often poorer and more likely to report an established relationship with their broker than new annuity buyers, with 37 percent stating that broker recommendation was the main reason for the purchase. The author concluded that the combination of high trust and compensation-based conflicts caused tangible harms to consumers. In an analysis of FINRA disciplinary actions against four large annuity firms, the author found material omissions or misrepresentations which undervalued the contracts in 50 to 77 percent of the investigated annuity exchanges.[597]

Research shows that fiduciary protections in the annuity markets lead to better outcomes for investors. By analyzing deferred annuity sales at a large financial services provider during 2013 to 2015, Bhattacharya et al. (2024) found that fiduciary duty increases risk-adjusted returns of deferred annuities by 25 basis points, though it was accompanied by a 16 percent decline in the entry of affected firms.[598] Barbu (2022) strengthens these findings with his analysis of the effects of New York's Best Interest Regulation 187. Barbu finds that, immediately after New York implemented its rule, 1035 annuity exchange transactions in New York fell 60 percent from their baseline values in comparison with the rest of the country.[599] It is unclear how those effects would persist in the long-term,

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[588] Comment letter received from the Public Investors Advocate Bar Association on the *Notification of Proposed Rulemaking: Retirement Security Rule: Definition of an Investment Advice Fiduciary,* (January 2024).

[589] *See e.g.,* California Department of Insurance, *Deceptive Sales Practices When Purchasing Annuities,* California Department of Insurance, *http://www.insurance.ca.gov/0150-seniors/0100alerts/DeceptiveSales.cfm;* North Carolina Department of Insurance, *Annuities and Senior Citizens,* North Carolina Department of Insurance, *https://www.ncdoi.gov/consumers/annuities/annuities-and-senior-citizens;* Mississippi Insurance Department, *Annuities and Senior Citizens: Senior Citizens Should Be Aware Of Deceptive Sales Practices When Purchasing Annuities,* Mississippi Insurance Department, *https://www.mid.ms.gov/consumers/annuities-senior-citizens.aspx;* Kentucky Department of Insurance, *Annuities and Senior Citizens Consumer Alert: Senior Citizens Should Be Aware of Deceptive Sales Practices When Purchasing Annuities,* Kentucky Department of Insurance, *https://insurance.ky.gov/ppc/Documents/AnnuitiesandSenior.pdf;* Massachusetts Division of Insurance, *Annuities and Senior Citizens: Senior Citizens Should Be Aware Of Deceptive Sales Practices When Purchasing Annuities,* Massachusetts Division of Insurance, *https://www.mass.gov/service-details/annuities-and-senior-citizens;* Georgia Office of the Commissioner of Insurance and Safety Fire, *Annuity Tips,* Georgia Office of the Commissioner of Insurance and Safety Fire, *https://oci.georgia.gov/insurance-resources/annuity/annuity-tips;* South Dakota Division of Insurance, *Consumer Alert: Annuities and Senior Citizens: Senior Citizens Should Be Aware Of Deceptive Sales Practices When Purchasing Annuities,* South Dakota Division of Insurance, *https://dlr.sd.gov/insurance/publications/alerts/documents/annuities_senior_citizens.pdf.*

[590] Minnesota Attorney General, *Annuities: Unsuitable Investments for Seniors,* Minnesota Attorney General, *https://www.ag.state.mn.us/consumer/Publications/AnnuitiesUnsuitableInvforSeniors.asp.*

[591] *Ibid.*

[592] Mark Egan, Gregor Matvos, & Amit Seru, *The Market for Financial Adviser Misconduct,* 127(1) Journal of Political Economy (February 2019), *https://www.journals.uchicago.edu/doi/10.1086/700735.*

[593] Brian Anderson, *SEC Bars Advisor for Federal Retirement Plan Rollover Fraud https://401kspecialistmag.com/sec-bars-advisor-for-federal-retirement-plan-rollover-fraud/* (September 2, 2022) accessed February 13, 2024.

[594] Barbu, A., *Ex-Post Loss Sharing in Consumer Financial Markets.* Tech. rep.,INSEAD. *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4079524*

[595] Barbu finds that 70% of 1035 exchanges come from policies originating before the financial crisis. Barbu at 10. Minimum benefit guarantees guarantee consumers certain benefits regardless of market conditions.

[596] The definition of 1035 exchange intensity, according to Barbu, is the total amount of 1035 exchanges divided by total assets.

[597] Barbu, A., *Ex-Post Loss Sharing in Consumer Financial Markets* at 61 (Table X). Tech. rep.,INSEAD. *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4079524.*

[598] Vivek Bhattacharya, Gaston Illanes, & Manisha Padi at 2, *Fiduciary Duty and the Market for Financial Advice,* Working Paper, (February 27, 2024), *https://www.dropbox.com/scl/fi/gj5skffl sip2nhee1662c/Draft.pdf?rlkey=msd12c734n8ddrct 8uzqg0qut&dl=0.* This is an updated version of the working paper cited in the proposal. (*See* Vivek Bhattacharya, Gaston Illanes, & Manisha Padi, *Fiduciary Duty and the Market for Financial Advice,* Working Paper, (January 13, 2020), *https://www.nber.org/papers/w25861.*

[599] Barbu, A., *Ex-Post Loss Sharing in Consumer Financial Markets* at 28. Tech. rep.,INSEAD. *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4079524*

though these results suggest that the rulemaking will improve the quality of advice in the investment market and protect the welfare of investors and retirees.

Approximately $3.8 trillion in pension entitlements are held in annuities at life insurance companies, including those within IRAs.[600] Advice associated with many of these assets are already subject to a best interest standard, such as variable annuities and registered index-link annuities that are covered by Regulation Best Interest or annuities that are sold in States with a fiduciary standard. LIMRA estimates that variable annuities and registered index-linked annuities account for $98.8 billion, or 26 percent of total annuity sales in 2023.[601] In addition, the State of New York, which enforces a higher standard of care on annuity sales,[602] accounted for 2.6 percent of fixed annuity sales in 2016.[603] Accordingly, the Department estimates that approximately 30 percent of annuity sales are subject to the SEC's Regulation Best Interest or a similar standard while the remaining 70 percent of the annuity market is not subject to a material conflicts of interest standard as stringent as either the Department's approach under ERISA or the SEC's approach. Additionally, the Department has assumed in this rulemaking that 80 percent of annuity sales are covered by ERISA, suggesting that $2.1 trillion in ERISA-covered pension entitlements held in annuities are not covered by a best interest standard.[604] If, consistent with Bhattacharya et al. (2024), the rulemaking results in a 25-basis point increase in risk-adjusted returns, the expansion of fiduciary duty would lead to annual gains for investors (a mix of societal benefits and transfers) of $5.3 billion.[605]

The benefits of this rulemaking's application of fiduciary status to investment advice from insurance agents, brokers, and Independent Producers include eliminating the incentives for regulatory arbitrage by those agents. Without this rulemaking, insurers and insurance intermediaries can secure excess profits at investors' expense by rewarding investment advice providers for giving biased advice in ways that broker-dealers or investment advisers operating under Regulation Best Interest or the Advisers Act fiduciary duty, respectively, cannot.

Case Study: Indexed Annuities

The Department is particularly concerned about vulnerable Retirement Investors who lack a basic understanding of investment fundamentals and the complexities associated with indexed annuities. FINRA cautions that, ''indexed annuities are complex financial instruments, and retirement experts warn that such annuities include a number of features that may result in lower returns than an investor may expect.'' [606] While indexed annuities have a minimum guaranteed rate of return tied to an underlying index, the guarantee rate does not cover all of a premium.[607] Additionally, the sheer number of indexes has increased from a dozen in 2005 to at least 150 in 2022, and their complexity has expanded, with 94 percent including a mix of one or more indexes plus a cash or bond component.[608] Moreover, while the rate of return of the indexed annuity is linked to performance of the index, indexed annuity returns are subject to contractual limitations which effectively cap returns. FINRA identified the following contractual limitations observed in indexed annuities:

- Participation rates explicitly set the percentage of index returns that are credited to the annuity;
- Spread, margin, or asset fees are subtracted from the index returns; and
- Interest caps limit the returns if the underlying index sees large returns.[609]

FINRA also warns that indexed annuities may be able to change these contractual limitations, depending on the terms of the contract.[610]

In a 2020 investor alert, the SEC warned, ''*You can lose money buying an indexed annuity.* Read your contract carefully to understand how your annuity works.'' [611] The SEC listed several ways that investors in these products can lose money, including through surrender charges and withdrawals during a specified time period. The SEC further cautioned:

- ''Indexed annuity contracts describe both how the amount of return is calculated and what indexing method they use. Based on the contract terms and features, an insurance company may credit your indexed annuity with a lower return than the actual index's gain.''
- ''Indexed annuity contracts commonly allow the insurance company to change some of these features periodically, such as the rate cap. Changes can affect your return. Read your contract carefully to determine what changes the insurance company may make to your annuity.'' [612]

Early versions of fixed index annuities were fairly straightforward, with a guaranteed minimum value based on a share of premium payments with a potential for additional interest returns based on the performance of an underlying equity index. Over time, additional features and enhancements were added, including alternative crediting strategies such as multi-year and monthly index averaging; the introduction of new and increasingly complex indices; and optional riders, including long-term care, death, and guaranteed lifetime withdrawal benefit (GLWB) riders.[613] The structure of fixed index annuities created added complexity on both the product level from multiple formulas required to calculate interest to be credited to an account within a stated period, and the investment decision level given the number of potential, both standard and engineered, indexes.

[600] Board of Governors of the Federal Reserve System, *Financial Accounts of the United States: Flow of Funds, Balance Sheets, and Integrated Macroeconomic Accounts: First Quarter 2023,* Table L.227 Federal Reserve Statistical Release Z.1. (June 8, 2023), *https://www.federalreserve.gov/releases/z1/20230608/html/l227.htm.*

[601] LIMRA, Preliminary U.S. Individual Annuity Sales Survey (2023, 4th Quarter).

[602] N.Y. Comp. Codes R. & Regs. Tit. 11 § 224.4.

[603] National Association for Fixed Annuities, *2016 State-by-State Fixed Annuity Sales Study,* (2017), *https://nafa.com/online/library/2016-NAFA-Annual-Sales-Study.pdf.*

[604] For more information on this assumption, refer to the Affected Entities section.

[605] $3.8 trillion in assets × 70% of the assets not covered by a fiduciary standard × 80% covered by ERISA × 0.25% increase in returns = $5.3 billion.

[606] Financial Industry Regulatory Authority, *The Complicated Risks and Rewards of Indexed Annuities,* Financial Industry Regulatory Authority, (July 2022), *https://www.finra.org/investors/insights/complicated-risks-and-rewards-indexed-annuities.*

[607] Coryanne Hicks & Phillip Moeller, *17 Things You Need to Know About Annuities,* U.S. News and World Report, (May 3, 2021), *https://money.usnews.com/investing/investing-101/articles/things-you-need-to-know-now-about-annuities.*

[608] John Hilton, *Kings of the Hill: Indexed products spur life, annuity sales,* InsuranceNewsNet Magazine (July 1, 2022), *https://insurancenewsnet.com/innarticle/kings-of-the-hill.*

[609] Financial Industry Regulatory Authority, *The Complicated Risks and Rewards of Indexed Annuities,* Financial Industry Regulatory Authority, (July 2022), *https://www.finra.org/investors/insights/complicated-risks-and-rewards-indexed-annuities.*

[610] *Id.*

[611] Securities and Exchange Commission, *Updated Investor Bulletin: Indexed Annuities,* Securities and Exchange Commission, (July 2020), *https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-bulletins/updated-13.*

[612] *Id.*

[613] Low, Zi Xiang, Manabu Shoji, and David Wang. ''Fixed Index Annuity Overview in the U.S. and Japan,'' Miliman White Paper (November 2023). *https://www.milliman.com/-/media/milliman/pdfs/2023-articles/11-15-23_fixed-indexed-annuity-japan-vs-us-markets.ashx.*

The complexity of some index options allows insurance companies to reduce volatility by adjusting the index's exposure to risk based on market conditions. These include volatility-targeting indexes, which are designed to maintain a consistent level of volatility over time by automatically adjusting exposure to riskier assets, and minimum variance indexes, which select stocks with the lowest historical volatility and adjust the weights of each stock to achieve a target level of risk.[614] Some indexes incorporate an ''excess return'' component, where a benchmark return is subtracted from the gross return to determine the amount of ''excess'' return that contract owner will earn. Depending on market conditions, it is possible that the excess return feature will materially erode the return on the annuity, which may create confusion and disappointment for owners who do not fully understand the complexity and potential impact of this feature.[615]

In 2023, CEA examined the proposed rule and analyzed publicly available data to provide an example of how retirement savers investing in fixed index annuities could end up with lower returns than they would if they had the rule in place. CEA provided an illustration of how to try to quantify the benefits and costs of a fixed index annuity, using the fair market price of the options. In this example, CEA used the S&P 500 price index on Bloomberg's options pricing calculator for a specified day in 2023. Based on those calculations, CEA estimated that investors on that date could be paying 1.2% of the assets they invested, as the downside protection and loss of upside potential at the time of investment.[616] CEA noted that this 1.2% cost did not include the additional explicit sales charges or fees, or any transaction costs or operational costs. CEA also observed that a risk-averse investor might be willing to pay more than fair value, to insure against the possibility of loss, which would add further to the cost. All of this highlights the lopsided fair value of the contract for a fixed index annuity, CEA opined. This is consistent with the Department's analysis on the benefit of this rulemaking to plan participants and Retirement Investors purchasing annuities. Indeed, as CEA noted elsewhere in its analysis, if total assets invested in fixed index annuities in 2021 had paid 1.2 percent of assets [617] for the protection of an annuity, forgone returns could be as high as $7 billion. In its comment letter on the proposal to the Department, Morningstar evaluated the impact of the rule on Retirement Investors rolling funds into fixed indexed annuities. To capture how commissions might decline, Morningstar compared pricing spread for fixed index annuities and fixed-rate annuities, where the pricing spread is defined as ''the yield that the insurance company takes from the earned rate of the supporting general account portfolio for overhead costs and profit.'' Based on the annual premium volume of total fixed index annuities sales in 2023, they estimated that retirement savers rolling funds into fixed index annuities would save $3.25 billion per year in fees under this rulemaking, and this is without considering other benefits, such as the reduction in surrender fees due to more appropriate annuity contracts.[618]

Protections Concerning Advice Given to Plan Fiduciaries

This rulemaking will also yield economic benefits by extending protections to advice given to ERISA plan fiduciaries. Accordingly, the rulemaking will ensure that investors and the Secretary could enforce the fiduciary protections by pursuing claims for fiduciary misconduct involving ERISA-covered plans. When a broker-dealer currently provides advice to plan fiduciaries, the advice generally is not covered by Regulation Best Interest because the plan fiduciaries are typically not retail customers.[619] Pool et al. (2016) offered evidence that mutual fund companies acting as service providers to 401(k) plans display favoritism toward their own affiliated funds, even when their performance is worse, generating ''significant subsequent negative abnormal returns for participants investing in those funds.'' [620] The rulemaking aims to reduce or eliminate such harmful favoritism.

Pool et al. (2022) demonstrated that funds that offer defined contribution plan recordkeepers revenue-sharing payments are more likely to be added as investment options on plan menus and are also more likely to be retained. Additionally, plans whose menus include funds that share revenue had higher expense ratios resulting in significantly higher fees.[621] Pool states that this is ''consistent with the notion that . . . less transparent indirect payments allow record keepers to extract additional rents from plan participants.'' [622] Fiduciaries can negotiate the specific formula and methodology under which revenue sharing will be credited to the plan or plan service providers, indirectly reducing the fees the plan pays which could in turn mitigate the conflict, but this requires a sophisticated understanding of the underlying agreement.[623]

In its comment letter regarding the proposal, Morningstar argued that under this rulemaking, Retirement Investors would save $55 billion in fees over the next 10 years as workplace retirement plan seek cheaper investment options.[624] Given the proliferation of fee arrangements for investment advice that are increasingly less transparent to clients and regulators as well as the variation in standards and safeguards across advice markets, the Department believes it is critical to extend protections associated with fiduciary status under ERISA, to protect Retirement Investors' savings.

Plan fiduciaries receive advice on many important topics. For defined contribution plans, these topics can include plan design provisions such as investment alternatives, whether the plan should have automatic enrollment, default contribution rates, and default

[614] Bhauwala, Nikhil. *What Are Volatility Control Indexes? What Does It Mean For You As An Annuity Holder and Advisor?,* AdvisorWorld (Feb. 25, 2023), *https://advisorworld.com/annuities/annuity-faqs/what-are-volatility-control-indexes-what-does-it-mean-for-you-as-an-annuity-holder-and-advisor/#What%20Are%20Risk-Controlled%20Indexes*.

[615] *Ibid.*

[616] CEA's estimate was calculated using August 1, 2023 end-of-day prices, using the historic volatility of the S&P 500 price index on Bloomberg's options pricing calculator, with the put option's strike price at the current index price, the call option's strike price at 6.75% above the index's price on August 1, and the maturity of the option at 1 year.

[617] 1.2 is the percent of assets paid for a fixed indexed annuity on Aug. 1, 2023, as noted in the Appendix to CEA's analysis.

[618] Comment letter received from Morningstar on the *Notification of Proposed Rulemaking: Retirement Security Rule: Definition of an Investment Advice Fiduciary,* (January 2024). This estimate is a result of a forecast of mean account balances for fixed annuities after seven years. The estimate assumes that 55 percent of annuities sales would be affected by the final rule.

[619] Advice provided by an investment adviser to a plan fiduciary is subject to the Advisers Act fiduciary duty.

[620] Veronika K. Pool, Clemens Sialm, & Irina Stefanescu, *It Pays to Set the Menu: Mutual Fund Investment Options In 401(K) Plans,* 71(4) The Journal of Finance 1779–1812 (August 2016), *https://onlinelibrary.wiley.com/doi/abs/10.1111/jofi.12411.*

[621] Veronika K. Pool, Clemens Sialm, & Irina Stefanescu, *Mutual Fund Revenue Sharing in 401(k) Plans,* Vanderbilt Owen Graduate School of Management Research Paper at 30–31 (November 8, 2022), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3752296*.

[622] *Ibid.* at 36.

[623] *See* Employee Benefits Security Administration, *2013–03A,* Advisory Opinions, (2013), *https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2013-03a.*

[624] Comment letter received from Morningstar on the *Notification of Proposed Rulemaking: Retirement Security Rule: Definition of an Investment Advice Fiduciary,* (January 2024).

investments. For defined benefit plans, it can include selection of investments and investment strategies as well as distribution options. Given the large number of participants in ERISA plans and the huge asset holdings of such plans, the benefits of protecting the advice received by plan fiduciaries is likely to be substantial.

Increased Confidence in Advisers and in the Reliability of Their Advice

The market for financial advice generally works best when investors trust investment advice providers and their trust is well-placed. Both conditions are necessary for optimal results. If investors distrust investment advice providers, they will incur higher costs to select a provider and monitor their conduct. Their provider may also incur higher costs to counter prospective and existing customers' distrust. Distrustful investors may be less likely to obtain beneficial advice and more likely not to follow beneficial advice.[625]

Likewise, if investors trust investment advice providers more than is warranted, they may reduce their monitoring of the adviser's actions and accept less transparency in policies, procedures and fees, making them more vulnerable to harm from advice that is biased by advisory conflicts.[626] A 2019 survey regarding the Australian financial advice industry reported that the biggest barriers for consumers in accessing financial advice are cost (35 percent), limited financial circumstances in which it is ''not worth getting financial advice'' (29 percent), the desire to manage an individual's own finances (26 percent), a lack of trust (19 percent), or a lack of perceived value in paying for financial advice (18 percent).[627]

By ensuring that, when advisers hold themselves out as occupying a position of trust and confidence, they are actually held to that standard, this rulemaking will ensure that legitimate investor expectations of advice that is in their best interest are upheld, rather than dishonored. Relatedly, persons who are not in fact, willing to adhere to a fiduciary standard when making recommendations to Retirement Investors will need to be candid about that fact. Accordingly, this rulemaking will facilitate efficient, trust-based relationships between Retirement Investors and investment advice providers of all types, so investors will be more likely to obtain and follow beneficial advice that is consistent with their retirement goals.

In response to the proposal, several commenters weighed in on the benefits of advice to investors, such as better asset allocation, diversification, tax strategies, and investment strategies. Some of these commenters suggested investors will lose access to education and advice and that these benefits of having access to this type of advice may outweigh the risks of conflicted advice, and as a result, the Department overestimates the benefits of the proposal. This argument, however, assumes, in large part, that as a result of the rulemaking, investors will no longer have access to basic information and education regarding such matters as asset allocation, diversification, as well as tax and investment strategies, which the Department has expressly carved out from the scope of fiduciary advice. Moreover, the rule has carefully limited its treatment of investment recommendations as fiduciary recommendations to those circumstances where a reasonable investor would believe that the adviser occupies a position of trust and confidence. And, in those circumstances, the obligations imposed by the rulemaking are clearly aligned with the obligations imposed by Regulation Best Interest. The Department does not believe that requiring trusted advisers to act with care and loyalty, or avoid misleading statements or overcharges—the core obligations of the rulemaking—will result in the loss of access to the wide range of investment products and advisory services available today in the financial marketplaces. In substantial part, the rulemaking simply requires advisers to adhere to standards consistent with the way they hold themselves out to their customers. Moreover, many other commenters shared the Department's concern for conflicted advice, particularly with one-time advice, referencing the magnitude of potential losses.

There is extensive evidence that investors are often subject to behavioral biases that lead to costly systematic investment errors. There is evidence that good advice can improve saving and investing decisions. Accordingly, the rulemaking may result in a beneficial reallocation of investment capital. Montmarquette and Viennot-Briot (2015) provided evidence that ''having a financial advisor for at least four years has a positive and significant impact on financial assets'' and that ''the positive effect of advice on wealth creation cannot be explained by asset performance alone: the greater savings discipline acquired through advice plays the major role.'' [628]

Fisch et al. (2016) also provided evidence that ''highlight[s] the potential value of professional advice in mitigating the effects of financial illiteracy in retirement planning.'' [629] Fisch et al. recruited Amazon Mechanical Turk users (MTurk sample), a crowdsourcing marketplace, to allocate a hypothetical ten thousand dollars among ten investments options as part of a 401(k) plan. Separately, professional advisers—registered investment advisers, broker-dealers or dual registrants—were asked to allocate ten thousand dollars on behalf of a hypothetical 30-year-old, single client, with no children, a lower middle-class income and no substantial outside savings or investments. They found that professional advisers, on average, selected portfolios with higher returns, allocated more money to cheaper index funds, paid lower fees, and accessed more information in connection with the allocation decision than the MTurk sample. For example, professional advisers were ''uniformly sensitive to the fact that the equity risk premium and the 30-year time horizon of the allocation decision warranted substantial equity exposure-facts that the low-literacy investors seemed to be unaware.'' [630] Overall, professional advisers had a higher level of financial knowledge, which enabled them to make better retirement investing decisions from which unsophisticated investors could benefit.

Enforcement

Under the rulemaking, the full range of covered investment advice interactions with Title I Plans will be subject to enforcement by the Department, as well as to private claims

[625] Paul Gerrans & Douglas A. Hershey, *Financial Adviser Anxiety, Financial Literacy, and Financial Advice Seeking,* 51(1) Journal of Consumer Affairs 54–90 (2017), *https://www.jstor.org/stable/44154765.*

[626] Winchester, Danielle & Sandra Huston, *Trust Reduces Costs Associated with Consumer-Financial Planner Relationship,* 71(4) Journal of Financial Service Professionals 80–91 (2017), *https://web.p.ebscohost.com/ehost/pdfviewer/pdfviewer?vid=0&sid=1ca603cd-53ca-4cbb-99b1-5fd43782b0c4%40redis.*

[627] Australian Securities and Investments Commission, *Report 627 – Financial Advice: What Consumers Really Think,* Australian Securities and Investments Commission, (August 2019), *https://download.asic.gov.au/media/5243978/rep627-published-26-august-2019.pdf.*

[628] Claude Montmarquette & Nathalie Viennot-Briot, *The Value of Financial Advice,* 16(1) Annals of Economics and Finance 69–94 (2015), *http://aeconf.com/articles/may2015/aef160104.pdf.*

[629] Jill E. Fisch, Tess Wilkinson-Ryan, & Kristin Firth, *The Knowledge Gap in Workplace Retirement Investing and the Role of Professional Advisors,* 66(3) Duke Law Journal (2016), *https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3875&context=dlj.*

[630] *Id.*

by Retirement Investors. In general, participants and beneficiaries have the right to bring suit under ERISA 502(a) against fiduciaries who breach their duties and obligations to the plan, including engaging in non-exempt prohibited transactions. This private right of action, which ensures participants and beneficiaries have ready access to the Federal courts, provides critical protection of tax-advantaged retirement plans. For advice interactions not currently covered by relevant standards of conduct, such as much advice provided to plan fiduciaries, these enforcement measures will help to ensure the rulemaking is implemented effectively. For advice interactions that are subject to State regulation, under the rulemaking they will have stronger oversight, which will provide greater protections to investors.

Charoenwong et al. (2019) showed that regulatory oversight has an important impact on investment advice.[631] They studied a policy reform that did not affect the laws or rules that registered investment advisers were operating under; instead, it changed the regulatory oversight. The reform shifted some advisers from a Federal regulator, the SEC, to State-securities regulators. Registered investment advisers who shifted to the State-securities regulators received 30–40 percent more complaints from customers, relative to the unconditional complaint rate. This effect mainly resulted from fiduciary violations. Furthermore, the vigor of the enforcement program mattered; the more resources a State-securities regulator had, the fewer complaints there tended to be. Consequently, the addition of ERISA's remedial provisions and enforcement can be expected to enhance compliance with the obligation to give advice that is prudent and loyal, even under the SEC's closely aligned conduct standards.

The rulemaking will also ensure the imposition of appropriate excise taxes for prohibited transactions involving both ERISA-covered plans and IRAs. As part of their retrospective review, Financial Institutions will be required to report to the Department of the Treasury any non-exempt prohibited transactions in connection with fiduciary investment advice, correct those transactions, and pay any resulting excise taxes. Failure to report, correct, and pay an excise tax, in addition to existing factors, will make a Financial Institution ineligible to rely on PTE 2020–02 and PTE 84–24, provided that a finding of ineligibility satisfies the timing and scope of ineligibility provisions under the amendments to PTE 2020–02 and/or PTE 84–24, as applicable. The Department believes these additional conditions will provide important protections to Retirement Investors by enhancing the existing protections of PTE 2020–02 and PTE 84–24.

7. Impact of the Rulemaking on Small Account Retirement Investors

Some observers have argued that some small savers—individuals, or households with low account balances or of modest means—will lose access to investment advice under this regulatory action and become worse off. The Department has considered in detail the overall impact of this rulemaking on small savers and, after careful review, disagrees.

The Department recognizes that investment advice is often very valuable for small savers. There is ample evidence and broad consensus that many U.S. consumers struggle to make and implement good retirement saving and investment decisions without effective help. Many lack the skills, motivation, or discipline to accumulate adequate savings, optimize their investment strategies, and thereby realize financial security in retirement.[632] In particular, less sophisticated investors may benefit from additional guidance to make sure they are taking basic steps such as saving adequately and allocating their investments with an appropriate amount of risk.

However, small savers are especially vulnerable to the detrimental effects of conflicted advice as they cannot afford to lose any of their retirement savings, and therefore stand to benefit significantly from this rule. Advisory conflicts have historically distorted the market in ways that have prevented consumers from accessing less conflicted investment alternatives. With fewer economic resources, small savers are particularly susceptible to any practices that diminish their resources by extracting unnecessary fees or by yielding lower returns. Less sophisticated investors frequently do not know how much they are paying for advice and are not equipped to effectively monitor the quality of the advice they receive.[633] This is supported by research illustrating that consumers have difficulty observing fees and accounting for them in their financial decisions.[634] Moreover, limited transparency in what can be complex compensation arrangements of potentially conflicted adviser relationships impedes the ability of even knowledgeable investors to fully understand the cost and impact of conflicts of interest on their investments.[635] Indeed, Agnew et al. (2021) found in an experimental setting that younger, less financially literate, and less numerate participants were more likely to hire a low-quality adviser.[636] Moreover, it is possible that these small savers do not understand the potential effects of their advisers' conflicts and that disclosure directly to these consumers is unlikely to change this without other protections in place.[637] Cain, Loewenstein, and Moore find just that, observing that while investors do not sufficiently discount advice when conflicts are disclosed, advisers that disclose a conflict ''feel morally licensed'' to provide biased advice, potentially exacerbating the conflict at the expense of investors.[638]

[631] Ben Charoenwong, Alan Kwan, & Tarik Umar, *Does Regulatory Jurisdiction Affect the Quality of Investment-Adviser Regulation,* 109(10) *American Economic Review* (October 2019), *https://www.aeaweb.org/articles?id=10.1257/aer.20180412.*

[632] EBSA, *Regulating Advice Markets Definition of the Term ''Fiduciary'' Conflicts of Interest – Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions,* pp. 108, (April 2016), *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.* (''many IRA investors lack sophistication''); 136 (older individuals often ''lack even a rudimentary understanding of stock and bond prices, risk diversification, portfolio choice, and investment fees''); and 137 (''only one-half of individuals aged 50 and older in the United States can correctly answer two simple financial questions that involve calculations. Many respondents failed to correctly conclude that $100 would grow to more than $102 after five years if interest accrues at 2 percent per year, while others were unable to determine that an account earning interest at 1 percent while inflation was 2 percent would lose buying power'').

[633] Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term ''Fiduciary'' Conflicts of Interest – Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions,* pp. 136–40, (April 2016), *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.*

[634] Edelen, Roger M., Evans, Richard B. and Kadlec, Gregory B., ''Disclosure and agency conflict: Evidence from mutual fund commission bundling,'' Journal of Financial Economics, Elsevier, vol. 103(2), pp. 308–326 (2012).

[635] Beh, Hazel, and Amanda M. Willis. ''Insurance Intermediaries.'' Connecticut Insurance Law Journal 15, no. 2 (2009): 571–98.

[636] Julie Agnew, Hazel Bateman, Christine Eckert, Fedor Iskhakov, Jordan Louviere, and Susan Thorp. *Who Pays the Price for Bad Advice?: The Role of Financial Vulnerability, Learning and Confirmation Bias,*'' ARC Centre of Excellence in Population Ageing Research, Working Paper 2021/19, (July 1, 2021).

[637] EBSA, *Regulating Advice Markets Definition of the Term ''Fiduciary'' Conflicts of Interest – Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions,* pp. 268–271, (April 2016), *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.*

[638] Cain, Daylian M., George Loewenstein, and Don A. Moore. ''The Dirt on Coming Clean: Perverse

The Department also believes that having a common, high standard of conduct associated with retirement investment advice will increase trust in advisers and Financial Institutions, and make it more likely that small savers will seek advice.

Small investors often save using an ERISA plan, with roughly 38 percent of U.S. households having one or more defined contribution retirement plans with a non-zero balance and of those, more than one-third having a balance with less than $25,000.[639] Frequently this is the main vehicle they use to save for retirement; in fact, approximately two-thirds of households participating in a pension plan do not own an IRA.[640] This rulemaking will require advice given to the plan fiduciaries to meet a fiduciary standard, resulting in improvements in plan design and selection of investments on the menu that will benefit small savers as the vast majority of small savers choose investments from their plan's platform rather than investing through a brokerage account, if their plan even offers a brokerage account option.[641] Moreover, because research shows that lower-income participants tend to be more influenced by default options than high income participants, small savers will benefit from plan fiduciaries choosing default options that are well selected and well monitored.[642]

The Department received comments to its proposal arguing that extending the fiduciary definition would result in advisers exiting smaller account markets such as small employer-based plans and lower balance IRAs which would cause small investors to have less access to professional financial advice. These comments largely relied on a survey of broker-dealers and other financial advisory firms conducted after the Department's 2016 Rulemaking, which theorized that ''in order for investors to retain access to advice on retirement accounts from the study participants, who eliminated or limited advised brokerage access, 10.2 million accounts would have to move to a fee-based option.'' It is important to note, however, that the survey was commissioned by a party that sued to block the Department's 2016 Rulemaking, that participants were self-selected, responses were not verified, and the Department is not aware of any follow-up study having been conducted to determine how many of those accounts actually lost access to advice as the survey did not account for customers' ability to move to different firms or the availability of a full range of investment choices and advisory arrangements in the market as a whole.[643] In particular, the same survey cited by commenters stated that while firms may eliminate or limit advised brokerage platforms, they generally also acknowledged they would still give Retirement Investors other options such as a fee-based program, a self-directed brokerage account, robo-advice, or a call-center.[644] Moreover, the analysis was not based on the current rulemaking, which is more narrow in scope.

Because the 2016 rulemaking was vacated prior to full implementation, it is not possible to ascertain precisely what impact the rule would have had if it had been permitted to move forward. Irrespective of one's views on that question, however, this rulemaking is not the equivalent of the 2016 rule, as discussed above, but rather is much more aligned with the SEC's Regulation Best Interest. It is worth noting that there has not been a decline in access to advice associated with the implementation of Regulation Best Interest. In fact, analysis of the Survey of Consumer Finances found that the use of brokers as a source of advice for savings and investing among households under 65 with below median incomes *increased* modestly between 2019 and 2022.[645]

Moreover, in a 2024 random survey of its members, the Certified Financial Planner (CFP) Board found that most members' ability and willingness to serve their client was not impacted by the adoption of SEC's Regulation Best Interest, with 82 percent not raising the required investable asset minimum for clients and 86 percent not terminating client services following the rule.[646] Given these responses to similar regulatory changes, the Department is skeptical that the market will react to this rulemaking and its requirement that entities provide advice that is prudent and loyal, by ceasing to offer the full range of investment and advice models. Rather, the Department anticipates that by requiring advisers to accurately represent the nature of their relationship and advice, retirement investment advice markets will work more efficiently and result in innovations and cost-efficient delivery models to provide prudent and loyal advice to small investors. While individual firms may adjust their offerings, and investors may respond by switching firms, there is still every reason to expect that after a transitional period there will be a wide range of products and services available across the market.

The Department also received several comments that argued this rulemaking would exacerbate the racial wealth gap, citing a study conducted in 2021, two years prior to the proposal, that cannot address the contours of this more targeted rulemaking. Additionally, the cited 2021 study does not account for changes to the regulatory and legal environment since the 2016 Final Rule, including the SEC imposing a Best Interest standard on financial advice provided to retail investors for securities by brokers and dealers, and the SECURE and SECURE 2.0 Acts' provisions which promote access to retirement plans and portability within the retirement system. Furthermore, the cited study does not account for the share of Black and Hispanic households that used financial advisers to estimate how those population would be impacted by either the 2016 Final Rule or the current rulemaking. Moreover, as pointed out by another commenter, the study ''cites a 2019 Vanguard study by Kinniry Jr., et. al. that estimates that Vanguard's Personal Advisor Services could add 3 percent to annual net returns. However,

Effects of Disclosing Conflicts of Interest.'' Journal of Legal Studies 34 (2005): 1–25.

[639] EBSA tabulations based on the 2019 and 2022 Federal Reserve Board, Survey of Consumer Finances.

[640] Constantijn W.A. Panis & Michael J. Brien, *Savers With and Without a Pension* (2015), *https://www.dol.gov/sites/dolgov/files/EBSA/researchers/analysis/retirement/savers-with-and-without-a-pension.pdf.*

[641] In 2022, participants with annual income between $15,000 and $150,000 invested less than 0.5% of their defined contribution plan assets through a brokerage account. *See* Vanguard, *How America Saves,* (2023). *https://institutional.vanguard.com/content/dam/inst/iig-transformation/has/2023/pdf/has-insights/how-america-saves-report-2023.pdf.*

[642] John Beshears, Ruofei Guo, David Laibson, Brigitte C. Madrian, & James J. Choi, *Automatic Enrollment with a 12% Default Contribution Rate* (August 18, 2023), *https://spinup-000d1a-wp-offload-media.s3.amazonaws.com/faculty/wp-content/uploads/sites/27/2023/08/JPEF-20230802.pdf.* James Choi, David Laibson, Brigette Madrian, & Andrew Metrick, *For Better or For Worse: Default Effects and 401(k) Savings Behavior,* In Wise DA (ed.), Perspectives on the Economics of Aging. Chicago: University of Chicago Press, pp. 81–121.

[643] *See* Deloitte, *The DOL Fiduciary Rule: A Study in How Financial Institutions Have Responded and the Resulting Impacts on Retirement Investors,* (August 9, 2017) (Deloitte 2017 study). The Deloitte 2017 study explains that the study participants were ''invited'' by SIFMA and notes that Deloitte ''was not asked to and did not independently verify, validate or audit the information presented by the study participants.'' *Id.* at 4–5, 5 fn. 5.

[644] Deloitte, *The DOL Fiduciary Rule: A Study in How Financial Institutions Have Responded and the Resulting Impacts on Retirement Investors,* (August 9, 2017).

[645] Tabulations from the 2019 and 2022 Survey of Consumer Finances.

[646] CFP Board of Standards, *Access to Financial Advice Survey,* (Mar. 2024). *2024-access-to-financial-advice-report.pdf* (*cfp.net*).

Vanguard advisers are fiduciaries who do not offer conflicted advice and so would not be affected by the proposed rule.'' As such, the Department does not consider critiques arguing that this rulemaking will exacerbate the wealth gap to be valid.

Another commenter stated that for fixed and fixed indexed annuities, fee-based advice models serve more affluent individuals, while salespeople compensated using commissions tend to serve the needs of ''average Americans,'' suggesting that this rulemaking will negatively impact access to these types of annuities for smaller savers. However, this argument is premised on two false assumptions: that this rulemaking eliminates the use of commissions, and that commission-based annuities are largely marketed to lower-income savers. As noted above, the Department does not require the elimination of sales commissions or other payment methods; rather, it requires that when presenting an individualized financial recommendation to a Retirement Investor who is expected to act on that recommendation, the adviser must uphold their duty of care and loyalty and place the investor's interest before their own.

In addition, when making this argument the commenter referenced a survey from the Committee of Annuity Insurers that reported the median household income of annuity holders is $79,000 and argued that this is significantly below that of the median income for a middle-class household.[647] However, the survey also indicates that 78 percent of annuity owners are retired and that the median age of annuity owners is 74. Given that the majority of annuity holders are retired and therefore do not earn a wage or salary, which significantly impacts household income, comparing the median annuity holder's household income to that of all households, including those still in the workforce, is inappropriate. A more appropriate comparison is that of median household incomes for ages 65 to 74 (below the median age of annuity holders), which in 2022 was $61,000, suggesting that annuity holders are actually substantially wealthier than their peers.[648]

In contrast, other commenters disputed the claim that this rulemaking will reduce small savers' access to investment advice. The CFP Board noted that after it ''adopted a broad fiduciary standard, the CFP Board saw no evidence that CFP professionals stopped providing advice to moderate-income clients. The CFP Board also has seen no evidence to suggest that the proposed rule would restrict access to advice, particularly for moderate-income Americans.'' [649] In fact, the CFP Board reported that after its new standards were adopted, only 10 percent of their members raised required asset minimums and only 6 percent terminated client services.[650] The new standards also did not discourage entry of new financial professionals with a record number of new CFP certificants in 2023—also the most diverse class in the Board's history.[651] Another commenter noted that they disagreed with the assertion that the rulemaking would result in reduced access to advice, noting that they ''provide financial planning services and retirement advice to clients from all backgrounds and income levels. Rather than limiting access, adoption of the Proposed Rule will likely lead to increased marketplace innovation and to the development of improved financial products and services benefitting all retirement savers.''

Moreover, the preliminary market reactions to the 2016 Rule differed from what the industry anticipated at the time and reiterated in response to the 2023 proposal. In a survey conducted in September 2017, 82 percent of broker-dealers had not made changes to their handling of smaller, retail retirement accounts, although about 18 percent had raised their minimum account threshold and closed smaller accounts.[652] In examining the effects of the 2016 Final Rule, Egan, Ge, and Tang (2022) found that while variable annuity sales had decreased, there is no evidence that the change affected investors with less wealth more than others. They concluded that variable annuity sales had become more sensitive to expenses and that insurers had increased the relative availability of low-expense products. Therefore, the study concluded that investor welfare had improved overall because of the 2016 Rulemaking, despite the fact that it was vacated.[653]

Further, as discussed in the Benefits and Transfers section, one notable response from the industry to the 2016 Rulemaking was the creation of two new share classes of mutual funds: clean shares and T shares (or transactional shares). Clean shares provide greater transparency for investors and are sold ''without any front-end load, deferred sales charge, or other asset-based fee for sales or distribution.'' [654] While T shares have front-end loads, they have ''a standard, maximum sales charge across all fund categories of 2.5 percent and a 0.25 percent 12b–1 fee.'' [655] According to a 2017 report from Morningstar, T shares would ''help financial advisors maintain their traditional business model—selling mutual funds on commission—while complying with new rules. Further, these T shares would feature uniform commissions, reducing or eliminating financial advisors' conflicts of interest in making recommendations to clients.[656]

Following the revocation of the 2016 Rulemaking, the industry has moved away from offering T shares,[657] while the offering of clean shares has increased in recent years.[658] This response suggests that, rather than choosing to stop offering services to smaller investors, the industry is likely to find alternative means to provide services to this segment of the market.

[647] The Committee of Annuity Insurers, *Survey of Owners of Individual Annuity Contract.* (July 2022) *https://www.annuity-insurers.org/wp-content/uploads/2023/07/Gallup-Survey-of-Owners-of-Individual-Annuity-Contracts-2022.pdf.*

[648] Federal Reserve Board 2022 Survey of Consumer Finances. *https://www.federalreserve.gov/econres/scf/dataviz/scf/chart/#series:Before_Tax_Income;demographic:agecl;population:5,6;units:median;range:1989,2022.*

[649] Comment letter received from the Certified Financial Planner Board of Standards on the *Notification of Proposed Rulemaking: Retirement Security Rule: Definition of an Investment Advice Fiduciary,* (January 2024).

[650] CFP Board of Standards, *Access to Financial Advice Survey,* (Mar. 2024), *https://www.cfp.net/-/media/files/cfp-board/Knowledge/Reports-and-Research/2024-Access-to-Financial-Advice-Report.pdf.*

[651] *CFP Board Approaches 100,000 CFP Professionals, with the Most Ever Exam-takers in a Single Year,* (January 11, 2023), *www.cfp.net/news/2024/01/cfp-board-approaches-100000-cfp-professionals-with-most-ever-exam-takers-in-a-single-year.* Last accessed 3/7/2023.

[652] John Crabb, *The Fiduciary Rule Poll, International Financial Law Review,* International Finance Law Review (October 2017), *https://media2.mofo.com/documents/171000-fiduciary-rule-poll.pdf.*

[653] Egan, Mark, Shan Ge, & Johnny Tang, *Conflicting Interests and the Effect of Fiduciary Duty – Evidence from Variable Annuities,* 35(12) The Review of Financial Studies 5334–5486. (December 2022).

[654] SEC, *Introduction to Investing: Glossary, https://www.investor.gov/introduction-investing/investing-basics/glossary/clean-shares.*

[655] Morningstar, *Descriptions of Share Class Types, https://morningstardirect.morningstar.com/clientcomm/Share_Class_Types.pdf.*

[656] Aron Szapiro and Paul Ellenbogen, *Early Evidence on the Department of Labor Conflict of Interest Rule: New Share Classes Should Reduce Conflicted Advice, Likely Improving Outcomes for Investors,* Morningstar Policy Research, (April 2017).

[657] Greg Iacurci, *T Shares Are Dead,* InvestmentNews (December 20, 2018), *https://www.investmentnews.com/t-shares-are-dead-77482.*

[658] Rebecca Moore, *Clean Shares' Popularity,* Plan Adviser, (October 2023), *https://www.planadviser.com/print-page/?url=https://www.planadviser.com/magazine/clean-shares-popularity/&cid=46591.*

As in 2016, the Department expects that industry's response to this rulemaking will be to offer alternative, less conflicted, products and services to small investors.

The surveys, papers, and predictions described above do not support a finding that small investors would lose access to personalized advice as a result of fiduciary protections, even under the 2016 Rulemaking, which imposed more onerous conditions—and liability—on firms and advisers than is true of the final rule and exemptions. This rulemaking broadly comports with Regulation Best Interest, and the Department is not aware of any substantial, documented reductions in access to advice as a result of Regulation Best Interest.

The rulemaking accommodates different types of business models. It is possible that, as the market evolves, small investors and the firms that serve them will increasingly move away from commission-based full-service or ''advised'' brokerage accounts or commission-compensated advice from insurance agents. Instead, they may use one or more of the following: target date funds (which adjusts risk allocation over time based on the target date); receiving advice directly from investment firms (which allows for interaction with a live adviser though the advice tends to focus on in-house funds and investments); hourly engagement or subscription-based firms (which are particularly useful for financial planning); and robo-advice (which generally provides a customized investment mix based on information about the investor's financial circumstances and existing investment assets).[659]

The Department expects the final rule and exemptions will not significantly impact the overall availability of affordable investment advice, but rather improve the quality of this advice as conflicts are removed. This will apply as well to small investors who continue to have access to advice. Furthermore, increasing the quality of advice provided to retirement plan fiduciaries will benefit many workers who are participating in a defined contribution or defined benefit pension plan.

This is supported by the experience in the United Kingdom, which adopted a far more aggressive stance in addressing conflicted advice than the Department proposed in the 2016 Rulemaking or the current rulemaking. When the United Kingdom initially banned commissions for investment advice and required more stringent qualifications for advisers under its Retail Distribution Review (RDR) in 2013, the advice rate fell both in the lead up to the regulatory change and in the years immediately following its implementation. However, more recent research has found evidence of improvements in the market since 2017, including a 38 percent increase in the number of United Kingdom adults that received regulated financial advice in the past year and a 12-percentage point increase in consumer awareness of automated advice,[660] which suggested a greater focus on digital advice as a potential solution to provide low-cost investment advice with specifically tailored outcomes to individual investors at scale.[661] Moreover, while the total number of firms fell, the number of staff advising on retail investment products increased by 5 percent between 2018 and 2022.[662]

The Department has reason to believe that such alternative forms of advice have become more available in the United States and, as in the United Kingdom, are beneficial to small investors. In recent years, the investment advice market has seen an increase in financial technology and robo-advice service providers, which cater to small savers. In 2017, Morningstar noted that advances in financial technology could increase personal advisers' productivity and streamline compliance, enabling them to offer higher service levels affordably to small investors even as they adapt business practices to mitigate conflicts of interest.[663] Because the core portfolio management functions are performed by computer algorithm, robo-adviser services generally can be expanded more easily than traditional advisory services. The marginal cost incurred by a robo-adviser to serve additional customers is very small relative to that incurred by traditional advisers. Robo-advisers are often willing to serve investors with assets under $500,[664] and some robo-advisers do not require a minimum investment at all.[665] The financial needs of small investors can often be met by the degree of customization offered by robo-advice and do not justify a more expensive, extremely personalized strategy.

Many robo-advice providers claim to offer relatively conflict-free services, claiming no commission, no performance fees, and no compensation from third parties. Others claim to serve investors as fiduciaries. Robo-adviser offerings are typically comprised of ETFs that, in comparison to mutual funds, offer little room for revenue streams and payment shares that would create the traditional conflicts of interest for advisers discussed elsewhere in this analysis (*e.g.,* 12b–1 fees or subtransfer agent fees).[666]

The Department did receive some comments voicing concerns with regard to robo-advice, particularly in regard to market downturns with one commenter noting, ''the use of model portfolios—a hallmark of 'robo-advice'—can lead to herd like behavior, thus putting participants at risk of disaster when their models do the same thing for all investors at the same time.'' However, the use of model portfolios is not unique to robo-advice and has grown more prevalent in recent years. Many traditional investment advisers rely on model portfolios to outsource investment management and free up Investment Professionals' time to provide other services. In 2023, approximately $424 billion were invested in model portfolios, a 48 percent increase from 2021.[667]

A recent study by Liu et al. (2021) looked specifically at the impact of using robo-advisers on investment

[659] Christine Benz & Jeremy Glaser, *The Best Ways for Small Investors to Get Advice,* Morningstar (February 21, 2017), *https://www.morningstar.com/articles/794212/the-best-ways-for-smaller-investors-to-get-advice.*

[660] The United Kingdom Financial Conduct Authority, Financial Lives 2022 Survey: Consumer Investment and Financial Advice, *Evaluation of the Impact of the Retail Distribution Review and the Financial Advice Market Review,* (July 2023), *https://www.fca.org.uk/publication/financial-lives/fls-2022-consumer-investments-financial-advice.pdf.*

[661] The United Kingdom Financial Conduct Authority (FCA) has highlighted that digital advice can be more convenient for consumers and can offer efficiency and cost benefits to providers. *See* FCA, *Feedback Statement on Call for Input: Regulatory Barriers to Innovation in Digital and Mobile Solutions* (March 2016), *http://www.fca.org.uk/static/fca/article-type/feedback%20statement/fs16-02.pdf*).

[662] The United Kingdom Financial Conduct Authority, *Data from the Retail Mediation Activities Return (RMAR),* 2018–2022 (August, 2023), *https://www.fca.org.uk/data/retail-intermediary-market/previous-editions-retail-intermediary-market-data.*

[663] Michael Wong, *Financial Services: Weighing the Strategic Tradeoffs of the Fiduciary Rule,* Morningstar (February 2017), *https://www.morningstar.com/articles/798573/financial-services-weighing-the-strategic-tradeoffs-of-the-fiduciary-rule.*

[664] Wealthfront, *Account Minimums to Invest with Wealthfront,* Wealthfront, *https://support.wealthfront.com/hc/en-us/articles/210994423--Account-minimums-to-invest-with-Wealthfront.*

[665] One example is Betterment. *See* Betterment, *Pricing at Betterment,* Betterment, *https://www.betterment.com/pricing/.*

[666] Jennifer Klass & Eric Perelman, *Chapter 3: The Transformation of Investment Advice: Digital Investment Advisors as Fiduciaries, The Disruptive Impact of FinTech on Retirement Systems,* Oxford University Press 38 (2019).

[667] Millson, Adam, *U.S. Model Portfolio Landscape: 2023 in Review,* Morningstar Manager Research (February 2024).

performance during the 2020 financial crisis caused by the COVID–19 global pandemic.[668] Using portfolio and transaction data from investors at a Taiwanese mutual fund online investment platform, Liu et al. (2021) found that robo-advice significantly reduced the losses experienced by investors during the crisis and that investors using robo-advice adjusted risk levels and trading to adapt to changes in the market while other investors did not.

Similarly, a study by D'Acunto et al. (2018) looked at how the introduction of robo-advice changed investor behavior in India. The study found that following the introduction of robo-advice, investors that had been under-diversified improved their diversification and experienced better portfolio performance through robo-advice. On the other hand, investors that had been well-diversified prior to the introduction of robo-advice did not change their diversification, but did increase their trading activity, which did not translate into better performance.[669]

While the Department does recognize that robo-advice is not a completely conflict-free solution to providing low-cost, investment advice, based on these findings, the Department believes that robo-advice can still play a vital role in the investment advice landscape for Retirement Investors, particularly for younger, lower-balance investors. Additionally, while the rate of adoption of pure robo-advice has slowed, firms have begun adding hybrid financial advice offerings that blend access to a human adviser with automated advice.[670] These hybrid robo-advice alternatives may mitigate some of the concerns expressed regarding pure robo-advice.[671] With the same fiduciary standard applying to all of these types of advice, this Rulemaking ensures that different business models will be treated in a consistent manner and that different types of customers, including small investors, will be protected.

8. Reform in the United Kingdom

As regulators in several countries have identified failures in their investment advice markets, they have undertaken a range of regulatory and legislative initiatives that directly address conflicted investment advice. One of the most studied initiatives occurred in the developed pension markets of the United Kingdom, where the Financial Conduct Authority (FCA) issued new regulations effective January 1, 2013, called the Retail Distribution Review (RDR). The United Kingdom focused its new regulatory regime on more transparent fee-for-service compensation structures. The United Kingdom enacted an aggressive reform that banned commissions on all retail investment products, not just those related to retirement savings; [672] required that customers in the United Kingdom be charged directly for advice; and raised qualification standards for advisers.

In marked contrast to these reforms, the Department's rulemaking does not ban commissions or eliminate conflicted compensation structures, but rather relies upon conduct standards and oversight structures designed to minimize the harmful impact of conflicts of interest, while permitting a wide range of business practices and models. The Department's rulemaking represents a middle ground between no reform and the outright bans on conflicted payments, allowing businesses to use a range of compensation practices while minimizing the harmful impact of conflicts of interest on the quality of advice.

Moreover, the Department's regulatory action is narrower than the rules passed by the United Kingdom as it does not prescribe additional qualification standards for existing financial advisers or broadly ban commissions. Those rules also sought to overhaul the entire financial advice market, while this rule focuses on advice to Retirement Investors and seeks to harmonize all advice to Retirement Investors under a uniform standard and oversight structure including disclosure requirements, rather than the existing patchwork of regulatory standards. Still, an important aim of all these interventions is to reduce incentives for financial advisers to recommend investments that are not in their client's best interest and thereby increase investor confidence in financial advice.

The experience of the United Kingdom suggests that while there are transitional costs of overhauling the incentive structure and qualifications of the financial advisers, the changes have resulted in a modest increase in the number of adults accessing financial advice as well as their satisfaction with the advice they are receiving, though there remains a large number of adults with substantial holdings in cash outside the investment space.[673] In general, the United Kingdom experience, which was more broadly applied, indicates that these reforms will not result in a significant reduction of advice.

9. Cost

To estimate compliance costs associated with the rulemaking, the Department considers the marginal cost associated with the rulemaking. The Department estimates that the rulemaking will impose total costs of $536.8 million in the first year and $332.7 million in each subsequent year. The estimated compliance costs associated with the amendments in the final rule and PTEs are summarized in the table below. Over 10 years, the costs associated with the final rule and associated amendments to the PTEs will total approximately $2.5 billion, annualized to $359.9 million per year (using a 7 percent discount rate).[674]

[668] Che-Wei Liu, Mochen Yang, & Ming-Hui Wen, *Judge Me on My Losers: Does Adaptive Robo-Advisors Outperform Human Investors During the COVID–19 Financial Market Crash?* Production and Operations Management Forthcoming, (Accessed Aug. 31, 2023), *https://doi.org/10.1111/poms.14029.*

[669] Francesco D'Acunto, Nagpurnanand Prabhala, & Alberto G. Rossi, *The Promises and Pitfalls of Robo-Advising,* 32(5) The Review of Financial Studies 1983–2020, (April 2019), *https://doi.org/10.1093/rfs/hhz014.*

[670] Purcell, Kylie. ''Are Robo-Advisers Still the Answer to Costly Advice or a Dying Breed?'' Nasdaq (November 24, 2023). *https://www.nasdaq.com/articles/are-robo-advisors-still-the-answer-to-costly-advice-or-a-dying-breed.*

[671] Morningstar, ''2023 Robo-Advice Landscape.'' (August 2023). *https://institutional.vanguard.com/content/dam/inst/iig-transformation/insights/pdf/Robo-Advisor_Landscape_2023-Vanguard.pdf.*

[672] Non-advised'' services, or execution-only sales, where no advice or recommendation is given, fall outside of the RDR. Thus, a commission is still permitted for non-advised annuity sales. The FCA is currently examining the risks that exist with the purchase of ''non-advised'' annuities. Please see: *http://www.fca.org.uk/static/documents/consultation-papers/cp15-30.pdf.*

[673] The U.K. Financial Conduct Authority, Financial Lives 2022 Survey: Consumer Investment and Financial Advice, *Evaluation of the Impact of the Retail Distribution Review and the Financial Advice Market Review,* (July 2023), *https://www.fca.org.uk/publication/financial-lives/fls-2022-consumer-investments-financial-advice.pdf.*

[674] The costs would be $3.0 billion over 10-year period, annualized to $356.0 million per year if a 3 percent discount rate were applied.

TABLE 7—SUMMARY OF MARGINAL COST AND PER-ENTITY COST BY EXEMPTION

	Total cost	
	First year	Subsequent years
3(21)(A)(ii) of ERISA:		
PTE 2020–02	$248,063,209	$165,502,919
PTE 84–24	288,737,197	167,239,823
Mass Amendment [1]	0	0
Total	536,800,406	332,742,741

[1] As finalized, the amendments to the Mass Amendment do not impose an additional burden on entities continuing to rely on those exemptions. However, the amendments will require entities to rely on PTE 84–24 and PTE 2020–02 for exemptive relief covering transactions involving the provision of fiduciary investment advice. These costs are accounted for in the cost estimates for PTE 84–24 and PTE 2020–02.

The estimated costs associated with the amendments to each of the PTEs are broken down and explained below. More detail can be found in the Paperwork Reduction Act sections of each respective exemption, also published in today's **Federal Register**.[675]

The quantified costs are significantly lower than the corresponding costs in the 2016 regulatory impact analysis, due to the smaller scope of this rulemaking relative to the 2016 Final Rule, as well as compliance structures adopted by the industry to reduce conflicted advice in response to State regulations, Regulation Best Interest, the NAIC model rule, PTE 2020–02, and changes made in response to the Department's 2016 Rulemaking before it was vacated. The methodology for estimating the costs of the final rule and amendments to the PTEs is consistent with the methodology and assumptions used in the 2020 analysis for the current PTE 2020–02.

Comment Summary

In the proposal, many of commenters expressed concern that the Department had underestimated the costs of the proposal. Some commenters criticized that the Department underestimated the cost of implementation and ongoing compliance with the exemptions. Some of these commenters criticized that the Department did not include certain types of costs, such as technology or training costs. Other commenters criticized that the Department's estimate of the time required to comply with the requirements were too low. Some commenters expressed concern that the proposal would cause significant changes to the market for investment advice and that this restructuring of the market would create large costs. Additionally, some commenters expressed concern that the rulemaking would increase uncertainty and that such uncertainty would be costly.

Some commenters provided estimates of the cost of the proposal. Some of these commenters provided general estimates of the likely magnitudes of the cost—most of the estimates provided stated that the actual cost of the proposal would be between 10 and 20 times the cost estimated in the proposal. One commenter remarked that the actual cost would be 100 times the cost estimated in the proposal.

A few commenters gave more specific information on how they would estimate the costs of the proposal. The Financial Service Institute, based on a survey conducted by Oxford Economics, estimated that the costs of the proposal imposed on broker-dealers would be approximately $2.8 billion in the first year and $2.5 billion in subsequent years, 11 and 12 times the Department's estimate in the proposal, respectively. They noted that their estimates include costs to upgrade software systems and incremental time of staff and broker-dealers.[676] Additionally, the ICI estimated that the first-year cost estimates for PTE 2020–02 would exceed $2.9 billion. This is 12.1 times higher than the first-year cost estimates in the proposal.[677]

Some commenters provided literature and data regarding the total costs of the regulation, but these reports lacked the specific information needed to separate out the costs of fiduciary status from other costs. Additionally, many of these reports were based on surveys of expected costs from a small sample of firms. The reports did not include information that would allow the Department to fully assess the report's findings, such as including survey questions or representativeness of respondents. With these limitations in mind, the results were used to inform the analysis, where possible. However, they were not used as primary estimates.

Other commenters expressed concern about the Department's assessment of costs relative to other regulatory requirements. Some commenters noted that the Department underestimated the costs relative to the requirements under the existing PTE 2020–02, SEC regulations, and the NAIC Model Regulation. Other commenters noted that the Department was correct to consider the existing requirements in its baseline for cost estimates.

Some commenters addressed specific concerns about the Department's estimates. Many of the commenters expressed concern that the estimated costs to draft or update disclosures were too low. Other commenters noted that task of drafting and updating policies and procedures would take a team of professionals several iterations, noting that the Department's estimate did not consider the complexity of the requirement. One commenter remarked that recordkeeping services often contractually exclude fiduciary activities, and the proposal would either result in plans losing the recordkeeping

[675] As noted above, the Department is amending the following exemptions: PTE 2020–02 (*Improving Investment Advice for Workers & Retirees*), PTE 84–24 (*Class Exemption for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters*), PTE 75–1 (*Exemptions From Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers and Banks*), PTE 80–83 (*Class Exemption for Certain Transactions Between Investment Companies and Employee Benefit Plans*), PTE 80–83 (*Class Exemption for Certain Transactions involving Purchase of Securities where Issuer May Use Proceeds to Reduce or Retire Indebtedness to Parties In Interest*), PTE 83–1 (*Class Exemption for Certain Transactions Involving Mortgage Pool Investment Trusts*) and PTE 86–128 (*Class Exemption for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers*).

[676] Comment letter received from the Financial Services Institute on the *Notification of Proposed Rulemaking: Retirement Security Rule: Definition of an Investment Advice Fiduciary,* (January 2024).

[677] Comment letter received from the Investment Company Institute on the *Notification of Proposed Rulemaking: Retirement Security Rule: Definition of an Investment Advice Fiduciary,* (January 2024).

services they rely upon or significant costs to renegotiate contracts. Another commenter expressed concern that the certification requirement of the retrospective review would be particularly burdensome to entities making digital rollover recommendations.

Some commenters criticized that the proposal would increase costs for Retirement Investors, as Financial Institutions would pass on costs their clients. Others predicted that Retirement Investors would lose access to advice or certain products, particularly small savers. Other commenters remarked that there is no evidence that a fiduciary status would increase costs to investors. For a larger discussion on the current situation and how the Department approached small savers in this rulemaking, refer to the Impact of the Rulemaking on Small Savers section above.

In preparing for the final rulemaking, the Department has considered these comments and has clarified its language and reevaluated its estimates as appropriate. In response, the Department has increased the estimated costs to comply with PTE 2020–02 and PTE 84–24 and made changes to the requirements to further harmonize this rulemaking with other requirements faced by the industry. The specific adjustments to the estimates are discussed in greater detail below.

Preliminary Assumptions and Cost Estimate Inputs

The final rulemaking requires the use of amended PTE 2020–02 or PTE 84–24 for compensation resulting from fiduciary investment advice related to retirement savings. For the purposes of this analysis, the Department assumes that the percent of Retirement Investors who are in employment-based plans receiving electronic disclosures would be similar to the percent of plan participants receiving electronic disclosures under the Department's 2002 and 2020 electronic disclosure safe harbors.[678] Accordingly, the Department estimates that 96.1 percent of the disclosures sent to Retirement Investors will be sent electronically, and the remaining 3.9 percent will be sent by mail.[679]

One commenter suggested that this assumption overstates the use of electronic disclosures for IRA owners and that 60 percent would be more appropriate. The Department is not able to substantiate that suggestion but understands that IRA owners may be different than plan participants with regards to electronic delivery of documents. In response, the Department reevaluated its estimate. In this analysis, the Department assumes that approximately 72 percent of IRA owners will receive disclosures electronically.[680]

Furthermore, the Department estimates that communications between businesses (such as disclosures sent from one Financial Institution to another) will be 100 percent electronic.

For disclosures sent by mail, the Department estimates that entities will incur a cost of $0.68 [681] for postage and $0.05 per page for material and printing costs.

Additionally, the Department assumes that several types of personnel will perform the tasks associated with information collection requests at an hourly wage rate of $65.99 for clerical personnel, $133.24 for a top executive, $165.29 for an insurance sales agent, $165.71 for a legal professional, $198.25 for a financial manager, and $228.00 for a financial adviser.[682]

The Department received several comments on the Department's labor cost estimate in the proposal, particularly the cost for legal support, remarking that it was too low. The Department assumes that tasks involving legal professionals will be completed by a combination of legal professionals, likely consisting of attorneys, legal support staff, and other professionals and in-house and out-sourced individuals. The labor cost associated with these tasks is estimated to be $165.71, which is the Department's estimated labor cost for an in-house attorney. The Department understands that some may feel this estimate is comparatively low to their experience, especially when hiring an outside ERISA legal expert. However, the Department has chosen this cost estimate understanding that it is meant to be an average, blended, or typical rate from a verifiable and repeatable source.[683]

Finally, the Department assumes affected entities will likely incur only incremental costs if they were already subject to rules or requirements from the Department or another regulator related to investment advice.

Costs Associated With Amendments to Section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974 and Section 4975(e)(3)(B) of the Code

The final rule changes the definition of a fiduciary such that some Financial Institutions previously not considered fiduciaries will be so under the final rule. Additionally, some Financial Institutions, who already provide fiduciary services for some clients or types of services, will be required to act as a fiduciary for more services under the final rule.

Entities may incur costs associated with the amendments to regulations under section 3(21)(A)(ii) of ERISA and section 4975(e)(3)(B) of the Code. While most of the cost incurred will be associated with the amendments to related PTEs, entities who did not previously identify as a fiduciary may also incur transition costs. These costs will likely differ significantly by type of Financial Institution. For instance, retail broker-dealers subject to Regulation Best Interest or investment advisers subject to the Advisers Act will be closer to satisfying the requirements of a fiduciary under ERISA than an insurance company or Independent Producer selling annuity products.

The Department requested comment on the costs these entities would incur by becoming fiduciaries under this rule, as well as the underlying data to

[678] 67 FR 17263 (Apr. 9, 2002); 85 FR 31884 (May 27, 2020).

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

[680] The Department used information from a Greenwald & Associates survey which reported that 84 percent of retirement plan participants find electronic delivery acceptable, and data from the National Telecommunications and Information Administration Internet Use Survey which indicated that 86 percent of adults 65 and over use email on a regular basis, which is used as a proxy for internet fluency and usage. Therefore, the assumption is calculated as: (84% find electronic delivery acceptable) × (86% are internet fluent) = 72% are internet fluent and find electronic delivery acceptable.

[681] United States Postal Service, *First-Class Mail,* United States Postal Service (2023), *https://www.usps.com/ship/first-class-mail.htm.*

[682] Internal Department calculation based on 2023 labor cost data and adjusted for inflation to reflect 2024 wages. For a description of the Department's methodology for calculating wage rates*, see:* EBSA, *Labor Cost Inputs Used in the Employee Benefits Security Administration, Office of Policy and Research's Regulatory Impact Analyses and Paperwork Reduction Act Burden Calculations,* EBSA, *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf.*

[683] For a description of the Department's methodology for calculating wage rates*, see:* EBSA, *Labor Cost Inputs Used in the Employee Benefits Security Administration, Office of Policy and Research's Regulatory Impact Analyses and Paperwork Reduction Act Burden Calculations,* EBSA*, https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf.*

estimate these costs. The Department was particularly interested in costs that would be incurred in satisfying the requirements to the PTEs, such as legal costs, fiduciary insurance costs, technology costs, human capital costs, or other costs of this nature.

The Department received several comments regarding the costs of transitioning to fiduciary status. Several commenters noted that the change in definition would significantly increase the costs and risks associated with providing investment advice, and a few commenters specifically mentioned the increased costs associated with the rulemaking's inclusion of Title I Plans. The commenters did not provide data to estimate these costs. Some commenters provided literature and data regarding the total costs of the regulation, but these reports lacked the specific information needed to separate out the costs of fiduciary status from other costs. Additionally, these reports were primarily based on surveys of expected costs from a small sample of firms. The reports did not include information that would allow the Department to fully assess the report's findings, such as including survey questions or representativeness of respondents. With these limitations in mind, the results were used to inform the analysis, where possible. However, they were not used as primary estimates.

The Department also received several comments concerning the increased legal liability or cost of insurance that Financial Institutions would incur. The Department has clarified that this rulemaking does not create a new private right of action. These comments did not provide specific information on the additional cost of insurance premiums. However, firms or individuals providing financial advice may choose to purchase insurance, or purchase additional insurance, to protect against the cost of errors, omissions, fiduciary breaches, and other liabilities arising from their work. The Department expects that insurance premiums for some firms could increase as a result of the change in fiduciary status resulting from this rulemaking. Much of the additional premiums would consist of transfers from service providers to harmed investors as compensation for breaches of fiduciary duty. There would also be transfers among insured service providers between providers who have claims versus those who do not. In both cases, the net recipients of the transfers are investors who are harmed and now compensated. Part of the price of insurance does reflect a cost due to payment of profits to insurers and costs. The commenters did not provide specific information on the additional cost of insurance premiums, and the Department does not have sufficient data to estimate the size of these transfers or costs.

The Department believes that most costs incurred by entities that will now be considered ERISA fiduciaries under this rulemaking are attributable to compliance with the PTEs. These costs are discussed in greater detail below. In consideration of the comments on the costs imposed by the definition change, the Department has significantly increased its cost estimate to review and implement the amendments for all entities. It has also reevaluated the assumption that all entities eligible to rely on PTE 2020–02 were doing so. As, discussed below, the estimates now reflect an assumption that 30 percent of broker-dealers, registered investment advisers, and insurance companies would be newly reliant on PTE 2020–02.

Costs Associated With PTE 2020–02

The Department is amending PTE 2020–02 to cover more transactions and revising some of the specific obligations to emphasize the existing core conditions of the exemption. This amendment is intended to align with other regulators' rules and standards of conduct. As such, the Department expects that satisfying the amendment will not be unduly burdensome.

Summary of Affected Entities

The entities that the Department expects to be affected by the amendments to the PTE are also affected by the existing PTE 2020–02. The Department estimates that 18,632 Financial Institutions, composed of 1,920 broker-dealers, 16,398 registered investment advisers,[684] 84 insurers, 200 pure robo-advisers, and 31 non-bank trustees.[685]

The Department recognizes that the rulemaking may change the number of Financial Institutions who choose to rely on PTE 2020–02. Consistent with its initial analysis in 2020, the proposal assumed that all entities eligible to rely on the existing PTE 2020–02 were relying on it. However, one commenter indicated that some entities eligible to use PTE 2020–02 had determined that their business practices did not trigger fiduciary status or had modified their business practices to avoid relying upon it. The definitional changes in this rulemaking may now require these entities to rely on PTE 2020–02. As a result, these entities will now incur the full compliance costs of PTE 2020–02. In response to this concern, this analysis assumes that 30 percent of currently eligible entities would begin to rely on PTE 2020–02 in response to the rulemaking.[686]

The analysis below considers the cost to comply to the amendments by entity type, given existing compliance requirements of other regulators, such as the SEC and State regulators where applicable. The Department recognizes that entities within the insurance industry are subject to different regulatory regimes, depending on the types of products they offer. The Department does not have data on what proportion of entities are subject to the requirements in the NAIC Model regulation, or subject to regulation by the SEC or State insurance departments.

Costs To Review the Rule

The Department estimates that all 18,632 Financial Institutions affected by the amendments to PTE 2020–02 will need to review the rule. The Department acknowledges that the review process will vary significantly by institution. Some organizations may use in-house teams to review the rule and devise an implementation plan, others may outsource review to a third party, and still others may choose a hybrid approach. Outsourcing the review process can lead to efficiencies as one organization reviews the rule and then provides information to many others. These efficiencies may be particularly beneficial to small entities, which make up the majority of entities.

In the proposal, the Department estimated that it would take an average of nine hours for a legal professional to review the rule. The Department received several comments indicating that this was a significant underestimate with some commenters suggesting that the review would take a team of professionals. In response to these comments and in further consideration of what review processes affected Financial Institutions may employ, the

[684] The Department estimates that 16,264 registered investment advisers do not provide pure robo-advice.

[685] For more information on how the number of each type of entity is estimated, refer to the Affected Entities section.

[686] The Department is not aware of any source to determine the percentage of firms currently eligible for, but not using PTE 2020–02, but which now need to rely on the exemption. In response to the lack of information, the Department selected a meaningful percentage of firms that would be in this category, in order to provide an estimate of the cost to comply with PTE 2020–02. As a point of reference, each percentage point change to this assumption (the share of currently eligible newly reliant entities) results in a 0.28 percentage point change in the estimated total cost of compliance for PTE 2020–02.

Department has updated its estimate. The Department estimates that, on average, it will take a Financial Institution 20 hours to review the rule and develop an implementation plan, resulting in a total hour burden of 372,646 hours and an estimated cost of $61.8 million in the first year.[687]

Costs Associated With General Disclosures for Investors

In the proposal, the Department received several comments indicating that its estimates of the hourly burden associated with preparing and updating disclosures underestimated the burden of the proposed amendments. In response, the Department has reviewed and updated its assumptions. The Department's considerations for each requirement are discussed in more detail below. Additionally, the Department has made changes to harmonize the disclosure requirements of PTE 2020–02 with the disclosure requirements of other regulators.

Costs Associated With Modifications of Existing Disclosure Requirements

Section II(b) of the existing exemption, finalized in 2020, requires Financial Institutions to provide the following disclosures to Retirement Investors before engaging in or at the time of a transaction pursuant to the exemption:

(1) a written acknowledgment that the Financial Institution and its Investment Professionals are fiduciaries;

(2) a written description of the services to be provided and any conflicts of interest of the Investment Professional and Financial Institution; and

(3) documentation of the Financial Institution and its Investment Professional's conclusions as to whether a rollover meets the Care Obligation and Loyalty Obligation, before engaging in a rollover or offering recommendations on post-rollover investments.

The Department is finalizing the disclosure conditions from the proposal with some modifications. The Department proposed requiring a written statement informing the investor of their right to obtain a written description of the Financial Institution's policies and procedures and information regarding costs, fees, and compensation. The Department received several comments regarding its estimate of the number of annual requests per firm, and the cost burdens associated with the proposed Provision of Disclosures. After reviewing the comments and existing disclosures associated with the rulemaking, the Department has removed this requirement. The modifications to the disclosure requirements included in the final rulemaking are described below.

Costs Associated With the Written Acknowledgement of Fiduciary Status

Financial Institutions will be required to provide a written acknowledgment that the Financial Institution and its Investment Professionals are providing fiduciary investment advice to the Retirement Investor and are fiduciaries under Title I, the Code, or both when making investment recommendations. This condition would not be met if the fiduciary acknowledgement states that the Financial Institution and its Investment Professionals ''may'' be fiduciaries or will become fiduciaries only ''if'' or ''when'' providing fiduciary investment advice as defined under the applicable regulation.

The amendment makes minor changes to the existing requirement for a written acknowledgment that the Financial Institution and its Investment Professionals are fiduciaries. The Department does not have data on how many Financial Institutions will need to modify their disclosures in response to these amendments; however, the Department expects that the disclosures required under the existing form of PTE 2020–02 likely satisfy this requirement for most Financial Institutions covered under the existing exemption. As discussed above, the Department also assumes that 30 percent of broker-dealers, registered investment advisers, and insurance companies will be newly reliant on the exemption and will incur the full costs to comply.

Additionally, of the 70 percent of the broker-dealers, registered investment advisers, and insurance companies currently assumed to be reliant on the existing exemption, the Department assumes that 10 percent will need to update their disclosures and that it will take a legal professional at a Financial Institution, on average, 10 minutes to update existing disclosures.

Robo-advisers, non-bank trustees, and newly reliant broker-dealers, registered investment advisers, and insurance companies will need to draft the acknowledgement. The Department estimates that it will take a legal professional at these entities, on average, 30 minutes to draft the acknowledgement. Updating and drafting the acknowledgement is estimated to result in a cost of approximately $0.5 million in the first year.[688]

Costs Associated With the Relationship and Conflict of Interest Disclosure

The rulemaking also expands on the existing requirement for a written description of the services provided to also require a statement on whether the Retirement Investor would pay for such services, directly or indirectly, including through third-party payments. This disclosure is consistent with the disclosure requirements under Regulation Best Interest. Accordingly, the Department expects that retail broker-dealers will not incur a cost to satisfy this requirement.

For all other Financial Institutions which relied on the existing exemption (*i.e.,* 70 percent of non-retail broker-dealers, registered investment advisers, and insurance companies), the Department assumes it will take a legal professional 30 minutes to update existing disclosures to include this information. Robo-advisers, non-bank trustees and newly reliant broker-dealers, registered investment advisers, and insurance companies will need to draft the Relationship and Conflict of Interest disclosure, which the Department estimates will take a legal professional at a large institution five hours and a legal professional at a small institution one hour, on average, to prepare such a draft.[689] This results in an estimated cost of approximately $4.8 million in the first year.[690]

[687] The burden for rule review and planning is estimated as: (18,632 entities × 20 hours) ≈ 372,646 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: (18,632 entities × 20 hours) × $165.71 ≈ $61,751,119.

[688] The number of financial entities needing to update their written acknowledgement is estimated as: (1,920 broker-dealers × 10% × (100% ¥ 30%)) + (8,035 SEC-registered investment advisers × 10% × (100% ¥ 30%)) + (8,363 State-registered investment advisers × 10% × (100% ¥ 30%)) + (84 insurers × 10% × (100% ¥ 30%)) ≈ 1,288 Financial Institutions updating existing disclosures. The number of financial entities needing to draft their written acknowledgement is estimated as: 200 robo-advisers + 31 non-bank trustees + (1,920 broker-dealers × 30%) + (8,035 SEC-registered investment advisers × 30%) + (8,363 State-registered investment advisers × 30%) + (84 insurers × 30%) ≈ 5,751 Financial Institutions drafting new disclosures. The burden is estimated as: (1,288 Financial Institutions × (10 minutes ÷ 60 minutes)) + (5,751 Financial Institutions × (30 minutes ÷ 60 minutes) ≈ 3,090 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: 3,090 burden hours × $165.71 ≈ $512,106. Note: Due to rounding values may not sum.

[689] As discussed in the Regulatory Flexibility Act analysis, the Department estimates that 10 robo-advisers and 31 non-bank trustees are considered small entities. For more information, refer to the Affected Entities discussion in the Regulatory Flexibility Act section of this document.

[690] The number of financial entities needing to update their written description of services to comply with the Relationship and Conflict of Interest disclosure is estimated as: 84 insurers + ((600 non-retail broker-dealers + 8,035 SEC-registered investment advisers + 8,363 State-

Costs Associated With New Disclosure Requirements

As amended, PTE 2020–02 requires Financial Institutions to provide investors with a Written Statement of the Care Obligation and Loyalty Obligation disclosure. As presented in more detail in the preamble, this disclosure defines the Care and Loyalty Obligations as related to the investor's relationship with the financial professional.

Cost Associated With the Written Statement of Care Obligation and Loyalty Obligation Disclosure

Under the Advisers Act, the SEC's Regulation Best Interest, and Form CRS, most registered investment advisers and broker-dealers with retail investors already provide disclosures that the Department expects will satisfy these requirements.[691]

The Department expects that the written statement of Care Obligation and Loyalty Obligation will not take a significant amount of time to prepare [692] and will be uniform across clients. The Department assumes that a legal professional employed by a broker-dealer or registered investment advisers, on average, will take 30 minutes to modify existing disclosures and that it will take insurers, robo-advisers, and non-bank trustees, on average, one hour to prepare the statement. This results in a cost estimate of approximately $1.6 million in the first year.[693]

Costs Associated With the Provision of Disclosures to Retirement Investors

Financial Institutions will incur costs associated with preparing and sending the new disclosure requirements. The Department does not have data on the number of Retirement Investors that have relationships with Financial Institutions that would engage in transactions covered under the amended exemption. For the purposes of this analysis the Department uses the number of defined contribution plan participants (114.9 million).[694] According to the Plan Sponsor Council of America, 38.8 percent of plans offer investment advice to participants.[695] Accordingly, the Department estimates that 44.6 million plan participants will receive the disclosures.[696] Additionally, the Department estimates that 67.8 million IRA owners will receive disclosures.[697]

Of the 44.6 million plan participants, it is assumed that 3.9 percent, or 1.7 million plan participants would receive paper disclosures.[698] The Department assumes that there will not be a measurable increase in the time burden for a clerical worker to prepare the additional disclosures for individuals already receiving plan disclosures. The Department estimates that providing the additional disclosures would require two additional pages, resulting in a material cost estimate of $173,914.[699]

Of the 67.8 million IRA owners, it is assumed that 28.2 percent, or 19.1 million IRA owners would receive paper disclosures.[700] Again, the Department assumes that there would not be a measurable increase in the time burden for a clerical worker to prepare the additional disclosures for individuals who would already receive account disclosures. The Department estimates that providing the additional disclosures would require two additional pages, resulting in a material cost estimate of $1.9 million.[701]

Summary of Costs Associated With the General Disclosures

The Department estimates that the total cost associated with preparing and providing the general disclosures discussed above to be approximately $8.9 million in the first year and $2.1 million in subsequent years.[702]

Costs Associated With Rollover Documentation and Disclosure for Financial Institutions

Compared to the requirements in the existing exemption, the amendment clarifies the rollover disclosure requirements in Section II(b)(3) and II(c)(3). Before engaging in a rollover or making a recommendation to a plan participant as to the post-rollover investment of assets, the Financial Institution and Investment Professional is required to document the basis for their conclusions to recommend a rollover, and must provide that documentation to the Retirement Investor.

In the proposal, the Department proposed requiring the rollover documentation for all rollovers, including plan to IRA rollovers, IRA to IRA rollovers, and plan to plan rollovers. In the finalized exemption, the Department is limiting this requirement to plan to IRA rollovers. As discussed in the Affected Entities section, the Department estimates that 4.5 million rollovers will be affected by the amendments to PTE 2020–02 annually.[703]

As a best practice, the SEC already encourages broker-dealers to record the basis for significant investment decisions, such as rollovers, although doing so is not required under Regulation Best Interest or the Advisers

registered investment advisers) × (100% ¥ 30%)) ≈ 11,983 Financial Institutions updating existing disclosures. The number of financial entities needing to draft their Relationship and Conflict of Interest disclosure is estimated as: (200 robo-advisers + 31 non-bank trustees) + ((600 non-retail broker-dealers + 8,035 SEC-registered investment advisers + 8,363 State-registered investment advisers) × 30%) ≈ 5,330 Financial Institutions drafting new disclosures. Of these 5,330 Financial Institutions, 976 are small. The hours burden is calculated as: ((11,983 entities updating × (30 minutes ÷ 60 minutes)) + ((976 small entities drafting × 1 hour) + (4,354 entities drafting × 5 hours)) ≈ 28,738 burden hours. The labor rate is applied as: 28,738 burden hours × $165.71 ≈ $4,762,239. Note: Due to rounding values may not sum.

[691] Form CRS Relationship Summary; Amendments to Form ADV, 84 FR 33492 (July 12, 2019), 17 CFR 240.15l–1(a)(2)(i).

[692] This requirement is consistent with requirements under the SEC's Advisers Act, Regulation Best Interest, and Form CRS that require most registered investment advisers and broker-dealers with retail investors to provide disclosures. (*See* Form CRS Relationship Summary; Amendments to Form ADV, 84 FR 33492 (July 12, 2019), 17 CFR 240.15l–1(a)(2)(i).)

[693] The burden is estimated as: [(1,920 broker-dealers + 16,398 registered investment advisers) × (30 minutes ÷ 60 minutes)] + [(84 insurers + 200 robo-advisers + 31 non-bank trustees) × 1 hour] ≈ 9,474 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: 9,474 burden hours × $165.71 ≈ $1,569,868.

[694] In 2021, there were approximately 114,931,000 defined contribution participants. (*See* U.S. Department of Labor, EBSA, Private Pension Plan Bulletin Abstract of 2021 Form 5500 Annual Reports, (September, 2023), Table A1, *https://www.dol.gov/sites/dolgov/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletins-abstract-2021.pdf.*)

[695] Plan Sponsor Council of America, *PSCA's 66th Annual Survey of Profit Sharing and 401(k) Plans,* Table 110, (2023).

[696] This is estimated as: 114,931,000 × 38.8% ≈ 44,593,228.

[697] In 2023, there were 67,781,000 IRAs. (*See* Cerulli, The Cerulli Report, U.S. Retirement End-Investor 2023, Exhibit 5.12, (2023)).

[698] The number of plan participants receiving paper disclosures is estimated as: (44,593,228 plan participants receiving investment advice × 3.9%) ≈ 1,739,136 paper disclosures.

[699] The cost is estimated as: (1,739,136 paper disclosures × 2 pages) × $0.05 ≈ $173,914.

[700] This is estimated as: 67,781,000 IRA owners × 28.2% ≈ 19,114,242 paper disclosures.

[701] The cost is estimated as: (19,114,242 paper disclosures × 2 pages) × $0.05 ≈ $1,911,424.

[702] The cost in the first year is estimated as: ($512,106 to prepare the written acknowledgment + $1,569,868 to prepare the written statement of the Care Obligation & Loyalty Obligations + $4,762,239 to prepare the written statement of all material facts + 2,085,338 to prepare and send disclosures) ≈ $8,929,550. The cost in subsequent years is attributable to the $2,085,338 to prepare and send disclosures. Note that the total value may not equal the sum of the parts due to rounding.

[703] The Department estimates that 4,485,059 rollovers from defined contribution plan accounts will occur annually. For more information on how the number of IRA rollover is estimated, refer to the Affected Entities section. In light of ongoing litigation, the Department is assuming for purposes of this discussion that all Affected Entities will become subject to these requirements, regardless of whether they currently provide fiduciary investment advice.

Act.[704] In addition, some firms may voluntarily document significant investment decisions to demonstrate compliance with applicable law, even if not required. SIFMA commissioned Deloitte to conduct a survey of its member firms to learn how they expected to implement Regulation Best Interest. The survey was conducted by December 31, 2019, prior to Regulation Best Interest's effective date of June 30, 2020. Just over half (52 percent) of the broker-dealers surveyed indicated they already require their financial advisers to provide the rationale documentation for rollover recommendations.[705]

The Department estimates that documenting each rollover recommendation will require 30 minutes for a personal financial adviser whose firms currently do not require rollover documentations and five minutes for financial advisers whose firms already require them to do so. This result in a labor cost estimate of $142.0 million.[706]

These rollover disclosures are expected to be two pages in length and accompany other documentation associated with the transactions at no additional postage cost. The materials cost is estimated as $0.05 per page, totaling $8,571 annually.[707]

This results in an estimated annual cost of approximately $142.0 million.[708] The Department received a comment stating that these hourly burdens were underestimated. The Department acknowledges this comment but deems this a reasonable estimate of the marginal time for this requirement. In practice, this requirement should be a logical outgrowth of a consultation, where the financial professional is simply documenting the relevant factors that resulted in the investment recommendation. Initially, firms may differ in the time burdens of this requirement according to their complexity and level of current implementation of Regulation Best Interest. However, the Department assumes that the regulatory uniformity introduced by this rulemaking, including in its disclosure requirements, will bring the marginal costs associated with this requirement in-line with these estimates. The Department has increased its estimate of the number of disclosures needing to be sent out, which result in an overall increase in the cost estimate.

The Department assumes Financial Institutions that do not have enhanced technology capabilities for other regulations will take a mixed approach, combining current technology solutions with manual processes. Accordingly, the Department estimates that Financial Institutions already requiring rollover documentation will face no more than a nominal burden increase, and only to the extent that their current compliance systems do not meet the requirements of this exemption. Those firms currently not documenting rollover recommendations will likely face a larger, but still somewhat limited burden.

Costs Associated With Annual Report of Retrospective Review for Financial Institutions

PTE 2020–02 currently requires Financial Institutions to conduct a retrospective review at least annually that is reasonably designed to prevent violations of, and achieve compliance with, the conditions of this exemption, the Impartial Conduct Standards, and the policies and procedures governing compliance with the exemption. The retrospective review must include a discussion of any self-corrections of violations.

Robo-advisers, non-bank trustees, and newly reliant broker-dealers, registered investment advisers, and insurance companies will incur costs associated with conducting the annual review as a result of this rulemaking.

The Department does not have data on how many will incur costs associated with this requirement; however, the Department expects that many of entities already develop an audit report. Broker-dealers are subject to similar annual review and certification requirements under FINRA Rule 3110,[709] FINRA Rule 3120,[710] and FINRA Rule 3130; [711] SEC-registered investment advisers are already subject to retrospective review requirements under SEC Rule 206(4)–7; and insurance companies in many States are already subject to State insurance law based on the NAIC's Model Regulation.[712] Accordingly, in this analysis, the Department assumes that these entities will incur minimal costs to meet this requirement.

In 2018, the Investment Adviser Association estimated that 92 percent of SEC-registered investment advisers voluntarily provide an annual compliance program review report to senior management.[713] The Department assumes that State-registered investment advisers exhibit similar retrospective review patterns as SEC-registered investment advisers. Accordingly, the Department estimates that eight percent of advising retirement plans will incur costs associated with producing a retrospective review report.

The Department assumes that 10 percent of robo-advisers, non-bank trustees, and newly reliant broker-dealers and insurance companies will incur the full cost of producing an audit report. The Department estimates that 0.8 percent of newly reliant registered investment advisers will incur the full cost of producing the audit report.

This results in an estimate of 123 entities not currently producing audit reports, of which 26 are small entities.[714] The remaining 5,629 entities will need to make modifications to satisfy the requirements, of which 1,062

[704] See 84 FR 33318, 33360 (''[W]e encourage broker-dealers to record the basis for their [rollover] recommendations.....'').

[705] Deloitte, *Regulation Best Interest: How Wealth Management Firms are Implementing the Rule Package,* Deloitte, (Mar. 6, 2020).

[706] The burden is estimated as: (4,485,059 rollovers × 49% advisor assisted × 48% not already documenting × (30 minutes ÷ 60 minutes)) + (4,485,059 rollovers × 49% advisor assisted × 52% already documenting × (5 minutes ÷ 60 minutes)) ≈ 622,676 hours. A labor rate of $228.00 is used for a personal financial adviser. The labor rate is applied in the following calculation: 622,676 burden hours × $228 ≈ $141,970,058. Note, the total values may not equal the sum of the parts due to rounding.

[707] The number of disclosures mailed is estimated as: 4,485,059 rollovers × 49% advisor assisted × 3.9% disclosures sent by mail ≈ 85,709 disclosures. The material and postage cost is estimated as: 85,709 disclosures mailed × $0.05 per page × 2 pages ≈ $8,571. Note, the total values may not equal the sum of the parts due to rounding.

[708] Total cost is estimated as: $8,571 materials and postage cost + $141,970,058 to produce the disclosures ≈ $141,978,629. Note, the total values may not equal the sum of the parts due to rounding.

[709] *Rule 3110. Supervision,* FINRA Manual, *https://www.finra.org/rules-guidance/rulebooks/finra-rules/3110.*

[710] *Rule 3120. Supervisory Control System,* FINRA Manual, *https://www.finra.org/rules-guidance/rulebooks/finra-rules/3120.*

[711] *Rule 3130. Annual Certification of Compliance and Supervisory Processes,* FINRA Manual, *https://www.finra.org/rules-guidance/rulebooks/finra-rules/3130.*

[712] NAIC Model Regulation, Section 6.C.(2)(i) (The same requirement is found in the NAIC Suitability in Annuity Transactions Model Regulation (2010), Section 6.F.(1)(f).)

[713] *2018 Investment Management Compliance Testing Survey,* Investment Adviser Association (Jun. 14, 2018), *https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/publications/2018-Investment-Management_Compliance-Testing-Survey-Results-Webcast_pptx.pdf.*

[714] This is estimated as: {[(1,920 broker-dealers + [(8,035 SEC-registered investment advisers + 8,363 State-registered investment advisers) × 8%] + 84 insurers) × 30% that are newly relying on PTE 2020–02] + (200 robo-advisers + 31 non-bank trustees)} × 10% ≈ 123 Financial Institutions. Note: Due to rounding values may not sum.

are small.[715] The Department received no comments on this assumption.

The Department estimates that it will take a legal professional five hours for small firms and ten hours for large firms to produce a retrospective review report, resulting in an estimated cost of $0.2 million.[716] The Department estimates that it will take a legal professional one hour for small firms and two hours for large firms to modify existing reports, on average. This results in an estimated cost of $1.7 million.[717]

The Department estimates it will take a certifying officer two hours for small firms and four hours for large firms to review the report and certify the exemption, resulting in an estimated cost burden of approximately $4.1 million.[718]

This results in a total cost annual cost of $6.0 million.

The Department is clarifying that the Financial Institution must update the policies and procedures as business, regulatory, and legislative changes and events dictate, and to ensure they remain prudently designed, effective, and compliant with the exemption. Under the original exemption, Financial Institutions were already required to maintain their policies and procedures. The Department's estimates for any additional cost for entities updating their policies and procedures are discussed in the section labeled costs associated with written policies and procedures for Financial Institutions, below.

Costs Associated With Written Policies and Procedures for Financial Institutions

The time required to establish, maintain, and enforce written policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards will depend on the size and complexity of the Financial Institution. Entities, particularly small entities, may also get compliance support from third parties which could lead to efficiencies of implementation.

Entities newly reliant upon PTE 2020–02 due to this rulemaking will likely need to develop these policies and procedures. The Department estimates that, for entities newly reliant upon PTE 2020–02 due to this rulemaking, this requirement will take legal professionals 40 hours at a large firm and 20 hours at a small firm in the first year.[719] Retail broker-dealers and all registered investment advisers should have policies and procedures in place to satisfy other regulators that can be amended to comply with this rulemaking. For instance, the Department acknowledges that for registered investment advisers, this rulemaking may apply to a broader range of activities performed than the Advisers Act, and therefore, some registered investment advisers may need to revisit their policies and procedures to ensure compliance. The Department estimates it will take 10 hours for small firms and 20 hours for large firms to amend their policies and procedures. The Department estimates the requirement to have an estimated cost of $18.5 million in the first year.[720]

The rulemaking adds a requirement to review policies and procedures at least annually and to update them as needed to ensure they remain prudently designed, effective, and current. This includes a requirement to update and modify the policies and procedures, as appropriate, after considering the findings in the retrospective review report. The Department estimates that it will take a legal professional an additional five hours for all entities reliant on the exemption. The Department estimates that the requirement results in an estimated first year cost of $10.9 million and an annual cost of approximately $15.4 million in subsequent years.[721]

The amendments also require Financial Institutions to provide their complete policies and procedures to the Department upon request. Based on the number of past cases as well as current open cases that would merit such a request, the Department estimates that it will request 165 policies and procedures in the first year and 50 policies and procedures in subsequent years. The Department assumes that a clerical worker will prepare and send their complete policies and procedures to the Department and that it will take them 15 minutes to do so. The Department received no comments on these assumptions. The Department estimates

[715] This is estimated as: {[(1,920 broker-dealers + 84 insurers + 8,035 SEC-registered investment advisers + 8,363 State-registered investment advisers) × 30% that are newly relying on PTE 2020–02] + (200 robo-advisers + 31 non-bank trustees)} ⊻ ({[(1,920 broker-dealers + [(8,035 SEC-registered investment advisers + 8,363 State-registered investment advisers) × 8%] + 84 insurers) × 30% that are newly relying on PTE 2020–02] + (200 robo-advisers + 31 non-bank trustees)} × 90%) =5,629 Financial Institutions. Note: Due to rounding values may not sum.

[716] The burden is estimated as: (26 small Financial Institutions × 5 hours) + [(96 large Financial Institutions) × 10 hours] ≈ 1,094 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: {(26 small Financial Institutions × 5 hours) + [(96 large Financial Institutions) × 10 hours]} × $165.71 ≈ $181,289. Note, the total values may not equal the sum of the parts due to rounding.

[717] The burden is estimated as: (1,062 small Financial Institutions × 1 hours) + [(4,567 large Financial Institutions) × 2 hours] ≈ 10,196 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: {(1,062 small Financial Institutions × 1 hours) + [(4,567 large Financial Institutions) × 2 hours]} × $165.71 ≈ $1,689,582. Note, the total values may not equal the sum of the parts due to rounding.

[718] The burden is estimated as: (1,088 small Financial Institutions × 2 hours) + [(4,663 large Financial Institutions) × 4 hours] ≈ 20,830 hours. A labor rate of $198.25 is used for a financial manager. The labor rate is applied in the following calculation: 20,830 burden hours × $198.25 ≈ $4,129,476 Note, the total values may not equal the sum of the parts due to rounding.

[719] The Department estimates that 3,531 entities, consisting of 302 retail broker-dealers, 129 non-retail broker-dealers, 85 SEC-registered retail registered investment advisers, 144 SEC-registered non-retail registered investment advisers, 2,192 State-registered retail registered investment advisers, 568 State-registered non-retail registered investment advisers, 71 insurers and insurance agents, 10 robo-advisers, and 31 non-bank trustees, are considered small entities. For more information, refer to the Affected Entities discussion in the Regulatory Flexibility Act section of this document.

[720] The burden is estimated as follows: [(302 small retail broker-dealers + 85 small SEC-registered retail registered investment advisers + 144 small SEC-registered non-retail registered investment advisers + 2,192 small State-registered retail registered investment advisers + 568 small State-registered non-retail registered investment advisers) × 30% newly reliant on the PTE × 10 hours] + {[(1,017 large retail broker-dealers + 129 small non-retail broker-dealers + 4,859 large SEC-registered retail registered investment advisers + 2,947 large SEC-registered non-retail registered investment advisers + 4,450 large State-registered retail registered investment advisers + 1,153 large State-registered non-retail registered investment advisers + 71 small insurers) × 30% newly reliant on the PTE] + (10 small robo-adviser + 31 non-bank trustees) × 20 hours} + {[(471 large non-retail broker-dealers + 13 large insurers) × 30% newly reliant on the PTE] + 190 large robo-advisers) × 40 hours]} ≈ 111,864 hours. The labor rate is applied in the following calculation: 111,864 burden hours × $165.71 ≈ $18,536,977. Note, the total values may not equal the sum of the parts due to rounding.

[721] The burden is estimated as follows: The first-year cost of updating policies and procedures for plans that currently have policies and procedures: [(302 small retail broker-dealers + 85 small SEC-registered Retail registered investment advisers + 144 small SEC-registered non-retail registered investment advisers + 2,192 small State-registered retail registered investment advisers + 568 small State-registered non-retail registered investment advisers) × 30% newly reliant on the PTE] + [(1,018 large retail broker-dealers + 129 small non-retail broker-dealers + 4,859 large SEC-registered retail registered investment advisers + 2,947 large SEC-registered non-retail registered investment advisers + 4,450 large State-registered retail registered investment advisers + 1,153 large State-registered non-retail registered investment advisers + 71 small insurers) × 30% newly reliant on the PTE] + (10 small robo-adviser + 30 small non-bank trustees) + [(471 large non-retail broker-dealers + 13 large insurers) × 70% already reliant on the PTE] + (190 large robo-advisers + 1 large non-bank trustees) ≈ 13,112 entities. The burden estimate is calculated as: 13,112 × 5 hours ≈ 65,559 hours. The labor rate is applied in the following calculation: 65,559 hours × $165.71 ≈ $10,863,864. In subsequent years the cost of updating is calculated as: (All 18,632 affected entities × 5 hours) ≈ 93,161 burden hours. The labor rate is applied in the following calculation: 93,161 burden hours × $165.71 burden hours = $15,437,780. Note, the total values may not equal the sum of the parts due to rounding.

that the requirement will result in an estimated cost of approximately $2,700 in the first year [722] and $800 in subsequent years.[723] The Department assumes Financial Institutions will send the documents electronically and thus will not incur costs for postage or materials.

This results in a total cost of $29.4 million in the first year and $15.4 million in subsequent years.[724]

Summary of Total Cost for the Amendments to PTE 2020–02

The Department estimates that in order to meet the additional conditions of the amended PTE 2020–02, affected entities will incur a total cost of $248.1 million and a per-firm cost of $13,314 in the first year and a total cost of $165.5 million and a per-firm cost of $8,883 in subsequent years.[725]

Costs Associated With PTE 84–24

PTE 84–24 provides an exemption for insurance agents, insurance brokers, and pension consultants to receive a sales commission from an insurance company for the purchase of an insurance or annuity contract with plan or IRA assets. Relief is also provided for a principal underwriter for an investment company registered under the Investment Company Act of 1940 to receive a sales commission for the purchase of securities issued by the investment company with plan or IRA assets.

The Department is amending PTE 84–24 to exclude the receipt of compensation received as a result of providing investment advice from the existing relief. Except for Independent Producers, fiduciary advisers will be expected to rely on the relief provided by PTE 2020–02, rather than PTE 84–24. The rulemaking provides exemptive relief to fiduciaries who are Independent Producers that recommend annuities from an unaffiliated Financial Institution to Retirement Investors. Relief for Independent Producers depends on protective conditions that substantially mirror those contained in PTE 2020–02. The conditions are tailored to protect Retirement Investors from the specific conflicts that arise for Independent Producers who are compensated through commissions when providing investment advice to Retirement Investors regarding the purchase of an annuity.

Some commenters remarked that the proposal had underestimated the number of Independent Producers that would be affected by the proposal. As discussed in the Affected Entities section of this analysis, the Department has considered the comments and revised its estimate of the number of Independent Producers and the number of transactions affected by the amendments to PTE 84–24. Commenters also remarked that the Department had underestimated the costs that entities relying on the NAIC Model Regulation would incur to comply with the proposal. Accordingly, the Department has reviewed the requirements of the NAIC Model Regulation and has modified its time estimates, described in further detail below.

The Department recognizes that entities within the insurance industry are subject to different regulatory regimes, depending on the types of products they offer. The Department does not have data on what proportion of entities are subject to the requirements in the NAIC Model Regulation, SEC, or State insurance departments. The analysis below considers a level of prior compliance with other regulators, when estimating the cost of compliance as many of these entities are already meeting some, if not most, of the requirements of this rulemaking.

Summary of Affected Entities

The Department expects that 87,799 entities will be affected by the amendments to PTE 84–24, consisting of 1,011 pension consultants, 10 investment company principal underwriters that service plans, 10 investment company principal underwriters that service IRAs, 86,410 Independent Producers, and 358 insurance companies.[726] Additionally, the Department estimates that 1,727 plans will be affected by the amendments.[727]

Costs of Rule Review

The Department estimates that entities—including pension consultants, investment company principal underwriters, and insurance companies—currently relying on the exemption will need to review the rule. In the proposal, the Department assumed that rule review would take, on average, two hours. The Department received several comments indicating that this was an underestimate. Upon, further consideration and consistent with the changes made to PTE 2020–02, the Department estimates that such a review will take each Financial Institution, on average, 20 hours to review the rule. Applying the labor rate associated with legal professionals, this results in an estimated cost of approximately $4.6 million.[728]

The Department understands that Independent Producers will also need to understand the rule and how it affects their business. It is expected that they will get substantial help in compliance from third parties such as the insurance carriers they represent or the IMOs they contract with in preparing materials and training. The Department allocates five hours of time per Independent Producer to review the policies and procedures developed by the carriers and integrate the standards into their independent business practices. The Department estimates this to cost roughly $71.4 million in total, assuming an opportunity cost of $165.29 per hour for the Independent Producer.[729] Therefore, the total cost associated with rule familiarization is estimated to be $76.0 million.[730]

[722] The burden is estimated as: (165 × (15 minutes ÷ 60 minutes)) ≈ 41 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: (165 × (15 minutes ÷ 60 minutes)) × $65.99 ≈ $2,722. Note, the total values may not equal the sum of the parts due to rounding.

[723] The burden is estimated as: (50 × (15 minutes ÷ 60 minutes)) = 13 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: (50 × (15 minutes ÷ 60 minutes)) × $65.99 ≈ $825. Note, the total values may not equal the sum of the parts due to rounding.

[724] The cost in the first year is estimated as: ($18,536,977 + $10,863,864 + $2,722) ≈ $29,403,563. The cost in subsequent years is estimated as: ($15,437,780 + $825) ≈ $15,438,605. Note, the total values may not equal the sum of the parts due to rounding.

[725] The first-year total cost includes: ($61,751,119 for rule review + $8,929,550 for general disclosures + $141,978,629 for rollover disclosures + $6,000,348 for the retrospective review + $29,403,563 for policies and procedures) = $248,063,209. The total cost in subsequent years includes: ($2,085,338 for general disclosures + $141,978,329 for rollover disclosures + $6,000,348 for the retrospective review + $15,538,605 for policies and procedures) = $165,502,919. Note, the total values may not equal the sum of the parts due to rounding.

[726] For more information on how the number of each entity type is calculated, refer to the Affected Entities section.

[727] For more information on how the number of each entity type is calculated, refer to the Affected Entities section.

[728] The burden is estimated as: (1,389 entities × 20 hours) ≈ 27,772 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: 27,772 burden hours × $165.71 ≈ $4,602,148.

[729] The cost estimate for Independent Producers is estimated as: 86,410 Independent Producers × 5 hours ≈ 432,050 burden hours. The labor rate is applied in the following calculation: (86,410 Independent Producers × 5 hours) × $165.29 ≈ $71,413,545. Note, the total values may not equal the sum of the parts due to rounding.

[730] Combining the $4,602,148 for firms and the $71,413,545 results in a total estimated cost of $76,015,692.

Costs Associated With Disclosures to Investors

The amendment requires Independent Producers to provide disclosures to Retirement Investors at or before engaging in a transaction covered by this exemption. Under the amendments, Independent Producers seeking relief will be required to provide:

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

(2) a written statement of the Care Obligation and Loyalty Obligation that is owed;

(3) a disclosure of all material facts relating to the scope and terms of the relationship with the Retirement Investor, such as material fees and costs, the types and scope of services provided, and notice of the Retirement Investor's right to request additional information regarding cash compensation;

(4) a disclosure of all material facts relating to Conflicts of Interest that are associated with the recommendation;

(5) a written explanation of the basis to recommend an annuity; and

(6) a written explanation of the basis to recommend a rollover.

Costs Associated With Preparing General Disclosure Documents

For more generalized disclosures, the Department assumes that insurance companies will prepare and provide disclosures required by the exemption to Independent Producers selling their products. Additionally, in the PTE 84–24, the Department is providing model language that will satisfy the requirements associated with the written fiduciary acknowledgement and written statement of the Care Obligation and Loyalty Obligation.

However, some of the disclosures required by the exemption are tailored specifically to the Independent Producer. For these, the Department assumes that the disclosure will need to be prepared by the Independent Producer themselves. The Department recognizes that some may rely on intermediaries in the distribution channel to prepare more specific disclosures and that the costs associated with the preparation will be covered by charges imposed by the intermediary for its services. The costs for the intermediary to prepare the disclosure may result in an increase in charges. The Department expects that this charge will not exceed the cost of preparing the disclosure in house.

Costs Associated With the Written Fiduciary Acknowledgement

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

Due to the nature of Independent Producers, the Department assumes that most Insurers will make draft disclosures available to Independent Producers, pertaining to their fiduciary status. However, the Department expects that a small percentage of Independent Producers—about 5 percent or 4,320 Independent Producers—may draft their own disclosures. The Department assumes that a legal professional for each of the 358 insurance companies and an insurance sales agent for 4,320 Independent Producers, will spend 30 minutes to produce a written acknowledgement in the first year. This results in an estimated cost of approximately $387,000 in the first year.[731]

Cost Associated With the Statement of the Care Obligation and Loyalty Obligation

Regarding the required written statement of the Care Obligation and Loyalty Obligation owed by the Independent Producer, the Department similarly assumes that most Insurers will make draft disclosures available to Independent Producers. Further, the Department has provided model language that satisfied this requirement. The Department assumes that a legal professional for each of the 358 insurance companies will spend one hour of legal staff time and 5 percent of Independent Producers, or 4,320 Independent Producers, will spend one hour to prepare the statement in the first year. This results in an estimated cost of approximately $773,000 in the first year.[732]

Costs Associated With the Relationship and Conflict of Interest Disclosure

The rulemaking expands on the existing requirement for a written description of the services provided to also require a statement on whether the Retirement Investor would pay for such services, directly or indirectly, including through third-party payments. This disclosure must also include a notice of the Retirement Investor's right to request additional information regarding cash compensation.

The Department recognizes that many Independent Producers may not have the internal resources to prepare such disclosure. The Department expects that some may rely on intermediaries in the distribution channel to prepare the disclosures and some may seek external legal support. However, the Department expects that these costs associated with the preparation will be covered by charges imposed by the intermediary for its services or by the fee paid to external legal support. As such, the Department still attributes this cost to the Independent Producer. The Department received several comments regarding the number of Independent Producers and has revised its estimate of them in its analysis.

Accordingly, the Department assumes that all 86,410 Independent Producers in this analysis will need to prepare the disclosure. The Department assumes that for small Independent Producers, a legal professional will spend three hours of legal staff time drafting the written material facts disclosure, while for large Independent Producers, a legal professional will spend five hours of legal staff time drafting the written disclosure. This results in an estimated cost of approximately $43.2 million in the first year.[733]

[731] The burden is estimated as: [(358 Financial Institutions + 4,320 Independent Producers) × (30 minutes ÷ 60 minutes)] ≈ 2,339 hours. A labor rate of approximately $165.71 is used for a legal professional and $165.29 is used for an independent producer. The labor rates are applied in the following calculation: [(358 Financial Institutions × (30 minutes ÷ 60 minutes)) × $165.71] + [(4,320 Independent Producers × (30 minutes ÷ 60 minutes)) × $165.71] ≈ $386,657. Note, the total values may not equal the sum of the parts due to rounding.

[732] This is estimated as: (4,320 Independent Producers + 358 insurance companies) × 1 hour ≈ 4,678 hours. A labor rate of $165.29 is used for an Independent Producer and $165.71 for a legal professional at an insurance company. The labor rate is applied in the following calculation: (4,320 Independent Producers × 1 hour × $165.29) + (358 insurance companies × 1 hour × $165.71) ≈ $773,313. Note, the total values may not equal the sum of the parts due to rounding.

[733] The burden is estimated as: [(85,541 small Independent Producers × 3 hours) + (869 large Independent Producers × 5 hours)] ≈ 260,967 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: [(85,541 small Independent Producers × 3 hours) + (869 large Independent Producers × 5 hours)] × $165.71 ≈ $43,244,858. Note, the total values may not equal the sum of the parts due to rounding.

Costs Associated With the Compensation Disclosure

Upon request of the Retirement Investor, the Independent Producer must disclose a reasonable estimate of the amount of cash compensation received and the frequency of occurrence. The Department is adopting a structure similar to that of the NAIC Model Regulation and New York Rule 194, such that Retirement Investors will first receive a notice of their right to request additional information regarding cash compensation and will only receive such information if requested. The Department expects that Independent Producers will not incur a significant cost to provide this information. Based on observations of similar disclosure structures, the Department estimates that 10 percent of the estimated 500,000 annual transactions will include a request for this disclosure. The cost associated with the provision of this custom disclosure will be discussed in the Costs Associated with the Provision of Disclosures to Retirement Investors section below.

Costs Associated With Documenting the Basis for an Annuity Recommendation, Rollover Recommendation, or Making a Recommendation to a Plan Participant as to the Post-Rollover Investment of Assets Currently Held in a Plan

The amendment requires an Independent Producer to provide a disclosure to investors that documents the Independent Producer's consideration to recommend an annuity or rollover. Due to the fact-specific nature of this disclosure, the Department assumes that the content of the disclosure will need to be prepared by the Independent Producer. The Department recognizes that some may rely on intermediaries in the distribution channel, and some may seek external legal support to assist with drafting the disclosures. However, the Department expects that most Independent Producers will prepare the disclosure themselves. The Department received no comments on this assumption.

The Department estimates that 500,000 Retirement Investors will receive documentation of the basis for recommending an annuity each year.[734] The Department assumes that, for each of these Retirement Investors, an Independent Producer will spend one hour of their time drafting the documentation. This results in an estimated cost of approximately $41.3 million annually.[735]

Costs Associated With the Provision of Disclosures to Retirement Investors

As described in the Affected Entities section, the Department estimates that 500,000 Retirement Investors will engage in covered transactions with an Independent Producer, and therefore receive documentation of the basis for recommending an annuity each year.[736]

As discussed at the beginning of the cost section, the Department assumes that 28.2 percent of disclosures sent to IRA owners will be mailed. Accordingly, of the estimated 500,000 affected Retirement Investors, 141,000 Retirement Investors are estimated to receive paper disclosures.[737] For paper copies, an insurance sales professional is assumed to take two minutes to prepare and mail the required information to the Retirement Investor. Thus, this requirement results in an estimated labor cost of approximately $777,000.[738] The Department assumes that each disclosure will include seven pages, resulting in annual material and paper costs of approximately $145,000.[739] Additionally, as discussed above, the Department estimates that 10 percent of Retirement Investors will request additional compensation information and will need to be provided with an additional compensation disclosure. The Department assumes it will take 10 minutes to complete the estimated two-page disclosure and prepare it for mailing, resulting in a cost of approximately $1.5 million annually.[740]

Additionally, Independent Producers are required to send the documentation to the Insurer. The Department expects that such documentation will be sent electronically and result in a de minimis burden. The Department received no comments on this assumption.

Summary Costs Associated With Disclosures

The estimates described above result in a total cost estimate of $88.1 million in the first year and $43.7 million in subsequent years for the preparation and provision of all disclosures.[741]

Costs Associated With Policies and Procedures

The amendment requires Insurers to establish, maintain, and enforce written policies and procedures to review each recommendation from an Independent Producer before an annuity is issued to a Retirement Investor. The Insurer's policies and procedures must mitigate conflicts of interest to the extent that a reasonable person reviewing the policies and procedures and incentive practices as a whole would conclude that they do not create an incentive for the Independent Producer to place its interests, or those of the insurance, or any affiliate or related entity, ahead of the interests of the Retirement Investor. Insurers' policies and procedures must also include a prudent process for determining whether to authorize an Independent Producer to sell the Insurer's annuity contracts to Retirement Investors, and for taking action to protect Retirement Investors from Independent Producers who have

[734] For information on this estimate, refer to the estimate of IRAs affected by the amendments to PTE 84–24 in the Affected Entities section.

[735] The burden is estimated as: 500,000 rollovers × (30 minutes ÷ 60 minutes) = 250,000 hours. A labor rate of approximately $165.29 is used for an Independent Producer. The labor rate is applied in the following calculation: [500,000 rollovers × (30 minutes ÷ 60 minutes)] × $165.29 = $41,322,500. Note, the total values may not equal the sum of the parts due to rounding.

[736] For information on this estimate, refer to the estimate of IRAs affected by the amendments to PTE 84–24 in the Affected Entities section.

[737] This is estimated as: (500,000 Retirement Investors × 28.2%) = 141,000 paper disclosures. Note, the total values may not equal the sum of the parts due to rounding.

[738] This is estimated as: (141,000 paper disclosures × (2 minutes ÷ 60 minutes)) = 4,700 hours. A labor rate of $165.29 is used for an insurance sales agent. The labor rate is applied in the following calculation: (141,000 paper disclosures × (2 minutes ÷ 60 minutes)) × $165.29 = $776,863. Note, the total values may not equal the sum of the parts due to rounding.

[739] This is estimated as: 141,000 rollovers resulting in a paper disclosure × [$0.68 postage + ($0.05 per page × 7 pages)] = $145,230. Note, the total values may not equal the sum of the parts due to rounding.

[740] The labor cost is estimated as: (50,000 disclosures × 28.2% sent by mail × (10 minutes ÷ 60 minutes)) = 8,803 hours. A labor rate of $165.29 is used for an insurance sales agent. The labor rate is applied in the following calculation: (50,000 disclosures × 28.2% sent by mail × (10 minutes ÷ 60 minutes)) × $165.29 = $1,455,103. The material cost is estimated as: 14,100 rollovers resulting in a paper disclosure × [$0.68 postage + ($0.05 per page × 2 pages)] = $10,998. The total cost is estimated as: $1,455,103 + $10,998 = $1,466,101. For more information on the assumptions included in this calculation, refer to the regulatory impact analysis of this document. Note, the total values may not equal the sum of the parts due to rounding.

[741] The cost in the first year is estimated as: ($386,657 for the disclosure confirming fiduciary status + $773,313 for the written statement of the Care Obligation & Loyalty Obligation Owed + $43,244,858 for the statement in the Relationship and Conflict of Interest disclosure + $41,322,500 for the rollover disclosure) + ($776,863 to prepare and send disclosures + $145,230 for material and postage costs) + ($1,455,103 for additional compensation disclosure preparation + $10,998 for materials and postage) = $88,115,522.The cost in subsequent years is estimated as: ($41,322,500 for the rollover disclosure + $776,863 to prepare and send disclosures + $145,230 for material and postage costs) + (1,455,103 for additional compensation disclosure + $10,998 for materials and postage) = $43,710,694. Note, the total values may not equal the sum of the parts due to rounding. Note, the total values may not equal the sum of the parts due to rounding.

failed to adhere to the Impartial Conduct standards, or who lack the necessary education, training, or skill. Finally, Insurers must provide their complete policies and procedures to the Department within 30 days upon request.

These requirements are consistent with, though more protective than, the requirements in NAIC Model Regulation. The NAIC Model Regulation has been updated and revised several times; however, both the 2010 NAIC Model Regulation [742] and the 2020 revisions to the NAIC Model Regulation [743] include a requirement to ''establish and maintain procedures for the review of each recommendation prior to issuance of an annuity.'' [744] While the 2010 version required that such procedures be ''designed to ensure that there is a reasonable basis to determine that a recommendation is suitable,'' [745] the 2020 version requires such procedures be ''designed to ensure there is a reasonable basis to determine that the recommended annuity would effectively address the particular consumer's financial situation, insurance needs and financial objectives.'' [746]

Most States have adopted some form of the NAIC Model Regulation, and, to date, 43 States have adopted the most recent version, and New York has adopted its own, more protective set of requirements in New York Rule 187.[747] The Harkin Amendment, Section 989J of the Dodd-Frank Act, requires States to adopt rules that meet or exceed the minimum requirements of model regulation modifications within five years of adoption.[748]

While many Insurers may have policies and procedures in place that largely satisfy the requirements of the rulemaking, the Department expects that many will need to change and improve policies and procedures to be fully compliant.

The Department received several comments indicating that the time needed to develop policies and procedures was underestimated. In response, the Department has revised upwards both the time to develop policies and procedures, as well as the time to review the rule, which includes any planning necessary for implementation.

The Department expects that satisfying this requirement will be more time consuming for larger entities due to the complexity of their businesses. The Department assumes that, for each large Insurer, legal professionals will spend, on average, 40 hours of legal staff time drafting or modifying the policies and procedures, and for each small insurance company, legal professionals will spend, on average, 20 hours of legal staff time. This results in an estimated cost of approximately $1.4 million in the first year.[749]

The rulemaking requires that the Insurer update and modify policies and procedures in response to the findings of the retrospective review. Accordingly, in the following years, the Department assumes for each Insurer, legal professionals will spend five hours reviewing. This results in an estimated cost of approximately $296,000 in subsequent years.[750]

The rule also requires Insurers to review each of the Independent Producer's recommendations before an annuity is issued to a Retirement Investor to ensure compliance with the Impartial Conduct Standards and other conditions of this exemption. The Department assumes that for each Insurer, reviewing the recommendations of Independent Producers will take approximately 30 minutes. This results in an estimated cost of approximately $49.6 million each year.[751]

The rulemaking also requires Insurers to provide their complete policies and procedures to the Department within 30 days of request. As discussed above for PTE 2020–02, the Department estimates that it will request 165 policies and procedures in the first year and 50 in subsequent years. Assuming that the number of requests for the entities covered under PTE 2020–02 is equivalent to the number of requests for the entities covered under PTE 84–24, the Department assumes that it will request three policies and procedures from insurers in the first year and one request in subsequent years, on average.[752] This results in an estimated cost of approximately $50 in the first year [753] and $15 in subsequent years.[754]

The Department estimates that satisfying the requirements described above will result in a total cost of approximately $50.9 million in first year and $49.9 million in subsequent years.[755]

[742] NAIC, *Model Suitability Regulations,* § 6(F)(1)(d) NAIC (2010), *https://naic.soutronglobal.net/Portal/Public/en-GB/RecordView/Index/25201.*

[743] NAIC, *Model Suitability Regulations,* § 6(F)(1)(d) NAIC (2010), *https://naic.soutronglobal.net/Portal/Public/en-GB/RecordView/Index/25201.*

[744] This language was included in both the 2010 and 2020 versions of Model Regulation 275. See NAIC, *Model Suitability Regulations,* § 6(F)(1)(d) NAIC (2010), *https://naic.soutronglobal.net/Portal/Public/en-GB/RecordView/Index/25201.;* NAIC, *Model Suitability Regulations,* § 6(F)(1)(d) NAIC (2020).

[745] NAIC, *Model Suitability Regulations,* § 6(F)(1)(d) NAIC (2010), *https://naic.soutronglobal.net/Portal/Public/en-GB/RecordView/Index/25201.*

[746] NAIC, *Model Suitability Regulations,* § 6(F)(1)(d) NAIC (2020), *https://content.naic.org/sites/default/files/inline-files/MDL-275.pdf.*

[747] When the Department conducted its analysis of States in July 2023, 39 States had adopted the NAIC Model Regulation, including its best interest standard: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. Since then, the NAIC Model Regulation has also been adopted by Utah, Oklahoma, Vermont, and California. NAIC, *Implementation of 2020 Revision to Model #275: Suitability in Annuity Transaction Model Regulations,* (January 2024),*https://content.naic.org/sites/default/files/files/cmte-a-aswg-mdl-275-adoption-map_4.pdf.* New York's Rule 187 also contains a best interest standard in Section 224.4 and policy and procedure requirements in Section 224.6.

[748] NAIC. *Suitability in Annuity Transactions Model Regulation* (#275) Best Interest Standard of Conduct Revisions Frequently Asked Question, (May 2021).

[749] This is estimated as: (301 small insurance companies × 20 hours) + (57 large insurance companies × 40 hours) ≈ 8,286 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: 8,286 hours × $165.71 ≈ $1,373,123. Note, the total values may not equal the sum of the parts due to rounding.

[750] This is estimated as: 358 insurance companies × 5 hours ≈ 1,788 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: (358 insurance companies × 5 hours) × $165.71 ≈ $296,302. Note, the total values may not equal the sum of the parts due to rounding.

[751] This is estimated as: (500,000 recommendations × (30 minutes ÷ 60 minutes)) ≈ 250,000 hours. A labor rate of $198.25 is used for a financial professional. The labor rate is applied in the following calculation: (500,000 recommendations × (30 minutes ÷ 60 minutes)) × $198.25 ≈ $49,562,500. Note, the total values may not equal the sum of the parts due to rounding.

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

[753] The burden is estimated as: 3 requests × (15 minutes ÷ 60 minutes) = 0.75 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: (3 requests × (15 minutes ÷ 60 minutes)) × $65.99 = $49.49.

[754] The burden is estimated as: 1 request × (15 minutes ÷ 60 minutes) = 0.25 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: (1 request × (15 minutes ÷ 60 minutes)) × $65.99 = $16.50.

[755] The cost in the first year is estimated as: ($1,373,123 to develop policies and procedures + $49,562,500 to review rollover recommendations + $49 to provide policies and procedures to the Department) = $50,935,672. The cost in subsequent years is estimated as: ($296,302 to review policies and procedures + $49,562,500 to review rollover

Continued

Costs Associated With Retrospective Review

The amendment requires Insurers to conduct a retrospective review at least annually. The review is required to be reasonably designed to prevent violations of and achieve compliance with (1) the Impartial Conduct Standards, (2) the terms of this exemption, and (3) the policies and procedures governing compliance with the exemption. The review is required to evaluate the effectiveness of the supervision system, any noncompliance discovered in connection with the review, and corrective actions taken or recommended, if any. The retrospective review must also include a review of Independent Producers' rollover recommendations and the required rollover disclosure.

As part of this review, the Insurer must prudently determine whether to continue to permit individual Independent Producers to sell the Insurer's annuity contracts to Retirement Investors. Additionally, the Insurer must update the policies and procedures as business, regulatory, and legislative changes and events dictate, and to ensure they remain prudently designed, effective, and compliant with the exemption.

The Insurer annually must provide a written report to a Senior Executive Officer which details the review. A Senior Executive Officer is any of the following: the chief compliance officer, the chief executive officer, president, chief financial officer, or one of the three most senior officers of the Financial Institution. The Senior Executive Officer must annually certify that (A) the officer has reviewed the report of the retrospective review; (B) the Insurer has provided Independent Producers with the methodology and results of the retrospective review, has corrected any prohibited transactions—including paying excise taxes and reporting to the IRS, and that the Insurer has received a certification that the Independent Producer has filed Form 5330 within 30 days after the form is due; (C) the Insurer has established policies and procedures prudently designed to ensure that Independent Producers achieve compliance with the conditions of this exemption, and has updated and modified the policies and procedures as appropriate after consideration of the findings in the retrospective review report; and (D) the Insurer has in place a prudent process to modify such policies and procedures.

Insurers are also required to provide the Independent Producer with the underlying methodology and results of the retrospective review, including a description of any non-exempt prohibited transaction the Independent Producer engaged in with respect to investment advice defined under Code section 4975(e)(3)(B). The Insurer must instruct the Independent Producer to correct any prohibited transactions, report those transactions to the IRS on Form 5330 and provide a copy of that form to the Insurer, and pay any resulting excise taxes imposed by Code section 4975. The Department assumes that the insurance company will provide the methodology and results electronically.

The Department lacks data on the average number of Independent Producers selling annuities per insurance company. For the purposes of this analysis, the Department assumes that, on average, each Independent Producer sells the products of three insurance companies. From each of these insurance companies, they may sell multiple products. As such, the Department assumes that each year, insurance companies will need to prepare approximately 259,230 retrospective reviews,[756] or on average, each Insurer will need to prepare approximately 725 retrospective reviews.[757]

The Department received comments remarking that its estimate for the retrospective review understated the burden of this requirement. In the final rulemaking, the Department has stated that Insurers may use sampling in their review of an Independent Producer's transactions so long as any sampling or other method is designed to identify potential violations, problems, and deficiencies that need to be addressed. With this in mind, the Department has not revised its estimate of the average time conducting the retrospective review of each Independent Producer will take. However, the Department received several comments regarding the number of Independent Producers and has revised them upward in our analysis. This has increased the total estimated cost of the retrospective review requirement.

The Department assumes that, for each Independent Producer selling an Insurer's products, legal professionals at the insurance company will spend one hour of legal staff time, on average, conducting and drafting the retrospective review. This results in an estimated cost of approximately $43.0 million.[758]

The Department assumes it will take a Senior Executive Officer four hours to review and certify the reports. This results in an estimated annual cost of approximately $0.2 million.[759]

The Department assumes that the insurance company will provide the methodology and results electronically. The Department received no comments on this assumption. The Department estimates that it will take clerical staff five minutes each to prepare and send each of the estimated 259,230 retrospective reviews. This results in an estimated annual cost of approximately $1.4 million.[760] The Department expects the results to be provided electronically, thus the Department does not expect there to be any material costs with providing Independent Producers with the retrospective review.

The Department estimates that satisfying the requirements for retrospective reviews will result in an estimated total annual cost of approximately $44.6 million.[761]

The cost associated with updating and modifying policies and procedures in response to the findings of the retrospective review is discussed above in the discussion of policies and procedures.

Costs Associated With Self-Correction

The amendment requires an Independent Producer that chooses to use the self-correction provision of the exemption to notify the Insurer of any corrective actions taken due to a violation of the exemption's conditions. As discussed above, the Insurer must

recommendations + $16 to provide policies and procedures to the Department) = $49,858,818. Note, the total values may not equal the sum of the parts due to rounding.

[756] This is estimated as: 86,410 Independent Producers × 3 insurance companies covered ≈ 259,230 retrospective reviews.

[757] This is estimated as: 259,230 retrospective reviews ÷ 358 insurance companies ≈ 725 retrospective reviews, on average.

[758] This is estimated as: 259,230 retrospective reviews × 1 hour ≈ 259,230 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: (259,230 retrospective reviews × 1 hour) × $165.71 ≈ $42,957,003. Note, the total values may not equal the sum of the parts due to rounding.

[759] This is estimated as: 358 firms × 4 hours ≈ 1,430 hours. A labor rate of $133.24 is used for a Senior Executive Officer. The labor rate is applied in the following calculation: 1,430 hours × $133.24 ≈ $190,594.

[760] This is estimated as: 259,230 retrospective reviews × (5 minutes ÷ 60 minutes) ≈ 21,603 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: (259,230 retrospective reviews × (5 minutes ÷ 60 minutes)) × $65.99 ≈ $1,425,549. Note, the total values may not equal the sum of the parts due to rounding.

[761] The annual cost is estimated as: ($42,957,003 to conduct the retrospective review + $190,594 for the review of the retrospective review + $1,425,549 for the provision of the report to Independent Producers) = $44,573,147. Note, the total values may not equal the sum of the parts due to rounding.

discuss corrective actions in the retrospective review. The Department does not have data on how often violations will occur, or on how often Independent Producers will choose to use the self-correction provisions of the amendment. The Department expects that such violations will be rare. For illustration, the Department assumes that one percent of transactions will result in self-correction, which would result in 5,000 notifications of self-correction being sent. Assuming it will take an Independent Producer 30 minutes, on average, to draft and send a notification to the insurance company, it will result in an annual cost of approximately $413,000.[762]

The self-correction provisions of this rulemaking allow entities to correct violations of the exemption in certain circumstances, when either the Independent Producer has refunded any charge to the Retirement Investor or the Insurer has rescinded a mis-sold annuity, canceled the contract, and waived the surrender charges. The correction must occur within 90 days of the day the Independent Producer learned or should have learned of the violation. The Independent Producer must notify the Insurer responsible for conducting the retrospective review, and the violation and correction must both appear in the written report of the retrospective review. Without the self-correction provisions, an Independent Producer would also be required to report those transactions to the IRS on Form 5330 and pay the resulting excise taxes imposed by Code section 4975 in connection with non-exempt prohibited transactions involving investment advice under Code section 4975(e)(3)(B).[763]

Costs Associated With Recordkeeping

The final amendment incorporates a new recordkeeping provision for transactions involving the provision of fiduciary investment advice that is similar to the recordkeeping provision in PTE 2020–02 and retains the existing recordkeeping requirements in Section V(e) of PTE 84–24 for transactions that do not involve the provision of fiduciary investment advice. In the proposal, the Department proposed a broader recordkeeping requirement, but in response to comments, the final amendment scaled back the amended recordkeeping conditions in the exemption. The recordkeeping provision in the final amendment requires Independent Producers to maintain for six years from the date of a covered transaction sufficient records to demonstrate that the conditions of the exemption have been met.

For this analysis, the Department only considers the cost for Insurers and Independent Producers complying with the new recordkeeping requirements. The Department estimates that the additional time needed to maintain records to be consistent with the exemption will require an Independent Producer and Insurers two hours, resulting in an estimated cost of $28.7 million.[764]

Summary of Total Cost for the Amendments to PTE 84–24

The Department estimates that in order to meet the additional conditions of the amended PTE 84–24, affected entities will incur a total cost of $288.7 million in the first year and $167.2 million in subsequent years.[765]

Costs Associated With the Mass Amendments

The following analysis summarizes the changes and associated costs to PTE 75–1, PTE 77–4, PTE 1980–83, PTE 83–1, and PTE 86–128. For more information on the cost estimates, refer to the Paperwork Reduction Act statements for the amendments, published elsewhere in today's edition of the **Federal Register**.

The most significant change in the amendments to PTEs 75–1, 77–4, 80–83, 83–1, and 86–128 is the removal of relief for the receipt of compensation by an investment advice fiduciary in connection with the provision of fiduciary investment advice. Entities previously relying on these exemptions for relief concerning investment advice will be required to meet the conditions of PTE 2020–02 or PTE 84–24 to receive relief. Several commenters on the proposal expressed concern about the cost burden associated this change, with many stating that the Department had not considered the cost associated with moving to PTE 2020–02. In consideration with these comments, the Department has increased its cost estimates for entities newly relying on PTE 2020–02 and PTE 84–24. The increases include significant increases in the cost estimates to review and implement the rule and to establish policies and procedures. For a complete discussion of the cost estimates, refer to the discussion of costs associated with PTE 2020–02 and PTE 84–24 above.

Costs Associated With PTE 75–1

In the proposal, the Department proposed to amended PTE 75–1 Parts II and V to adjust the recordkeeping requirement to shift the burden from plans and IRA owners to Financial Institutions. In the final rulemaking, the Department has decided to keep the recordkeeping requirement unchanged from the existing exemption.

Summary of Affected Entities

The amendment to PTE 75–1 affects banks, reporting dealers, and broker-dealers registered under the Securities Exchange Act of 1934. As discussed in the Affected Entities section above, the Department estimates that 1,919 broker-dealers and 2,025 banks will use PTE 75–1.[766]

Costs Associated With Disclosure Requirements in Part V

The Department amends PTE 75–1 Part V to allow an investment advice fiduciary to receive reasonable compensation for extending credit to a plan or IRA to avoid a failed purchase or sale of securities involving the plan or IRA if (1) the terms of the extension of credit are at least as favorable to the plan or IRA as the terms available in an arm's length transaction between unaffiliated parties, and (2) prior to the extension of credit, the plan or IRA receives written disclosure, including the interest rate or other fees that will be charged on the credit extension as well as the method of determining the balance upon which interest will be charged.

[762] The burden is estimated as: (500,000 transaction × 1% of transactions resulting in self-correction × (30 minutes ÷ 60 minutes)) = 2,500 hours. A labor rate of $165.29 is used for an Independent Producer. The labor rate is applied in the following calculation: (500,000 transaction × 1% of transactions resulting in self-correction × (30 minutes ÷ 60 minutes)) × $165.29 = $413,225. Note, the total values may not equal the sum of the parts due to rounding.

[763] The Retrospective Review also requires a certification that Form 5330 and any resulting excise taxes have been filed and paid as appropriate.

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

[765] The first-year total cost includes: ($76,015,692 for rule review + $88,115,522 for general disclosures + $50,935,672 for policies and procedures + $44,573,147 for the retrospective review + $413,225 for self-correction + $28,683,939 for recordkeeping) = $288,737,197. The total cost in subsequent years includes: ($43,710,694 for disclosures + $49,858,818 for policies and procedures + $44,573,147 for the retrospective review + $413,225 for self-correction + $28,683,939 for recordkeeping) = $167,239,823. Note, the total values may not equal the sum of the parts due to rounding.

[766] For more information on how the number of each type of entity is estimated, refer to the Affected Entities section.

The Department believes that it is a usual and customary business practice to maintain records required for demonstrating compliance with SEC-mandated disclosure distribution regulations. Further, the Department believes that this new requirement is consistent with the disclosure requirement mandated by the SEC in 17 CFR 240.10b–16(1) for margin transactions.[767] Therefore, the Department concludes that this requirement produces no additional burden to the public.

Costs Associated With Removing Fiduciary Investment Advice From Parts III and IV

Additionally, the Department is amending PTE 75–1 Parts III and IV, which provide relief for investment advice fiduciaries, by removing relief for compensation received as a result of providing fiduciary investment advice from the covered transactions. Investment advice providers will instead have to rely on the amended PTE 2020–02 and the investment advice providers costs are accounted for in the cost estimates for PTE 2020–02.

Summary of Total Cost for the Amendments to PTE 75–1

The removal of investment advice from PTE 75–1 Parts III and IV moves the estimated costs of providing investment advice to the cost estimates for PTE 2020–02. While the Department estimates that most entities will rely on PTE 2020–02, the increase in the total cost for PTE 75–1 results from revisions to some estimates, such as time burdens for compliance, which have been adjusted in response to comments.

Costs Associated With PTE 77–4, PTE 80–83, PTE 83–1

Summary of Affected Entities

The amendment to PTE 77–4 affects mutual fund companies. As discussed in the Affected Entities section, the Department estimates that 812 mutual fund companies will be affected by the amended PTE 77–4.[768]

PTE 80–83 allows banks to purchase, on behalf of employee benefit plans, securities issued by a corporation indebted to the bank that is a party in interest to the plan. The Department estimates that 25 fiduciary-banks with public offering services will be affected by the amended PTE 80–83.[769]

PTE 83–1 provides relief for the sale of certificates in an initial issuance of certificates by the sponsor of a mortgage pool to a plan or IRA when the sponsor, trustee, or insurer of the mortgage pool is a fiduciary with respect to the plan or IRA assets invested in such certificates.

Summary of Total Cost for the Amendments to PTE 77–4, PTE 80–83, and PTE 83–1

The Department is amending PTE 77–4, PTE 80–83, and PTE 83–1, which include relief for investment advice fiduciaries, by removing fiduciary investment advice from the covered transactions. Investment advice providers will instead have to rely on the amended PTE 2020–02 for exemptive relief covering investment advice transactions and the investment advice providers' costs are accounted for in the cost estimates for PTE 2020–02.

Costs Associated With Amendment to PTE 86–128

Summary of Affected Entities

The amendments to PTE 86–128 will affect fiduciaries of employee benefit plans and IRAs that rely on the class exemption to effect or execute securities transactions (''transacting fiduciaries'') and independent plan fiduciaries that authorize the plan or IRA to engage in the transactions (''authorizing fiduciaries''). Fiduciaries of employee benefit plans and IRAs will be affected by the removal of relief for the receipt of compensation as a result of providing investment advice. Fiduciaries who fall under the definition of a Financial Institution under PTE 2020–02 may rely on that exemption for relief for compensation as a result of investment advice. The costs associated with PTE 2020–02 are discussed elsewhere in this analysis. For more information about the cost for Fiduciaries of employee benefit plans that will continue to rely on PTE 86–128, refer to the Paperwork Reduction Act sections for PTE 86–128, also published in today's **Federal Register**.

As discussed in the Affected Entities section, the Department estimates that 251 broker-dealers will be affected by the amendments to PTE 86–128. Additionally, the Department estimates that 10,000 IRAs will engage in transactions covered under this class exemption, of which 210 are new IRAs.[770]

In the proposal, a few commenters expressed concern that disruption would be caused by the amendments. One commenter expressed concern that the removal of investment advice would increase costs to retirement investors, as entities would need to comply with PTE 2020–02. The Department did not receive comments specifically addressing the Department's estimates of the number of entities that would continue to rely on PTE 86–128 or plans receiving services from those entities.

Summary of Total Cost for the Amendments to PTE 86–128

The Department is adding a new Section II(d) which removes relief in this exemption for the receipt of compensation as the result of the provision of fiduciary investment advice. Instead, investment advice providers will have to rely on PTE 84–24 and PTE 2020–02 for exemptive relief covering transactions involving the provision of fiduciary investment advice and the investment advice providers' costs are accounted for in the cost estimates for PTE 84–24 and PTE 2020–02.

The Department had proposed imposing additional requirements on the independent plan fiduciaries authorizing the IRA to engage in these transactions (''authorizing fiduciary'') under the conditions contained in the exemption. In the final rulemaking, the Department has decided to not impose such requirements. Additionally, the Department proposed including a new recordkeeping requirement applicable to Section VII. The Department received several comments opposing this requirement, particularly the requirement to make records available to participants and beneficiaries. In consideration of the comments received, the Department has also removed this requirement in the final amendment.

As such, as finalized, the amendments to PTE 86–128 do not impose additional burdens on the entities who continue to rely on the exemption.

10. Regulatory Alternatives

The Department considered various alternative approaches in developing this rulemaking. Those alternatives are discussed below.

Broader Rule

The Department considered a definition of an investment advice

[767] EBSA, *Regulating Advice Markets Definition of the Term ''Fiduciary'' Conflicts of Interest – Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions,* pp. 258 (Apr. 2016), *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.*

[768] For more information on how the number of each type of entity is estimated, refer to the Affected Entities section.

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fiduciary that would be broader in scope, similar to the 2016 Final Rule. In promulgating the 2016 Final Rule, the Department expanded the definition of a fiduciary beyond the five-part test included in the 1975 regulation. The 2016 Final Rule covered as fiduciary investment advice:

- recommendations by a person who represents or acknowledges their fiduciary status under the Act or the Code;
- advice rendered pursuant to a written or verbal agreement, arrangement or understanding that the advice is based on the particular investment needs of the Retirement Investor;
- recommendations directed to a specific Retirement Investor or Investors regarding the advisability of a particular investment or management decision with respect to securities or other investment property of the plan or IRA; and
- recommendations to buy, sell or hold assets held in IRAs and other non-Title I ERISA plans.

In developing this rulemaking, the Department has crafted a more focused definition that addresses the scope issues identified by the Fifth Circuit's *Chamber* opinion while still protecting Retirement Investors. The Department was also cognizant of stakeholders' concerns that compliance costs associated with the broader 2016 Final Rule would lead to adverse consequences such as increases in the cost of investment advice and potential loss of access by Retirement Investors with small account balances.

Unlike the 2016 Final Rule, the amended definition does not automatically treat as fiduciary advice all compensated recommendations directed to a specific Retirement Investor regarding the advisability of a particular investment or management decision with respect to securities or other investment property of the plan or IRA. The current rulemaking instead limits application of investment advice fiduciary status to circumstances that indicate the Retirement Investor may place trust and confidence in the recommendation as a professional recommendation based upon the particular needs of the investor. The rulemaking reflects the Department's interpretation of the text of the statute, as informed by the Fifth Circuit's emphasis on relationships of trust and confidence. For example, an entity can satisfy the test under (c)(1)(i) of this rulemaking only if a recommendation is made under circumstances that would indicate to a reasonable investor in like circumstances that the recommendation is individualized to the Retirement Investor, reflects professional or expert judgment as applied to the individual investor's circumstances, and may be relied upon by the Retirement Investor to advance their own interests; essentially, the entity has held themselves out as a trusted advice provider and invited the Retirement Investor's reliance on them.

No Amendment to PTE 2020–02

The Department considered not amending PTE 2020–02 and leaving the exemption in its present form. The Department has retained the core components of the original PTE, including the Impartial Conduct Standards and the requirement for strong policies and procedures aimed at avoiding and mitigating conflicts of interest. These are fundamental investor protections that are necessary to ensure the Financial Institutions and Investment Professionals provide investment advice that is in the best interest of Retirement Investors. The retention of the core elements of PTE 2020–02 will also ensure that any work Financial Institutions have done to comply with PTE 2020–02 will prepare them to comply with the amended exemption.

However, the Department believes that broadening the exemption to cover all principal transactions and robo-advice, as well as providing additional protections are necessary to more fully protect Retirement Investors and ensure that fiduciary investment advice providers adhere to the standards outlined in PTE 2020–02. Therefore, as discussed in greater detail in the preamble to amended PTE 2020–02, also published in today's **Federal Register**, the amendments clarify and tighten the existing text of PTE 2020–02, while also broadening the scope of the exemption so more parties can use it.

No Amendment to PTE 84–24

The Department is aware that insurance companies sometimes sell insurance products through independent agents who sell multiple insurance companies' products. Thus, when the Department originally finalized PTE 2020–02, the Department explained that insurance companies could rely on either PTE 2020–02 or PTE 84–24. As a result, the Department considered the option of leaving PTE 84–24 unaltered, but ultimately concluded that the amendment will be a better approach with regards to covered advice providers.

Since the Department first issued PTE 2020–20, insurance companies that distribute annuities through independent agents have expressed concerns that they may not be able to effectively comply with PTE 2020–02 due to the difficulties overseeing independent insurance producers who do not work for any one insurance company and are not obligated to recommend only one company's annuities. The Department understands that this compliance issue has been resolved by reliance on PTE 84–24.

However, without the amendments, PTE 84–24 offers few of the protections provided by PTE 2020–02. Further, insurance companies' continued reliance on PTE 84–24 instead of PTE 2020–02 could prevent Retirement Investors from being able to fully compare varying products and services. In order to address these concerns, the Department has amended PTE 84–24 to provide exemptive relief for independent insurance producers who receive a sales commission or fee(s) from an insurance company in connection with the purchase of annuities or other insurance products with plan or IRA assets. The amendment addresses insurance industry concerns regarding the workability of PTE 2020–02's conditions, while also ensuring that fiduciary investment advice is delivered pursuant to the same core principles that protect Retirement Investors under PTE 2020–02.

The Department could have amended PTE 84–24 differently. In particular, the Department could have utilized a narrower definition of compensation that gets relief under the exemption. This approach could be more protective of Retirement Investors and reduce conflicts, but this alternative would have been more disruptive to business models than the selected approach.

Including an Individual Contract Requirement

The Department also considered amending PTE 2020–02 to require an enforceable written contract between the Financial Institution and the Retirement Investor. The predecessor to PTE 2020–02, the Best Interest Contract Exemption in the Department's 2016 rulemaking,[771] required such an enforceable contract. Ultimately, the Department concluded that the better course of action was not to include such a requirement. The Department is cognizant of the Fifth Circuit's finding that the contractual requirement in the Department's 2016 Rulemaking exceeded the scope of the Department's authority. In crafting an exemption that does not include an enforceable written

[771] *See* 81 FR 21002 (Apr. 8, 2016).

contract, the Department intends to avoid any potential disruption in the market for investment advice.

Instead, the Department believes that the compliance structure of the amended exemption includes sufficient oversight and compliance measures. For example, Financial Institutions' reports regarding their retrospective review are required to be certified by a Senior Executive Officer of the Financial Institution and provided to the Department within 30 business days of request. The exemption also includes eligibility provisions, which the Department believes will encourage a culture of compliance among Financial Institutions and Investment Professionals.

The amendment also conditions relief on the Financial Institutions reporting any non-exempt prohibited transactions to the IRS, correcting those transactions, and paying any resulting excise taxes imposed under Title II of ERISA. Further, the amendment adds the repeated failure to report, correct, or pay an excise tax to the list of factors that could make a Financial Institution ineligible to rely on PTE 2020–02. The Department believes these additional conditions will provide important protections to Retirement Investors by enhancing the existing protections of PTE 2020–02.

Relying on Disclosure Alone

Some commenters responding to the 2015 proposed rule [772] advocated that the Department issue broad PTEs that exempt all or almost all existing and potential adviser business models and compensation arrangements on the sole condition that material conflicts be disclosed. However, the Department declines to take this approach because the Department does not believe that disclosure alone is adequately protective of Retirement Investors.

As discussed above in the ''Need for Regulatory Action'' section, many of the issues in the retirement saving space arise out of a combination of inexpert customers and conflicted advisers. Enhanced disclosure requirements help make the industry more transparent and accessible. However, most Retirement Investors are not as financially sophisticated as those providing investment advice, which can make it extremely difficult to detect lapses in the quality of financial advice. Due to the complexity of the industry, Retirement Investors may not fully understand disclosures of advisers' conflicts or, the impacts that those conflicts could have on their investments. A large body of research discussed in the regulatory impact analysis for the 2016 Final Rule suggested that disclosures alone can have, at best, a minor impact on conflicts, and can sometimes exacerbate the conflicted behavior.[773] Advisers may inflate the bias in their advice to counteract any discounting that might occur because of the disclosure of conflicts.[774] In addition, even when inexpert Retirement Investors receive easy-to-understand disclosures alerting them to conflicts, there is no ready way for them to use that knowledge to improve investment outcomes, inasmuch as they are still dependent on the adviser's recommendations and expertise.

Adding a Requirement for a Web Disclosure

The Department considered amending PTE 2020–02 and PTE 84–24 to require Financial Institutions to disclosure the sources of third-party compensation received in connection with recommended investment products on a public web page and requested comments on the matter in the preamble to the proposed amendment. Such disclosures could allow market-based forces to extend protections to consumers by discouraging and eliminating the most conflicted compensation practices.

These disclosures would allow Investment Professionals, experts, and consultants, as well as academic researchers, to draw attention to the concerning aspects of the conflicts and even rate firms based on the scope of their conflicts.[775] However, industry commenters generally opposed the condition on the grounds that it would be very costly to maintain such a website and that it would only provide a limited benefit to Retirement Investors. Due to these comments, the Department decided against inclusion of a web disclosure exemption condition at this time.

Allowing for More Parties To Review Records

For the amendment to PTE 2020–02, the Department considered allowing more parties to review the records necessary to determine whether the exemption is satisfied, such as:

- any authorized employee of the Department or the Department of the Treasury,
- any fiduciary of a plan that engaged in a transaction pursuant to this exemption,
- any contributing employer, any employee organization whose members are covered by a plan that engaged in a transaction pursuant to this exemption, and
- any participant or beneficiary of a plan or beneficial owner of an IRA acting on behalf of the IRA that engaged in a transaction pursuant to this exemption.

Although the proposed broader recordkeeping condition is consistent with other exemptions, the Department understands commenters' concerns regarding broader access to the documents and has concern that broad access to the documents could have a counterproductive impact on the formulation and documentation of appropriate firm oversight and control of recommendations by Investment Professionals.

The Department does not have data on how often Financial Institutions would receive such requests. For the purposes of this analysis, the Department assumes that, on average, Financial Institutions would receive 10 requests per year and that preparing and sending each request would take a legal professional, on average, 30 minutes. Based on these assumptions, the Department estimates that the amendments would have resulted in an annual cost of approximately $15.4 million.[776]

Proposed Disclosures to Retirement Investors That Were Modified

The proposed rulemaking included the Conflict of Interest Disclosures and the Rollover Disclosures that were changed for the final rulemaking. The

[772] *See* FR 21927 (Apr. 20, 2015).

[773] *See* FR 20946, 20950–51 (Apr. 8, 2016).

[774] George Loewenstein, Daylian M. Cain & Sunita Sah, *The Limits of Transparency: Pitfalls and Potential of Disclosing Conflicts of Interest,* 101(3) American Economic Review 423–28, (May 2011).

[775] Augustin Landier & David Thesmar, *Regulating Systemic Risk Through Transparency: Tradeoffs in Making Data Public,* Working Paper 17664 National Bureau of Economic Research (December 2011), 320, *https://www.nber.org/system/files/working_papers/w17664/w17664.pdf. See also* Randall A. Heron & Erik Lie, *Does Backdating Explain the Stock Price Pattern Around Executive Stock Option Grants?,* 83(2) Journal of Financial Economics 271–295 (2007).; Randall A. Heron & Erik Lie, *What Fraction of Stock Option Grants to Top Executives Have Been Backdated or Manipulated*?, 55(4) Management Science 513–525; Mark Carhart, Ron Kaniel & Adam Reed, *Leaning for the Tape: Evidence of Gaming Behavior in Equity Mutual Funds,* 57(2) Journal of Finance 661–693 (2002).; Truong X. Duong & Felix Meschke, *The Rise and Fall of Portfolio Pumping Among U.S. Mutual Funds,* 60 Journal of Corporate Finance (February 2020).

[776] The burden is estimated as follows: (19,528 Financial Institutions × 10 requests) × (30 minutes ÷ 60 minutes) = 96,450 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: [(19,528 Financial Institutions × 10 requests) × (30 minutes ÷ 60 minutes)] × $165.71 = $15,368,343.

changes were to align the disclosure requirements with requirements under Regulation Best Interest and the NAIC model rules. Doing so reduced the cost of compliance, while the Department continues to monitor the effectiveness and utility of the disclosures.

Adding Specificity To Conflict of Interest & Material Fact Disclosures

The Department received many comments asserting that the conflict of interest and material fact disclosure requirements in the proposal would burden Financial Institutions without providing sufficient incremental benefits to Retirement Investors beyond those provided by the disclosures required by the SEC's Regulation Best Interest standard. While the Department also received comments expressing support for the Department's proposed amendments that would have clarified and tightened the existing PTE 2020–02 disclosure requirements, the Department ultimately decided to base the pre-transaction disclosure requirements on the SEC's Regulation Best Interest disclosure requirements. The Department made this determination to ensure that Retirement Investors received sufficient information to make informed decisions, while also reducing compliance burdens by adopting requirements consistent with existing SEC requirements.

Eligibility

The Department considered conditioning eligibility for both PTE 84–24 and 2020–02 on the actions of both fiduciaries themselves and any ''affiliates.'' The benefit of using this broad term was to foster a wide-reaching culture of compliance in the retirement investment industry. However, in response to industry comments stating that the Department's use of the term ''affiliate'' was confusing and overbroad, the Department decided to use the narrower term ''controlled group'' in the ineligibility provisions of both final amendments.

The Department also revised the ineligibility provisions based on foreign convictions to exclude any convictions that occur within foreign jurisdictions included on the Department of Commerce's list of ''foreign adversaries.'' [777] This change was made in response to commenter concerns that convictions have or could occur in foreign nations that are intended to harm U.S.-based Financial Institutions and thus, would not truly meet the section's ''substantially equivalent'' requirement.

Finally, the Department considered the inclusion of a Department-led ineligibility determination, again, as a way to promote a culture of compliance in the industry. However, the Department ultimately decided to condition ineligibility on determinations in court proceedings, whether domestic or foreign convictions, that met the standards outlined in the ineligibility section. This decision was made after consideration of commenters' due process concerns.

11. Uncertainty

In estimating costs associated with rollover documentations, the Department faces uncertainty in determining the number of rollovers affected by the amendments to PTE 2020–02 and PTE 84–24. Some financial services professionals who do not generally serve as fiduciaries may act in a fiduciary capacity when making certain rollover recommendations, and thus will be affected by the exemptions. Alternatively, the opposite can also be true. Financial services professionals who generally serve as fiduciaries may act in a non-fiduciary capacity in handling certain rollover recommendations, and thus will not be affected by the exemptions. Thus, there is uncertainty in estimating the cost of compliance. The Department expects that the rulemaking will result in lower fees and expenses for plan participants, but the Department faces uncertainty in estimating the magnitude of savings.

N. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (PRA) (*44 U.S.C. 3506(c)(2)(A)*), the Departments solicited comments concerning the information collection requirements (ICRs) included in the proposed rule. At the same time, the Departments also submitted ICRs to OMB, in accordance with 44 U.S.C. 3507(d).

The Department received comments that addressed the burden estimates used in the analysis of the proposed rule. The Department reviewed these public comments in developing the paperwork burden analysis and subsequently revised the burden estimates in the amendments to the PTEs discussed below.

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

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

By email: ebsa.opr@dol.gov

There is no paperwork burden associated with the final rule. However, there is paperwork burden associated with the amendments to PTEs 75–1, 84–24, 86–128, and 2020–02. The Department estimates that the amendments would not affect the paperwork burden related to PTEs 77–4, 80–3, and 83–1. The PRA analysis for the amendments is included with each of the respective amendments.

PTE 75–1

Type of Review: Revision of an existing collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Titles: Prohibited Transaction Exemption 75–1 (Security Transactions with Broker-Dealers, Reporting Dealers and Banks).

OMB Control Number: 1210–0092.

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

Estimated Number of Respondents: 3,944.

Estimated Number of Annual Responses: 3,944.

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

Estimated Total Annual Burden Hours: 15,778 hours.

Estimated Total Annual Burden Cost: $0.

PTE 84–24

Type of Review: Revision of an Existing Collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Prohibited Transaction Exemption (PTE) 84–24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters.

OMB Control Number: 1210–0158.

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

Estimated Number of Respondents: 89,818.

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

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

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

Estimated Total Annual Burden Cost: $191,759.

PTE 86–128

Type of Review: Revision to an existing collection.

[777] 15 CFR 7.4.

Agency: Employee Benefits Security Administration, Department of Labor.

Titles: PTE 86–128 (Securities Broker-Dealers).

OMB Control Number: 1210–0059.

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

Estimated Number of Respondents: 326.

Estimated Number of Annual Responses: 4,150.

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

Estimated Total Annual Burden Hours: 177 hours.

Estimated Total Annual Burden Cost: $3,300.

PTE 2020–02

OMB Control Number: 1210–0163.

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

Estimated Number of Respondents: 18,632.

Estimated Number of Annual Responses: 114,609,171.

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

Estimated Total Annual Burden Hours: 2,599,221 hours.

Estimated Total Annual Burden Cost: $18,359,543.

O. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) [778] imposes certain requirements on rules subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act or any other law.[779] Under section 604 of the RFA, agencies must submit a final regulatory flexibility analysis (FRFA) of a final rulemaking that is likely to have a significant economic impact on a substantial number of small entities, such as small businesses, organizations, and governmental jurisdictions. Below is the Department's FRFA.

1. Need for and Objectives of the Rule

As discussed earlier, the Department believes that changes to the marketplace since 1975, when the Department finalized the five-part ''fiduciary'' test, have made the existing definition inadequate and obsolete. This rulemaking will update the definition of ''fiduciary'' to reflect changes to the retirement and financial advice marketplaces since 1975 and add important protections to existing prohibited transaction class exemptions. More detail can be found in the ''Need for Regulatory Action'' section of this regulatory impact analysis.

Smaller retirement plans may be more susceptible to conflicts of interest on the part of service providers, because they are less likely than larger retirement plans to receive investment advice from a service provider that is acting as a fiduciary. Smaller plans have historically received investment advice from insurance brokers or broker-dealers, who may be subject to conflicts of interest.[780] Larger plans may also have sufficient resources and in-house expertise to make investment decisions without outside assistance.[781] Additionally, many sponsors of smaller plans may have a lack of knowledge of whether the providers to the plan are fiduciaries and how the provider's compensation varies based on the investment options selected.[782]

One commenter noted that, according to the Morningstar 2023 Retirement Plan Landscape Report, participants in small plans pay nearly double what participants in large plans pay.[783] As such, small plans and their participants could see significant benefits from the protections provided in the amendments.

2. Comments From the Small Business Administration on the RFA

The U.S. Small Business Administration Office of Advocacy (SBA) submitted a comment expressing concern regarding a number of assumptions and calculations in the RFA.[784] The Department has considered the comment letter and addressed them as appropriate.

The SBA first expressed concern that the number of affected entities is underestimated, with particular concern for the estimate of small, affected entities. In response to this comment, among others, Department has revised multiple estimates. The commenter highlighted the Department's assumptions that the regulation would affect 4,000 Independent Producers. The number of Independent Producers was revised upwards from 4,000 to 86,410. The number of affected insurance companies was also re-estimated using a new methodology based on the *Statistics of U.S. Businesses,* which increased the number of affected insurance companies from 398 to 442. Additionally, the Department's estimate for discretionary fiduciaries was reconsidered. Instead of looking at all broker-dealers, the Department decided to estimate discretionary fiduciaries with the number of dual-registered broker-dealers. The Department believes that this produces a more accurate estimate of discretionary fiduciaries. This reduces the estimate of discretionary fiduciaries from 1,894 to 251. In response to additional comments, the Department has also added 31 non-bank trustees to the small and total affected entities list. This estimate is described in the Affected Entities section of the regulatory impact analysis. Finally, the affected entity estimates for broker-dealers, registered investment advisers, and banks all were revised with the same methodology used in the proposal using updated data. None of these changes for broker-dealers, registered investment advisers, and banks exceeded 5 percent of the original estimates. These changes are all discussed in further detail in the regulatory impact analysis. Since the Department's small entity estimates are based off shares of the total affected entities, these changes result in an updated number of affected small entities in the RFA.

Additionally, the SBA recommended that the Department use different data sources to calculate the share of affected entities that are small. Specifically, they recommended that the Department use the *Statistics of U.S. Businesses* from the U.S. Census Bureau. In response, the Department has updated the small, affected entity estimates using shares calculated from this data source where applicable. This change, combined with the affected entities changes, alter the small, affected entity estimates. In the proposal, the rulemaking was estimated to affect 11,919 small entities in the regulatory impact analysis and 27,057 small entities in the RFA. In the Final rule, this estimate has been updated to affect 91,956 small entities in the regulatory impact analysis and 107,446 in the RFA. Looking at notable changes, the number of small Independent Producers has increased to 85,564 from 3,960 in the proposal. The number of small discretionary fiduciaries decreased from 1,835 to 243 and the number of mutual fund companies decreased from 796 to 728 in the

[778] *5 U.S.C. 601 et seq.*

[779] *5 U.S.C. 601(2), 603(a); see 5 U.S.C. 551.*

[780] U.S. Government Accountability Office, GAO–11–119, *401(K) Plans: Improved Regulation Could Better Protect Participants from Conflicts of Interest,* U.S. Government Accountability Office (2011), *http://www.gao.gov/products/GAO-11-119.*

[781] *Id.*

[782] *Id.*

[783] In this analysis small plans are defined as plans with less than $25 million in assets, while large plans are defined as plans with more than $100 million in assets. (*See* Lia Mitchell, *2023 Retirement Landscape Report: An In-Depth Look at the Trends and Forces Reshaping U.S. Retirement Plans,* Morningstar Center for Retirement & Policy Studies (April 2023).

[784] Comment letter received from the U.S. Small Business Administration Office of Advocacy on the *Notification of Proposed Rulemaking: Retirement Security Rule: Definition of an Investment Advice Fiduciary,* (January 2024).

proposal. All other changes in small, affected entities were smaller than 5 percent of the original estimates. The Department has also provided tables to illustrate how small entities are distributed across size categories based on revenue.

The SBA also expressed concern that the Department had not thoroughly analyzed the costs to small entities relative to large ones. The commenter provided a survey of expectations regarding future compliance costs, but this survey did not provide a breakdown of these costs or expectations by business size.[785] They did not provide additional data or suggest an alternative methodology for the Department to analyze the differential costs of the rulemaking on small entities. In the absence of such data, the Department is unable to provide unique estimates of costs for different small plan sizes. However, in response to this comment and others, the Department has chosen to revise upwards many of the cost averages described in the FRFA, and has also instituted different hourly burden estimates for small and large firms in certain requirements. Additionally, the Department has added a discussion to this analysis about the estimated cost of small institutions of varying sizes and displayed these costs as a share of revenue at these differently sized firms.

This rulemaking applies the same compliance requirements, regardless of the size of the entity, under the premise that the provisions of the rulemaking are necessary to protect Retirement Investors when engaged in an otherwise prohibited transaction. Further, when considering the SBA size thresholds, nearly all Financial Institutions affected by the rulemaking are considered small entities. As such, all comments received on the proposal have been considered with small entities in mind. For more information on how the Department considered commenters' feedback on the rulemaking and its estimates, refer to the regulatory impact analysis.

The SBA also expressed concern that the Department did not properly analyze regulatory alternatives that would decrease the burdens on small entities. As described above, all alternatives and comments received on the proposal have been considered with small entities in mind. In particular, SBA highlighted two alternatives that they believe merited further discussion. First, SBA stated that the Department should quantify the cost savings associated with not amending PTE 2020–02. Second, SBA stated that the Department should consider the cost savings associated with exempting small businesses from the definition of an investment advice fiduciary. Realistically, these alternatives must be discussed as one, because if the Department amended the definition of an investment advice fiduciary without amending PTE 2020–02, then that would leave small businesses without exemptive relief. This would save small businesses the compliance costs of PTE 2020–02, but would ultimately leave them unable to provide investment advice, potentially incurring much larger costs in lost business. Exempting small businesses from treatment as investment advice fiduciaries, in combination with not amending PTE 2020–02, would remove all of the costs described in the Regulatory Flexibility Analysis, thus incurring a cost savings of $138.1 million in the first year and $62.4 million in subsequent years. However, many investors, plans, and retirees rely on small Financial Institutions, especially under the expansive definitions utilized in the RFA. Assuming the distribution of the investment advice amongst firms is similar to the distribution of revenue, then this could leave approximately 38 percent of the market for investment advice without protection.[786] The Department considered this alternative, but ultimately decided that investors utilizing these small financial firms deserve protection, and that the regulatory uniformity imposed by a single standard would reduce confusion and be better for the market for investment advice.

Finally, the Department notes that many small entities also sponsor retirement plans and therefore are subject to ERISA liability. As noted above in the Need for Regulatory Action section, ERISA plan fiduciaries, particularly those for small plans, are often confused as to whether the advice they receive is fiduciary, may receive inadequate disclosures and can be steered into poor performing funds, negatively impacting the plan and its participants and beneficiaries. For those small plan sponsors, this rulemaking will now ensure that that advice they receive is held to a fiduciary standard which will in turn reduce the sponsor's expected amount of ERISA liability.

3. Other Significant Comments on the RFA

In addition to the comment's received from the SBA discussed above, several commenters expressed concern that the proposal would increase costs on small businesses. One commenter elaborated that small businesses do not have compliance departments to implement the changes necessary. Some of these commenters noted that the proposal could force some small businesses to stop offering services to Retirement Investors.

The Department acknowledges that the transition costs in this rulemaking may be more burdensome for smaller businesses; however, as discussed above, compliance with some of the requirements will be smaller for entities with less complex business models. Additionally, many small institutions will outsource compliance tasks. The Department expects that for any entity choosing to outsource, the cost of hiring a third party will be less than the cost to use available staffing.

The Department expects that is particularly true regarding how Independent Producers will experience costs. Nearly all Independent Producers are considered small entities under the SBA definition. Many of which are one person operations or relatively small firms on a headcount basis. The Department understands that when examined in isolation this fact can lead to erroneous conclusions regarding the burden these individual firms will experience. In practice Independent Producers frequently partner and/or contract with carriers directly or through third parties called Insurance Marketing Organizations. These organizations provide varying levels of support to Independent Producers. This support can take several forms such as carrier contracting, lead generation, back-office administration, compliance, training, and any combination of these and other pertinent services. While this structure is exemplified by Independent Producers, the Department expects that other small Financial Institutions will rely on similar mechanisms.

[785] Nat'l Ass'n of Ins. & Fin. Advisors, NAIFA Survey Shows the DOL's Fiduciary Proposal Will Increase Costs and Reduce Access to Retirement Planning Services (Dec. 19, 2023), *https://advocacy.naifa.org/news/naifa-surveyshows-the-dols-fiduciary-proposal-will-increase-costs-and-reduce-access-to-retirement-planning-services.*

[786] According to Departmental Analysis of the *Statistics of U.S. Businesses* by examining a weighted average of the receipts attributable to small firms.

This structure leads to economies of scale in areas such as compliance. For this reason, the Department based its assumptions on this operational structure while describing the burdens. The Department believes that the burdens described in the FRFA represent a reasonable blended average of these approaches across a spectrum of organizational and relational complexity.

4. Affected Small Entities

The SBA defines small businesses and issues size standards by industry.[787] [788] The SBA defines a small business in the financial investments and related activities sector as a business with up to $47.0 million in annual receipts. 97 percent of broker-dealers [789] and 99 percent of registered investment advisers [790] are small businesses according to the SBA size standards.

TABLE 8—AFFECTED SMALL FINANCIAL ENTITIES

	Prohibited transaction exemptions					
	2020–02	84–24	75–1	77–4	80–83	86–128
Broker-Dealers	1,862		1,862			
Registered Investment Advisers	16,195					
Pure Robo-Advisers	10					
Discretionary Fiduciaries						243
Insurance Companies	71	261				
Insurance Producers		85,564				
Banks			1,538		19	
Mutual Fund Companies				728		
Investment Company Principal Underwriters	([1])	20				
Nonbank Trustees	30					
Pension Consultants	([1])	924				

[1] Pension consultants and investment company principal underwriters who were relying on PTE 84–24 for investment advice will no longer be able to rely on the exemption as amended for receipt of compensation as a result of providing investment advice. However, these pension consultants and investment company principal underwriters can rely on PTE 2020–02 when they are part of a Financial Institution, such as a registered investment adviser, broker-dealer, insurance company, or bank, which are already accounted for.

In its economic analysis for its initial issuance of PTE 2020–02, the Department included all entities eligible for relief on a variety of transactions and compensation that may not have been covered by prior exemptions in its cost estimate. In 2020, the Department acknowledged that not all these entities will serve as investment advice fiduciaries to plans and IRAs within the meaning of Title I and the Code. Additionally, it is unclear how widely Financial Institutions will rely upon the new exemptions and which firms are most likely to choose to rely on it.

This analysis, like the analysis from 2020, includes all entities eligible for relief in its cost estimate. These estimates are subject to caveats like those in 2020, though this rule will expand the parties that will be considered investment advice fiduciaries and also will narrow the exemption alternatives. In the proposal, the Department received several comments regarding its estimate of the number of financial entities that would be affected. Commenters expressed concern about the Department's assumption that all eligible entities already rely on PTE 2020–02, as some entities did not consider their conduct to trigger fiduciary status. These commenters noted that under the amended definition of a fiduciary, these entities would consider themselves fiduciaries for the first time and incur transition costs, accordingly. In response to this comment, the Department has revised its estimate to assume that 30 percent of broker-dealers, registered investment advisers, and insurance companies were not previously relying upon PTE 2020–02 and will incur the transition costs under this rulemaking.

In response to comments, the Department has conducted an analysis of small entities across a wide range of revenue and asset categories. Additionally, the Department has amended its calculations of small entities in the RFA to utilize the Statistics of U.S. Businesses from the U.S. Census Bureau. Due to a lack of sufficiently detailed data, the Department cannot provide a breakdown of entities by revenue for robo-advisers and principal underwriters. Additionally, while data on insurance companies is presented in the Statistics of U.S. Businesses, the Department does not believe that this data has sufficient granularity to describe the entities affected by this rulemaking. This rulemaking will only affect a select subset of insurance companies writing annuities and some life insurance products. Therefore, the Department will continue to utilize its existing source from the LIMRA factbook, which details the largest sellers of annuities by revenue. From this number, the Department is able to calculate the number of large annuity sellers and use this to calculate the number of small annuity sellers. However, since this data only provides direct data on the largest annuity sellers, the Department is unable to provide a revenue breakdown for this industry. Additionally, since the SBA size definition for banks is based on assets, rather than receipts, the Department will continue to use FDIC asset data to define bank size in the RFA. The NAICS codes used in generating this table are subsequently discussed in the FRFA during individual discussions of each small, affected entity.

[787] *13 CFR 121.201.*

[788] *15 U.S.C. 631 et seq.*

[789] This is estimated on the percent of entities with less than $47.0 million for the industry Securities Brokerage, NAICS 523120. See NAICS Association, Count by NAICS Industry Sectors, *https://www.naics.com/business-lists/counts-by-naics-code/.*

[790] This is estimated on the percent of entities with less than $47.0 million for the industry Investment Advice, NAICS 523930. See NAICS Association, Count by NAICS Industry Sectors, *https://www.naics.com/business-lists/counts-by-naics-code/.*

TABLE 9—SHARE OF AFFECTED SMALL ENTITIES BY REVENUE

Revenue	<$100 Thousand	$100–$500 Thousand	$0.5–$1 Million	$1–$5 Million	$5–$25 Million	$25–$47 Million	SBA large	SBA small [791]
Broker-Dealers	16.6%	45.7%	17.6%	12.7%	3.7%	0.8%	3.0%	97.0%
Registered Investment Advisers	24.3	46.7	14.6	10.8	2.1	0.3	1.2	98.8
Pure Robo-Advisers							95.0	5.0
Discretionary Fiduciaries	16.6	45.7	17.6	12.7	3.7	0.8	3.0	97.0
Insurance Companies							24.9	75.1
Insurance Producers	18.7	53.6	15.6	9.7	1.7	0.2	1.0	99.0
Mutual Fund Companies	27.1	29.2	8.3	18.1	10.1	2.1	10.4	89.6
Investment Company Principal Underwriters							0.0	100.0
Pension Consultants	10.8	22.7	12.9	27.9	14.7	2.3	8.6	91.4
Nonbank Trustees	15.3	44.0	17.9	16.0	3.9	0.5	2.4	97.6
Banks [792]	4.9	10.8	18.5	22.3	11.7	7.8	24.1	75.9

In addition to providing the share of small affected entities in each asset or revenue category, this data is also displayed in the form of a calculated number of small affected entities in Table 10. This is generated by applying the percentages from Table 9 to the total affected entities numbers previously calculated in the Affected Entities section of the regulatory impact analysis. It should be noted that, due to rounding differences in the table, some of the numbers presented will not sum to the total small entity number.

TABLE 10—CALCULATED NUMBER OF AFFECTED SMALL ENTITIES BY REVENUE

Revenue	<$100 Thousand	$100–$500 Thousand	$0.5–$1 Million	$1–$5 Million	$5–$25 Million	$25–$47 Million	SBA large	SBA small [793]
Broker-Dealers	318	877	337	244	71	16	58	1,862
Registered Investment Advisers	3,987	7,658	2,394	1,771	339	47	203	16,195
Pure Robo-Advisers							190	10
Discretionary Fiduciaries	42	115	44	32	9	2	8	243
Insurance Companies							110	333
Insurance Producers	16,176	46,302	13,458	8,402	1,469	183	846	85,564
Mutual Fund Companies	220	237	68	147	82	17	84	728
Investment Company Principal Underwriters							0	20
Pension Consultants	110	229	131	283	148	23	87	924
Nonbank Trustees	5	14	6	5	1	0	1	30
Banks [794]	99	218	375	451	236	157	487	1,538

Registered Investment Advisers

Small, registered investment advisers who provide investment advice to retirement plans or Retirement Investors and registered investment advisers who act as pension consultants will be directly affected by the amendments to PTE 2020–02. The Department estimates that 16,598 registered investment advisers, including 200 robo-advisers, will be affected by the amendments.[795] The Department estimates that 98.8 percent of Registered Investment Advisers are small businesses according to the SBA size standards.[796] Based on these statistics, the Department estimates that 16,195 small registered investment advisers exclusive of pure robo-advisers, including those registered with the SEC and the State, will be affected by the amendments.[797]

Robo-Advisers

The amendments to PTE 2020–02 will affect robo-advisers. The Department estimates that 200 robo-advisers will be affected by the amendments.[798] The Department does not have information on how many of these robo-advisers are considered small entities. The Department expects that most robo-advisers will not be considered small. For the purposes of this analysis, the Department assumes that 5 percent of robo-advisers, or an estimated 10 robo-advisers, are small entities.

Broker-Dealers

Small broker-dealers who provide investment advice to retirement plans or Retirement Investors and registered investment advisers who act as pension consultants will be directly affected by the amendments to PTE 2020–02. Additionally, the amendments modify PTE 75–1 and PTE 86–128 such that small broker-dealers will no longer be able to rely on those exemptions for investment advice. The Department does not have information about how many small broker-dealers provide investment advice to plan fiduciaries, plan participants and beneficiaries, and IRA owners. However, the Department believes that few broker-dealers,

[791] The total value may not equal the sum of the parts due to rounding.

[792] The SBA Size categorization for banks is based on total assets, not revenue. Banks are presented on the same chart for simplicity, but their figures are based off of asset cutoffs at $50, $100, $200, $400, $600, and $850 million.

[793] The total value may not equal the sum of the parts due to rounding.

[794] The SBA Size categorization for banks is based on total assets, not revenue. Banks are presented on the same chart for simplicity, but their figures are based off of asset cutoffs at $50, $100, $200, $400, $600, and $850 million.

[795] For more information on this estimate, refer to the Affected Entities section of the regulatory impact analysis.

[796] This is estimated on the percent of entities with less than $47.0 million for the industry Investment Advice, NAICS 523930. See NAICS Association, Count by NAICS Industry Sectors, *https://www.naics.com/business-lists/counts-by-naics-code/*.

[797] The number of small investment advisers, who do not provide pure robo-advice, is estimated as: (16,398 investment advisers − 200 robo-advisers) × 98.7% = 16,185 small investment advisers.

[798] For more information on this estimate, refer to the Affected Entities section of the regulatory impact analysis.

regardless of size, will continue to rely on PTE 75–1 and PTE 86–128 for transactions that do not involve investment advice.

The Department assumes that 1,920 broker-dealers will be affected by the amendments.[799] The Department estimates that 97.0 percent of broker-dealers are small businesses according to the SBA size standards.[800] Accordingly, the Department assumes that 1,862 small broker-dealers will be affected by the amendments.[801]

Discretionary Fiduciary

The amendments to PTEs 75–1 Parts III & IV, 77–4, 80–83, 83–1, and 86–128 will exclude the receipt of compensation from transactions that result from the provision of investment advice. Therefore, fiduciaries will have to rely on another exemption to receive compensation for investment advice, such as PTE 2020–02. Fiduciaries that exercise full discretionary authority or control could continue to rely on these exemptions, as long as they comply with all of the applicable exemption's conditions. Discretionary fiduciaries will still be able to effect or execute securities transactions. Any discretionary fiduciaries seeking relief for investment advice, however, will be required to rely on the amended PTE 2020–02. The Department lacks reliable data on the number of investment advice providers who are discretionary fiduciaries that will rely on the amended exemption.

For the purposes of this analysis, the Department believes that the number of dual-registered broker-dealers that render services to retirement plans provides a reasonable estimate of the number of entities that will rely on the exemption. As of December 2022, there were 456 broker-dealers registered as SEC- or State-registered investment advisers.[802] Consistent with the assumptions made about broker-dealers affected by the amendments to PTE 2020–02, the Department estimates that 55 percent, or 251 broker-dealers will be affected by the amendments to PTE 86–128.[803]

Insurance Companies

The amendments to PTE 2020–02 and PTE 84–24 affect small insurance companies and captive agents. The existing version of PTE 84–24 granted relief for all insurance agents, including insurance agents who are overseen by a single insurance company; however, the amendments exclude insurance companies and captive agents currently relying on the exemption for investment advice. These entities will be required to comply with the requirements of PTE 2020–02 for relief involving investment advice.

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

One recent source stated that 81 percent of individual annuities sales are conducted through an independent distribution channel.[804] The Department uses this statistic to update its estimate of the number of sales through the independent distribution channel. The Department assumes that the percent of companies selling annuities through an independent distribution channel is proportionate to the percent of sales conducted through an independent distribution channel. The Department recognizes that the distribution of sales by distribution channel is likely different from the distribution of insurance companies by distribution channel but has adopted this assumption due to a lack of additional data.

Also, the Department recognizes that some insurance companies use multiple distribution channels, though the Department did not receive any comment on how common the use of multiple distribution channels is. Looking at the 10 insurance companies with the highest annuity sales in 2022, one relied on captive distribution channels, seven relied on independent distribution channels, and two relied on both.[805] Accordingly, most insurance companies appear to primarily use either independent distribution or a combination of captive and independent distribution. However, any entity using a captive insurance channel, or using both captive and independent channels, likely has already incurred most of the costs of this rulemaking under PTE 2020–02. Costs are estimated by assuming that entities using a third-party distribution system, even if they also use captive agents, will incur costs for the first time under amended PTE 84–24. This assumption leads to an overestimation of the cost incurred by insurance companies.

Following from the revised assumption that 81 percent of activity being associated with independent, or third party, channels, the Department estimates that 84 insurance companies distribute annuities through captive channels and will rely on PTE 2020–02 for transactions involving investment advice. Further, the Department estimates that 358 insurance companies distribute annuities through independent channels and will rely on PTE 84–24 for transactions involving investment advice.[806] Regarding entities affected by PTE 84–24, 73.1 percent, or approximately 262 entities, are estimated to meet the SBA definition of small entities. For entities affected by PTE 2020–02, the Department continues to rely on the estimated number of small insurers developed in the Affected Entities section of the regulatory impact analysis, which is 71 small entities. This

[799] For more information on this estimate, refer to the Affected Entities section of the regulatory impact analysis.

[800] This is estimated on the percent of entities with less than $47.0 million for the industry Securities Brokerage, NAICS 523120. See NAICS Association, Count by NAICS Industry Sectors, *https://www.naics.com/business-lists/counts-by-naics-code/.*

[801] The number of retail broker-dealers affected by this exemption is estimated as: (1,919 broker-dealers × 96.9%) = 1,860 broker-dealers.

[802] Estimates are based on the SEC's FOCUS filings and Form ADV filings.

[803] In 2023, 55 percent of registered investment advisers provided employer-sponsored retirement benefits consulting. (*See* Cerulli Associates, *U.S. RIA Marketplace 2023: Expanding Opportunities to Support Independence,* Exhibit 5.10. The Cerulli Report.) The Department assumes the percentage of broker-dealers provide advice to retirement plans is the same as the percent of investment advisers providing services to plans. This is calculated as 456 hybrid broker-dealers × 55% = 251 affected entities.

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

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

[806] The number of insurance companies using captive distribution channels is estimated as 442 × 81% = 358 insurance companies. The number of insurance companies using independent distribution channels is estimated as 442 − 358 = 84 insurance companies.

figure was not re-calculated based on the *Statistics of U.S. Businesses* because it accounts exclusively for insurers selling annuities, while the *Statistics of U.S. Businesses* would include all direct insurers.

Captive Insurance Agents

Additionally, as discussed in the Affected Entities section of the regulatory impact analysis, the Department estimates that 1,577 captive insurance agents will be affected by the amendments. The Department estimates that 99 percent of these captive agents work for small entities.[807] Thus, the Department estimates there are 1,561 captive insurance agents that will be affected by the amendments.[808]

Independent Producers

The rulemaking also affects independent insurance producers that recommend annuities from unaffiliated Financial Institutions to Retirement Investors, as well as the Financial Institutions whose products are recommended. While captive insurance agents are employees of an insurance company, other insurance agents are ''independent'' and may work with multiple insurance companies. Though these independent insurance producers may rely on PTE 2020–02, the Department believes they are more likely to rely on PTE 84–24. For this reason, the Department only considers captive insurance agents in the analysis for PTE 2020–02 and not Independent Producers.

The Independent Insurance Agents and Brokers of America estimated that there were 40,000 Independent Producers in 2022. The Department does not have data on what percent of Independent Producers serve the retirement market. In the proposal, the Department assumed that 10 percent, or 4,000, of these Independent Producers serve the retirement market. As noted in the Affected Entities section of the regulatory impact analysis, the Department received several comments suggesting that its estimate for the number of independent insurance agents was too low, while commenters provided estimates that were substantially higher, asserting an estimate between 80,000 and 120,000 agents an appropriate level, the commenters did not provide any documentation or basis for their suggestions. In response, the Department analyzed employment data from the March 2023 Current Population Survey to identify the number of self-employed workers in the ''Finance and Insurance'' industry whose occupation was listed as ''Insurance Sales Agents.'' This identified 86,410 self-employed insurance sales agents in the Finance and Insurance industry.[809] The Department decided to utilize this as the number of Independent Producers for the analyses presented even though this data point likely contains workers who do not sell annuities or would otherwise not be impacted by the rulemaking; therefore, the Department believes this results in an overestimate of costs associated with Independent Producers.[810]

The Department estimates that 99 percent of these entities are small entities.[811] As such, the Department estimates that 85,564 small Independent Producers will be affected by the amendment.

Pension Consultants

The Department expects that pension consultants will continue to rely on the existing PTE 84–24; however, the amendment will exclude compensation received by pension consultants as a result of providing investment advice from relief under the existing PTE 84–24. As such, any pension consultants relying on the existing exemption for investment advice will be required to work with a Financial Institution under PTE 2020–02 to receive compensation for fiduciary investment advice. In this analysis, the Department includes pension consultants in the affected entities for continued relief for the existing provisions of PTE 84–24 and as a part of registered investment advisers for the amended PTE 2020–02.

As discussed in the Affected Entities section of the regulatory impact analysis, the Department estimates that 1,011 pension consultants serve the retirement market. The Department estimates that approximately 91.4 percent of these entities are small entities.[812] As such, the Department estimates that 924 pension consultants will be affected by the amendments.

Principal Company Underwriter

The Department expects that some investment company principal underwriters for plans and IRAs rely on the existing PTE 84–24. The amendment excludes compensation received by investment company principal underwriters as a result of providing investment advice from relief under the existing PTE 84–24. As such, any principal company underwriter relying on the existing exemption for investment advice will be required to work with a Financial Institution under amended PTE 2020–02 to receive compensation for fiduciary investment advice. In this analysis, the Department includes principal company underwriters in the affected entities for continued relief for the existing provisions of PTE 84–24 as well as the amended PTE 2020–02 as registered investment advisers.

As discussed in the Affected Entities section, the Department assumes that 10 investment company principal underwriters for plans and 10 investment company principal underwriters for IRAs will use this exemption once with one client plan. The Department estimates that approximately 97 percent of these entities are small entities.[813] As a result,

[807] This is estimated on the percent of entities with annual receipts less than $15.0 million for the industry Insurance Agencies and Brokerages, NAICS 524210. *See* NAICS Association, *Count by NAICS Industry Sectors, https://www.naics.com/business-lists/counts-by-naics-code/.;* Small Business Administration, *Table of Size Standards,* (December 2022), *https://www.sba.gov/document/support-table-size-standards.*

[808] The number of captive insurance agents is calculated as: (1,577 captive agents × 99.0%) = 1,561 captive insurance agents serving the annuity market.

[809] EBSA Tabulations based off the March 2023 Current Population Survey.

[810] When revising its estimate of Independent Producers for the final rulemaking, the Department considered using the proportion of premiums attributable to life insurance activity as a proxy for the share of insurance agents that sell annuities. Data from the U.S. Department of the Treasury, Federal Insurance Office, ''Annual Report on the Insurance Industry,'' indicates that roughly 23 percent of insurance premiums in 2023 were from life insurance activity. Assuming that this translates into 23 percent of insurance agents selling life insurance products would reduce the number of estimated independent life insurance producers affected from 86,410 to 20,185. If the Department assumed this level of Independent Producers it would result in a total estimated cost associated with the PTE 84–24 rulemaking of just $67.7 million in the first year and $36.3 million in subsequent years. The Department ultimately decided to not use share of insurance premiums adjustment in the Final Rule.

[811] This is estimated on the percent of entities with annual receipts less than $15.0 million for the industry Insurance Agencies and Brokerages, NAICS 524210. *See* NAICS Association, *Count by NAICS Industry Sectors, https://www.naics.com/business-lists/counts-by-naics-code/.;* Small Business Administration, *Table of Size Standards,* (December 2022), *https://www.sba.gov/document/support-table-size-standards.*

[812] This is estimated on the percent of entities with annual receipts less than $45.5 million for the industry Third Party Administration of Insurance and Pension Funds, NAICS 524292. *See* NAICS Association, *Count by NAICS Industry Sectors, https://www.naics.com/business-lists/counts-by-naics-code/.;* Small Business Administration, *Table of Size Standards,* (December 2022), *https://www.sba.gov/document/support-table-size-standards.*

[813] This is estimated on the percent of entities with less than $47.0 million for the industry Investment Banking and Securities Intermediation, NAICS 523110. *See* NAICS Association, *Count by*

Continued

the Department estimates that all 10 of the estimated small investment company principal underwriters for plans and all 10 of the estimated small investment company principal underwriters for IRAs will be affected by the proposed amendments.

Banks and Credit Unions

The amendments to PTE 80–83, PTE 75–1, and PTE 2020–02 may affect banks and credit unions. The amendments to PTE 80–83 and PTE 75–1 will exclude entities currently relying on the existing exemptions for investment advice, which will instead be required to comply with PTE 2020–02 for relief.

The Department estimates that approximately 76 percent of commercial banks are small banks.[814] As discussed in the Affected Entities section of the regulatory impact analysis, the Department estimates that 4,049 commercial banks will use the amended PTE 75–1, of which 3,076 are estimated to be small.[815] Additionally, in the Affected Entities section of the regulatory impact analysis, the Department estimates that 25 fiduciary-banks with public offering services will use the amended PTE 80–83, of which, 19 are estimated to be small.[816] The Department recognizes that these estimates assume that the proportion of small banks using the aforementioned PTEs will be the same as the proposition of all banks using the PTEs. The Department recognizes that the banking industry within the United States is characterized by high market concentration.[817]

The amendments could also affect credit unions. The Department estimates that there are approximately 4,645 credit unions.[818] In 2023, the SBA estimated that there are 4,586 small credit unions.[819] As discussed in the Affected Entities section of the regulatory impact analysis, while the Department acknowledges that some credit unions may rely on PTE 75–1 and PTE 80–83 as amended, the Department does not have data, and did not receive any comment on the proposal, to suggest how many credit unions current rely on these exemptions or will continue to rely on these exemptions as amended.

Mutual Fund Companies

The amendments modify PTE 77–4 such that mutual fund companies providing services to plans can no longer rely on PTE 77–4 for relief when giving investment advice and will instead need to rely on PTE 2020–02 for relief.

As discussed in the Affected entities section of the regulatory impact analysis, the Department estimates that 812 mutual fund companies will be affected by the amendments to PTE 77–4. The Department estimates that approximately 92 percent of these mutual fund companies, or 744 mutual fund companies, are small.[820]

Mortgage Pool Sponsors

PTE 83–1 provides relief for the sale of certificates in an initial issuance of certificates by the sponsor of a mortgage pool to a plan or IRA when the sponsor, trustee, or insurer of the mortgage pool is a fiduciary with respect to the plan or IRA assets invested in such certificates. The amendments exclude exemptive relief for investment advice. Under the rulemaking, these mortgage pool sponsors operating as or under a Financial Institution will be able to rely on PTE 2020–02 for relief concerning investment advice.

5. Impact of the Rule

The Department believes the costs associated with the amendments are modest because the rulemaking was developed in consideration of other regulatory conduct standards. The Department believes that many Financial Institutions and Investment Professionals have already developed compliance structures for similar regulatory standards. The Department does not expect that the rulemaking will impose a significant compliance burden on small entities. As discussed, the Department estimates that the rulemaking will impose costs of approximately $536.8 million in the first year and $332.7 million in each subsequent year, of which approximately $328.7 million in the first year and $140.7 million in each subsequent year will be imposed on small Financial Institutions.

The table below summarizes the estimated aggregate cost for small entities due to the proposed amendments to each exemption. The following section describes estimated cost for each entity type for each exemption.

TABLE 11—SUMMARY OF TOTAL COST AND AVERAGE PER-ENTITY COSTBY EXEMPTION FOR SMALL ENTITIES

	Total cost		Per-entity cost	
	First year	Subsequent years	First year	Subsequent years
PTE 84–24	$201,839,804	$82,820,265	$2,326	$954
PTE 2020–02	126,887,617	57,891,821	6,984	3,186
Mass Amendments [1]				
Total	328,727,421	140,712,086	9,310	4,140

[1] As finalized, the amendments to the Mass Amendment do not impose an additional burden on entities continuing to rely on those exemptions. However, the amendments will require entities to rely on PTE 84–24 and PTE 2020–02 for exemptive relief covering transactions involving the provision of fiduciary investment advice. These costs are accounted for in the cost estimates for PTE 84–24 and PTE 2020–02.

NAICS Industry Sectors, https://www.naics.com/business-lists/counts-by-naics-code/.

[814] This is estimated on the percent of commercial banks with assets less than $850 million. *See* Federal Deposit Insurance Corporation, *FOIA RIS Data Bulk Download,* (September 2023), *https://www.fdic.gov/foia/ris/index.html.;* Small Business Administration, *Table of Size Standards,* (December 2022), *https://www.sba.gov/document/support--table-size-standards.*

[815] The number of small commercial banks that would use PTE 75–1 is estimated as: (4,049 banks × 76%) = 3,076 small banks.

[816] The number of small banks that would use PTE 80–83 is estimated as: (25 fiduciary-banks with public offering services × 76%) = 19 banks.

[817] Jim DiSalvo, *Banking Trends: Has the Banking Industry Become Too Concentrated?,* Federal Reserve Bank of Philadelphia, (2023), *https://www.philadelphiafed.org/-/media/frbp/assets/economy/articles/economic-insights/2023/q1/bt-has-the-banking-industry-become-too-concentrated.pdf.*

[818] For more information on how the number of credit unions is estimated, refer to the Affected Entities section of the regulatory impact analysis.

[819] 88 FR 18906 (March 29, 2023).

[820] This is estimated on the percent of entities with annual receipts less than $40 million for the industry Open End Investment Fund, NAICS 525910. *See* NAICS Association, *Count by NAICS Industry Sectors, https://www.naics.com/business-lists/counts-by-naics-code/.;* Small Business Administration, *Table of Size Standards,* (December 2022), *https://www.sba.gov/document/support--table-size-standards.*

Note: The sum of the columns may not sum to total due to rounding.

Preliminary Assumptions and Cost Estimate Inputs

The Department also assumes affected entities will likely incur only incremental costs if they are already subject to rules or requirements from the Department or another regulator. The Department acknowledges that not all entities will decide to use the amended PTE 2020–02 and PTE 84–24 for transactions resulting from fiduciary investment advice. Some may instead rely on other existing exemptions that better align with their business models. However, for this cost estimation, the Department assumes that all eligible entities will use the PTE 2020–02 and PTE 84–24 for such transactions. The Department recognizes that this may result in an overestimate, as not all entities will necessarily rely on these exemptions.

The Department does not have information on how many Retirement Investors—including plan beneficiaries, plan participants, and IRA owners—receive electronic disclosures from investment advice fiduciaries. For the purposes of this analysis, the Department assumes that the percent of Retirement Investors in plans that are receiving electronic disclosures will be similar to those under the Department's 2020 and 2002 electronic disclosure safe harbors.[821] Accordingly, the Department estimates that 96.1 percent of the disclosures sent to Retirement Investors in plans will be sent electronically, and the remaining 3.9 percent will be sent by mail.[822] Additionally, the Department assumes that approximately 72 percent of IRA owners will receive disclosures electronically.[823] Furthermore, the Department estimates that communications between businesses (such as disclosures sent from one Financial Institution to another) will be 100 percent electronic.

The Department assumes that various types of personnel will perform the tasks associated with information collection requests at an hourly wage rate of $65.99 for clerical personnel, $133.24 for a top executive, $165.29 for an insurance sales agent, $165.71 for a legal professional, $198.25 for a financial manager, and $228 for a financial adviser.[824] Additionally, in response to comments, the Department has also analyzed these costs according to different revenue sizes. The per entity costs for the rulemaking as a share of revenue are displayed below.

TABLE 12—TOTAL THREE-YEAR AVERAGE PER-ENTITY COST BY ENTITY AND REVENUE, SHARE OF REVENUE [825]

Revenue	Independent producer (%)	Pension consultant (%)	Insurer (%)	Broker (%)	RIA [826] (%)	Robo adviser (%)	Nonbank trustee (%)	Bank [827] (%)
<$100k	3.16	6.63	.....	5.62	4.91	.....	7.34	<0.001
$100–$500k	0.53	1.10	.....	0.97	1.04	.....	1.23	<0.001
$0.5–$1m	0.21	0.44	.....	41	61	.....	0.50	<0.001
$1–$5m	0.05	0.11	.....	0.12	0.29	.....	0.14	<0.001
$5–$25m	0.01	0.02	.....	0.05	0.22	.....	0.05	<0.001
$25–$47m	0.00	0.01	.....	0.04	0.17	.....	0.05	<0.001
SBA Small	0.01	0.01	0.28	0.01	0.01	0.11	0.01	<0.01

Cost Associated With PTE 2020–02

Summary of Affected Entities

The analysis presented in this section is distinct from that presented in the regulatory impact analysis because the Department is relying on the SBA definition of a small entity and an updated source recommended by the SBA for the RFA whereas the regulatory impact analysis utilizes an alternative definition and data source. The result of using the SBA definition in conjunction with its preferred data source is an increase in the estimated number of affected small entities from 3,531, which was used in the regulatory impact analysis, to 18,169 in the RFA for PTE 2020–02. Costs are allocated to small entities in two manners depending on the task. When allocating the fixed costs of review, development of disclosure, and compliance measures instituted at an entity level, the costs are distributed using the time, labor, and other assumptions presented in the regulatory impact analysis associated with the task for small entities. Alternatively, when the costs are associated with transactional or revenue generating activity, the costs are calculated on a revenue weighted basis. For example, Census *Statistics of U.S. Businesses* data show that approximately 99 percent of Investment Advice firms reporting under NAIC 523930 have revenues under the SBA threshold. These firms generate roughly 30 percent of the industry classes' receipts. Therefore, when the Department allocates fixed costs, the costs will be calculated based on the number of affected small entities such as for rule review, where 99% of the total 16,398 Investment Advisers are allocated 20 hours of a legal professionals' time to review. When the cost is variable or transaction based,

[821] 85 FR 31884 (May 27, 2020); 67 FR 17263 (Apr. 9, 2002).

[822] The Department estimates approximately 94.2 percent of Retirement Investors receive disclosures electronically. This is the sum of the estimated share of Retirement Investors receiving electronic disclosures under the 2002 electronic disclosure safe harbor (58.2 percent) and the estimated share of Retirement Investors receiving electronic disclosures under the 2020 electronic disclosure safe harbor (36 percent).

[823] The Department used information from a Greenwald & Associates survey which reported that 84 percent of retirement plan participants find electronic delivery acceptable, and data from the National Telecommunications and Information Administration internet Use Survey which indicated that 86 percent of adults 65 and over use email on a regular basis, which is used as a proxy for internet fluency and usage. Therefore, the assumption is calculated as: (84% find electronic delivery acceptable) × (86% are internet fluent) = 72% are internet fluent and find electronic delivery acceptable.

[824] Internal Department calculation based on 2023 labor cost data. For a description of the Department's methodology for calculating wage rates. *See* EBSA, *Labor Cost Inputs Used in the Employee Benefits Security Administration, Office of Policy and Research's Regulatory Impact Analyses and Paperwork Reduction Act Burden Calculations, https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf.*

[825] Values are displayed as a share of the midpoint for each revenue category. For instance, values in the "<$100k" category are displayed as a share of $50,000.

[826] This includes both State-registered and SEC-registered investment advisers.

[827] The SBA Size categorization for banks is based on total assets, not revenue. Banks are presented on the same chart for simplicity, but their figures are based off of asset cutoffs at $50, $100, $200, $400, $600, and $850 million.

such as with rollover documentation costs, the costs allocated to small firms will be around 30 percent of the total costs.

Cost To Review the Rule

The Department estimates that all 18,169 of the small Financial Institutions affected will each need to review the rule, as it applies to their business. The Department acknowledges that the review process will vary significantly by institution. Some organizations may use in-house teams to review the rule and devise an implementation plan, others may outsource review to a third party, and still others may choose a hybrid approach. Outsourcing the review process can lead to efficiencies as one organization reviews the rule and then provides information to many others. These efficiencies may be particularly beneficial to small entities which make up the majority of entities. The Department estimates that such a review will take a legal professional, on average, 20 hours to review the rule and develop an implementation plan, resulting in a total cost of $60.2 million.[828] The Department increased this burden estimate from 9 hours in response to comments received.

Cost Associated With General Disclosures

The amendments require small entities to modify existing general disclosures and develop additional general disclosures to those required under the existing exemption. For more information on the changed requirements for each disclosure, refer to the descriptions in the preamble and regulatory impact analysis of this document. The Department estimates that the total cost for the 18,169 small Financial Institutions to update their disclosure materials and distribute the newly required disclosures is $4.4 million during the first year and approximately $570,000 in each subsequent year.[829]

Cost Associated With Rollover Documentation and Disclosure

As discussed in the cost section of the regulatory impact analysis, the Department bases its estimates on the rollover activity observed in 2023, where the nearly half of the 4,485,059 rollovers, or 2,197,679 rollover transactions, involved receiving advice.[830] The Department lacks reliable data on the number of rollovers that involve small Financial Institutions. As described in the Affected Entities section of this RFA the Department assumes the percent of rollovers conducted by small institutions is proportional to the percent of revenue generated by entities classified as small within the entity category being discussed. Using the proportional revenue of each type of entity the Department estimates that approximately 579,598 rollovers, or 26.4 percent, will be conducted via small Financial Institutions.

Building from the discussion above, the Department estimates an annual cost of approximately $39.1 million for rollover transaction documentation.[831]

Cost Associated With Written Policies and Procedures

Entities that were not previously complying with PTE 2020–02 will incur the cost to develop policies and procedures in the first year. As described in more detail in the Cost section of the regulatory impact analysis, the time burdens assumed depend on prior reliance on either a previous version of the PTE or similar regulatory scheme in which much of the required work is assumed to be complete. For small entities that are currently complying with the requirement, the Department assumes 10 hours to bring their current policies and procedures into compliance and 20 hours for firms to develop them from first principles. Additionally, the Department estimates that most entities will require an additional 5 hours to update their policies and procedures each year. The amendments will also require Financial Institutions to provide their complete policies and procedures to the Department within 30 days of request. This cost is incorporated into the estimate presented above but discussed separately below for completeness's sake. Based on the number of past cases as well as current open cases that would merit such a request, the Department estimates that the Department will request a total of 165 policies and procedures in the first year and 50 policies and procedures in subsequent years. Assuming the number of requests from small institutions is proportionate to the number of small Financial Institutions, the Department estimates that it will request 160 policies and procedures from small Financial Institutions in the first year and 49 in subsequent years.[832] The Department estimates that fulfilling the requirement will result an estimated cost of approximately $2,656 in the first year[833] and $808 in subsequent years.[834] The cost for a firm receiving the request will be approximately $17 in years when a request is made and no

[828] The burden is estimated as: (18,169 entities x 20 hours) ≈ 363,381 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: (18,169 entities × 20 hours) × $165.71 ≈ $60,215,805.

[829] The burden cost for producing and updating disclosures is estimated as:

Newly reliant entities create fiduciary disclosure {[(18,169 small entities−41 robo-advisor, and non-bank trustees) × 30% × (30 minutes ÷ 60 minutes)] + (41 × (30 minutes ÷ 60 minutes)} ≈ 2,740 hours;

Previously reliant entities update fiduciary disclosure [(18,169 small entities−41 robo-advisor, and non-bank trustees) × 70% × 10% × (10 minutes ÷ 60 minutes)] ≈ 211 hours;

Previously reliant entities develop written statement of Care and Loyalty Obligation disclosure [18,057 small entities × (30 minutes ÷ 60 minutes)] ≈ 9,029 hours;

Newly reliant entities develop written statement of Care and Loyalty Obligation disclosure (112 small entities × 1 hour) ≈ 112 hours;

Newly reliant entities create Relationship and Conflict of Interest disclosure {[(18,169 small entities−41 robo-advisor, and non-bank trustees−1,862 broker-dealers) + (1,862 broker-dealers × (600 non-retail ÷ 1,920 total broker-dealers)) × 30%] + [(41 robo-advisor, and non-bank trustees) × 1 hour] ≈ 5,074 hours;

Previously reliant entities update All Material Facts disclosure [(18,169 small entities−41 robo-advisor, and non-bank trustees−1,862 Broker-dealers) + (1,862 Broker-dealers × (600 non-retail ÷ 1,920 total Broker-dealers)) × 70% × (30 minutes ÷ 60 minutes)] ≈ 5,897 hours;

Aggregating these tasks results in an hour burden of 23,062 hours and an equivalent burden cost of $3,821,660 to produce and update the disclosures.

The burden for disclosure materials is estimated as: (5,474,608 small entity disclosures × $0.10) ≈ $574,609.

[830] For more information on how the number of IRA rollovers is estimated, refer to the Affected Entities section of the regulatory impact analysis.

[831] The burden is estimated as: 2,197,679 rollovers × 27.6% involving small entities = 605,564 small rollovers. The labor rate of $64.60 per rollover (based on a rate of $228 per hour for a Personal Financial Adviser) and a material cost of $0.10 per paper rollover disclosure are applied in the following calculation: [(605,564 small rollovers × $64.60) + (605,564 small rollovers × 3.9% paper disclosures × $0.10)] = $39,121,801. For more information on the assumptions included in this calculation, refer to the regulatory impact analysis of this document.

[832] The percent of Financial Institutions that are small is estimated as: (18,169 small Financial Institutions/18,632 Financial Institutions) = 97.5%. The number of policies and procedures requested from small financial entities in the first year is estimated as: (165 × 97.5%) = 161. The number of policies and procedures requested from small financial entities in the first year is estimated as: (50 × 97.5%) = 49.

[833] The burden is estimated as: (161 × (15 minutes ÷ 60 minutes)) = 40 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: (161 × (15 minutes ÷ 60 minutes)) × $65.99 = $2,656. For more information on the assumptions included in this calculation, refer to the regulatory impact analysis of this document.

[834] The burden is estimated as: (49 × (15 minutes ÷ 60 minutes)) ≈ 12 burden hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: (49 × (15 minutes ÷ 60 minutes)) × $65.99 = $808. For more information on the assumptions included in this calculation, refer to the regulatory impact analysis of this document.

cost in most years when no request is made.

The requirements to maintain and review policies and procedures are estimated to result in an aggregate cost of $20.0 million in the first year and $15.0 million in subsequent years for small Financial Institutions, or roughly $1,101 average cost per entity in the first year and $829 in subsequent years.[835]

Costs Associated With Annual Report of Retrospective Review for Financial Institutions

PTE 2020–02 requires Financial Institutions to conduct a retrospective review at least annually that is reasonably designed to prevent violations of and achieve compliance with the conditions of this exemption, Impartial Conduct Standards, and the policies and procedures governing compliance with the exemption.

While entities relying on the existing exemption will not incur additional costs with this requirement, robo-advisers, and newly reliant broker-dealers, registered investment advisers, and insurance companies, who either were not covered under, or not relying upon, the existing exemption, will incur costs associated with conducting the annual review. As stated in the regulatory impact analysis, the Department assumes that 30 percent of entities that were previously able to rely on the PTE chose not to do so and will be newly reliant due to this rulemaking and incur a full cost of compliance. As presented previously in the regulatory impact analysis, the Investment Adviser Association estimated in 2018 that 92 percent of SEC-registered investment advisers voluntarily provide an annual compliance program review report to senior management.[836] The Department assumes that State-registered investment advisers exhibit similar retrospective review patterns as SEC-registered investment advisers. Accordingly, the Department estimates that eight percent of advising retirement plans will incur costs associated with producing a retrospective review report.

The Department assumes that 10 percent of robo-advisers and newly reliant broker-dealers and insurance companies will incur the full cost of producing an audit report. The Department estimates that 0.8 percent of newly reliant registered investment advisers will incur the full cost of producing the audit report.

This results in an estimate of 98 newly affected small entities not currently producing audit reports.[837] The remaining 5,479 newly affected small entities will need to make modifications to satisfy the requirements.[838]

The Department estimates that it will take a legal professional five hours for small firms to produce a retrospective review report, resulting in an estimated cost of $0.1 million.[839] The Department estimates that it will take a legal professional one hour for small firms to modify existing reports, on average. This results in an estimated cost of $0.9 million.[840]

The Department estimates it will take a certifying officer two hours for small firms to review the report and certify the exemption, resulting in an estimated cost burden of approximately $2.2 million.[841]

This results in a total cost annual cost of $3.1 million.

Summary of Total Cost

The Department estimates that in order to meet the additional conditions of the amended PTE 2020–02, affected small entities will incur a total cost of $131.9 million in the first year and $62.9 million in subsequent years.[842] The cost by requirement and entity type is summarized below.

[835] This burden in the first year is estimated as: [(5,250 small entities × 10 hours) + (229 small entities × 20 hours) + (12,731 small entities × 5 hours)] ≈ 120,785 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is used in the following calculation: [(5,250 small entities × 10 hours) + (229 small entities × 20 hours) + (12,731 small entities × 5 hours)] × $165.71 ≈ $20,008,658. Additionally, 160 small entities will spend 15 minutes each providing the Department with a copy of their policies and procedures in the first year resulting an additional burden of approximately 40 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: [160 small entities × (15 minutes ÷ 60 minutes)] × $65.99 ≈ 2,656. The total cost for the first year is estimated as: $20,008,658 + $2,656 = $20,011,315. This burden in the second year is estimated as: (18,169 small entities × 5 hours) ≈ 90,857 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is used in the following calculation: (18,169 small entities × 5 hours) × $165.71 ≈ $15,053,951. Additionally, 49 small entities will spend 15 minutes each providing the Department with a copy of their policies and procedures in the first year resulting an additional burden of approximately 12 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: [49 small entities × (15 minutes ÷ 60 minutes)] × $65.99 ≈ $808. The total cost for the second year is estimated as: $15,053,951 + $808 = $15,054,760.

[836] *2018 Investment Management Compliance Testing Survey,* Investment Adviser Association (Jun. 14, 2018), *https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/publications/2018-Investment-Management_Compliance-Testing-Survey-Results-Webcast_pptx.pdf.*

[837] This is estimated as: {[(1,861 broker-dealers + 71 insurers) × 10%] + [(7,935 SEC-registered investment advisers + 8,260 State-registered investment advisers) × 0.8%] × 30% that are newly relying on PTE 2020–02] + (10 robo-advisers + 31 non-bank trustees) × 10%} ≈ 98 Financial Institutions. Note: Due to rounding values may not sum.

[838] This is estimated as: {[(1,861 broker-dealers + 71 insurers) × 90%] + [(7,935 SEC-registered investment advisers + 8,260 State-registered investment advisers) × 99.2%] × 30% that are newly relying on PTE 2020–02] + (10 robo-advisers + 31 non-bank trustees) × 90%} ≈ 5,479 Financial Institutions. Note: Due to rounding values may not sum.

[839] The burden is estimated as: (98 small entities creating an audit × 5 hours) ≈ 490 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: 630 burden hours × $165.71 ≈ $81,236. Note, the total values may not equal the sum of the parts due to rounding.

[840] The burden is estimated as: 5,353 small entities updating an audit × 1 hours) ≈ 5,353 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: 5,353 burden hours × $165.71 ≈ $886,983. Note, the total values may not equal the sum of the parts due to rounding.

[841] The burden is estimated as: 5,479 newly reliant small entities × 2 hours) ≈ 25,377 hours. A labor rate of $198.25 is used for a financial manager. The labor rate is applied in the following calculation: 10,958 burden hours × $198.25 ≈ $2,172,432. Note, the total values may not equal the sum of the parts due to rounding.

[842] The burden in the first year is estimated as: $60,215,805 for rule review + $4,398,045 for disclosures + $39,121,801 for rollover documentation + $20,008,658 for policies and procedures + $8,171,727 for retrospective review = $131,918,693. The burden in the subsequent years is estimated as: $574,609 for disclosures + $39,121,801 for rollover documentation + $15,053,951 for policies and procedures + $8,171,727 for retrospective review = $62,922,896.

TABLE 13—THREE-YEAR AVERAGE COST BY TYPE OF ENTITY AND REQUIREMENT

	Broker-dealer	SEC-registered investment adviser	State-registered investment adviser	Insurance company	Robo-adviser	Non-bank trustee
Total	$2,057,340	$8,766,344	$9,124,980	$77,978	$11,047	$34,247
Per-Entity	$1,105	$1,105	$1,105	$1,105	$1,105	$1,105
Disclosure:						
Total	$101,864	$846,560	$881,193	$6,509	$8,143	$4,820
Per-Entity	$55	$107	$107	$92	$814	$155
Rollover Documentation:						
Total	$878,139	$18,493,989	$19,250,589	$2,048	$460,359	$36,678
Per-Entity	$472	$2,331	$2,331	$29	$46,036	$1,183
Policies:						
Total	$1,789,886	$7,232,234	$7,528,108	$76,028	$19,333	$59,932
Per-Entity	$961	$911	$911	$1,077	$1,933	$1,933
Retrospective Review:						
Total	$350,946	$1,351,008	$1,406,278	$13,309	$4,661	$14,449
Per-Entity	$188	$170	$170	$189	$466	$466
Total:						
Total	$5,178,174	$36,690,135	$38,191,149	$175,871	$503,542	$150,125
Per-Entity	$2,781	$4,624	$4,624	$2,492	$50,354	$4,843
SBA:						
SBA Threshold	$47,000,000	$47,000,000	$47,000,000	$47,000,000	$47,000,000	$47,000,000
Per-Entity Cost as a Percentage of SBA Threshold.	0.006%	0.010%	0.010%	0.005%	0.107%	0.010%

In response to comments, the Department has also conducted an analysis of these per-entity costs as a share of a variety of different entity sizes. This analysis for PTE 2020–02 is presented below in Table 14.

TABLE 14—THREE-YEAR AVERAGE PER-ENTITY COST OF PTE 2020–02 BY ENTITY AND REVENUE, SHARE OF REVENUE [843]

Revenue	Insurance company (%)	Broker-dealers (%)	SEC-registered RIA (%)	State-registered RIA (%)	Robo-advisers (%)	Nonbank trustees (%)
<$100k		4.66	4.91	4.91		7.34
$100–$500k		0.81	1.04	1.04		1.23
$0.5–$1m		0.35	0.61	0.61		0.50
$1–$5m		0.10	0.29	0.29		0.14
$5–$25m		0.04	0.22	0.22		0.05
$25–$47m		0.04	0.17	0.17		0.05
SBA Small	0.01	0.01	0.01	0.01	0.11	0.01

Cost Associated With PTE 84–24

Summary of Affected Entities

As discussed in the Affected Entities section of the regulatory impact analysis, the Department expects that 86,769 small financial entities will be affected by the amendments, including 924 pension consultants, 20 investment company principal underwriters, 85,564 Independent Producers, and 261 insurance companies.[844]

Cost To Review the Rule

The Department estimates that all 86,769 of the small Financial Institutions affected will each need to review the rule and develop an implementation plan, as it applies to their business. The Department estimates that such a review and planning will take a legal professional, on average, 20 hours for small insurers, pension consultants, and mutual fund underwriters. The Department expects that the majority of Independent Producers will receive support from the carrier(s) they are contracted with or the Insurance Marketing Organization in understanding the rulemaking and therefore allocates five hours of time per Independent Producer to review the policies and procedures developed by the carriers and integrate the standards into their independent business practices, resulting in a total cost of $74.7 million in the first year.[845]

Costs Associated With General Disclosures

The amendment requires small Independent Producers to provide disclosures to Retirement Investors prior to, or at the time of, a transaction covered by this exemption. For more information on the requirement changes for each disclosure, refer to the descriptions in the preamble and regulatory impact analysis of this

[843] Values are displayed as a share of the midpoint for each revenue category. For instance, values in the ''<$100k'' category are displayed as a share of $50,000.

[844] For more information on how the number of each type of entity is estimated, refer to the Affected Entities section.

[845] The burden is estimated as: [(85,564 Independent Producers × 5 hours) + (1,205 entities × 20 hours) ≈ 450,835 hours. A labor rate of $165.71 is used for a legal professional and a labor rate of $165.29 for an Independent Producer. The labor rate is applied in the following calculation: [(85,564 Independent Producers × 5 hours × $165.29) + (1,205 entities × 20 hours × $165.71)] ≈ $74,707,970. Note: Due to rounding values may not sum.

document. The Department estimates the marginal cost of the disclosure requirements to be approximately $43.6 million in the first year for the development of disclosures to meet the requirements of the rulemaking.[846]

Cost Associated With Rollover Documentation and Disclosure

The amendment requires an Independent Producer to provide a rollover disclosure that is similar to the disclosure required in the amended PTE 2020–02. As discussed in the regulatory impact analysis, the Department assumes that such disclosures will be prepared by the Independent Producer.

In the regulatory impact analysis, the Department estimates that 500,000 Retirement Investors will receive documentation of the basis for recommending a rollover each year.[847] The Department does not have data on what proportion of rollovers will be produced by small Independent Producers. For the purposes of this analysis, the Department assumes that the proportion of rollovers advised by small Independent Producers is equal to the share of revenue associated with small Independent Producers compared to the revenue produced by all Independent Producers. The Department estimates that approximately 48.7 percent of rollovers will be produced by small Independent Producers.[848] The Department estimates small Independent Producers will need to provide approximately 243,600 rollover disclosures annually. This results in an estimated cost of approximately $20.1 million annually.[849]

Costs Associated With the Provision of Disclosures to Retirement Investors

The Department estimates that the number of disclosures that will need to be provided to Retirement Investors by small entities is equal to the number of rollover disclosures, or approximately 243,600 disclosures. Preparing and sending the general disclosures described above is estimated to cost of approximately $450,000.[850] Additionally, as discussed in more detail in the Cost section of the regulatory impact analysis, the Retirement Investor may request a follow up disclosure which is intended to provide more detail on the compensation associated with the potential transaction. The Department estimates that 10 percent of Retirement Investors will request additional information regarding the rollover and will need to be provided this disclosure which is estimated to cost approximately $714,000 to produce and provide.[851]

Additionally, Independent Producers will be required to send the documentation to the insurance company for pre-transaction approval. The Department expects that such documentation will be sent electronically and result in a de minimis burden.

Costs Associated With the Retrospective Review

The amendment requires a retrospective review to be conducted at least annually. The review must be reasonably designed to prevent violations of and achieve compliance with (1) the Impartial Conduct Standards, (2) the terms of this exemption, and (3) the policies and procedures governing compliance with the exemption. The review is required to evaluate the effectiveness of the supervision system, any noncompliance discovered in connection with the review, and corrective actions taken or recommended, if any. Insurers will be required to annually provide a written report that details the review to a Senior Executive Officer for certification. Insurers will also be required to provide the Independent Producer with the underlying methodology and results of their retrospective review.

In the final rulemaking, the Department has stated that Insurers may use sampling in their review of an Independent Producer's transactions so long as any sampling or other method is designed to identify potential violations, problems, and deficiencies that need to be addressed. With this in mind, the Department has not revised its estimate of the average time conducting the retrospective review of each Independent Producer will take. However, the Department received several comments regarding the number

[846] The burden is estimated as: Fiduciary Notice = For Independent Producers: [(86,410 Independent Producers × 99% proportion of entities are small Independent Producers × 5% assumed to create disclosure) × (30 minutes ÷ 60 minutes)] ≈ 2,139 hours. Applying a labor rate for an Independent Producer results in: (2,139 hours × $165.29) ≈ $353,571. For insurers: 358 insurers × 73.1% proportion of entities that are small × (30 minutes ÷ 60 minutes) ≈ 131 hours. Applying a labor rate for a legal professional results in: (131 hours × $165.71) ≈ $21,652. Combining the costs for both entity types yields: $353,571 + $21,052 ≈ 375,223 to create the fiduciary notice.

Written Statement of Care Obligation & Loyalty Obligation = For Independent Producers: [(86,410 Independent Producers × 99% proportion of entities are small Independent Producers × 5% create disclosure) × 1 hour] ≈ 4,278 hours. Applying a labor rate for an Independent Producer results in: (4,278 hours × $165.29) ≈ $707,142. For insurers: 358 insurers × 73.1% proportion of entities that are small × 1 hour ≈ 261 hours. Applying a labor rate for a legal professional results in: (261 hours × $165.71) ≈ $43,303. Combining the costs for both entity types yields: $707,142 + $43,303 ≈ $750,445. Relationship and Conflict of Interest disclosure= [(86,410 Independent Producers × 99% proportion of entities are small Independent Producers) × 3 hours] ≈ 256,691 hours. Applying a labor rate for legal professional results in: (256,691 hours × $165.71) ≈ $42,536,316. Summing these components results in the total estimated cost of: ($353,571 for Fiduciary Notice by Independent producer + $21,652 for Fiduciary Notice by Insurer + $707,142 for Statement of Care Obligation & Loyalty Obligation by Independent Producer + $43,303 for Statement of Care Obligation & Loyalty Obligation by Insurer + $42,536,316 for Relationship and Conflict of Interest disclosures by Independent Producer) ≈ $43,661,983.

[847] For information on this estimate, refer to the estimate of IRAs affected by the amendments to PTE 84–24 in the Affected Entities section of the regulatory impact analysis.

[848] This is estimated on the percent of entities with annual receipts less than $15.0 million for the industry Insurance Agencies and Brokerages, NAICS 524210. *See* NAICS Association, *Count by NAICS Industry Sectors, https://www.naics.com/business-lists/counts-by-naics-code/.;* Small Business Administration, *Table of Size Standards,* (December 2022), *https://www.sba.gov/document/support — table-size-standards.*

[849] The burden is estimated as: [(500,000 rollovers × 48.7% proportion of business activity associated with small entities) × (30 minutes ÷ 60 minutes)] ≈ 121,824 burden hours. A labor rate of $165.29 is used for an Independent Producer. The labor rate is applied in the following calculation: [(500,000 rollovers × 48.7% proportion of business activity associated with small entities) × (30 minutes ÷ 60 minutes)] × $165.29 ≈ $20,136,349. For more information on the assumptions included in this calculation, refer to the regulatory impact analysis of this document.

[850] The labor cost is estimated as: [(500,000 disclosures × 28.2% sent by mail × 48.7% proportion of business activity associated with small Independent Producers) × (2 minutes ÷ 60 minutes)] ≈ 2,290 burden hours. A labor rate of $165.29 is used for an insurance sales agent. The labor rate is applied in the following calculation: [(500,000 disclosures × 28.2% sent by mail × 48.7% proportion of business activity associated with small Independent Producers) × (2 minutes ÷ 60 minutes)] × $165.29 ≈ $378,563. The material cost is estimated as: 68,709 rollovers resulting in a paper disclosure × [$0.68 postage + ($0.05 per page × 7 pages)] ≈ $70,770. The total cost is estimated as: $378,563 + $70,770 ≈ $449,334. For more information on the assumptions included in this calculation, refer to the regulatory impact analysis of this document.

[851] The labor cost is estimated as: (500,000 rollovers × 48.7% proportion of business activity associated with small entities × 10% request rate) ≈ 24,365 requests for the Detailed Compensation Disclosure. Each disclosure is estimated to take 10 minutes to prepare. Therefore, the hours burden is: 24,365 disclosure requests × (10 minutes ÷ 60 minutes) ≈ 4,061 burden hours. A labor rate of $165.29 is used for an insurance sales agent. The labor rate is applied in the following calculation: 4,061 burden hours × $165.29 ≈ $671,212. The mailing cost is estimated as: (24,365 requests × 28.2% receiving disclosures via mail) ≈ 6,871 rollovers resulting in a paper disclosure × [$0.68 postage + ($0.05 per page × 2 pages)] + (2 minutes ÷ 60 minutes) to prepare the disclosure for mailing × $165.29 labor rate for an Insurance Sales Agent ≈ $43,216. The total cost is estimated as: $671,212 + $43,216 ≈ $714,427. For more information on the assumptions included in this calculation, refer to the regulatory impact analysis of this document.

of Independent Producers and has revised them upward accordingly.

The Department estimates that Insurers will need to prepare a total of 259,230 retrospective reviews.[852] The Department does not have data on the proportion of retrospective reviews that will be prepared by small insurance companies. As presented in the Summary of Affected Entities section of this RFA, the proportion of activity or cost associated with small entities for entity level tasks is attributed by the share of small entities in that industry. This results in an estimate of approximately 189,428 retrospective reviews for small insurance companies.[853]

The Department assumes that the audit preparation will take one hour of a legal professional's time, at a labor cost of $165.71 per hour. Therefore, the cost to small insurers is estimated at approximately $31.4 million annually.[854] The certification of the summary of the audits is expected to take a Senior Executive Officer, at a labor cost of $133.24 per hour, an average of four hours per small entity, which results in an estimated approximate cost of $139,273.[855] Finally, the Department estimates that it will take a clerical professional, at a labor rate of $65.99 per hour, five minutes per report to provide the results and methodology to Independent Producers. This results in an estimated cost to small entities of roughly $1 million.[856] These communications are assumed to be electronic therefore there are no postage or materials costs.

The Department estimates that meeting the requirements of the rulemaking, which include conducting and drafting the retrospective review, having the review certified by a Senior Executive, and providing feedback to Independent Producers to result in an annual cost of approximately $32.6 million.[857]

Costs Associated With Self-Correction

The amendment requires an Independent Producer that chooses to use the self-correction provision of the exemption to notify the Insurer of any corrective actions taken due to a violation of the exemption's conditions. As discussed above, the Insurer must discuss corrective actions in the retrospective review. The Department does not have data on how often violations will occur, or on how often Independent Producers will choose to use the self-correction provisions of the amendment. The Department expects that such violations will be rare. For illustration, the Department assumes that 1 percent of transactions will result in self-correction. This results in 2,436 notifications of self-corrections being sent from small Independent Producers. Assuming it will take an Independent Producer 30 minutes, on average, to draft and send a notification to the insurance company, it will result in an annual cost of approximately $201,363.[858]

Costs Associated With Policies and Procedures

The amendment requires Insurers to establish, maintain, and enforce written policies and procedures for the review of each Independent Producer's recommendation before an annuity is issued to a Retirement Investor. The Insurer's policies and procedures must mitigate conflicts of interest to the extent that a reasonable person reviewing the policies and procedures and incentive practices as a whole would conclude that they do not create an incentive for the Independent Producer to place its interests, or those of the Insurer, or any affiliate or related entity, ahead of the interests of the Retirement Investor. Insurers' policies and procedures must also include a prudent process for determining whether to authorize an Independent Producer to sell the Insurer's annuity contracts to Retirement Investors, and for taking action to protect Retirement Investors from Independent Producers who have failed to adhere to the impartial conduct standards, or who lack the necessary education, training, or skill. Finally, Insurers must provide their complete policies and procedures to the Department within 30 days upon request.

The Department estimates that drafting or modifying the policies and procedures will cost approximately $0.9 million in the first year [859] and that the requirement to review policies and procedures annually will cost approximately $217,000 in subsequent years for small entities.[860] The Department estimates that it will take the Insurer approximately 30 minutes to review the Independent Producers rollover recommendation and to provide feedback to the Independent Producer resulting in an annual cost of $159,000.[861] Providing policies and procedures to the Department upon request is estimated to result in a de minimis annual cost.[862]

[852] For more information on this estimate, refer to the Cost section of the regulatory impact analysis.

[853] The number of retrospective reviews prepared by small insurance companies is estimated as: [259,230 × (358 entities × 73.1% SBA small entities)] ≈ 189,428 retrospective reviews.

[854] This burden is estimated as: (189,428 reviews by small entities × 1 hour) ≈ 189,428 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: (189,428 reviews by small entities × 1 hour) × $165.71 ≈ $31,390,045.

[855] This burden is estimated as: (358 entities × 73.1% SBA small entities) × 4 hours ≈ 1,045 hours burden. A labor rate of $133.24 is used for a senior executive officer. The labor rate is applied in the following calculation: (358 entities × 73.1% SBA small entities × 4 hours) × $133.24 ≈ $139,273.

[856] This burden is estimated as: 189,428 reviews by small entities × (5 minutes ÷ 60 minutes) ≈ 15,786 burden hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: [189,428 reviews by small entities × (5 minutes ÷ 60 minutes)] × $65.99≈ $1,041,694.

[857] This burden is the combination of: $31,390,045 to conduct the review + $139,273 to review and certify the review + $1,041,694 to provide review results to Independent Producers ≈ $32,571,012.

[858] The burden is estimated as: [(500,000 transactions × 1% of transactions resulting in self-correction × 48.7% proportion of business activity associated with small Independent Producers) × (30 minutes ÷ 60 minutes)] ≈ 1,218 hours. A labor rate of $165.29 is used for an Independent Producer. The labor rate is applied in the following calculation: [(500,000 transactions × 1% of transactions resulting in self-correction × 48.7% proportion of business activity associated with small Independent Producers) × (30 minutes÷ 60 minutes)] × $165.29 ≈ $201,363.

[859] This is estimated as: (358 insurers × 73.1% proportion of small insurance companies × 20 hours) ≈ 5,226 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: (358 insurers × 73.1% proportion of small insurance companies × 20 hours) × $165.71 ≈ $866,069. For more information on the assumptions included in this calculation, refer to the regulatory impact analysis of this document.

[860] This is estimated as: (358 insurers × 73.1% proportion of small insurance companies × 5 hours) = 1,307 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: (358 insurers × 73.1% proportion of small insurance companies × 5 hours) × $165.71 ≈ $216,517. For more information on the assumptions included in this calculation, refer to the regulatory impact analysis of this document.

[861] This is estimated as: [(500,000 IRA rollover transactions × 0.3% proportion of business activity associated with small insurers) × (30 minutes ÷ 60 minutes)] ≈ 802 burden hours. A labor rate of $198.25 is used for a financial manager. The labor rate is applied in the following calculation: [(500,000 IRA rollover transactions × 0.3% proportion of business activity associated with small insurers) × (30 minutes ÷ 60 minutes)] × $198.25 ≈ $158,969. The communication of the outcome is expected to be provided electronically.

[862] The number of requests in the first year is estimated as: [(358 insurers × 73.1% proportion of insurance companies that are small) ÷ 87,799 affected entities] × (165 requests in PTE 2020–02 ≈ 3 requests. The number of requests in subsequent years is estimated as: [(358 insurers × 73.1% proportion of small insurance companies) ÷ 87,799 affected entities] × 50 requests in PTE 2020–02 ≈ 1 request. The burden is estimated as: (3 requests × (15 minutes ÷ 60 minutes)) = 0.75 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculations: Year one: (3 requests × (15 minutes ÷ 60 minutes)) × $65.99 ≈ $49. Subsequent years: (1 request × (15 minutes ÷ 60 minutes)) × $65.99 ≈ = $17.

Costs Associated With the Recordkeeping

The amendment incorporates a new recordkeeping provision for transactions involving the provision of fiduciary investment advice that is similar to the recordkeeping provision in PTE 2020–02, and retains the existing recordkeeping requirements in Section V(e) of PTE 84–24 for transactions that do not involve the provision of fiduciary investment advice. The Department estimates that the additional time needed to maintain records for the Financial Institutions to be consistent with the exemption will require an insurance company and Independent Producer two hours annually, resulting in an estimated annual cost of $28.4 million.[863]

Summary of Total Cost

The Department estimates that in order to meet the additional conditions of the amended PTE 84–24, small, affected entities would incur a total cost of $201.8 million in the first year and $82.8 million in subsequent years. The total and per-entity cost by type of entity is broken down in the table below.

TABLE 15—COST BY TYPE OF SMALL ENTITY AND REQUIREMENT, FIRST YEAR

	Independent producer	Pension consultants	Financial institutions/ insurance companies	Mutual fund underwriters
Rule Review:				
Total	$70,714,175	$3,061,442	$866,069	$66,284
Per-Entity	826	3,314	3,314	3,314
Disclosure:				
Total	64,897,138		65,955	
Per-Entity	758		249	
Policies and Procedures:				
Total			1,025,087	
Per-Entity			3,923	
Retrospective Review:				
Total			32,571,012	
Per-Entity			124,640	
Self-Correction:				
Total	201,363			
Per-Entity	2			
Recordkeeping:				
Total	28,285,670		86,607	
Per-Entity	331		331	
Total:				
Total Cost	164,098,348	3,061,442	34,613,730	66,284
Per-Entity Cost	1,918	3,314	132,457	3,314
SBA:				
Threshold (in $ millions)	15.0	45.5	47.0	47.0
Per-Entity Cost as a Percentage of SBA Threshold	0.013%	0.007%	0.282%	0.007%

In response to comments, the Department has also conducted an analysis of these per-entity costs as a share of a variety of different entity sizes. This analysis for PTE 84–24 is presented below in Table 16.

TABLE 16—THREE-YEAR AVERAGE PER-ENTITY COST OF PTE 84–24 BY ENTITY AND REVENUE, SHARE OF REVENUE [864]

Revenue	Independent producer (%)	Insurance company	Pension consultants (%)	Investment company principal underwriters
<$100k	3.16		6.63	
$100–$500k	0.53		1.10	
$0.5–$1m	0.21		0.44	
$1–$5m	0.05		0.11	
$5–$25m	0.01		0.02	
$25–$47m	0.00		0.01	
SBA Small	0.01	0.28	0.01	0.01

[863] This is estimated as: (85,564 Independent Producers + 301 small insurance companies) × 2 hours = 171,650 hours. A labor rate of $165.29 is used for an Independent Producer. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: [(85,564 Independent Producers × 2 hours × $165.29) + (301 small insurance companies × 2 hours × $165.71)] = $28,372,277.

[864] Values are displayed as a share of the midpoint for each revenue category. For instance, values in the "<$100k" category are displayed as a share of $50,000.

Costs Associated With the Mass Amendments

Cost Associated With PTE 75–1

Summary of Affected Entities

The amendment to PTE 75–1 will affect banks, reporting dealers, and broker-dealers registered under the Security Exchange Act of 1934. As discussed in the Affected Entities section above, the Department estimates that 3,944 Financial Institutions, comprised of 1,919 broker-dealers and 2,025 banks, would use PTE 75–1.[865] The Department estimates that, of these affected entities, 1,861 broker-dealers and 1,538 banks would be small.

Costs Associated With Disclosure Requirements in Part V

The Department amended PTE 75–1 Part V to allow an investment advice fiduciary to receive reasonable compensation for extending credit to a plan or IRA to avoid a failed purchase or sale of securities involving the plan or IRA if certain conditions are met.[866] Prior to the extension of credit, the plan or IRA must receive written a disclosure, including the interest rate or other fees that will be charged on the credit extension as well as the method of determining the balance upon which interest will be charged. As discussed in the regulatory impact analysis, the Department expects that these disclosures are common business practice and will not create an additional burden on small broker-dealers or banks.

Costs Associated With Recordkeeping in Parts II and V

Additionally, the Department proposed to amend PTE 75–1 Parts II and V to adjust the recordkeeping requirement to shift the burden from plans and IRAs to Financial Institutions. For the final amendments, this requirement was removed, so there is no added burden for recordkeeping.

Costs Associated With Removing Fiduciary Investment Advice From Parts III and IV

Finally, the Department amended Parts III and IV, which currently provide relief for investment advice fiduciaries, by removing fiduciary investment advice from the covered transactions. Investment advice providers will instead have to rely on the amended PTE 2020–02 for exemptive relief covering investment advice transactions. The Department believes that since investment advice providers were already required to provide records and documentation under PTE 2020–02, this amendment will not result in additional costs.

Summary of Total Cost

The removal of investment advice from PTE 75–1 Parts III & IV moves the estimated costs of providing investment advice to the cost estimates for PTE 2020–02 and leaves other burdens unchanged. While the Department estimates that most entities will rely on PTE 2020–02, the increase in the total cost for PTE 75–1 results from revisions to some estimates, such as time burdens for compliance, which have been adjusted in response to comments. In response to comments, the Department has conducted an analysis of the remaining per-entity costs as a share of a variety of different entity sizes.

Cost Associated With PTE 77–4, PTE 80–83, PTE 83–1, and PTE 86–128

Summary of Affected Entities

The amendment to PTE 77–4 will affect mutual fund companies. As discussed in the Affected Entities section, the Department estimates that 812 mutual fund companies will be affected by the amended PTE 77–4.[867]

PTE 80–83 allows banks to purchase, on behalf of employee benefit plans, securities issued by a corporation indebted to the bank that is a party in interest to the plan. The Department estimates that 19 small fiduciary-banks with public offering services will be affected by the amended PTE 80–83.[868]

PTE 83–1 provides relief for the sale of certificates in an initial issuance of certificates by the sponsor of a mortgage pool to a plan or IRA when the sponsor, trustee, or insurer of the mortgage pool is a fiduciary with respect to the plan or IRA assets invested in such certificates.

The amendment to PTE 86–128 will affect fiduciaries of employee benefit plans that affect or execute securities transactions (''transacting fiduciaries'') and independent plan fiduciaries that authorize the plan. As discussed in the Affected Entities section, the Department estimates that 243 transacting fiduciaries will be affected by the amendments to PTE 86–128.

Summary of Total Cost

The Department amended PTE 77–4, PTE 80–83, PTE 83–1, and PTE 86–128 by removing receipt of compensation as a result of providing fiduciary investment advice from the covered transactions. Investment advice providers will instead have to rely on the amended PTE 2020–02 for exemptive relief covering investment advice transactions. The Department believes that since investment advice providers were already required to provide such documentation under these exemptions, these amendments will result in a de minimis change for investment advice providers. Thus, these amendments will not result in measurable additional costs.

6. Duplicate, Overlapping, or Relevant Federal Rules

The rules in ERISA and the Code that govern advice on the investment of retirement assets overlap with SEC rules that govern the conduct broker-dealers that advise retail investors and the fiduciary duty imposed on investment advisers by the Advisers Act. The Department considered conduct standards set by other regulators, such as SEC, NAIC, and FINRA, in developing the final rule, with the goal of avoiding overlapping or duplicative requirements. To the extent the requirements overlap, compliance with the other disclosure or recordkeeping requirements can be used to satisfy the exemption, as long as the conditions are satisfied.

7. Description of Alternatives Considered

Section 604 of the RFA requires the Department to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. This rulemaking involves predominantly small entities which required the impact on small entities to be a primary concern. The Department tried to align the requirements in this rulemaking with the requirements set by other regulators to minimize regulatory burden.

Additionally, the Department has removed certain requirements in the PTEs, resulting in a lower compliance cost for fiduciary advice providers. For instance:

- The Department removed the requirement of the right to obtain specific information regarding costs, fees, and compensation. Removing this requirement saved small entities $82.86 per-entity for entities already relying on PTE 2020–02, and $165.71 per-entity for

[865] For more information on how the number of each type of entity is estimated, refer to the Affected Entities sections of the regulatory impact analysis and the Regulatory Flexibility Analysis.

[866] For more information on these conditions, refer to the preamble and regulatory impact analysis of this document.

[867] For more information on how the number of each type of entity is estimated, refer to the Affected Entities section.

[868] For more information on how the number of each type of entity is estimated, refer to the Affected Entities section.

entities newly reliant on PTE 2020–02 in the first year.[869]

- In the proposal for PTE 2020–02, the Department considered requiring a rollover disclosure for all rollovers but instead limited the disclosure to rollovers from plans to IRAs in the final exemption. The Department estimates that approximately 70 percent of rollovers are plan-to-IRA rollovers.[870] The Department estimates that small Financial Institutions will no longer need to complete approximately 246,000 rollover disclosures due to this change.[871] Removing this requirement will save small entities $64.60 for each rollover they conduct that is not between a plan and an IRA.[872] Another $0.10 per rollover will be saved for any of these transactions that are conducted with paper disclosures.
- In the final PTE 2020–02, the Department has modified the requirement for a written description of services to be more consistent with the material facts disclosure required by Regulation Best Interest. When it was separate, the description of services had a per-entity cost ranging from $96.66 per small broker-dealer to $248.66 per small Insurer in the first year.[873] The Department believes that some of these costs will be absorbed from the ability of small businesses to comply with Regulation Best Interest and this rulemaking more easily through the material facts disclosure.
- In PTE 84–24, the Department also removed a requirement to provide a general disclosure on commissions received, instead allowing this information to be provided to investors on request. This resulted in a per entity saving for small entities of $165.71 in the first year.[874]

The Department considered not amending PTE 2020–02 and leaving the exemption in its present form. The Department supports the existing PTE 2020–02 and has retained its core components in the amendment, including the Impartial Conduct Standards and the requirement for strong policies and procedures designed to mitigate conflicts of interest and ensure compliance with the exemption conditions. However, the Department believes that broadening the exemption to cover all principal transactions and robo advice, as well as providing additional protections are necessary to ensure that fiduciary investment advice providers adhere to the protective standards outlined in PTE 2020–02. Therefore, the amendments clarify and tighten the existing text of PTE 2020–02 to enhance the disclosure requirements and strengthen the disqualification provisions while also broadening the scope of the exemption so more parties can use it. For more information, refer to the preamble to amended PTE 2020–02, also published in today's **Federal Register**.

The Department has sought to, where appropriate, minimize the burden of disclosure requirements in PTE 2020–02 and PTE 84–24. For instance, in PTE 2020–02 and PTE 84–24, the Department has provided model language that will satisfy more general disclosure requirements. Additionally, based on comments received on the proposal, the Department has made several adjustments to its disclosure requirements. In the final amendments, the Department has changed the requirements to provide a written description of services to be more consistent with the disclosure requirement of all material facts required on Regulation Best Interest for both PTE 2020–02 and PTE 84–24. As such, entries already complying with Regulation Best Interest will already likely be providing sufficient disclosure for this requirement.

For PTE 2020–02, several commenters expressed concern about the burden and litigation risk associated with the ''right to obtain specific information regarding costs, fees, and compensation'' for Retirement Investors. At this time, the Department has decided to remove this element and align the disclosure conditions with the requirements of Regulation Best Interest, in order to provide a uniform and cost-effective approach to disclosures. For PTE 84–24, Investment Producers must still provide a notice of a Retirement Investor's right to request additional information regarding cash compensation. The Department considered requiring Independent Producers to produce this information by default but instead decided to make this information available by request to be similar to the obligations of an Independent Producer under Section 6.A.2.a.v and 6.A.2.b of the NAIC Model Regulation [875] and requirements in the State of New York.[876]

The Department has considered requiring Financial Institutions to disclose the sources of third-party compensation received in connection with recommended investment products on a public web page in PTE 2020–02. When considering this requirement, the Department discussed exempting small Financial Institutions from this disclosure. In the final rulemaking, the Department has decided to not include this requirement.

Based on comments received in the proposal, the Department is adding transition relief to PTEs 2020–02 and 84–24. The amended exemptions both

[869] The per-entity cost is estimated as: ($165.71 per hour × 0.5 hour) ≈ $82.86 and ($165.71 per hour × 1 hour) ≈ $165.71. A labor rate of $165.71 is used for a legal professional.

[870] As discussed in the Affected Entities section of the regulatory impact analysis, the Department estimates that approximately 6.4 million rollovers occur annually, of which 4.5 million are plan-to-IRA rollovers.

[871] The number of plan-to-plan and IRA-to-IRA rollovers is estimated as: 6.4 million total rollovers − 4.5 million plan-to-IRA rollovers = 1.9 million rollovers. The number of adviser intermediated rollovers by small Financial Institutions is estimated as: 1.9 million rollovers × 49 percent of rollovers adviser mediated × 26.4 percent rollovers by small Financial Institutions = 245,784 rollovers.

[872] The per-entity is estimated with a blended average of firms already and newly documenting rollovers. Newly documenting firms are assumed to have a burden of 0.5 hours, while already documenting firms have a burden of 5 minutes. A labor rate of $228.00 is used for a personal financial advisor. As discussed in the Cost section of the regulatory impact analysis, the Department estimates that 48% of firms already document rollovers, while 52% do not. The per-rollover cost is estimated as ((48% × 30 minutes) × $228.00) + ((52% × 5 minutes) × $228.00) = $64.60.

[873] The per-entity cost is estimated as: ($165.71 per hour × 35 minutes) ≈ $96.66 and ($165.71 per hour × 1.5 hours) ≈ $248.66. A labor rate of $165.71 is used for a legal professional.

[874] The per-entity cost is estimated as: ($165.71 per hour × 1 hour) ≈ $165.71 ≈ $165.71. A labor rate of $165.71 is used for a legal professional.

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

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

have an Applicability Date 150 days (which adds 90 days to the proposed 60 days) after publication in the **Federal Register**. Financial Institutions and Investment Professionals will have one year after the Applicability Date before they are responsible for full compliance. This transition relief is available for all sizes of Financial Institutions that will rely on the exemptions; however, the additional time to comply with the requirements will likely be particularly beneficial for smaller entities with fewer resources to ensure compliance.

P. Unfunded Mandate Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 [877] (UMRA) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final rule that may result in an expenditure of $100 million or more (adjusted annually for inflation with the base year 1995) in any one year by State, local, and Tribal governments, in the aggregate, or by the private sector. That threshold is approximately $183 million in 2024.

For purposes of the Unfunded Mandates Reform Act, this rulemaking is expected to have an impact on the private sector. For the purposes of the rulemaking, the regulatory impact analysis shall meet the UMRA obligations.

Q. Federalism Statement

Executive Order 13132 outlines the fundamental principles of federalism. It also requires Federal agencies to adhere to specific criteria in formulating and implementing policies that have ''substantial direct effects'' on the States, the relationship between the National Government and States, or on the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that have these federalism implications must consult with State and local officials throughout the process of developing the regulation.

As discussed throughout this analysis, this regulatory action would affect the insurance industry pertaining to annuities. These entities are also regulated by States, many of whom, as discussed in the discussion of the regulatory baseline, have taken regulatory or legislative actions. The Department has carefully considered the regulatory landscape in the States and worked to ensure that its regulations would not impose obligations on advisers or the insurance industry that are inconsistent with their responsibilities under State law, including the obligations imposed in States that based their laws on the NAIC Model Regulation. Nor would these regulations impose obligations or costs on the State regulators. As discussed above, however, the Department has increased the protections afforded by many of these laws, consistent with its own responsibilities under ERISA, and has endeavored to lend greater uniformity on the provision of advice to Retirement Investors, so that advisers covered by the rule must all abide by a uniform fiduciary standard. The Department has had discussions with State insurance regulators and State-regulated parties about these issues including the need to ensure that Retirement Investors have sufficient protection when receiving investment advice.

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

The Department intends to work with State insurance regulators as we move forward with implementation to ensure that this regulation complements the protections provided by the NAIC Model Regulation. The Department also intends to continue to work with State securities regulators.

Authority

This regulation is finalized pursuant to the authority in section 505 of ERISA (Pub. L. 93–406, 88 Stat. 894 (Sept. 2, 1974); 29 U.S.C. 1135) and section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713 (Oct. 17, 1978)), 3 CFR, 1978 Comp. 332, effective December 31, 1978 (44 FR 1065 (Jan. 3, 1979)), 3 CFR, 1978 Comp. 332, 5 U.S.C. App. 237, and under Secretary of Labor's Order No. 1–2011, 77 FR 1088 (Jan. 9, 2012).

List of Subjects in 29 CFR Part 2510

Employee benefit plans, Employee retirement income security act, Pensions, Plan assets.

For the reasons set forth in the preamble, the Department amends part 2510 of subchapter B of chapter XXV of title 29 of the Code of Federal Regulations as follows:

PART 2510—DEFINITIONS OF TERMS USED IN SUBCHAPTERS C, D, E, F, G, AND L OF THIS CHAPTER

■ 1. The authority citation for part 2510 is revised to read as follows:

Authority: 29 U.S.C. 1002(1)–(8), 1002(13)–(16), 1002(20), 1002(21), 1002(34), 1002(37), 1002(38), 1002(40)–(44), 1031, and 1135; Div. O, Title I, Sec. 101, Pub. L. 116–94, 133 Stat. 2534 (Dec. 20, 2019); Div. T, Title I, Sec. 105, Pub. L. 117–328, 136 Stat. 4459 (Dec. 29, 2022); Secretary of Labor's Order 1–2011, 77 FR 1088 (Jan. 9, 2012); Secs. 2510.3–21, 2510.3–101 and 2510.3–102 also issued under Sec. 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 752 (2018) (E.O. 12108, 44 FR 1065 (Jan. 3, 1979)), and 29 U.S.C. 1135 note. Section 2510.3–38 also issued under Sec. 1(b) Pub. L. 105–72, 111 Stat. 1457 (Nov. 10, 1997).

■ 2. Revise § 2510.3–21 to read as follows:

§ 2510.3–21 Definition of ''Fiduciary.''

(a)–(b) [Reserved]

(c) *Investment advice.* (1) For purposes of section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974 (ERISA), section 4975(e)(3)(B) of the Internal Revenue Code (Code), and this paragraph, a person renders ''investment advice'' with respect to moneys or other property of a plan or IRA if the person makes a recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property (as defined in paragraph (f)(10) of this section) to a retirement investor (as defined in paragraph (f)(11) of this section), and either paragraph (c)(1)(i) or (ii) of this section are satisfied:

(i) The person either directly or indirectly (*e.g.,* through or together with any affiliate) makes professional investment recommendations to investors on a regular basis as part of their business and the recommendation is made under circumstances that would indicate to a reasonable investor in like circumstances that the recommendation is based on review of the retirement investor's particular needs or individual circumstances, reflects the application of professional or expert judgment to the retirement investor's particular needs or individual circumstances, and may be relied upon by the retirement investor as intended to advance the retirement investor's best interest; or

(ii) The person represents or acknowledges that they are acting as a fiduciary under Title I of ERISA, Title

[877] Unfunded Mandates Reform Act of 1995, Public Law 104–4, 109 Stat. 48, (1995).

II of ERISA, or both, with respect to the recommendation.

(iii) A person does not provide ''investment advice'' within the meaning of this paragraph (c)(1)(iii) if they make a recommendation but neither paragraph (c)(1)(i) nor (c)(1)(ii) of this section is satisfied. For example, a salesperson's recommendation to purchase a particular investment or pursue a particular investment strategy is not investment advice if the person does not represent or acknowledge that they are acting as a fiduciary under ERISA Title I or Title II with respect to the recommendation and if the circumstances would not indicate to a reasonable investor in like circumstances that the recommendation is based on review of the retirement investor's particular needs or individual circumstances, reflects the application of professional or expert judgment to the retirement investor's particular needs or individual circumstances, and may be relied upon by the retirement investor as intended to advance the retirement investor's best interest. Similarly, the mere provision of investment information or education, without an investment recommendation, is not advice within the meaning of this rule.

(iv) Written statements by a person disclaiming status as a fiduciary under ERISA Title I or Title II, or this section, or disclaiming the conditions set forth in paragraph (c)(1)(i) of this section, will not control to the extent they are inconsistent with the person's oral or other written communications, marketing materials, applicable State or Federal law, or other interactions with the retirement investor.

(2) A person who is a fiduciary with respect to a plan or IRA by reason of rendering investment advice (as defined in paragraph (c)(1) of this section) for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan or IRA, or having any authority or responsibility to do so, shall not be deemed to be a fiduciary regarding any assets of the plan or IRA with respect to which such person does not have any discretionary authority, discretionary control, or discretionary responsibility, does not exercise any authority or control, does not render investment advice (as defined in paragraph (c)(1) of this section) for a fee or other compensation, and does not have any authority or responsibility to render such investment advice, provided that nothing in this paragraph shall be deemed to:

(i) Exempt such person from the provisions of section 405(a) of ERISA concerning liability for fiduciary breaches by other fiduciaries with respect to any assets of the plan; or

(ii) Exclude such person from the definition of the term ''party in interest'' (as set forth in section 3(14)(B) of ERISA) or ''disqualified person'' (as set forth in section 4975(e)(2) of the Code) with respect to any assets of the plan or IRA.

(d) *Execution of securities transactions.* (1) A person who is a broker or dealer registered under the Securities Exchange Act of 1934, a reporting dealer who makes primary markets in securities of the United States Government or of an agency of the United States Government and reports daily to the Federal Reserve Bank of New York its positions with respect to such securities and borrowings thereon, or a bank supervised by the United States or a State, shall not be deemed to be a fiduciary, within the meaning of section 3(21)(A) of ERISA or section 4975(e)(3) of the Code, with respect to a plan or an IRA solely because such person executes transactions for the purchase or sale of securities on behalf of such plan or IRA in the ordinary course of its business as a broker, dealer, or bank, pursuant to instructions of a fiduciary with respect to such plan or IRA, if:

(i) Neither the fiduciary nor any affiliate of such fiduciary is such broker, dealer, or bank; and

(ii) The instructions specify:

(A) The security to be purchased or sold,

(B) A price range within which such security is to be purchased or sold, or, if such security is issued by an open-end investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1, *et seq.*), a price which is determined in accordance with Rule 22c–1 under the Investment Company Act of 1940 (17 CFR 270.22c–1),

(C) A time span during which such security may be purchased or sold (not to exceed five business days), and

(D) The minimum or maximum quantity of such security which may be purchased or sold within such price range, or, in the case of a security issued by an open-end investment company registered under the Investment Company Act of 1940, the minimum or maximum quantity of such security which may be purchased or sold, or the value of such security in dollar amount which may be purchased or sold, at the price referred to in paragraph (d)(1)(ii)(B) of this section.

(2) A person who is a broker-dealer, reporting dealer, or bank which is a fiduciary with respect to a plan or IRA solely by reason of the possession or exercise of discretionary authority or discretionary control in the management of the plan or IRA or the management or disposition of plan or IRA assets in connection with the execution of a transaction or transactions for the purchase or sale of securities on behalf of such plan or IRA which fails to comply with the provisions of paragraph (d)(1) of this section shall not be deemed to be a fiduciary regarding any assets of the plan or IRA with respect to which such broker-dealer, reporting dealer or bank does not have any discretionary authority, discretionary control, or discretionary responsibility, does not exercise any authority or control, does not render investment advice (as defined in paragraph (c)(1) of this section) for a fee or other compensation, and does not have any authority or responsibility to render such investment advice, provided that nothing in this paragraph shall be deemed to:

(i) Exempt such broker-dealer, reporting dealer, or bank from the provisions of section 405(a) of ERISA concerning liability for fiduciary breaches by other fiduciaries with respect to any assets of the plan; or

(ii) Exclude such broker-dealer, reporting dealer, or bank from the definition of the term ''party in interest'' (as set forth in section 3(14)(B) of ERISA) or ''disqualified person'' (as set forth in section 4975(e)(2) of the Code) with respect to any assets of the plan or IRA.

(e) *For a fee or other compensation, direct or indirect.* For purposes of section 3(21)(A)(ii) of ERISA and section 4975(e)(3)(B) of the Code, a person provides investment advice ''for a fee or other compensation, direct or indirect,'' if the person (or any affiliate) receives any explicit fee or compensation, from any source, for the investment advice or the person (or any affiliate) receives any other fee or other compensation, from any source, in connection with or as a result of the recommended purchase, sale, or holding of a security or other investment property or the provision of investment advice, including, though not limited to, commissions, loads, finder's fees, revenue sharing payments, shareholder servicing fees, marketing or distribution fees, mark ups or mark downs, underwriting compensation, payments to brokerage firms in return for shelf space, recruitment compensation paid in connection with transfers of accounts to a registered representative's new broker-dealer firm, expense reimbursements, gifts and gratuities, or other non-cash compensation. A fee or compensation is paid ''in connection with or as a result

of'' such transaction or service if the fee or compensation would not have been paid but for the recommended transaction or the provision of investment advice, including if eligibility for or the amount of the fee or compensation is based in whole or in part on the recommended transaction or the provision of investment advice.

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

(1) The term ''affiliate'' of a person means any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such person; any officer, director, partner, employee, representative, or relative (as defined in paragraph (f)(13) of this section) of such person; and any corporation or partnership of which such person is an officer, director, or partner.

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

(3) The term ''IRA'' means 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.

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

(5) The term ''IRA fiduciary'' means a person described in Code section 4975(e)(3) with respect to an IRA. For purposes of this section, an IRA owner or beneficiary who is merely receiving investment advice is not an IRA fiduciary.

(6) The term ''plan'' means any employee benefit plan described in section 3(3) of ERISA and any plan described in section 4975(e)(1)(A) of the Code.

(7) The term ''plan fiduciary'' means a person described in ERISA section (3)(21)(A) and Code section 4975(e)(3) with respect to a plan. For purposes of this section, a plan participant or beneficiary who is receiving investment advice is not a ''plan fiduciary'' with respect to the plan.

(8) The term ''plan participant'' or ''participant'' means, for a plan described in section 3(3) of ERISA, a person described in section 3(7) of ERISA.

(9) The term ''beneficiary'' means, for a plan described in section 3(3) of ERISA, a person described in section 3(8) of ERISA.

(10) The phrase ''recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property'' means recommendations as to:

(i) The advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property, investment strategy, or 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;

(ii) 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, selection of investment account arrangements (*e.g.,* account types such as brokerage versus advisory) or voting of proxies appurtenant to securities; and

(iii) Rolling over, transferring, or distributing assets from a plan or IRA, including recommendations as to whether to engage in the transaction, the amount, the form, and the destination of such a rollover, transfer, or distribution.

(11) The term ''retirement investor'' means a plan, plan participant or beneficiary, IRA, IRA owner or beneficiary, plan fiduciary within the meaning of ERISA section (3)(21)(A)(i) or (iii) and Code section 4975(e)(3)(A) or (C) with respect to the plan, or IRA fiduciary within the meaning of Code section 4975(e)(3)(A) or (C) with respect to the IRA.

(12) The term ''investment property'' does not include health insurance policies, disability insurance policies, term life insurance policies, or other property to the extent the policies or property do not contain an investment component.

(13) The term ''relative'' means a person described in section 3(15) of ERISA and section 4975(e)(6) of the Code or a sibling, or a spouse of a sibling.

(g) *Applicability.* Effective December 31, 1978, section 102 of the Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 752 (2018), transferred the authority of the Secretary of the Treasury to promulgate regulations of the type published herein to the Secretary of Labor. Accordingly, in addition to defining a ''fiduciary'' for purposes of section 3(21)(A)(ii) of ERISA, this section applies to the parallel provision in section 4975(e)(3)(B) of the Code, which defines a ''fiduciary'' of a plan defined in Code section 4975 (including an IRA) for purposes of the prohibited transaction provisions in the Code. For example, a person who satisfies paragraphs (c)(1)(i) or (ii) and (e) of this section in connection with a recommendation to a retirement investor that is an employee benefit plan as defined in section 3(3) of ERISA, a fiduciary of such a plan as defined in paragraph (f)(11), or a participant or beneficiary of such plan, including a recommendation concerning the rollover of assets currently held in a plan to an IRA, is a fiduciary subject to Title I of ERISA.

(h) *Continued applicability of State law regulating insurance, banking, or securities.* Nothing in this section shall be construed to affect or modify the provisions of section 514 of Title I of ERISA, including the savings clause in section 514(b)(2)(A) for State laws that regulate insurance, banking, or securities.

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

Lisa M. Gomez,

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

[FR Doc. 2024–08065 Filed 4–24–24; 8:45 am]

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

[Application No. D–12094]

ZRIN 1210–ZA34

Amendment to Prohibited Transaction Exemptions 75–1, 77–4, 80–83, 83–1, and 86–128

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

ACTION: Amendments to Prohibited Transaction Exemptions 75–1, 77–4, 80–83, 83–1, and 86–128.

SUMMARY: This document contains a notice of amendments to Prohibited Transaction Exemptions (PTEs) 75–1, 77–4, 80–83, 83–1, and 86–128, which are class exemptions from certain prohibited transaction provisions of the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code of 1986 (the Code). The amendments (collectively, the Mass Amendment) affect participants and beneficiaries of plans, individual retirement account (IRA) owners, and certain fiduciaries of plans and IRAs.

DATES: The Mass Amendment is effective September 23, 2024.

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

SUPPLEMENTARY INFORMATION:

Background

As described elsewhere in this edition of the **Federal Register**, the Department of Labor (Department) is amending the regulation defining when a person renders ''investment advice for a fee or other compensation, direct or indirect'' with respect to any moneys or other property of an employee benefit plan, for purposes of the definition of a ''fiduciary'' in section ERISA 3(21)(A)(ii) of ERISA and in Code section 4975(e)(3)(B) (the ''Regulation''). The Department also is amending PTE 2020–02 to provide additional clarity for advice fiduciaries and protections for retirement investors and PTE 84–24 to address specific issues that insurance companies face in complying with the conditions of PTE 2020–02 when distributing annuities through independent agents, elsewhere in this edition of the **Federal Register**.

On October 31, 2023, the Department released the proposed amendments to PTEs 75–1, 77–4, 80–83, 83–1, and 86–128 described below and invited all interested persons to submit written comments.[1] The Department received written comments on the proposed amendments, and on December 12 and 13, 2023, held a public hearing at which witnesses presented testimony. After careful consideration of the comments and testimony on the proposed amendments, the Department is granting the Mass Amendment with the modifications discussed herein.

The amendments to PTEs 75–1, 77–4, 80–83, 83–1, and 86–128 remove relief in those exemptions for the receipt of compensation as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

After this amendment is effective, investment advice fiduciaries must meet the conditions of PTE 2020–02 or PTE 84–24 for administrative relief when they receive otherwise prohibited compensation as a result of their provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder to Retirement Investors (defined as plans, plan participants or beneficiaries, IRAs, IRA owners and beneficiaries, plan fiduciaries within the meaning of ERISA section (3)(21)(A)(i) or (iii) and Code section 4975(e)(3)(A) or (C) with respect to the Plan, or IRA fiduciaries within the meaning of Code section 4975(e)(3)(A) or (C) with respect to the IRA).

As described in more detail below, the Department also is amending PTE 75–1 by: (1) expanding the extension of credit provision in Part V; and (2) adding a definition of the term ''IRA'' in Part V. The Department also is amending PTE 86–128 by: (1) revising the exemption's ''Recapture of Profits'' exception; and (2) making certain technical corrections and editorial changes.

The ERISA and Code provisions at issue generally prohibit fiduciaries with respect to employee benefit plans and IRAs from engaging in self-dealing in connection with transactions involving plans and IRAs. The Department is granting these amendments pursuant to its authority under ERISA section 408(a) and Code section 4975(c)(2).[2]

Other Advice Exemptions

As discussed elsewhere in this edition of the **Federal Register**, the Department is amending investment advice exemptions to ensure consistent and protective standards apply to investment advice. After considering the comments it received, the Department made significant changes to both PTEs 2020–02 and 84–24 to ensure that there is an investment advice exemption available that applies to an appropriately wide range of situations. Many comments raised issues, or discussed concerns, with the Department's proposed amendments collectively (rather than proposal by proposal). In this same vein, the Department considered these comments holistically. For example, one commenter expressed concern that it would no longer be able to rely on PTE 77–4 for investment advice if the proposed amendments were finalized and was also concerned about whether it could use PTE 2020–02. After consideration of the comments, the Department determined it would make changes to PTE 2020–02 to revise certain conditions and broaden its scope rather than make changes to the Mass Amendment proposal. Although the changes to PTEs 2020–02 [3] and 84–24 [4] are discussed more completely in the respective documents, the changes in the three exemption documents reflect the full scope of comments received. The conditions to those exemptions, as finalized, emphasize long-standing principles of loyalty and prudence, require careful management of conflicts of interest, and are workable across different compensation structures and business models related to the provision

[1] The proposed amendments were released on October 31, 2023, and were published in the **Federal Register** on November 3, 2023. 88 FR 76032.

[2] Reorganization Plan No. 4 of 1978 (5 U.S.C. App. 1 (2018)) generally transferred the authority of the Secretary of the Treasury to grant administrative exemptions under Code section 4975 to the Secretary of Labor.

[3] PTE 2020–02 requires financial institutions and investment professionals relying on the exemption to: (i) acknowledge their fiduciary status in writing; (ii) disclose their services and material conflicts of interest; and adhere to impartial conduct standards; (iii) adopt policies and procedures prudently designed to ensure compliance with the impartial conduct standards and mitigate conflicts of interest that could otherwise cause violations of those standards; (iv) document and disclose the specific reasons that any rollover recommendations from Title I plans to IRAs are in the retirement investor's best interest; (v) and conduct an annual retrospective compliance review.

[4] PTE 84–24 covers transactions with independent insurance agents, and requires them to comply with conditions similar to the amended PTE 2020–02.

of investment advice to Retirement Investors.

The Department has concluded that PTE 2020–02 and PTE 84–24 provide a uniform and workable framework for the definition of fiduciary under ERISA with respect to the provision of investment advice, and that the protections now afforded by those exemptions should be available to Retirement Investors generally when they receive recommendations from trusted advisers. For all the reasons described in the preambles to the amendments to PTE 84–24 and PTE 2020–02, published elsewhere today in this edition of the **Federal Register**, as well as the associated Regulatory Impact Analysis, the Department has determined to condition relief from the prohibited transaction rules for fiduciary advice on the terms of PTE 84–24 and PTE 2020–02. Retirement Investors will be best served by a uniform protective standard focused on the Impartial Conduct Standards, and associated policies and procedures, as set forth in the preambles and text of those exemptions. In the Department's judgment, there is no reason in law or policy to deprive Retirement Investors who receive advice that was formerly covered by the exemptions affected by these Mass Amendment of the protections now provided to all Retirement Investors under PTE 84–24 and PTE 2020–02.

Summary of Proposed Amendments to PTEs 75–1, 77–4, 80–83, 83–1, and 86–128

The proposed Mass Amendment was primarily aimed to ensure that all parties relying on the exemptive relief for the provision of investment advice are held to level standards and consistent criteria. In order to accomplish this goal, the Department proposed to amend PTEs 75–1 Parts III and IV, 77–4, 80–83, 83–1, and 86–128 by removing exemptive relief for the provision of fiduciary investment advice. Specifically, the proposal would have added the following statement to each exemption: ''*Exception.* No relief from the restrictions of ERISA section 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is available for fiduciaries providing investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder.''

This proposed amendment was intended to ensure that retirement investors would receive consistent and appropriate protections when receiving fiduciary investment advice. The Department proposed to accomplish this by removing relief for fiduciary investment advice from class exemptions except for PTE 2020–02 and PTE 84–24. The proposed amendment was intended to ensure that Retirement Investors received fiduciary investment advice that reflected an appropriate level of care and loyalty and financial professionals could rely on a single framework regardless of the business model or the compensation structure. The Department's intention was to create a level regulatory playing field that would apply to all of the investment products that fiduciary investment providers may recommend to Retirement Investors. Under the proposed amendments, retirement investors could expect to receive substantially the same strong protections with respect to fiduciary investment recommendations, irrespective of the type of investment product that was recommended, and advice providers would compete for retirement investor's business under a common standard focused on the investor's best interest.

Discussion of the Comments to the Mass Amendment in General

Commenters stated that the Regulation and all the proposed amendments, taken together, have internal contradictions. These commenters were concerned with perceived inconsistencies, costly conditions, and inefficient duplication (including with respect to remedies). According to these commenters, the Department's proposed changes would result in uncertainties, unintended consequences, counterproductive effects, and needless litigation. Commenters also expressed concern about the comment period and the proposed effective date. These general comments, and comments about the interaction between the Department's proposals are discussed both here and in other final amendments, published elsewhere in today's edition of the **Federal Register**.

Those commenters who focused on the proposed Mass Amendment tied their concerns to PTE 2020–02, and what they characterized as the Department's approach of requiring all fiduciary investment advice relief into PTE 2020–02. In particular, one commenter focused on certain transactions that would have been permitted by the class exemptions affected by the Mass Amendment, but which would have been excluded from PTE 2020–02, as proposed.[5] At least one commenter stated that the preamble to the proposal failed to identify the transactions being excluded from relief or explain the Department's rationale for excluding such transactions, some of which fiduciaries have been permitted to engage in since ERISA was passed. One of these commenters further opined that the Department's cost analysis in these regards was insufficient, and that the Administrative Procedure Act (the APA) and Executive Orders 12866 and 13563 preclude this kind of ''sleight-of-hand rulemaking.'' Other commenters cited the APA as well, and some also stated that the Mass Amendment exceeds the Department's authority, including under ERISA Section 408(a).[6]

Commenters expressed concern regarding the proposed Mass Amendment in light of the decision by the U.S. Court of Appeals for the Fifth Circuit, vacating the Department's 2016 rulemaking with respect to fiduciary advice.[7] Other commenters stated the proposed Mass Amendment would constitute improper regulation of IRAs.

Many of the commenters on the proposed Mass Amendment criticized the Department's approach as costly and said the Department had not adequately accounted for the costs to affected parties. For example, one commenter stated that, in their view, the majority of the changes proposed by the Department will be disruptive and unhelpful. Another commenter stated that the costs to the industry of changing their reliance on all of these

[5] One commenter stated that all of the following investments could not be traded in the dealer market under PTE 2020–02 as it currently exists: equities (U.S. and foreign), asset-backed trusts, U.S. bonds of entities other than corporations, certain structured notes issued by U.S. corporations and subject to registration requirements under the Securities Act of 1933, currency, foreign corporate bonds, foreign government bonds, Rule 144A securities, privately issued real estate securities, closed-end funds, equity IPOs, and debt IPOs. As noted elsewhere, the amended exemptions are not intended to limit the scope of the current exemptions except with respect to the receipt of compensation as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder. In addition, as discussed in the preamble to today's amendments to PTE 2020–02, and in its text, PTE 2020–02 has been broadly amended to encompass compensation for advice irrespective of the product recommended.

[6] ERISA section 408(a) and Code section 4975(c)(2), expressly permit the Department (through the Reorganization Plan No. 4 of 1978) to grant ''a conditional or unconditional exemption'' as long as the exemption is ''(A) administratively feasible, (B) in the interests of the plan and of its participants and beneficiaries, and (C) protective of the rights of participants and beneficiaries of the plan.''

[7] *See generally Chamber of Commerce* v. *U.S. Dep't of Lab.,* 885 F.3d 360 (5th Cir. 2018).

exemptions would be high and was insufficiently unanalyzed by the Department. According to these commenters, financial institutions have established their policies, procedures, compliance routines, risk assessments, training and supervision structures to accommodate the exemptions each has chosen to use and requiring all of those institutions to revamp their systems and processes will be expensive and time consuming. This commenter was concerned that these costs were not fully reflected in the Department's cost assessment or effective date of the exemption. This commenter raised threats of litigation and cautioned that to the extent these changes are ultimately invalidated, the industry and the plans they serve will suffer unnecessary costs and investment in ultimately vacated rules. In the view of this commenter, low and middle-income families would be disproportionately harmed by these changes, because it is the commenter's view that some firms and financial professionals would no longer provide fiduciary investment advice to low and middle-income families. One commenter disagreed that any changes were appropriate because the Department did not identify any harm. Other commenters called the proposed amendment ''arbitrary and capricious.''

Some of the commenters on these amendments focused specifically on concerns about an anticipated loss of efficiency. These commenters described PTEs 75–1, 77–4, 80–83, 83–1, and 86–128 as designed to cover specific types of transactions that financial services firms commonly undertake for plan or IRA investors. The conditions built into those class exemptions were specifically tailored to protect investors, while allowing for efficient conduct of ordinary and necessary plan transactions. If the proposed Mass Amendment is granted, these commenters argued that the efficiencies associated with the affected class exemptions would be lost, resulting in higher costs and fewer benefits to investors, and perhaps other unintended consequences. Another commenter stated that the insurance industry's suitability standards far exceed any other regulatory agency protections for protecting retirement accounts.

Other commenters focused specifically on the amendment to PTE 77–4. One commenter stated that eliminating the availability of PTE 77–4 for fiduciary investment advice would be highly disruptive and would create material new costs which would ultimately be borne by plans and participants. According to the commenter, PTE 77–4 already provides robust protections for plans and participants and these changes would lead to increased costs that the Department has failed to properly identify, analyze, and account for, and the costs of the disruption alone far outweigh any theoretical benefit to plans and participants. The commenter stated that the outsized burden of complying with the disclosure, documentation, reporting, and recordkeeping requirements of PTE 2020–02 may be too great for it to be viewed as a viable alternative to PTE 77–4 in many cases. The commenter added that the potential result of this is that financial firms are likely to no longer offer certain services to plans if doing so would require them to rely on PTE 2020–02.

Another commenter offered similar views, adding that for over 45 years financial institutions have relied on PTE 77–4 for both investment advice and discretionary programs. According to the commenter, the proposed amendment would require firms to fully inventory every product and service to identify every use of PTE 77–4 and determine whether the exemption can continue to be used and, if not, whether there are any viable alternatives. Other commenters expressed concern that the proposed amendments would result in increased compliance costs, including by having to rely on two class exemptions when previously only one was relied on. For example, a fiduciary would have to comply with PTE 2020–02 to recommend a particular program but would have to comply with PTE 77–4 to manage those assets.

One commenter cited several of the reasons above to support the view that the Mass Amendment is impermissible under ERISA Section 408(a), adding that many plans and participants would be harmed by the Mass Amendment.

Commenters focused on the impact of removing investment advice from PTE 86–128. According to one commenter, the proposed changes do not address situations where an adviser may have limited discretion over the purchase and sale of certain securities within an advisory account, such as mutual funds and exchange-traded funds (ETFs), but acts on a non-discretionary basis with respect to other securities within that same account, such as fee-based variable annuities or private placements. The commenter urged the Department to look more closely at the conditions of the exemption in light of the fact that PTE 86–128 deals only with agency transactions in securities, a field that the commenter characterized as fully regulated by the SEC that requires substantial transaction-based reporting. Other commenters stated that costs to retirement investors would increase if the proposal is adopted, because the material cost savings PTE 86–128 provides for investors would be lost if its relief is transferred to PTE 2020–02. One of these commenters stated that, in its members' view, PTE 86–128 provided a significant economic benefit to retirement investors when it is used, because the investor effectively receives two investment services for the price of one.

At least one commenter cited the difficulty small businesses face in complying with complex regulations, and one of these commenters stated that the Department's class exemptions appear in ''piecemeal'' form on its website. The commenter recommended that the Department update its class exemptions on its website to facilitate the review of the current exemption text (*i.e.,* with all amendments incorporated).

Numerous commenters expressed strong support for the proposed Mass Amendment, and the Department's proposal to move coverage of fiduciary investment advice to PTEs 2020–02 and 84–24 to ensure consistency for all types and forms of fiduciary investment advice. One commenter argued that the proposed changes were important and would provide vulnerable retirement investors with needed protection against bad actors. Another commenter emphasized the importance of a baseline of protection for American workers against predatory practices. One commenter raised concerns with the lack of transparency in the current system and indicated that a single set of standards would help increase accountability for financial advisors and would be an important step for restoring public trust in the work that financial advisors do. This same commenter also stated that the care and loyalty obligations proposed by the Department in PTE 2020–02 and PTE 84–24 were essential to ensure that investment advice fiduciaries were acting in the best interest of their clients and not for their own financial gain. According to this commenter, it would be problematic for the Department to offer exemptions that didn't have these same requirements.

Another commenter expressed surprise that investment advisers did not already have a uniform fiduciary responsibility to put the interests of their clients first and expressed approval of the Department's proposal. A commenter stated the ''the best interest of the client should be the advisor's sole concern, with no

secondary concern even coming into deliberation.'' Another commenter discussed how investment funds are vital to consumers, that the investment funds deserve appropriate fiduciary restrictions, and that such restrictions were present in the Department's proposed changes. One commenter viewed it as the government's responsibility to take steps to ensure that people who need money in their ''old age'' could trust their adviser. This commenter emphasized that the government should take action to ensure investment advisers worked to help retirement investors save money on fees while allowing savings to keep pace with inflation. Another commenter argued that it was imperative that financial advisers have a fiduciary duty to the retirement investor and no one else. In the commenter's view, this was accomplished through the Department's proposal. One commenter asked that the proposals be finalized as proposed, *i.e.,* setting up PTEs 2020–02 and 84–24 for all fiduciary investment advice, stating that it would provide increased protection for investors and would result in advisers providing honest information to retirement investors.

One commenter stated that retirement investors should receive fair, unbiased financial recommendations and that the recommendations should not be influenced by how much the adviser stands to make on the recommendation. This commenter also noted that, in their view, requiring advisers to satisfy a fiduciary obligation to their clients should be the baseline minimum requirement. This same commenter expressed approval of the disclosure and recordkeeping requirements in PTEs 2020–02 and PTE 84–24, stating that these requirements allow the recommendations to be audited and verified after the fact. In the view of this commenter, this is necessary to ensure that advisers can be held accountable for irresponsible and illegal advice.

After reviewing the comments, the Department has determined to finalize its proposal to remove fiduciary investment advice as covered transactions from the exemptions herein. Following consideration of the different issues raised by commenters, the Department continues to believe that fiduciary investment advice is best covered through a single set of standards, as set forth in PTEs 2020–02 and 84–24. The Department agrees with those commenters who raised concerns that certain transactions would have been unable to rely on PTE 2020–02 as originally proposed. As described more fully in the preamble to the final amendment to PTE 2020–02, the Department is making changes to broaden the scope of that exemption in response to the commenters.

The Department agrees with those commenters who emphasized the importance of consistent standards and practices for all investment advice for Retirement Investors. The Department also agrees with those commenters who argued in favor of imposing consistent care and loyalty obligations on all fiduciary investment advisers, regardless of the advice given or the compensation received. In the Department's view, this is best accomplished by reliance on a single set of standards for all fiduciary investment advice. As discussed in greater detail in the preambles to the amendments to PTE 2020–02 and PTE 84–24, published elsewhere today in this edition of the **Federal Register**, the Department has worked to ensure that this single set of standards works for a wide range of business practices. Additionally, this set of standards was specifically crafted to build upon long-standing principles found throughout ERISA and trust law. The care obligation and loyalty obligation, along with the required disclosures, policies and procedures, and retrospective review will ensure that Retirement Investors are appropriately protected.

It remains the Department's intent, however, to exclude from these amended exemptions only the receipt of compensation as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder. After reviewing comments that indicated its intent was unclear, the Department has revised the final amendment to reflect this intent more clearly. Therefore, this final amendment clarifies that relief from the restrictions of ERISA section 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is not available for the receipt of compensation as the result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder.

Regarding comments that the proposed transactions are already the subject of different regulatory schemes, the Department notes that this has been the case since the passage of ERISA. The fact that regulators with responsibility for other state or Federal statutes and who have different areas of authority have imposed different conditions on the entities subject to the amended class exemptions does not foreclose the Department from meeting its responsibility to ensure that the interest of plans and Retirement Investors are protected as required under ERISA section 408(a) and Code section 4975(c)(2).

In addition, the Department has revised its cost analysis for the prohibited transactions, particularly for PTE 2020–02 since more entities will be relying on that exemption. Costs associated with the proposed Mass Amendment are discussed below. After reviewing the entire record, the Department maintains its position that the enhanced protections afforded to plans and IRAs, and the uniformity of the regulatory environment, will provide stability and savings to plans and IRAs that outweighs the cost concerns raised by commenters. The Department also believes that the imposition of a common set of protective standards for a wide range of advice transactions in PTE 84–24 and PTE 2020–02 promotes efficiency and clarity, inasmuch as one need only look to the terms of these two exemptions, which are materially similar, for relief from advice transactions, rather than a complex patchwork of exemptions covering different transactions.

Regarding comments expressing concern about the Mass Amendment in light of the decision by the U.S. Court of Appeals for the Fifth Circuit referenced above, the Department does not create new causes of actions, mandate enforceable contractual commitments, or expand upon the remedial provisions of ERISA or the Code. Regarding comments expressing concern that the Mass Amendment constitute improper regulation of IRAs, the Department notes this rulemaking does not alter the existing framework for bringing suits under State law against IRA fiduciaries and does not aim to do so.

With respect to the comments above regarding inconsistencies, alleged duplicities, uncertainties, and contradictions the Department has strived herein and in the amendments published elsewhere in today's edition of the **Federal Register** to address the concerns and issues raised by commenters. The Department encourages parties to contact the Department's Office of Exemption Determinations should any further issues of ambiguity remain.

Regarding comments about the Mass Amendment's comment period and effective date, the robust comment period is described above and in the preamble to the Regulation, and the effective date of the Mass Amendment is now 150 days following publication

of the Mass Amendment in the **Federal Register**.

Regarding comments expressing concern that the Department has not made its findings under ERISA Section 408(a), after considering the entire record, the Department has determined that the Mass Amendment will provide important benefits that are in the interest of affected plans and IRAs. The Mass Amendment's protective conditions support a finding that the Mass Amendment is protective of affected plans and IRAs. The Department believes that Mass Amendment's conditions also support a finding that the Mass Amendment is administratively feasible. For a detailed discussion of the rationale, reasons, and responses to comments about the application of the exemption to advice transactions, the Department refers readers to the preambles to the amendments to PTE 84–24 and PTE 2020–02, published elsewhere today in this edition of the **Federal Register**.

The Department appreciates the comment regarding its class exemption website, and will strive to ensure its exemptions, including amendments thereto, are easily accessible.

Summary of Additional Proposed Amendments to PTE 75–1 [8]

Proposed Amendments to PTE 75–1, Part I, paragraphs (b) and (c): The Department proposed to revoke PTE 75–1, Part I, paragraphs (b) and (c), which has provided exemptive relief for certain non-fiduciary services provided by broker-dealers in securities transactions. As noted in the proposal, the Department proposed to revoke the relief provided in Parts I(b) and I(c) of PTE 75–1, because it duplicates the relief available under the statutory exemptions under Code section 4975(d)(2) and ERISA section 408(b)(2) and regulations thereunder.

Proposed Revocation of Part II(2) of PTE 75–1: The Department proposed to revoke Part II(2) of PTE 75–1 and requested comment regarding whether fiduciaries providing discretionary investment management services in connection with the purchase or sale of a mutual fund security in a principal transaction need the relief that is provided by PTE 75–1, Part II(2), and, if so, what conditions would be appropriate.

Proposed Amendment to PTE 75–1, Part II(f): The Department also proposed to revise the recordkeeping provisions of PTE 75–1, Part II(f) to place the responsibility for maintaining such records on the broker-dealer, reporting dealer, or bank engaging in the transaction with such plan or IRA rather than on the plan or IRA. The proposed amendment also would have required the broker-dealer to make the records reasonably available at their customary location for examination during normal business hours by: (A) Any duly authorized employee or representative of the Department or the Internal Revenue Service; (B) Any fiduciary of the plan or any duly authorized employee or representative of such fiduciary; (C) Any contributing employer and any employee organization whose members are covered by the plan, or any authorized employee or representative of these entities; or (D) Any participant or beneficiary of the plan or the authorized representative of such participant or beneficiary. In so doing, the proposal expanded the list of entities and persons eligible to receive these records, by adding the persons described in (B), the authorized representatives of the entities in (C), and the authorized representatives of the persons in (D).

None of the persons described in subparagraph (1)(B)–(D) above would have been authorized to examine privileged trade secrets or privileged commercial or financial information of such fiduciary, nor are they authorized to examine records regarding a plan or IRA other than the plan or IRA with which they are the fiduciary, contributing employer, employee organization, participant, beneficiary or IRA owner.[9]

Proposed Amendments to 75–1, Part V: The Department proposed to amend PTE 75–1, Part V, which permits a broker-dealer to extend credit to a plan or IRA in connection with the purchase or sale of securities. In the past, relief under PTE 75–1, Part V, has been limited in that the broker-dealer extending credit was not permitted to have or exercise any discretionary authority or control (except as a directed trustee) with respect to the investment of the plan or IRA assets involved in the transaction, nor render investment advice within the meaning of 29 CFR 2510.3–21(c) with respect to those plan assets, unless no interest or other consideration was received by the broker-dealer or any affiliate of the broker-dealer in connection with the extension of credit.

The Department was informed that relief was needed for broker-dealers to extend credit to plans and IRAs to avoid failed securities transactions, and to receive compensation in return. For example, the Department understands that broker-dealers can be required, as part of their relationships with clearinghouses, to complete securities transactions entered into by the broker-dealer's customers, even if a particular customer does not perform on its obligations. If a broker-dealer is required to advance funds to settle a trade entered into by a plan or IRA, or purchase a security for delivery on behalf of a plan or IRA as a result of a failed security transaction, the result can potentially be viewed as a loan of money or other extension of credit to the plan or IRA. Further, in the event a broker-dealer steps into a plan's or IRA's shoes in any particular transaction, it may charge interest or other fees to the plan or IRA. These transactions potentially violate ERISA section 406(a)(1)(B) and Code section 4975(c)(1)(B) and (D).

In the Department's view, the extension of credit to avoid a failed securities transaction currently falls within the contours of the existing relief provided by PTE 75–1, Part V, for extensions of credit ''[i]n connection with the purchase or sale of securities.'' Accordingly, broker-dealers that are not investment advice fiduciaries, *e.g.,* those who execute transactions but do not provide advice, were permitted to receive compensation for extending credit to avoid a failed securities transaction under the exemption as originally granted. Under the proposed amendment, the Department would have extended such relief to investment advice fiduciaries.

Specifically, under the proposed amendment to PTE 75–1, Part V(c), an investment advice fiduciary could have received reasonable compensation for extending credit to a plan or IRA to avoid a failed purchase or sale of securities involving the plan or IRA. In conjunction with the expanded relief in the amended exemption, Proposed Section (c) would have imposed several conditions. First, the potential failure of the purchase or sale of the securities could not have been caused by the

[8] The Department made the Proposed Amendments to PTE 75–1 discussed below as part of its 2016 rulemaking that was overturned by the U.S. Court of Appeals for the Fifth Circuit. *See generally Chamber of Commerce* v. *U.S. Dep't of Lab.,* 885 F.3d 360 (5th Cir. 2018).

[9] The proposed amendment provided that if such plan fiduciary refused to disclose information on the basis that such information is exempt from disclosure, the plan fiduciary would have been required to provide a written notice by the close of the thirtieth (30th) day following the request advising the requestor of the reasons for the refusal and that the Department may request such information. Finally, the proposed amendment would have provided that failure to maintain the required records necessary to determine whether the conditions of this exemption have been met will result in the loss of the exemption only for the transaction or transactions for which records are missing or have not been maintained. It would not have affected the relief for other transactions.

broker-dealer or any affiliate. Additionally, the terms of the extension of credit would have to be at least as favorable to the plan or IRA as the terms available in an arm's length transaction between unaffiliated parties. Finally, the plan or IRA must have received written disclosure of certain terms before the extension of credit. This disclosure would not have needed to be made on a transaction by transaction basis, and could have been part of an account opening agreement or a master agreement. The disclosure would have been required to include the rate of interest or other fees that will be charged on such extension of credit, and the method of determining the balance upon which interest will be charged.

The plan or IRA must additionally have been provided with prior written disclosure of any changes to these terms. The required disclosures were intended to be consistent with the requirements of Securities and Exchange Act Rule 10b–16, which governs broker-dealers' disclosure of credit terms in margin transactions.[10]

The Department also proposed to make the same revisions to the recordkeeping provisions of PTE 75–1, Part V that were made to the recordkeeping provisions of PTE 75–1, Part II(f) that are described above. This included expanding the persons and entities eligible to receive certain documents from a broker-dealer in the same manner described above in the PTE 75–1, Part II(f) discussion.

Finally, the Department proposed to add a definition of the term ''IRA'' to PTE 75–1, Part V. Under the proposed definition the term IRA would have meant any account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in Code section 408(a) and a health savings account described in Code section 223(d).

Discussion of Comments on Additional Proposed Amendments to PTE 75–1

Proposed Amendment to Part I(b) and (c). One commenter asserted that although Part I(b) and (c) transactions are covered by 408(b)(2), the industry still relies on Part I because: (1) it covers the actual transaction, as well as clearance, settlement or custodial functions incidental thereto; and (2) it provides clarification and relief regarding the provision of research, analysis, availability of securities and reports concerning issuers, industries, securities or other property economic factors or trends, portfolio strategy and performance ''under circumstances which do not make such party in interest or disqualified person a fiduciary with respect to such plan.''

After considering the comment, that Department has determined not to delete Part I(b) and (c) as was proposed.

Proposed Amendment to Part II. A commenter opposed the Department's proposed revocation of Part II(2), stating that the Department did not provide adequate grounds to revoke this exemption. According to this commenter, this exemption remains the bedrock of institutional dealer sales of securities and there would be significant cost and disruption if the Department did revoke this relief.

More than one commenter expressed concern that the proposed recordkeeping amendment, which would require broker-dealers, reporting dealers and/or banks to provide certain records to persons and entities that include beneficiaries and employee organizations, among others, may open the door to privacy concerns, fishing expeditions, abuse, and unnecessary risk.

After considering the comments, the Department has determined not to finalize the revocation of PTE 75–1, Part II(2) as was proposed. The Department also is not finalizing: (1) the proposed amendment that would have required the broker-dealer, reporting dealer, or bank engaging in the covered transaction to satisfy the recordkeeping requirement in Part II(e) of the exemption; nor (2) the proposed expansion of Part II(f) that would have permitted additional parties to review the records described in Part II(e). Therefore, only the parties that are entitled to examine the records described in Part II(e) of the current exemption may do so.

Proposed Amendment to Parts III and IV. The Department proposed to amend PTEs 75–1 Parts III and IV, by adding the following statement to each exemption: ''Exception. No relief from the restrictions of ERISA section 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is available for fiduciaries providing investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder.''

One commenter stated that ''the very thing covered by these parts is not permitted at all under PTE 2020–02. Plans and retirement investors will lose opportunities and trading efficiencies they currently enjoy with no alternative avenue open to them. Amazingly, the cost analysis does not mention the cost to plans or the market.''

As described in the preamble to the final amendment to PTE 2020–02, the Department is expanding the scope of that exemption to cover recommendations of any investment product, as long as the recommendation meets the conditions of PTE 2020–02. Therefore, all recommendations will be subject to the same protective conditions. Accordingly, the Department is clarifying the language in the proposed amendment to provide that: ''No relief from the restrictions of ERISA section 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is available for the receipt of compensation as a result of providing investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder.'' Fiduciary advice providers should look to amended PTE 2020–02 for relief.

Proposed Amendments to Part V. A commenter stated that it is appropriate to put the responsibility for recordkeeping on the financial firm. However, the commenter characterized the proposed condition in the extension of credit proposed amendment which would have provided that the failure of the purchase or sale of the securities was not caused by the fiduciary or its affiliate as a ''mistake.'' According to the commenter, generally, when there is a failure in the market, it is extremely hard to tell the exact cause, so the relief should not be conditioned on finger pointing, which could create unnecessary delays.

More than one commenter expressed concern that the proposed expansion of the recordkeeping amendment, which would have required broker-dealers to provide access to certain records for examination by more persons and entities than the current exemption may, among other consequences, open the door to privacy concerns, fishing expeditions, abuse, and unnecessary risk.

After considering the comments, the Department has determined not to finalize the proposed condition that would have required the investment advice fiduciary not to have caused the potential failure of the purchase or sale of the securities in the extension of credit amendment. The Department has determined that fiduciaries should be able to extend credit in order to avoid a failed securities transaction. The Department did not receive any

[10] The Department understands that it is the practice of many broker-dealers to provide such disclosures to all customers, regardless of whether the customer is presently opening a margin account. To the extent such disclosure is provided, the disclosure terms of the exemption are satisfied.

substantive comments on the IRA definition, which it is finalizing to read as follows: ''Individual Retirement Account'' or ''IRA'' means any plan that is an account or annuity described in Code section 4975(e)(1)(B) through (F). This language is consistent with the IRA definition in PTE 2020–02. After considering the comments, the Department also is not amending the recordkeeping provision in PTE 75–1 Part V.

Summary of Additional Proposed Amendments to PTE 86–128

The Department proposed certain administrative changes to PTE 86–128, which are not directly related to the provision of fiduciary investment advice. The Department proposed to delete Section IV(a), which provides an exclusion from the conditions of the exemption for certain plans not covering employees, including IRAs, to increase the safeguards available to these Retirement Investors. Therefore, under the proposed amendment, fiduciaries that exercise full discretionary authority or control with respect to IRAs could have continued to rely on PTE 86–128 but would have had to meet the protective conditions of this exemption for IRAs as well as for Title I plans.

The Department also proposed certain technical changes to the exemption, including deleting subsection IV(b)(1), and redesignating remaining sections as needed. The language currently in Section IV(b)(1) excludes fiduciary investment advice providers; however, under the proposed amendment, fiduciary investment advice providers would have been excluded from the exemption as a whole; therefore, the exclusion does not need to be repeated in Section IV. As a result of the deletion of Section IV(a) and IV(b)(1), the Department proposed to redesignate subsections IV(b)(2) and (3) as subsections IV(a)(1) and (2), respectively, Section IV(c) as Section IV(b), and Section IV(d) as Section IV(c).

Redesignated Section IV(b) of the proposed amendment would have provided that certain conditions in Section III do not apply in any case where the person who is engaging in a covered transaction returns or credits to the plan all profits earned by that person and any related entity in connection with the securities transactions associated with the covered transaction. This provision is referred to as the ''Recapture of Profits'' exception. The Department provided an exception from the conditions in Section III for the recapture of profits due to the benefits plans and IRAs would derive from such arrangements.

Discretionary trustees were first permitted to rely on PTE 86–128 without meeting the Recapture of Profits provision pursuant to an amendment in 2002 (the 2002 Amendment). Before the 2002 Amendment, Section III(a) provided that ''[t]he person engaging in the covered transaction [may not be] a trustee (other than a nondiscretionary trustee), or an administrator of the plan, or an employer any of whose employees are covered by the plan.'' Under the 2002 Amendment, the reference to ''trustee (other than a nondiscretionary trustee)'' was deleted from Section III(a); therefore, discretionary trustees had to satisfy additional conditions set forth in Section III(h) and (i) to rely on the exemption.[11]

The Department understands that after the 2002 Amendment, practitioners questioned whether discretionary trustees were permitted to rely on the Recapture of Profits exception, which allows persons identified in Section III(a) to engage in the covered transactions if they return or credit to the plan or IRA all profits, as an alternative to complying with Sections III(h) and (i). By deleting the reference to discretionary trustees from Section III(a), the Department understands that the 2002 Amendment inadvertently may have prevented discretionary trustees of plans or IRAs from using the Recapture of Profits exception from the conditions imposed by Section III of the exemption, and instead, may have limited the relief provided in the exemption to discretionary trustees that satisfy that additional conditions in Section III(h) and (i). This result was not intended; therefore, the Department proposed to modify the exemption to permit all discretionary trustees to utilize the recapture of profits exception as they originally were permitted to before the 2002 Amendment.

In order to achieve this result, the Department proposed to amend redesignated section IV(b) to provide that Sections III(a), III(h), and III(i) do not apply in any case where the person engaging in the covered transaction returns or credits to the plan or IRA all profits earned by that person in connection with the securities transaction associated with the covered transaction. In addition, the Department proposed to reinsert a reference to trustees (other than nondiscretionary trustees) in Section III(a) along with the existing references to plan administrators and employers. Finally, the Department proposed to add a sentence to the end of Section III(a) stating that: ''Notwithstanding the foregoing, this condition does not apply to a trustee (other than a nondiscretionary trustee) that satisfies Section III(h) and (i), and to all persons identified in this paragraph that satisfy the Recapture of Profits exception in Section IV(b)).''

The purpose of these proposed amendments was to clarify that discretionary trustees may engage in covered transactions if they satisfy Section III(h) and (i) of the exemption. Moreover, the proposed amendment would have clarified that all parties identified in Section III(a)—discretionary trustees, plan administrators, or employers who have any employees covered by the plan—can engage in a transaction covered under PTE 86–128 if they satisfy the Recapture of Profits exception.

Lastly, the Department proposed to add a new Section VII to PTE 86–128 that would have required the fiduciary engaging in a covered transaction to maintain records necessary to enable certain persons (described in proposed Section VII(b)) to determine whether the conditions of this exemption have been met.

Discussion of Comments to Additional Proposed Amendments to PTE 86–128

Proposed Amendment to IV(a). At least one commenter stated that the Department did not consider the disruption that would be caused by eliminating the exclusion from the exemption conditions for covered transaction engaged in on behalf of IRAs. Another commenter stated that the Department did not explain how a retail investor would benefit from, or understand, complex and potentially confusing disclosures they would have been required to receive under the proposed amendment, which are intended for institutional, sophisticated plan fiduciaries. The commenter stated also that the proposed amendment does not provide any guidance on how persons engaging in covered transactions under the exemption can comply with the proposed amendment.

After considering these comments, the Department has determined not to eliminate the exclusion from the current exemption conditions of PTE 86–128 for covered transactions engaged in on behalf of IRAs. The Department's objective for amending PTE 86–128 and other affected exemptions is to ensure that consistent and protective standards apply to investment advice. The Department does not intend to impose

[11] Section III(h) provides that discretionary trustees may engage in the covered transactions only with plans or IRAs with total net assets of at least $50 million, and Section III(i) requires discretionary trustees to provide additional disclosures.

any additional obligations on entities relying on PTE 86–128 at this time. The Department notes, however, that it may revisit the scope and content of PTE 86–128 as part of future notice and comment rulemaking.

Proposed Amendment to Part VII. Some commenters raised concerns with the proposed new recordkeeping provision. One commenter stated that absent such explanation or public policy rationale, it is not necessary to make the fiduciary's records available to the participants and beneficiaries (and their authorized representatives). The commenter recommended that the Department delete the proposed language that would allow retirement investors and their authorized representatives direct access to the records of fiduciaries relying on PTE 86–128.

Another commenter also expressed concerns about the proposed recordkeeping condition. Among other things, the commenter objected to unions being allowed to have any record of the plan. The commenter asserted that this provision undermines the careful balance of labor relations in this country and argued that it is preempted by the National Labor Relations Act.

After consideration of the comments, the Department has deleted the proposed recordkeeping requirements applicable to Section VII of PTE 86–128. However, as with PTE 2020–02, the Department intends to monitor compliance with the exemption closely and may revisit whether expanding the recordkeeping requirement is appropriate in the future. Any future amendments would be preceded by notice and an opportunity for public comment.

Other Proposed Change to PTE 86–128. The Department did not receive comments on the proposed technical changes discussed above, or the proposed modification that permits discretionary trustees to utilize the Recapture of Profits exception in Section IV(d) of PTE 86–128 as was permitted when the Department originally issued PTE 86–128. Therefore, the Department has finalized these technical changes as proposed.

Executive Orders

Executive Orders 12866 [12] and 13563 [13] direct agencies to assess all costs and benefits of available regulatory alternatives. If regulation is necessary, agencies must choose a regulatory approach that maximizes net benefits, including potential economic, environmental, public health and safety effects; distributive impacts; and equity. Executive Order 13563 emphasizes the importance of quantifying costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

Under Executive Order 12866, ''significant'' regulatory actions are subject to review by the Office of Management and Budget (OMB). As amended by Executive Order 14094,[14] entitled ''Modernizing Regulatory Review,'' section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as any regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of $200 million or more (adjusted every three years by the Administrator of the Office of Information and Regulatory Affairs (OIRA) for changes in gross domestic product); or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, Territorial, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4)raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in the Executive order, as specifically authorized in a timely manner by the Administrator of OIRA in each case.

It has been determined that this amendment is significant within the meaning of section 3(f)(1) of the Executive Order. Therefore, the Department has provided an assessment of the amendment's costs, benefits, and transfers, and OMB has reviewed the rulemaking.

Paperwork Reduction Act Statements

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

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

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

By email ebsa.opr@dol.gov

Preliminary Assumptions

The Department assumes that several types of personnel will perform the tasks associated with information collection requests at an hourly wage rate of $65.99 for clerical personnel, $165.71 for a legal professional, $198.25 for a financial manager.[15]

In the proposal, the Department received several comments on the Department's labor cost estimate, particularly the cost for legal support, remarking that it was too low. The Department assumes that tasks involving legal professionals will be completed by a combination of legal professionals, likely consisting of attorneys, legal support staff, and other professionals and in-house and out-sourced individuals. The labor cost associated with these tasks is estimated to be $165.71, which is the Department's estimated labor cost for an in-house attorney. The Department understands that some may feel this estimate is comparatively low to their experience, especially when hiring an outside ERISA legal expert. However, the Department has chosen this cost estimate understanding that it is meant to be an average, blended, or typical rate from a verifiable and repeatable source.

Removal of Investment Advice and PTE 2020–02

The Department is amending PTE 77–4, PTE 75–1, PTE 80–83, PTE 83–1, and PTE 86–128, to remove relief in those exemptions for the receipt of compensation as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section

[12] 58 FR 51735 (Oct. 4, 1993).

[13] 76 FR 3821 (Jan. 21, 2011).

[14] 88 FR 21879 (Apr. 6, 2023).

[15] Internal DOL calculation based on 2023 labor cost data and adjusted for inflation to reflect 2024 wages. For a description of the Department's methodology for calculating wage rates, *see:* Employee Benefits Security Administration, *Labor Cost Inputs Used in the Employee Benefits Security Administration, Office of Policy and Research's Regulatory Impact Analyses and Paperwork Reduction Act Burden Calculations,* Employee Benefits Security Administration, *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf.*

4975(e)(3)(B) and regulations thereunder. Investment advice providers will instead have to rely on the amended PTE 2020–02 or PTE 84–24 for exemptive relief covering investment advice transactions. For an estimate of the costs incurred by entities now reliant on PTE 2020–02, refer to the discussion of the amendments to PTE 2020–02 and PTE 84–24 published in this issue of today' **Federal Register**.

In the proposal, the Department received several comments that the Mass Amendments would be costly and disruptive. Some of the commenters expressed concern that the exemptions are tailored to specific types of transactions and moving all investment advice transactions to PTE 2020–02 and PTE 84–24 would be burdensome. Several commenters on the proposal expressed concern about the cost burden associated this change, with many stating that the Department had not considered the cost associated with moving to PTE 2020–02. In consideration of these comments, the Department has increased its cost estimates for entities newly relying on PTE 2020–02 and PTE 84–24. The increases include significant increases in the cost estimates to review and implement the rule and to establish policies and procedures. For a complete discussion of the cost estimates, refer to the Paperwork Reduction Act sections for PTE 2020–02 and PTE 84–24 or the regulatory impact analysis in Retirement Security Rule: Definition of an Investment Advice Fiduciary, also published in today's **Federal Register**.

Amendments to PTE 75–1

Affected Entities

Broker-dealers registered under the Securities Exchange Act of 1934 (15 U.S.C. 78a *et seq.*), reporting dealers, and banks are eligible to rely on the exemption. According to the SEC, approximately 3,490 broker-dealers were SEC-registered as of December 2022.[16] Not all broker-dealers perform services for employee benefit plans. In 2022, 55 percent of registered investment advisers provided employer-sponsored retirement benefits consulting.[17] Assuming the percentage of broker-dealers providing advice to retirement plans is the same as the percent of investment advisers providing services to plans, the Department estimates 55 percent, or 1,919 broker-dealers, would be affected by PTE 75–1.

According to the Federal Deposit Insurance Corporation, there are 4,049 commercial banks as of September 30, 2023.[18] If one-half of these banks (about 2,025) and 55 percent of broker-dealers (about 1,919 broker-dealers) relied on this exemption, there would be approximately 3,944 respondents.[19]

Disclosure Requirements

Under Part V(c) of PTE 75–1, when a fiduciary extends credit to avoid a failed purchase or sale of securities, the plan or IRA must receive written disclosure of the rate of interest (or other fees) that will apply and the method of determining the balance upon which interest will be charged, as well as prior written disclosure of any changes to these terms. The plan or IRA must also be provided with prior written disclosure of any changes to these terms.

The Department believes that it is a usual and customary business practice to maintain records required to demonstrate compliance with disclosure distribution regulations mandated by the Securities and Exchange Commission (SEC). The Department believes that this new disclosure requirement is consistent with the disclosure requirement mandated by the SEC in 17 CFR 240.10b–16(1) for margin transactions. Therefore, the Department concludes that this requirement produces no additional burden to the public.

Recordkeeping Requirements

In the proposal, the Department proposed to amended PTE 75–1 Parts II and V to adjust the recordkeeping requirement to shift the burden from plans and IRA owners to financial institutions. In the final rulemaking, the Department has decided to keep the recordkeeping requirement unchanged from the existing exemption.

The Department has assumed that financial service providers that transact with employee benefit plans will maintain these records on behalf of their client plans. Because of the sophisticated nature of financial service providers and the regulation of the securities industry by State and Federal government, and by self-regulatory organizations, the Department has assumed that the records required by this class exemption are the same records kept in the normal course of business, or in compliance with other requirements.

The Department has estimated that the time needed to maintain records for the financial institutions to be consistent with the exemption will be four hours per entity annually at a wage rate of $198.25 per hour.[20] Thus, the Department estimates it would take 15,778 hours at an equivalent cost of $3,127,949 to maintain the records and make the records available for inspection.[21]

TABLE 1—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH RECORDKEEPING

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Financial Manager	15,778	$3,127,949	15,778	$3,127,949
Total	15,778	3,127,949	15,778	3,127,949

[16] Estimates based on SEC's FOCUS filings and SEC's Form ADV filings.

[17] Cerulli Associates, *U.S. RIA Marketplace 2023,* Exhibit 5.10, Part 1, The Cerulli Report.

[18] Federal Insurance Deposit Corporation, *Quarterly Banking Profile,* Statistics at a Glance- as of September 30, 2023, *https://www.fdic.gov/analysis/quarterly-banking-profile/statistics-at-a-glance/2023sep/industry.pdf.*

[19] Reporting dealers covered by the exemption are not accounted for separately because they are banks and security brokerages that trade in U.S. Government Securities; thus, reporting dealers are already accounted for in the number of broker-dealer firms and banks. The New York Federal Reserve Bank reported 21 primary dealers on March 21, 2013. *http://www.newyorkfed.org/markets/pridealers_current.html.*

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

[21] The burden is estimated as follows: 3,944 financial institutions × 4 hours = 15,778 hours. A labor rate of $198.25 is used for a financial manager. The labor rate is applied in the following calculation: (3,944 financial institutions × 4 hours) × $198.25 = $3,127,949.

Summary

In sum, the Department estimates the total burden for the amended PTE 1975–1 is 15,778 hours at a total equivalent burden cost of $3,127,949. The total cost burden is estimated to be de minimis. The Department assumes that required records are maintained by the relevant affected entities, the broker-dealers and banks. Thus, there are no additional tasks performed outside of those performed by the brokerage firms and banks.

The paperwork burden estimates are summarized as follows:

Type of Review: Revision of an existing collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Titles: Prohibited Transaction Exemption 75–1 (Security Transactions with Broker-Dealers, Reporting Dealers and Banks).

OMB Control Number: 1210–0092.

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

Estimated Number of Respondents: 3,944.

Estimated Number of Annual Responses: 3,944.

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

Estimated Total Annual Burden Hours: 15,778 hours.

Estimated Total Annual Burden Cost: $0.

Amendments to PTE 86–128

Affected Entities

Using data from 2021 Form 5500, the Department estimates that 1,257 unique plans hired service providers denoting on the Schedule C that they were a discretionary trustee. Further, among these plans, 801 also reported that they provided investment management services or received investment management fees paid directly or indirectly by the plan.[22] Based on these values, the Department estimates on average, 1,000 plans have discretionary fiduciaries with full discretionary control. As small plans do not file the Schedule C, this estimate may be an underestimate.

In the proposal, a few commenters expressed concern that disruption would be caused by the amendments. One commenter expressed concern that the removal of investment advice would increase costs to retirement investors, as entities would need to comply with PTE 2020–02. The Department did not receive comments specifically addressing the Department's estimates of the number of entities that would continue to rely on PTE 86–128 under the proposed amendments and did not receive any which directly discussed plan reliance on PTE 86–128.

The Department estimates that of the estimated 1,000 plans discussed above, 7.5 percent are new accounts or new financial advice relationships.[23] Based on these assumptions, the Department estimates that 75 plans would be affected by the proposed amendments to PTE 1986–128.[24]

The Department lacks reliable data on the number of investment advice providers who are discretionary fiduciaries that would rely on the amended exemption. For the purposes of this analysis, the Department believes that in trying to capture financial entities engaging in cross trades with discretionary control, the number of dual-registered broker-dealers that render services to retirement plans provides an accurate estimate. As of December 2022, there were approximately 456 broker-dealers registered as SEC- or state-registered investment advisers.[25] Consistent with the assumptions made about broker-dealers affected by the amendments to PTE 2020–02, the Department estimates that 55 percent, or 251 broker-dealers will be affected by the amendments.

The Department requested comment on this assumption, particularly with regard to what types of entities would be likely to rely on the amended exemption, as well as any underlying data. The Department did not receive any comments.

Written Authorizations, Evaluations, Forms, Reports, and Statements

Written Authorization From the Authorizing Fiduciary to the Broker-Dealer

Authorizing fiduciaries of new plans entering into a relationship with a transacting fiduciary are required to provide the transacting fiduciary with an advance written authorization to perform transactions for the plan. The Department estimates that there are approximately 75 plans that are new or that enter new arrangements each year.[26] Therefore, the Department estimates that approximately 75 authorizing fiduciaries are expected to send an advance written authorization. It is assumed that a legal professional will spend 15 minutes per plan reviewing the disclosures and preparing an authorization form. This results in a burden of 19 hours with an equivalent cost of $3,107.[27]

To produce and distribute the authorization, the Department assumes that 100 percent of plans will use traditional electronic methods at no additional burden. The Department assumes that clerical staff will spend five minutes preparing and sending the authorization, resulting in a burden of approximately 6 hours with an equivalent cost of $412.[28]

In total, the written authorization requirement is expected to result in a total burden of 25 hours with an equivalent cost of $3,520.

[22] Estimates based on 2021 Form 5500 data.

[23] EBSA identified 57,575 new plans in its 2021 Form 5500 filings, or 7.5 percent of all Form 5500 pension plan filings.

[24] The number of new plans is estimated as: 1,000 plans × 7.5 percent of plans are new ≈ 75 new plans.

[25] Estimates are based on the SEC's FOCUS filings and Form ADV filings.

[26] 75 plans that are new or that enter new arrangements each year.

[27] The burden is estimated as follows: 75 plans × (15 minutes per plan ÷ 60 minutes) ≈ 19 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: [75 plans × (15 minutes per plan ÷ 60 minutes)] × $165.71 per hour ≈ $3,107.

[28] The burden is estimated as follows: 75 plans × (5 minutes per plan ÷ 60 minutes) ≈ 6 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: [75 plans × (5 minutes per plan ÷ 60 minutes)] × $65.99 ≈ $412.

TABLE 2—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE WRITTEN AUTHORIZATION

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	19	$3,107	19	$3,107
Clerical	6	412	6	412
Total	25	3,520	25	3,520

Note: The total value may not sum due to rounding.

Provision of Materials for Evaluation of Authorization of Transaction

Prior to a written authorization being made, the authorizing fiduciary must be provided by the financial institution with a copy of the exemption, a form for termination of authorization, a description of broker's placement practices, and any other reasonably available information. This information is assumed to be readily available.

To produce and distribute the materials, the Department assumes that 100 percent of financial institutions will use traditional electronic methods at no additional burden. The Department estimates that a clerical staff member will spend five minutes to prepare and distribute the required information to the authorizing fiduciary. This information will be sent to the 75 plans entering into an agreement with a financial institution, and based on the above, the Department estimates that this requirement results in a burden of 6 hours with an equivalent cost of $412.[29]

TABLE 3—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH PROVISION OF MATERIALS FOR TRANSACTION AUTHORIZATION

Activity	Year 1		Subsequent Years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Clerical	6	$412	6	$412
Total	6	412	6	412

Provision of an Annual Termination Form

Each authorizing fiduciary must be supplied annually with a form expressly providing an election to terminate the written authorization. It is assumed that legal professionals with each of the 251 affected transacting fiduciaries will spend on average 15 minutes preparing the termination forms, which results in a burden of 63 hours with an equivalent cost of $10,390.[30]

To produce and distribute the termination form to the 1,000 plans, the Department assumes that 100 percent of financial institutions will use traditional electronic methods at no additional burden. The Department estimates that clerical staff will spend five minutes per plan preparing and distributing the termination forms resulting in a burden of 83 hours with an equivalent cost of $5,499.[31]

In total, providing the annual termination form is expected to impose a burden of 146 hours with an equivalent cost of $15,889.

TABLE 4—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH PROVISION OF THE ANNUAL TERMINATION FORM

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	63	$10,390	63	$10,390
Clerical	83	5,499	83	5,499
Total	146	15,889	146	15,889

Transaction Reporting

The transacting fiduciary engaging in a covered transaction must furnish the authorizing fiduciary with either a conformation slip for each securities transaction or a quarterly report containing specified information. As discussed above, the provision of the confirmation already is required under

[29] The burden is estimated as follows: 75 plans × (5 minutes per plan ÷ 60 minutes) ≈ 6 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: [75 plans × (5 minutes per plan ÷ 60 minutes)] × $65.99 ≈ $412.

[30] The burden is estimated as follows: [251 transacting fiduciaries × (15 minutes per financial institution ÷ 60 minutes)] ≈ 63 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: [251 transacting fiduciaries × (15 minutes per financial institution ÷ 60 minutes)] × $165.71 per hour ≈ $10,390.

[31] The burden is estimated as follows: 1,000 plans × (5 minutes per plan ÷ 60 minutes) ≈ 83 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: [1,000 plans × (5 minutes per plan ÷ 60 minutes)] × $65.99 ≈ $5,499.

SEC regulations. Therefore, if the transaction reporting requirement is satisfied by sending conformation slips, no additional hour and cost burden will occur.

Annual Statement

In addition to the transaction reporting requirement, transacting fiduciaries are required to send an annual report to each of the 1,000 authorizing fiduciaries [32] containing the same information as the quarterly report and also containing all security transaction-related charges, the brokerage placement practices, and a portfolio turnover ratio.

In addition, it is assumed that the information that must be sent annually could be sent together; therefore, the clerical staff hours required to prepare and distribute the report has been included with the provision of annual termination form requirement. Therefore, no additional hour or equivalent cost burden has been reported.

Report of Commissions Paid

A discretionary trustee must provide an authorizing fiduciary with an annual report showing separately the commissions paid to affiliated brokers and non-affiliated brokers, on both a total dollar basis and a cents-per-share basis. The collecting and generation of the information for the quarterly report is reported as a cost burden. The clerical hour burden to prepare and distribute the report is included with the provision of annual termination form requirement, because both items are required to be sent annually.

A financial institution who is a discretionary trustee must provide each of the 1,000 authorizing fiduciaries with an annual report showing commissions paid to affiliated and non-affiliated brokers, on both a total dollar and a cents-per-share basis. As the report is sent annually, it is assumed that it could be sent with the transaction report. The Department estimates that 100 percent of financial institutions will use traditional electronic methods at no additional burden.

Financial institutions are required to report specific transaction fees and information to the plan fiduciaries. The information must be tracked, assigned to specific plans, and reported. It is assumed that it costs the financial institution $3.30 per plan to track this information.[33] With approximately 1,000 affected plans, this results in a cost burden of approximately $3,300 annually.[34]

In total, providing the report is expected to impose a total cost burden of $3,300.

TABLE 5—HOUR BURDEN AND COST ASSOCIATED WITH REPORT OF COMMISSIONS PAID

Activity	Year 1		Subsequent years	
	Burden hours	Cost burden	Burden hours	Cost burden
Clerical	0	$3,300	0	$3,300
Total	0	3,300	0	3,300

Summary

In total, the conditions of this exemption will result in the production of 44,821 disclosures.[35] The Department assumes that 100 percent of plans and financial institutions will use electronic methods to distribute the required information, at de minimis burden. Production and distribution of disclosures will result in an overall hour burden of 177 hours with an equivalent cost of $19,821 and an overall cost burden of $3,300.

The paperwork burden estimates are summarized as follows:

Type of Review: Revision to an existing collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Titles: PTE 86–128 (Securities Broker-Dealers).

OMB Control Number: 1210–0059.

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

Estimated Number of Respondents: 326.

Estimated Number of Annual Responses: 4,150.

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

Estimated Total Annual Burden Hours: 177 hours.

Estimated Total Annual Burden Cost: $3,300.

Amendments to PTE 77–4, 80–83 and PTE 83–1

The Department has determined that PTE 77–4 and PTE 80–83 do not have information collections impacted by the removal of advice from the exemption. There is no paperwork burden related to PTE 83–1.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) [36] imposes certain requirements on rules subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act or any other law.[37] Under section 604 of the RFA, agencies must submit a final regulatory flexibility analysis (FRFA) of a final rulemaking that is likely to have a significant economic impact on a substantial number of small entities, such as small businesses, organizations, and governmental jurisdictions. This amended exemption, along with related amended exemptions and a rule amendment published elsewhere in this issue of the **Federal Register**, is part of a rulemaking regarding the definition of fiduciary investment advice, which the Department has determined likely will have a significant economic impact on a substantial number of small entities. The impact of this amendment on small entities is included in the FRFA for the entire project, which can be found in the related notice of rulemaking found elsewhere in this edition of the **Federal Register**.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 [38] requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a final rule that may result in an expenditure of $100 million or more (adjusted annually for inflation with the base year 1995) in any 1 year

[32] 1,000 plans.

[33] This estimate is based on information from a Request for Information and from industry sources.

[34] 1,000 plans × $3.30 = $3,300.

[35] The total number of disclosures is calculated in the following manner: (75 Written authorization disclosures) + (75 Provision of materials for evaluation of authorization of transaction) + (1,000 Annual termination form) + (1,000 Annual Statement) + (1,000 Report of Commissions Paid) + (1,000 Information and fee tracking) = 4,150 disclosures.

[36] 5 U.S.C. 601 *et seq.*

[37] 5 U.S.C. 601(2), 603(a); *see* 5 U.S.C. 551.

[38] Public Law 104–4, 109 Stat. 48 (Mar. 22, 1995).

by state, local, and tribal governments, in the aggregate, or by the private sector. For purposes of the Unfunded Mandates Reform Act, as well as Executive Order 12875, these amended exemptions do not include any Federal mandate that will result in such expenditures.

Federalism Statement

Executive Order 13132 outlines fundamental principles of federalism. It also requires Federal agencies to adhere to specific criteria in formulating and implementing policies that have ''substantial direct effects'' on the states, the relationship between the national government and states, or on the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that have these federalism implications must consult with State and local officials and describe the extent of their consultation and the nature of the concerns of State and local officials in the preamble to the final regulation. Notwithstanding this, Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA.

The Department has carefully considered the regulatory landscape in the states and worked to ensure that its regulations would not impose obligations on impacted industries that are inconsistent with their responsibilities under state law, including the obligations imposed in states that based their laws on the NAIC Model Regulation. Nor would these regulations impose obligations or costs on the state regulators. As discussed more fully in the final Regulation and in the preamble to PTE 84–24, there is a long history of shared regulation of insurance between the States and the Federal government. The Supreme Court addressed this issue and held that ''ERISA leaves room for complementary or dual federal or state regulation'' of insurance.[39] The Department designed the final Regulation and exemptions to complement State insurance laws.[40]

The Department does not intend for these amendments to change the scope or effect of ERISA section 514, including the savings clause in ERISA section 514(b)(2)(A) for State regulation of securities, banking, or insurance laws. Ultimately, the Department does not believe these amendments have federalism implications because they have no substantial direct effect on the States, on the relationship between the National government and the States, or on the distribution of power and responsibilities among the various levels of government.

General Information

The attention of interested persons is directed to the following:

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

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

(3) The final amendment to the class exemptions is applicable to a particular transaction only if the transaction satisfies the conditions specified in the exemption; and

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

The Department is granting the following amendments to class exemptions on its own motion, pursuant to its authority under ERISA section 408(a) and Code section 4975(c)(2) and in accordance with procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637 (October 27, 2011)).[41]

Amendments to Class Exemptions

Prohibited Transaction Exemption 75–1, Exemptions From Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers and Banks

The Department amends Prohibited Transaction Exemption 75–1 under the authority of ERISA section 408(a) and Code section 4975(c)(2), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637 (October 27, 2011)).

I. Part III, *Underwritings,* is amended by inserting a new section III(h) to read as follows:

Exception. No relief from the restrictions of ERISA section 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is available for the receipt of compensation as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

II. Part IV, Market-making, is amended by inserting a new section IV(g) to read as follows:

Exception. No relief from the restrictions of ERISA section 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is available for the receipt of compensation as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder.

[39] *See John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank,* 510 U.S. 86, 98 (1993).

[40] *See BancOklahoma Mortg. Corp.* v. *Capital Title Co., Inc.,* 194 F.3d 1089 (10th Cir. 1999) (stating that McCarran-Ferguson Act bars the application of a Federal statute only if (1) the Federal statute does not specifically relate to the business of insurance; (2) a State statute has been enacted for the purpose of regulating the business of insurance; and (3) the Federal statute would invalidate, impair, or supersede the State statute); *Prescott Architects, Inc.* v. *Lexington Ins. Co.,* 638 F. Supp. 2d 1317 (N.D. Fla. 2009); *see also U.S.* v. *Rhode Island Insurers' Insolvency Fund,* 80 F.3d 616 (1st Cir. 1996). The Supreme Court has held that to ''impair'' a State law is to hinder its operation or ''frustrate [a] goal of that law.'' *Humana Inc.* v. *Forsyth,* 525 U.S. 299, 308 (1999).

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

III. Part V, Extension of Credit, is amended by adding new Section (c) as follows and redesignating Sections (c) and (d) as Sections (d) and (e), respectively:

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

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

(2) Prior to the extension of credit, the plan or IRA receives written disclosure of (i) the rate of interest (or other fees) that will apply and (ii) the method of determining the balance upon which interest will be charged, in the event that the fiduciary extends credit to avoid a failed purchase or sale of securities, as well as prior written disclosure of any changes to these terms. This section (c)(2) will be considered satisfied if the plan or IRA receives the disclosure described in Securities Exchange Act Rule 10b–16; [42]

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

Prohibited Transaction Exemption 77–4, Class Exemption for Certain Transactions Between Investment Companies and Employee Benefit Plans

The Department amends Prohibited Transaction Exemption 77–4 under the authority of ERISA section 408(a) and Code section 4975(c)(2), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637 (October 27, 2011)).

A new section II(g) is inserted to read as follows:

Exception. No relief from the restrictions of 406(b) and the taxes imposed by section 4975(a) and (b) by reason of sections 4975(c)(1)(E) and (F) is available for the receipt of compensation as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code 4975(e)(3)(B) and regulations thereunder.

Prohibited Transaction Exemption 80–83, Class Exemption for Certain Transactions Involving Purchase of Securities Where Issuer May Use Proceeds To Reduce or Retire Indebtedness to Parties in Interest

The Department amends Prohibited Transaction Exemption 80–83 under the authority of ERISA section 408(a) and Code section 4975(c)(2), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637 (October 27, 2011)).

A new section I.E. is inserted to read as follows:

Exception. No relief from the restrictions of 406(b) and the taxes imposed by Code sections 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is available for the receipt of compensation as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder.

Transaction Exemption 83–1, Exemption for Certain Transactions Involving Mortgage Pool Investment Trusts

The Department amends Prohibited Transaction Exemption 83–1 under the authority of ERISA section 408(a) and Code section 4975(c)(2), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637 (October 27, 2011)).

A new section I.E. is inserted to read as follows:

Exception. No relief from the restrictions of ERISA 406(b) and the taxes imposed by Code sections 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is available for the receipt of compensation as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder.

Prohibited Transaction Exemption 86–128, Class Exemption for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers

The Department amends Prohibited Transaction Exemption 86–128 under the authority of ERISA section 408(a) and Code section 4975(c)(2), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637 (October 27, 2011)).

I. New sections II(d) is inserted as follows:

(d) *Exception.* No relief from the restrictions of ERISA 406(b) and the taxes imposed by Code sections 4975(a) and (b) by reason of Code sections 4975(c)(1)(E) and (F) is available for the receipt of compensation as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder.

II. Section III(a) is amended to read as follows:

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

III. Section IV(b)(1) is deleted, and Sections IV(b)(2) and (3) are redesignated as Sections IV(b)(1) and (2).

IV. Section IV(c) is amended to read as follows:

(c) Recapture of profits. Sections III(a), III(h), and III(i) of this exemption do not apply in any case where the person engaging in a covered transaction returns or credits to the plan all profits earned by that person in connection with the securities transactions associated with the covered transaction.

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

Lisa M. Gomez,

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

[FR Doc. 2024–08068 Filed 4–24–24; 8:45 am]

BILLING CODE 4510–29–P

[42] 17 CFR 240.10b–16.

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

[Application No. D–12060]

ZRIN 1210–ZA33

Amendment to Prohibited Transaction Exemption 84–24

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

ACTION: Amendment to Prohibited Transaction Exemption 84–24.

SUMMARY: This document contains a notice of amendment to Prohibited Transaction Exemption (PTE) 84–24, an exemption from certain prohibited transaction provisions of the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code of 1986 (the Code). The amendment affects participants and beneficiaries of plans, individual retirement account (IRA) owners, and certain fiduciaries of plans and IRAs.

DATES: The amendment is effective September 23, 2024.

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

SUPPLEMENTARY INFORMATION:

Background

The Employee Retirement Income Security Act of 1974 (ERISA) provides, in relevant part, that a person is a fiduciary with respect to a plan to the extent they render investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so. Title I of the ERISA (referred to herein as Title I), which generally applies to employer-sponsored plans, includes this provision in ERISA section 3(21)(A)(ii).[1] ERISA's Title II (referred to herein as the Code), includes a parallel provision in Code section 4975(e)(3)(B), which defines a fiduciary of a tax-qualified plan, including individual retirement accounts (IRAs).

In addition to fiduciary obligations, ERISA and the Code ''categorically bar[]'' plan fiduciaries from engaging in transactions deemed ''likely to injure the pension plan.'' [2] These prohibitions broadly forbid a fiduciary from ''deal[ing] with the assets of the plan in his own interest or for his own account,'' and ''receiv[ing] any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.'' [3] Congress also gave the Department of Labor (the Department) authority to grant conditional administrative exemptions from the prohibited transaction provisions, but only if the Department finds that the exemption is (1) administratively feasible for the Department, (2) in the interests of the plan and of its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries of such plan.[4]

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

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

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

PTE 2020–02

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

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

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

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

[4] ERISA section 408(a), 29 U.S.C. 1108(a). Under the Reorganization Plan No. 4 of 1978, which Congress subsequently ratified in 1984, Sec. 1, Public Law 98–532, 98 Stat. 2705 (Oct. 19, 1984), Congress generally granted the Department authority to interpret the fiduciary definition and issue administrative exemptions from the prohibited transaction provisions in Code section 4975. 5 U.S.C. App. (2018).

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

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

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

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

Comments and Overview of the Amendment to PTE 84–24

Overview of Amended Exemption

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

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

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

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

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

Several commenters raised concerns with the Department's approach to amending PTE 84–24 and insurance recommendations more generally. Some commenters argued that the Federal Government should not be regulating the sales of insurance products. They argued that the McCarran-Ferguson Act assigns to the States, not the Federal Government, primary authority to regulate the business of insurance. Furthermore, several commenters pointed out that many States have adopted the 2020 National Association of Insurance Commissioners (NAIC) Suitability In Annuity Transactions Model Regulation 275 (the NAIC Model Regulation), which imposes a ''best interest'' standard on insurance producers. Some commenters argued that the Department should rely entirely on the NAIC Model Regulation instead of relying on the specific standards in ERISA and the Code.

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

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

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

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

[9] NAIC Model Regulation at section 6.E.4.c.

beneficiaries and in their interests. The Department is finalizing this amendment consistent with its statutory obligation.

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

- acknowledge their fiduciary status [11] in writing to the Retirement Investor;
- disclose their services and material conflicts of interest to the Retirement Investor;
- adhere to Impartial Conduct Standards requiring them to:

Æ investigate and evaluate investments, provide advice, and exercise sound judgment in the same way that knowledgeable and impartial professionals would in similar circumstances (the ''Care Obligation'');

Æ never place their own interests ahead of the Retirement Investor's interest or subordinate the Retirement Investor's interests to their own (the ''Loyalty Obligation'');

Æ charge no more than reasonable compensation and, if applicable, comply with Federal securities laws regarding ''best execution''; and

Æ avoid making misleading statements about investment transactions and other relevant matters;

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

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

Applicability Date

This Final Amendment is applicable to transactions pursuant to investment advice provided on or after September 23, 2024 (the ''Applicability Date''). For transactions pursuant to investment advice provided before the Applicability Date, the prior version of PTE 84–24 will remain available for all insurance agents and insurance companies that currently rely on the exemption.[12] Also, no party would be held to the amended conditions in Sections VII, VIII, IX or XI for a transaction that occurred before the Applicability Date of the amended exemption.

Several commenters stated that the Proposed Amendment's Applicability Date, which was set for 60 days after publication, did not provide sufficient time for parties to fully comply with the new conditions for receipt of reasonable compensation for investment advice. In response to these comments, the Department is adding a new Section XI, which provides a phase-in period for the one-year period beginning September 23, 2024. Thus, an Independent Producer may receive compensation under Section II(b) during the phase-in period if it complies with the Impartial Conduct Standards condition in Section VII(a) and the fiduciary acknowledgment condition under Section VII(b)(1). This one-year phase-in period is the same as the one-year compliance period the Department provided when it originally granted PTE 2020–02.

Excluding Investment Advice

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

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

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

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

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

[13] Nondiscretionary trustees were added in 1984, in response to a request from the Investment Company Institute listing typical nondiscretionary or trustee services. In an April 21, 1980 letter, ''ICI states nondiscretionary trustees and custodians:

(a) Open and maintain plan accounts and, in the case of defined contribution plans, individual participant accounts, pursuant to the employer's instructions that those providing investment advice

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

Description of Changes to Existing PTE 84–24

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

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

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

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

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

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

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

(c) The effecting by an insurance agent or broker, pension consultant or investment company Principal Underwriter of a transaction for the purchase, with plan assets, of an insurance or annuity contract or

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within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) would be excluded under Section II(a).

(b) Receive contributions from the employer and credit them to individual participant accounts in accordance with the employer's instructions;

(c) Invest contributions and other plan assets in shares of a mutual fund or funds or other products such as insurance or annuity contracts designated by the employer, plan trustee, or participants, and reinvest dividends and other distributions in such investments;

(d) Redeem, transfer, or exchange mutual fund shares or surrender insurance or annuity contracts as instructed by the employer, plan trustee, or participant;

(e) Provide or maintain ''designation of beneficiary'' forms and make distributions from the trust or custodial account to participants or beneficiaries in accordance with the instructions of the employer, plan trustee, participants, or beneficiaries;

(f) Deliver to participants or their employer all notices, prospectuses, and proxy statements, and vote proxies in accordance with the participants' instructions.

(g) Maintain records of all contributions, investments, distributions, and other transactions and report them to the employer and participants;

(h) Make necessary filings with the Internal Revenue Service and other government agencies;

(i) Keep custody of the plan's assets;

(j) Reply to and prepare correspondence, either directly or through the mutual fund distributor or adviser, regarding the investment account and the operation and interpretation of a master or prototype plan sponsored by the complex to which the nondiscretionary trustee or custodian belongs.

In some situations, the trustee or custodian is empowered to amend the master or prototype plan; in others, this power resides in the sponsor of the master or prototype plan. ICI further describes the duties of the nondiscretionary trustees as ''ministerial'' and indicates that such trustees possess no decisional authority with respect to a plan's funding medium or subsequent purchases or sales.''

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

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

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

(e) The purchase, with plan assets, of an insurance or annuity contract from an insurance company which is a fiduciary or a service provider (or both) with respect to the plan solely by reason of the sponsorship of a Pre-Approved Plan if the purchase is not as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

(f) The purchase, with plan assets, of securities issued by an investment company from, or the sale of such securities to, an investment company or an investment company Principal Underwriter, when such investment company, Principal Underwriter, or the investment company investment adviser is a fiduciary or a service provider (or both) with respect to the plan solely by reason of: (1) the sponsorship of a Pre-Approved Plan; or (2) the provision of Nondiscretionary Trust Services to the plan; or (3) both (1) and (2); and the purchase is not as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

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

Recordkeeping

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

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

Fiduciary Investment Advice Exemption

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

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

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

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

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

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

The Department disagrees with these assertions. The core conditions of PTE 84–24, including all the Impartial Conduct Standards, reflect core

fiduciary obligations that have been in ERISA since its passage nearly fifty years ago. The Department is confident that Independent Producers, who satisfy the fiduciary definition, can recommend covered insurance products in accordance with basic standards of care and loyalty, and without overcharging or misleading retirement investors.

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

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

Retirement Investors

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

Related Entity

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

Independent Producers

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

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

In response to these comments, the Department has revised this definition to permit statutory employees to rely upon PTE 84–24 when they are recommending transactions in which the statutory employer does not have a financial interest. In such cases, the statutory employer is similarly situated to insurance companies that are working with wholly independent agents. The Final Amendment does not, however, allow statutory employees to rely on PTE 84–24 when they are recommending transactions with the insurance company that acts as their statutory employer. As reflected in the Treasury's implementing regulations,[15] the statutory employee's principal business activity involves the solicitation of contracts for that one insurance company which ordinarily provides facilities and support to the statutory employee for that purpose, and these statutory employees often receive

[15] 26 CFR 31.3121(d)–1(d)(3)(ii) Full-time life insurance salesman. An individual whose entire or principal business activity is devoted to the solicitation of life insurance or annuity contracts, or both, primarily for one life insurance company is a full-time life insurance salesman. Such a salesman ordinarily uses the office space provided by the company or its general agent, and stenographic assistance, telephone facilities, forms, rate books, and advertising materials are usually made available to him without cost. An individual who is engaged in the general insurance business under a contract or contracts of service which do not contemplate that the individual's principal business activity will be the solicitation of life insurance or annuity contracts, or both, for one company, or any individual who devotes only part time to the solicitation of life insurance contracts, including annuity contracts, and is principally engaged in other endeavors, is not a full-time life insurance salesman.

health and other benefits from the ''employing'' insurance companies. Accordingly, the employing insurance company has a degree of potential control and influence over the conduct of the statutory employee, and the statutory employee has a corresponding commitment to that company that is not necessarily the same as in a relationship between a wholly independent agent and other Insurers.

Given these differences, the Department has concluded that PTE 84–24 is insufficiently protective of Retirement Investors with respect to recommendations of products in which the statutory employer has a financial interest. In such cases, both the employing insurance company and the statutory employee must rely on PTE 2020–02 for relief for prohibited transactions, just as similarly situated Financial Institutions rely on PTE 2020–02 with respect to recommendations of their proprietary products. Accordingly, statutory employees and the insurance companies would need to meet all the protective conditions of PTE 2020–02, including the requirement that the insurance company, acting as the supervising financial institution, acknowledge its fiduciary status with respect to the recommendation. However, when a statutory employee recommends transactions with an unrelated and unaffiliated insurance company, the statutory employee can rely on PTE 84–24 and make the fiduciary acknowledgment as an Independent Producer. Consistent with the conditions of PTE 84–24, those transactions would be subject to the supervision of the unrelated insurance company. To the extent that statutory employers or other insurance companies believe that neither PTE 2020–02 nor PTE 84–24 is appropriate for their particular circumstances, they can also apply to the Department for an individual or class exemption, which may be subject to different or additional protective conditions.

Insurers

The term ''Insurer'' as defined in Section X(f) is similar to the term ''Financial Institution'' defined in PTE 2020–02, except it would be limited to insurance companies. Even though amended PTE 84–24 does not require Insurers to be fiduciaries, an Independent Producer cannot rely on the exemption unless it is subject to oversight by an Insurer that satisfies the conditions set out in this Final Amendment. As under the NAIC Model Regulation and discussed in the policies and procedures section below, the Independent Producer must be subject to oversight by the Insurer whose products it recommends to the Retirement Investor, if the Independent Producer wants to rely on the exemption. As stated in Section VI(b), the Insurer will not necessarily become a fiduciary under ERISA or the Code merely by complying with this exemption's conditions. However, the Department cautions that Insurers selling insurance and annuity products through Independent Producers could become investment advice fiduciaries under ERISA and/or the Code through other actions they take. If the Insurers are fiduciaries, they could not rely on amended PTE 84–24 and would need to rely on a different prohibited transaction exemption, such as PTE 2020–02, for relief from ERISA section 406(b) and Code section 4975. The investment advice provisions of PTE 84–24 are solely available to the Independent Producer.

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

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

Exclusions

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

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

Impartial Conduct Standards of Amended PTE 84–24

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

Care Obligation and Loyalty Obligation

The Department is adopting the substance of the Proposed Amendment's Best Interest standard. However, as in PTE 2020–02, the Department is replacing the term ''Best Interest'' with its two separate components: the Care Obligation and the Loyalty Obligation. Under the amended provision, investment advice must, at the time it is provided, satisfy the Care Obligation and Loyalty Obligation. The Final Amendment specifically refers to each obligation separately, although they are unchanged in substance. Both the Care Obligation and the Loyalty Obligation must be satisfied when investment advice is provided. As defined in Section X(b), to meet the Care Obligation, an advice must reflect the care, skill, prudence, and diligence

under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor. As defined in Section X(g), to meet the Loyalty Obligation, the Independent Producer must not place the financial or other interests of the Independent Producer, Insurer, or any Affiliate, Related Entity, or another party ahead of the interests of the Retirement Investor or subordinate the Retirement Investor's interests to those of the Independent Producer, Insurer, or any Affiliate, Related Entity, or another party. For example, in choosing between annuity products offered by Insurers whose products the Independent Producer is authorized to sell, the Independent Producer may not recommend a product that is worse for the Retirement Investor but better or more profitable for the Independent Producer or Insurer.

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

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

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

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

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

The Department is revising the reasonable compensation standard in Section VII(a)(2). The Proposed Amendment would have limited the compensation that an Independent Producer could receive to an ''Insurance Sales Commission,'' defined to mean a sales commission paid by the Insurance Company or an Affiliate to the Independent Producer for the service of

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

recommending and/or effecting the purchase or sale of an insurance or annuity contract, including renewal fees and trailing fees, but excluding revenue sharing payments, administrative fees or marketing payments, payments from parties other than the Insurance Company or its Affiliates, or any other similar fees.

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

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

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

Some commenters argued that the limited definition was inconsistent with the Department's statement in footnote 10 of the Proposed Amendment's preamble that third party intermediary marketing organizations (IMOs) could compensate Independent Producers, presumably with compensation other than insurance commissions, as narrowly defined. In response to this comment, the Department confirms that all compensation under PTE 84–24 may be paid directly to IMOs or field market organizations (FMOs) which then compensate the individual Independent Producer who has provided investment advice. The Department also notes that ERISA section 408(b)(2) and Code section 4975(d)(2) are available for intermediaries providing non-fiduciary services.

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

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

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

No Materially Misleading Statements

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

To the extent the Independent Producer provides materials, including marketing materials that are prepared and provided by the Insurer, this

condition also would require such materials not to be materially misleading to the Independent Producer's knowledge.

Disclosure

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

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

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

Fiduciary Acknowledgment

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

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

As described in the preamble to PTE 2020–02, many commenters argued that the fiduciary acknowledgment requirement imposes contractual or warranty requirement on Independent Producers. Several other commenters noted, however, that neither PTE 84–24 nor PTE 2020–02 impose any contract or warranty requirements on fiduciary investment advice providers. Instead, the requirement simply ensures up-front clarity about the nature of the relationship and services being provided. The Department agrees with these commenters that this up-front clarity is important and does not impose any contract or warranty requirement. The fiduciary acknowledgment condition stands in marked contrast to the Department's 2016 rulemaking on fiduciary advice; the Department has imposed no obligation on fiduciary advice providers to enter into enforceable contracts with or to provide enforceable warranties to their customers. The only remedies for violations of the exemption's conditions, and engaging in a non-exempt prohibited transaction, are those provided by Title I of ERISA, which specifically provides a cause of action for fiduciary violations with respect to ERISA-covered Plans, and Title II of ERISA, which provides for imposition of the excise tax. Nothing in the exemption compels Independent Producers to make contractually enforceable commitments, and as far as the exemption provides, they could expressly disclaim any enforcement rights other than those specifically

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

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

provided by Title I of ERISA or the Code, without violating any of the exemption's conditions.

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

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

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

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

Model Disclosure

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

We are making investment recommendations to you regarding your retirement plan account or individual retirement account as fiduciaries within the meaning of Title I of the Employee Retirement Income Security Act and/or the Internal Revenue Code, as applicable, which are laws governing retirement accounts. The way we make money or otherwise are compensated creates some conflicts with your financial interests, so we operate under a special rule that requires us to act in your best interest and not put our interest ahead of yours.

Under this special rule's provisions, we must:

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

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

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

Relationship and Conflict of Interest Disclosure

Under Section VII(b)(3), the Independent Producer must disclose in writing all material facts relating to the scope and terms of the relationship with the Retirement Investor. This includes the material fees and costs that apply to the Retirement Investor's transactions, holdings, and accounts. The Independent Producer must also disclose the type and scope of services provided to the Retirement Investor, including any material limitations on the recommendations that may be made to the Retirement Investor. This description must include the products the Independent Producer is licensed and authorized to sell, inform the Retirement Investor in writing of any limits on the range of insurance products recommended, and identify the specific Insurers and specific

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

[20] PTE 84–14, Part V, Section (a), (49 FR 9494, March 13, 1984).

insurance products available to the Independent Producer for recommendation to the Retirement Investor. Further, under Section VII(b)(4), the Independent Producer must also disclose all material facts relating to Conflicts of Interest that are associated with the recommendation.

One difference from PTE 2020–02 is that Independent Producers must also provide a notice describing the Retirement Investor's right to request additional information regarding cash compensation. If the Retirement Investor makes that request, the Independent Producer must give the investor a reasonable estimate of the amount of cash compensation to be received by the Independent Producer, which may be stated as a range of amounts or percentages; and whether the cash compensation will be provided through a one-time payment or through multiple payments, the frequency and amount of the payments, which may also be stated as a range of amounts or percentages. Although this is an additional obligation in PTE 84–24 that is not in PTE 2020–02, the Department notes this disclosure requirement closely parallels the obligations of an Independent Producer under Section 6.A.2.a .v and 6.A.2.b of the NAIC Model Regulation [21] and is similar to, but more limited than, the standard imposed by New York State in Section 30.3 of a rule issued by the New York Department of Financial Services entitled ''Producer Compensation Transparency'' (referred to as Rule 194).[22]

The Department thinks that this additional transparency is especially important in the context of PTE 84–24 because, in contrast to PTE 2020–02, the Insurer has not assumed fiduciary responsibility with respect to the recommendation or its compensation and incentive practices, and because of the importance of these financial incentives in driving investment recommendations. As noted above, it is important that Retirement Investors have a clear understanding of the compensation, services, and conflicts of interest associated with recommendations so that they have sufficient information to make fully informed investment decisions. Additionally, clear and accurate disclosures can deter Independent Producers and Insurers from engaging in otherwise abusive practices that they would prefer not to expose to the light of day. Likewise, requiring a clear disclosure of otherwise hidden fees and conflicts involved in the sale of insurance products may serve to dissuade Insurers and Independent Producers from making imprudent recommendations that are driven by outsized financial incentives, rather than the Retirement Investor's best interests, resulting in lower overall costs to consumers.[23]

Best Interest Documentation and Rollover Disclosure

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

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

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

Other commenters expressed concern with the required rollover disclosure. For example, one commenter stated that it is unclear how an Independent Producer could compare fees and expenses of employer plans without an annuity option with a recommended annuity. According to this commenter, comparing annuities to other investment options are ''an apples-to-oranges comparison that would likely confuse a participant more than help.'' Another commenter characterized the condition as potentially requiring Independent

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

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

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

[24] Section 6.A.4.

Producers to violate the law, because as described by the commenter Federal securities laws prohibit individuals from recommending or providing detailed information or advice about securities unless they have a securities license. Thus, according to the commenter, Independent Producers who do not have a securities license (as most do not) would be forced to either break the law to comply with this condition or undertake the expense and burden of obtaining the appropriate securities licenses.

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

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

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

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

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

Good Faith and Exception for Disclosures Prohibited by Law

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

Policies and Procedures

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

recommend the Insurers' products. Because of their authority over the sale of their products and over the conduct of Independent Producers, the Insurers' actions and the financial incentives they create can promote or undermine participant interests.

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

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

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

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

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

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

Discussion of Comments

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

Obligation on Insurers

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

Other comments focused on practical challenges associated with some interpretations of the exemption's requirements. For example, one commenter argued that use of the term ''ensure'' was unacceptable because Insurers do not control Independent Producers and therefore cannot guarantee their compliance. Another commenter stated that requiring an insurer to review the recommendations of third-party products is an impossible task because they do not know those products and the products are not and

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

cannot be in their system for review. This commenter further questioned how an insurer can determine whether the recommendation is in the best interest of the Retirement Investor as compared to other products the Independent Producer is authorized to sell, if the Insurer is not required to supervise an Independent Producer's recommendations of other Insurers' products. This same commenter urged the Department to specify in the operative text that supervision does not include an obligation to consider and compare other companies' products. Another commenter also characterized the exemption as requiring Insurers to review all conduct of Independent Producers and stressed the fact that Insurers are not able to control all the actions of Independent Producers to the same degree as, for example, broker-dealers can regulate the conduct of their registered representatives.

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

The Department has considered these comments and continues to believe that the policies and procedures requirement is essential to the exemption. The Department is similarly not adopting the NAIC Model Regulation as a safe harbor. If trusted Independent Producers are to recommend insurance products to Retirement Investors, it is important that they are subject to proper oversight by the Insurer whose products they are recommending, and that those Insurers pay careful attention to financial incentives they create or administer that are misaligned with Retirement Investors' interests. Insurers choosing to rely on Independent Producers for distribution of their products should be able to comply with the protective and workable oversight obligations set out in Section VII(c). Moreover, while there are important differences between the requirements in Section VII(c) and the NAIC Model Regulation, as discussed below, the NAIC Model Regulation itself requires a significant level of supervision demonstrating that Insurers can (and already must) supervise producers. The NAIC Model Regulation specifically says, ''An insurer shall establish and maintain a supervision system that is reasonably designed to achieve the insurer's and its producers' compliance with this regulation.'' [26]

Even if Insurers were not already required to supervise Independent Producers under State law, the conditions in Section VII(c) do not place an excessive burden on Insurers. Section VII(c)(1) specifies that the policies and procedures must be prudently designed to ensure compliance with the Impartial Conduct Standards and other exemption conditions. The ''prudently designed'' standard does not require perfection with respect to every recommendation by every Independent Producer overseen by the Insurer. The Department recognizes that, even prudent oversight structures will not prevent every instance of inappropriate advice, and use of the word ''ensure'' was not intended to suggest otherwise. When an Independent Producer violates the terms of this exemption, notwithstanding the Insurer's adoption and implementation of a prudent oversight structure, the consequence is that the Independent Producer is responsible for the resulting prohibited transaction, not that the Insurer is disqualified from continuing to act as a supervisory Insurer under the exemption. On the other hand, if the Insurer fails to implement policies and procedures and conflict-management measures consistent with this exemption, Independent Producers could not rely on this exemption for relief from ERISA's prohibited transaction rules.

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

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

In contrast to ERISA's stringent approach to conflicts of interest, the NAIC Model Regulation's requirements regarding mitigation of material conflicts of interest is not as protective as either the Department's approach under ERISA or the SEC's approach under Regulation Best Interest. This is made clear in the NAIC Model Regulation's definition of a ''material conflict of interest'' which expressly carves out all ''cash compensation or non-cash compensation'' from treatment as sources of conflicts of interest.[27] ''Cash compensation'' that is excluded from the definition of a material conflict of interest is broadly defined to include ''any discount, concession, fee, service fee, commission, sales charge, loan,

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

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

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

Obligation on Independent Producers

Other commenters expressed concern that the obligation for Insurers to establish, maintain and enforce policies and procedures is too much of a burden for the Independent Producers who must comply with those policies and procedures. One commenter asserted that, from a practical perspective, it would be impossible for an Independent Producer to set up a system requiring the producer to follow different policies and procedures from different insurers, stating that it would inevitably lead to the producer's failure to meet the requirements of the Proposed Amendment. Another commenter stated that the obligation to figure out how to operate within different policies and procedures developed by different Insurers would drive many Independent Producers to reduce the number of Insurers for whom they sell and the number of different products they recommend. The commenter warned that this reduction could harm Retirement Investors because it would be based on the Independent Producer's own compliance burden, rather than the needs of Retirement Investors.

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

Incentives

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

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

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

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

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

violating the conditions of this exemption. However, Insurers working with these statutory employees must ensure that their policies and procedures and incentive practices are reasonably and prudently designed as required by Section VII(c).

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

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

Moreover, the conflicts of interest that give rise to prohibited transactions under Titles I and II of ERISA, include conflicts of interest associated with compensation, such as commissions and fees that the NAIC Model Regulation expressly excludes from treatment as material conflicts of interest. Specifically, the NAIC Model Regulation's definition of a ''material conflict of interest'' expressly carves out all ''cash compensation or non-cash compensation'' from treatment as sources of material conflicts of interest.[32] This ''cash compensation,'' which is excluded from the definition of a material conflict of interest, is broadly defined to include ''any discount, concession, fee, service fee, commission, sales charge, loan, override, or cash benefit received by a producer in connection with the recommendation or sale of an annuity from an insurer, intermediary, or directly from the consumer.[33] ''Non-cash compensation'' is also broadly defined to include ''any form of compensation that is not cash compensation, including but not limited to, health insurance, office rent, office support and retirement benefits.'' [34]

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

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

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

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

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

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

[31] ERISA section 408(a)(2), (3); 29 U.S.C. 1108(a)(2), (3); Code section 4975(c)(2)(B), (C).

[32] NAIC Model Regulation at section 5.I.

[33] NAIC Model Regulation at section 5.B.

[34] NAIC Model Regulation at section 5.J.

[35] See Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Conflicts of Interest, Q2, available at *https://www.sec.gov/tm/iabd-staff-bulletin-conflicts-interest.*

Reviewing Independent Producers

Some commenters raised specific concerns with the requirement in Section VII(c)(3), which provides that the Insurer whose product is recommended has a prudent process for determining whether to authorize an Independent Producer to sell the Insurer's annuity contracts and to protect the Retirement Investor from Independent Producers who have failed to adhere to the Impartial Conduct Standards or who lack the necessary education, training, or skill. A prudent process would include review of such objective materials as customer complaints, disciplinary history, and regulatory actions concerning the Independent Producer, as well as the Insurer's review of the Independent Producer's training, education, and conduct with respect to the Insurer's own products. Section VII(d)(1) specifies that Insurers may rely in part on sampling to conduct their retrospective reviews, as long as any sampling or other method is designed to identify potential violations, problems, and deficiencies that need to be addressed.

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

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

Providing Policies and Procedures to the Department

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

Retrospective Review

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

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

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

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

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

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

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

Some commenters supported the retrospective review condition and

supported having Insurers undertake a regular process to ensure that their policies and procedures are reasonably designed to detect and prevent violations of, and achieve compliance with, the conditions of the exemption. However, other commenters raised concerns, viewing the condition as excessive and inefficient. Commenters asserted that it is both impractical and unnecessary for Insurers to review each recommendation and expressed concern about the volume of recommendations. One commenter requested confirmation that testing done as part of the retrospective review could rely on standard sampling and testing techniques. Another commenter pointed to the language in the preamble to the Proposed Amendment acknowledging that insurance companies working with Independent Producers have less direct control over the conduct and compensation of Independent Producers than over their employees. As a result, they stated that Insurers would not have access to the information they would need to effectively ensure that Independent Producers fully complied with the Impartial Conduct Standards and the other exemption conditions. One commenter expressed concern that under the exemption, Independent Producers are not required to provide Insurers with sufficient information for them to be able to conduct the retrospective review. Some commenters argued that the Department should instead rely on the NAIC Model Regulation's written report to senior management which details a review, with appropriate testing, reasonably designed to determine the effectiveness of the insurer's supervision system, the exceptions found, and corrective action taken or recommended, if any.

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

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

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

The Department is also making several other changes to specifics of the retrospective review provision. To address concerns from some commenters about having the Insurer file Form 5330, the Department is revising the filing obligation to be the responsibility of the Independent Producer, which is a fiduciary, and thus a ''disqualified person liable for the tax under Code section 4975 for participating in a prohibited transaction.'' [36] However, the Insurer is expected to instruct the Independent Producer to correct those prohibited transactions, report the transactions to the IRS on Form 5330, pay the resulting excise taxes imposed by Code section 4975, and provide the Insurer with a certification that it has filed Form 5330 within 30 days after the form is due (including extensions). The Department is also revising Section VII(d)(3) for consistency with amended PTE 2020–02. The methodology and results of the retrospective review must be reduced to a written report that is provided to a Senior Executive Officer of the Insurer. This is essential for Insurers to know that their Independent Producers are actually correcting prohibited transactions.

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

Self-Correction

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

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

One commenter stated that it is unclear what is exactly meant by a ''mis-sold'' annuity and what is supposed to happen if an agent and Insurer disagree in that regard. Thus, according to this commenter, it is unclear how the agent or Insurer in the case of retrospective review would even discover any non-exempt prohibited transaction. This same commenter also questioned whether all non-exempt prohibited transactions require rescission or whether there is a materiality threshold. This commenter also stated that the Proposed Amendment did not address the common situation where an Insurer

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

rescinds an annuity as a matter of customer service without determining or admitting any violation of laws or, in this case, noncompliance with impartial conduct standards. Finally, this commenter asked how situations would be handled where agents and Insurers disagree on the need for correction under PTE 84–24.

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

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

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

Eligibility

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

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

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

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

transactions involving investment advice under Code section 4975(e)(3)(B).

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

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

Scope of Ineligibility

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

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

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

Foreign Convictions

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

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

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

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

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

The exemption for Qualified Professional Asset Managers (QPAMs), PTE 84–14, has a similar disqualification provision and the Department is not aware that any foreign convictions have occurred in foreign nations with respect to the QPAM exemption that are intended to harm U.S.-based financial institutions and believes there is a small likelihood of such occurrences. Further, the types of foreign crimes of which the Department is aware from its experience processing recent PTE 84–14 QPAM individual exemption requests for relief from convictions have consistently related to the subject institution's management of financial transactions and/or culture of compliance. For example, the underlying foreign crimes in those individual exemption requests have included: aiding and abetting tax fraud in France (PTE 2016–10, 81 FR 75147 (October 28, 2016) corrected at 88 FR 85931 (December 11, 2023), and PTE 2016–11, 81 FR 75150 (October 28, 2016) corrected at 89 FR 23612 (April 4, 2024)); attempting to peg, fix, or stabilize the price of an equity in anticipation of a block offering in Japan (PTE 2023–13, 88 FR 26336 (April 28, 2023)); illicit solicitation and money laundering for the purposes aiding tax evasion in France (PTE 2019–01, 84 FR 6163 (February 26, 2019)); and spot/futures-linked market price manipulation in South Korea (PTE 2015–15, 80 FR 53574 (September 4, 2015)).[38]

However, to address the concern expressed in the public comments that convictions have occurred in foreign nations that are intended to harm U.S.-based financial institutions, the Department has revised Section VIII(a)(1)(B) and VIII(b)(1)(B) in the Final Amendment to exclude foreign convictions that occur within foreign jurisdictions that are included on the Department of Commerce's list of ''foreign adversaries.'' [39] Therefore, the Department will not consider foreign convictions that occur under the jurisdiction of the listed ''foreign adversaries'' as an ineligibility event and has added the phrase ''excluding convictions and imprisonment that occur within foreign countries that are included on the Department of Commerce's list of ''foreign adversaries'' that is codified in 15 CFR 7.4.

Due Process

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

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

Some commenters on both PTEs 2020–02 and 84–24 also stated that while the six-month period provided in

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

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

[39] 15 CFR 7.4. The list of foreign adversaries currently includes the following foreign governments and non-government persons: The People's Republic of China, including the Hong Kong Special Administrative Region (China); the Republic of Cuba (Cuba); the Islamic Republic of Iran (Iran); the Democratic People's Republic of Korea (North Korea); the Russian Federation (Russia); and Venezuelan politician Nicola´s Maduro (Maduro Regime). The Secretary of Commerce's determination is based on multiple sources, including the National Security Strategy of the United States, the Office of the Director of National Intelligence's 2016–2019 Worldwide Threat Assessments of the U.S. Intelligence Community, and the 2018 National Cyber Strategy of the United States of America, as well as other reports and assessments from the U.S. Intelligence Community, the U.S. Departments of Justice, State and Homeland Security, and other relevant sources. The Secretary of Commerce periodically reviews this list in consultation with appropriate agency heads and may add to, subtract from, supplement, or otherwise amend the list. Sections VIII(a)(1)(B) and VIII(b)(1)(B) of the Final Amendment will automatically adjust to reflect amendments the Secretary of Commerce makes to the list.

the exemption may be adequate time to send a notice to Retirement Investors, it is insufficient time for a financial institution to determine an alternative means of complying with ERISA in order to continue to provide advice to Retirement Investors. These commenters requested the Department to revise the exemption to provide for at least 12 months to make the transition away from reliance on PTE 84–24 or to find an alternative means of complying with ERISA following a finding of ineligibility.

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

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

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

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

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

Timing of Ineligibility and One-Year Transition Period

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

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

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

The Final Amendment indicates that relief under the exemption during the

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

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

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

Form 5330

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

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

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

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

Alternative Exemptions

An Insurer or Independent Producer that is ineligible to rely on this exemption may rely on a statutory or separate administrative prohibited transaction exemption if one is available or may request an individual prohibited transaction exemption from the Department. To the extent an applicant requests retroactive relief in connection with an individual exemption application, the Department will consider the application in accordance with its retroactive exemption policy as set forth in 29 CFR 2570.35(d). The Department may require additional prospective compliance conditions as a condition of providing retroactive relief. A few commenters also expressed concern that the Alternative Exemptions process was not sufficient. One commenter in particular expressed concern with the length and expense of seeking to obtain an individual exemption, claiming this would result in harm to Plans.

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

impact of dangerous conflicts of interest.

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

Recordkeeping

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

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

Executive Order 12866 and 13563 Statement

Executive Orders 12866 [40] and 13563 [41] direct agencies to assess all costs and benefits of available regulatory alternatives. If regulation is necessary, agencies must choose a regulatory approach that maximizes net benefits, including potential economic, environmental, public health and safety effects; distributive impacts; and equity. Executive Order 13563 emphasizes the importance of quantifying costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

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

[40] 58 FR 51735 (Oct. 4, 1993).
[41] 76 FR 3821 (Jan. 21, 2011).
[42] 88 FR 21879 (Apr. 6, 2023).

Paperwork Reduction Act

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

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

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

By email: ebsa.opr@dol.gov

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

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

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

1.1 Preliminary Assumptions

In the analysis discussed below, a combination of personnel will perform the tasks associated with the ICRs at an hourly wage rate of $165.29 for an Independent Producer, $65.99 for clerical personnel, and $165.71 for a legal professional, and $133.24 for a senior executive.[44]

The Department does not have information on how many Retirement Investors, including Plan beneficiaries and participants and IRA owners, receive disclosures electronically from investment advice fiduciaries. For the purposes of this analysis in the Proposed Amendment, the Department assumed that the percent of Retirement Investors receiving disclosures electronically would be similar to the percent of Plan participants receiving disclosures electronically under the Department's 2002 and 2020 electronic disclosure rules, which was 3.9 percent at the time.[45] The Department received comment regarding this assumption presenting anecdotal evidence that the rate would be substantially lower, presumably due to the different characteristics of IRA and annuity consumers compared with actively working Plan participants. Accordingly, the Department revisited and revised the estimate to 71.8 percent of the disclosures sent to Retirement Investors being sent electronically, and the remaining 28.2 percent sent by mail.[46] Furthermore, the Department estimates that communications between businesses (such as disclosures sent from one financial institution to another) will be 100 percent electronic.

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

1.2 Costs Associated With Satisfying Conditions for Transactions Described in Section III(a)–(f)

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

- According to the Insurance Information Institute, in 2022, there were 3,328 captive agents, which are insurance agents who work for only one insurance company.[48] The Insurance Information Institute also found that life and annuity insurers accounted for 47.4 percent of all net premiums for the insurance industry in 2022.[49] Thus, the Department estimates there are 1,577 insurance agents and brokers relying on the existing provisions.[50]
- The Department expects that pension consultants would continue to rely on the existing PTE 84–24. Based on 2021 Form 5500 data, the Department estimates that 1,011 pension consultants serve the retirement market.[51]

In the Department's 2016 Regulatory Impact Analysis, it estimated that 398 insurance companies wrote annuities.[52] The Department requested information on how the number of insurance companies underwriting annuities has changed since then but received no meaningful insight. The Department revisited the estimate and settled on a revised approach to bring the estimate more current. To form a basis for its assumption of insurance companies affected by the rule, the Department looked at the estimate of 398 insurance companies writing annuities used in the 2016 RIA. This assumption was based on data of insurance companies that reported receiving either individual or group annuity considerations in 2014.[53] Comparatively, there were 710 firms in the direct life insurance carrier industry in 2014.[54] By these measures, in 2014, insurance companies writing annuities accounted for 56 percent of the direct life insurance carrier industry.

To gain more insight into annuity underwriting, as it pertains to the life insurance industry, the Department looked to the evolution of premiums. In 2014, annuity premiums accounted for 55 percent of life and annuity insurance

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

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

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

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

[47] United States Post Service, *First-Class Mail,* (2023), *https://www.usps.com/ship/first-class-mail.htm.*

[48] Insurance Information Institute, *A Firm Foundation: How Insurance Supports the Economy – Captives by State, 2021–2022, https://www.iii.org/publications/a-firm-foundation-how-insurance-supports-the-economy/a-50-state-commitment/captives-by-state* (last visited August 25, 2023).

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

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

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

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

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

[54] United States Census Bureau, *2014 SUSB Annual Data Tables by Establishment Industry,* (December 2016).

premiums.[55] By 2020, annuities had fallen to 48 percent of life and annuity insurance premiums. Between 2020 and 2022, the percentage remained constant around 48 percent.[56]

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

In addition, investment company principal underwriters may rely on the exemption. In the Department's experience, investment company principal underwriters almost never use PTE 84–24. Therefore, the Department assumes that 20 investment company principal underwriters will engage in one transaction annually under PTE 84–24, 10 of which are assumed to service Title I Plans and 10 are assumed to service IRAs.

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

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

While there are several sources of information regarding total sales or size of the annuity market that are generally consistent, the same is not true for transaction activity, which can vary dramatically across quarters and between sources. To improve its estimate of annual annuity transactions affected by the amendments to PTE 84–24, the Department tried two approaches which both relied on LIMRA total fixed annuity sales data. 2023 LIMRA data indicates that 34 percent of fixed annuity sales were fixed-indexed annuities.[63] Assuming sales are proportionate to transactions and using data from the Retirement Income Journal which reported roughly 109,863 fixed-indexed annuity products were sold in the fourth quarter of 2021,[64] annualizing this number to 439,452 the Department estimates that roughly 838,000 additional fixed-rate annuities (other than fixed-indexed) were sold over the same period, for a total of 1.3 million fixed annuity transactions in 2021 using this approach.

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

Using this average of these estimates, the Department then applied the following assumptions to arrive at its final estimate. Using McKinsey data on annuity distribution channels, the Department assumes that third-party distribution channels account for 81 percent of the annuity sales volume.[65] The Department further assumes that 80 percent of these annuities are held in ERISA covered accounts or purchased with ERISA Plan assets [66] and that 49 percent of transactions will rely on investment advice.[67] This results in an estimate of roughly 500,000 ERISA covered fixed annuity transactions involving an Independent Producers providing advice to an investor.[68]

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

1.2.1 Written Authorization From the Independent Plan Fiduciary

Based on the estimates discussed above, the Department estimates that authorizing fiduciaries for 1,727 Plans and authorizing fiduciaries for 500,000

[55] Insurance Information Institute, *Life/Annuity Insurance Income Statement, 2014–2018, https://www.iii.org/table-archive/222464/file.*

[56] Insurance Information Institute, *Facts + Statistics: Life Insurance,* (2024), *https://www.iii.org/fact-statistic/facts-statistics-life-insurance#Direct%20Premiums%20Written%20By%20Line,%20Life/Annuity%20Insurance,%202020-2022.*

[57] United States Census Bureau, *2021 SUSB Annual Data Tables by Establishment Industry,* (December 2023).

[58] Employee Benefits Security Administration, United States Department of Labor, *Private Pension Plan Bulletin: Abstract of 2021 Form 5500 Annual Reports,* Table A1 (2023; forthcoming).

[59] Cerulli Associates, *2023 Retirement-End Investor,* Exhibit 5.12. The Cerulli Report, (2023).

[60] EBSA identified 57,575 new plans in its 2021 Form 5500 filings, or 7.5 percent of all Form 5500 pension plan filings.

[61] In 2020, 7 percent of traditional IRAs were held by insurance companies. (*See* Investment Company Institute, *The Role of IRAs in US Households' Saving for Retirement, 2020,* 27(1) ICI Research Perspective (2021), *https://www.ici.org/system/files/attachments/pdf/per27-01.pdf.*) This number has been adjusted downward to 3 percent to account for the fact that some transactions are not covered by this exemption.

[62] 765,124 plans × 7.525 percent of plans are new × 3 percent of plans with relationships with insurance agents or pension consultants ≈ 1,727 plans.

[63] LIMRA, Preliminary U.S. Individual Annuity Sales Survey, Fourth Quarter 2023, (2023), *https://www.limra.com/siteassets/newsroom/fact-tank/sales-data/2023/q4/4q-annuity-sales.pdf.*

[64] Pechter, K., Moore, S., Fixed Indexed Annuities: What's Changed (or Not) in Ten Years, (June, 2022), *https://retirementincomejournal.com/article/fixed-indexed-annuities-a-retrospective/.*

[65] McKinsey & Company, Redefining the future of life insurance and annuities distribution, (January, 2024), *https://www.mckinsey.com/industries/financial-services/our-insights/redefining-the-future-of-life-insurance-and-annuities-distribution.*

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

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

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

IRA transactions will be required to send an advance written authorization to the 3,040 financial institutions for IRAs [69] for exemptive relief for the transactions described in Section III(a)–(f).

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

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

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

TABLE 1—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE WRITTEN AUTHORIZATION

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	17,756	$2,942,374	17,756	$2,942,374
Total	17,756	2,942,374	17,756	2,942,374

1.2.2 Disclosure

Based on the estimates discussed above, the Department estimates that approximately 3,050 financial institutions [71] will continue to utilize the exemption for exemptive relief for the transactions described in Section III(a)–(f) for each plan and IRA. In total, the Department estimates that 3,040 entities will prepare disclosures for plans and 3,040 entities would prepare disclosures for IRAs. The Department assumes that an in-house attorney will spend one hour of legal staff time drafting the disclosure for plans and one hour of legal staff time drafting the disclosure for IRAs. This results in an hour burden of approximately 6,080 hours with an equivalent cost of $1,007,508.[72]

The Department expects that the disclosures for Plans will be distributed through already established electronic means, and thus, the Department does not expect plans to incur any cost to send the disclosures. The Department lacks information on the proportion of the IRA contracts that will occur via Plan rollovers and therefore assumes all disclosures will be sent directly to the IRA customer. As previously stated, the Department estimates that 71.8 percent of disclosures for IRAs will be sent electronically at no additional burden. The remaining 28.2 percent of authorizations will be mailed. For paper copies, a clerical staff member is assumed to require two minutes to prepare and mail the required information to the IRA customer. This information will be sent to the 122,318 IRA customers plus the 10 investment company principal underwriters for IRAs entering into an agreement with an insurance agent, pension consultant, or mutual fund principal underwriter, and based on the above, the Department estimates that this requirement results in an hour burden of 1,150 hours with an equivalent cost of $75,881.[73]

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

TABLE 2—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE DISCLOSURE

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	6,080	$1,007,508	6,080	$1,007,508
Clerical	1,150	75,881	1,150	75,881
Total	7,230	1,083,388	7,230	1,083,388

The Department assumes that this information will include seven pages with 71.8 percent of disclosures distributed electronically through traditional electronic methods at no additional burden, and the remaining 28.2 percent of disclosures will be mailed. Accordingly, the Department

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

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

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

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

[73] The burden is estimated as: [(122,318 IRAs + 10 investment company principal underwriters for IRAs × 28.2 percent paper) × (2 minutes ÷ 60 minutes)] ≈ 1,150 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: [(122,318 IRAs + 10 investment company principal underwriters for IRAs × 28.2 percent paper) × (2 minutes ÷ 60 minutes)] × $65.99 ≈ $75,881.

estimates an annual cost burden of approximately $35,531.[74]

TABLE 3—MATERIAL AND POSTAGE COST ASSOCIATED WITH THE DISCLOSURE

	Year 1		Subsequent years	
	Pages	Equivalent burden cost	Pages	Equivalent burden cost
Material and Postage Cost	7	$35,531	7	$35,531
Total	7	35,531	7	35,531

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

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

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

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

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

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

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

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

Also, the Department recognizes that some insurance companies use multiple distribution channels, though the Department did not receive any

[74] The material cost is estimated as: [(122,318 IRA authorizations + 10 investment company principal underwriters for IRAs) × 28.2 percent paper] × [$0.68 + ($0.05 × 7 pages)] = $35,531.

[75] EBSA Tabulations based off the March 2023 Current Population Survey.

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

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

comment on how common the use of multiple distribution channels is. Looking at the 10 insurance companies with highest annuity sales in 2022, one relied on captive distribution channels, seven relied on independent distribution channels, and two relied on both.[78] Accordingly, most insurance companies appear to primarily use either captive distribution or independent distribution. However, any entity using a captive insurance channel, or using both captive and independent channels, likely has already incurred most of the costs of this rulemaking under PTE 2020–02. Costs are estimated by assuming that entities using a third-party distribution system, even if they also use captive agents, will incur costs for the first time under amended PTE 84–24. This assumption leads to an overestimation of the cost incurred by insurance companies.

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

The Department estimates that 70 of the 442 insurance companies are large entities.[80] In the Proposed Amendment, the Department requested data on how distribution channels differed by size of insurance company but did not receive any comments. In the absence of data relating to the distribution channel differences by firm size, the Department uses the aggregate rate in its estimates. That is, the Department assumes that 19 percent of large insurance companies (13 insurance companies) sell annuities through captive distribution channels, while the remaining 71 of the 84 insurance companies distributing annuities through captive channels are assumed to be small.[81] Additionally, 81 percent of large insurance companies (57 insurance companies) sell annuities through independent distribution channels, while the remaining 301 of the 358 insurance companies selling annuities through independent distribution channels are assumed to be small.[82]

1.3.1 Disclosures

As discussed above, the Department assumes that 86,410 Independent Producers service the retirement market, selling the products of 358 insurance companies. For more generalized disclosures, the Department assumes that insurance companies will prepare and provide disclosures to Independent Producers selling their products. However, some of the disclosures are tailored specifically to the Independent Producer and-or the transaction. The Department assumes that these disclosures will need to be prepared by the Independent Producer themselves. The Department recognizes that some may rely on intermediaries in the distribution channel to prepare more specific disclosures; however, the Department expects that the costs associated with the preparation would be covered by commissions retained by the intermediary for its services. The costs for the intermediary to prepare the disclosure may result in an increase in commission. The Department expects that this increase in commission will not exceed the cost of preparing the disclosure in house.

1.3.1.1 Written Acknowledgement That the Independent Producer Is a Fiduciary by the Independent Producer

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

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

TABLE 4—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE FIDUCIARY ACKNOWLEDGEMENT

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	179	$29,630	0	$0
Insurance Sales Agent	2,160	357,026	0	0

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

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

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

[81] The number of large insurance companies using a captive distribution channel is estimate as: 70 large insurance companies × 19% ≈ 13 insurance companies. The number of small insurance companies using a captive distribution channel is estimated as: 84 insurance companies—13 large insurance companies ≈ 71 small insurance companies.

[82] The number of large insurance companies using an independent distribution channel is estimate as: 70 large insurance companies × 81% ≈ 57 insurance companies. The number of small insurance companies using a captive distribution channel is estimated as: 358 insurance companies—57 large insurance companies ≈ 301 small insurance companies.

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

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

TABLE 4—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE FIDUCIARY ACKNOWLEDGEMENT—Continued

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Total	2,339	386,657	0	0

1.3.1.2 Written Statement of the Care Obligation and Loyalty Obligation

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

TABLE 5—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE WRITTEN STATEMENT OF THE BEST INTEREST STANDARD OF CARE OWED

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	358	$59,260	0	$0
Insurance Sales Agent	4,320	714,053	0	0
Total	4,678	773,313	0	0

1.3.1.3. Written Description of All Material Facts

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

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

TABLE 6—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE ALL MATERIAL FACTS

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	260,967	$43,244,858	0	$0
Total	260,967	43,244,858	0	0

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

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

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

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

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

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

TABLE 7—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE ROLLOVER DOCUMENTATION

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Insurance Sales Agent	250,000	$41,322,500	250,000	$41,322,500
Total	250,000	41,322,500	250,000	41,322,500

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

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

TABLE 8—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH PREPARING THE DISCLOSURES

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Insurance Sales Agent	13,503	$2,231,966	13,503	$2,231,966
Total	13,503	2,231,966	13,503	2,231,966

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

TABLE 9—MATERIAL COST ASSOCIATED WITH THE GENERAL DISCLOSURES

Activity	Year 1		Subsequent years	
	Pages	Equivalent burden cost	Pages	Equivalent burden cost
General Disclosures	7	$145,230	7	$145,230
Compensation Disclosure	2	10,998	2	10,998

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

[88] This is estimated as: (500,000 Retirement Investors × 28.2%) = 141,000 paper disclosures.

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

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

TABLE 9—MATERIAL COST ASSOCIATED WITH THE GENERAL DISCLOSURES—Continued

Activity	Year 1		Subsequent years	
	Pages	Equivalent burden cost	Pages	Equivalent burden cost
Total	9	156,228	9	156,228

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

1.3.2 Policies and Procedures

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

As discussed above, the Department estimates that 358 Insurers will need to meet this requirement, of which 301 are estimated to be small and 57 are estimated to be large.[91] The Department assumes that, for each large insurance company, an in-house attorney will spend 40 hours of legal staff time drafting the written description, and for each small insurance company, an in-house attorney will spend 20 hours of legal staff time. This results in an hour burden of 8,286 hours with an equivalent cost of $1,373,123 in the first year.[92]

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

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

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

TABLE 10—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH POLICIES AND PROCEDURES

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

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

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

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

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

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

[96] NAIC Model Suitability Regulations, § 6(F)(1)(d) (2010), *https://naic.soutronglobal.net/Portal/Public/en-GB/RecordView/Index/25201*.

[97] NAIC Model Suitability Regulations, § 6(C)(1)(d) (2020), *https://content.naic.org/sites/default/files/inline-files/MDL-275.pdf*.

[98] As of October of 2021, only three states had not adopted some form of NAIC Model Regulation 275. (*See* A.D. Banker & Company, *Annuity Best Interest State Map and FAQs,* (October 2021), *https://blog.adbanker.com/annuity-best-interest-state-map-and-faqs*).

[99] The burden is calculated as: 500,000 transactions × (30 minutes ÷ 60 minutes) ≈ 250,000 hours. A labor rate of $198.25 is used for a financial manager. The labor rate is applied in the following calculation: [500,000 transactions × (30 minutes ÷ 60 minutes)] × $198.25 ≈ $49,562,500.

1.3.3 Retrospective Review

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

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

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

TABLE 11—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE RETROSPECTIVE REVIEW

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	259,230	$42,957,003	259,230	$42,957,003
Total	259,230	42,957,003	259,230	42,957,003

1.3.3.2 Certification by the Senior Executive Officer of the Insurance Company

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

TABLE 12—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE CERTIFICATION BY THE SENIOR EXECUTIVE OFFICER

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Senior Executive Officer	1,430	$190,594	1,430	$190,594
Total	1,430	190,594	1,430	190,594

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

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

[100] This is estimated as: 86,410 Independent Producers × 3 insurance companies covered ≈ 259,230 retrospective reviews.

[101] This is estimated as: 259,230 retrospective reviews ÷ 358 entities ≈ 725 retrospective reviews, on average.

[102] This is estimated as: 259,230 retrospective reviews × 1 hour ≈ 259,230 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: (259,230 retrospective reviews × 1 hour) × $165.71 ≈ $42,957,003.

[103] This is estimated as: 358 insurance companies × 4 hours ≈ 1,430 hours. A labor rate of $133.24 is used for a Senior Executive Officer. The labor rate is applied in the following calculation: (358 insurance companies × 4 hours) × $133.24 ≈ $190,594.

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

TABLE 13—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE PROVISION OF THE RESULTS OF THE RETROSPECTIVE REVIEW

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Clerical	21,603	$1,425,549	21,603	$1,425,549
Total	21,603	1,425,549	21,603	1,425,549

1.3.4 Self-Correction

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

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

TABLE 14—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH SELF-CORRECTION

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Clerical	2,500	$413,225	2,500	$413,225
Total	2,500	413,225	2,500	413,225

1.3.5 Recordkeeping Requirement

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

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

TABLE 14—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE RECORDKEEPING REQUIREMENT

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	173,535	$28,683,939	173,535	$28,683,939
Total	173,535	28,683,939	173,535	28,683,939

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

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

1.4 Overall Summary

These paperwork burden estimates are summarized as follows:

Type of Review: Revision of an Existing Collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Prohibited Transaction Exemption (PTE) 84–24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters.

OMB Control Number: 1210–0158.

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

Estimated Number of Respondents: 89,818.

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

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

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

Estimated Total Annual Burden Cost: $191,759.

Regulatory Flexibility Act

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

Unfunded Mandates Reform Act

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

Federalism Statement

Executive Order 13132 outlines fundamental principles of federalism. It also requires Federal agencies to adhere to specific criteria in formulating and implementing policies that have ''substantial direct effects'' on the states, the relationship between the national government and states, or on the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that have these federalism implications must consult with State and local officials and describe the extent of their consultation and the nature of the concerns of State and local officials in the preamble to the final regulation. Notwithstanding this, Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA.

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

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

General Information

The attention of interested persons is directed to the following:

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

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

(3) The Final Amendment is applicable to a particular transaction only if the transaction satisfies the

[107] 5 U.S.C. 601 *et seq.*

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

[109] Public Law 104–4, 109 Stat. 48 (Mar. 22, 1995).

[110] *See* ''The Department's Role Related to the Sale of Insurance Products to Retirement Investors,'' supra.

[111] *See John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank,* 510 U.S. 86, 98 (1993).

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

conditions specified in the exemption; and

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

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

Amendment to PTE 84–24

Section I—Retroactive Application

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

Section II—Prospective Application

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

(b) Effective on the date that is September 23, 2024, the restrictions of ERISA sections 406(a)(1)(A), (D) and 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code sections 4975(c)(1)(A), (D), (E) and (F) do not apply to Independent Producers that provide fiduciary investment advice and engage in the transactions described in Section III(g), in accordance with the conditions set forth in Sections VI, VII, are satisfied, and the Independent Producer and Insurer are not ineligible under Section VIII, and subject to the definitional terms and recordkeeping requirements in Sections IX and X.

Section III—Transactions

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

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

(c) The effecting by an insurance agent or broker, pension consultant or investment company Principal Underwriter of a transaction for the purchase, with plan assets, of an insurance or annuity contract or securities issued by an investment company if the purchase is not as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

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

(e) The purchase, with plan assets, of an insurance or annuity contract from an insurance company which is a fiduciary or a service provider (or both) with respect to the Plan solely by reason of the sponsorship of a Pre-approved Plan if the purchase is not as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

(f) The purchase, with plan assets, of securities issued by an investment company from, or the sale of such securities to, an investment company or an investment company Principal Underwriter, when such investment company, Principal Underwriter, or the investment company investment adviser is a fiduciary or a service provider (or both) with respect to the plan solely by reason of: (1) the sponsorship of a Pre-approved plan; or (2) the provision of Nondiscretionary Trust Services to the plan; or (3) both (1) and (2); and the purchase is not as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder.

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

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

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

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

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

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

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

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

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

(2) In connection with the purchase of insurance or annuity contracts or securities issued by an investment company is not in excess of ''reasonable compensation'' within the contemplation of section 408(b)(2) and 408(c)(2) of ERISA and section 4975(d)(2) and 4975(d)(10) of the Code.

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

If such total is in excess of ''reasonable compensation,'' the ''amount involved'' for purposes of the civil penalties of section 502(i) of ERISA and the excise taxes imposed by section 4975(a) and (b) of the Code is the amount of compensation in excess of ''reasonable compensation.''

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

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

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

(1) a trustee of the plan (other than a Nondiscretionary Trustee who does not render investment advice with respect to any assets of the plan),

(2) a plan administrator (within the meaning of section 3(16)(A) of ERISA and section 414(g) of the Code),

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

(4) for transactions described in sections III (a) through (d) entered into after December 31, 1978, an employer any of whose employees are covered by the plan.

Notwithstanding the above, an insurance agent or broker, pension consultant, insurance company, or investment company Principal Underwriter that is affiliated with a trustee or an investment manager (within the meaning of section VI(b)) with respect to a plan may engage in a transaction described in section III(a) through (d) of this exemption on behalf of the plan if such trustee or investment manager has no discretionary authority or control over the plan assets involved in the transaction other than as a Nondiscretionary Trustee.

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

(A) If the agent, broker, or consultant is an affiliate of the insurance company, or if the ability of such agent, broker or consultant is limited by any agreement with such insurance company, the nature of such affiliation, limitation, or relationship;

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

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

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

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

(A) the nature of the relationship between the Principal Underwriter and the investment company issuing the securities and any limitation placed upon the Principal Underwriter by the investment company;

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

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

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

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

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

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

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

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

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

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

(2) A prohibited transaction will not be deemed to have occurred if, due to circumstances beyond the control of the insurance agent or broker, pension consultant, or Principal Underwriter,

such records are lost or destroyed prior to the end of such six-year period.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section VII—Investment Advice Arrangement

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

(a) Impartial Conduct Standards

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

(1) Investment advice must, at the time it is provided, satisfy the Care Obligation and Loyalty Obligation. As defined in Section X(b), to meet the Care Obligation, advice must reflect the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor. As defined in Section X(g), to meet the Loyalty Obligation, the advice must not place the financial or other interests of the Independent Producer, Insurer or any Affiliate, Related Entity, or other party ahead of the Retirement Investor's interests, or subordinate the Retirement Investor's interests to those of the Independent Producer, Insurer or any Affiliate, Related Entity, or other party. For example, in choosing between annuity products offered by Insurers, whose products the Independent Producer is authorized to sell on a commission basis, it is not permissible for the Independent Producer to recommend a product that is worse for the Retirement Investor, but better or more profitable for the Independent Producer or the Insurer;

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

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

(b) Disclosure

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) Policies and Procedures

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

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

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

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

(d) Retrospective Review

(1) The Insurer conducts a retrospective review of each Independent Producer, at least annually, that is reasonably designed to detect and prevent violations of, and achieve compliance with the conditions of this exemption, including the Impartial Conduct Standards, and the policies and procedures governing compliance with the exemption, including the effectiveness of the supervision system, the exceptions found, and corrective action taken or recommended, if any. The retrospective review also includes a review of Independent Producers' rollover recommendations and the required rollover disclosure. As part of this review, the Insurer prudently determines whether to continue to permit individual Independent Producers to sell the Insurer's annuity contracts to Retirement Investors. Additionally, the Insurer updates the policies and procedures as business, regulatory, and legislative changes and

events dictate, to ensure that the policies and procedures remain prudently designed, effective, and compliant with Section VII(c). Insurers may rely in part on sampling of each Independent Producer's transactions to conduct their retrospective reviews, as long as any sampling or other method is designed to identify potential violations, problems, and deficiencies that need to be addressed.

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

(A) correct those prohibited transactions;

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

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

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

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

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

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

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

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

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

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

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

(e) Self-Correction

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

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

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

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

Section VIII—Eligibility

(a) Independent Producer

Subject to the timing and scope of ineligibility provisions set forth in subsection (c), an Independent Producer will become ineligible to rely on the relief for transactions described in Section III(g), if, on or after September 23, 2024, the Independent Producer has been:

(1) Convicted by either:

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

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

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

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

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

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

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

(b) Insurers

Subject to the timing and scope of ineligibility provisions set forth in subsection (c), an entity will be ineligible to serve as an Insurer if, on or after September 23, 2024, the Insurer or an entity in the same Controlled Group as the Insurer has been:

(1) Convicted by either:

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

(B) a foreign court of competent jurisdiction as a result of any crime, however denominated by the laws of the relevant foreign or state government, that is substantially equivalent to an

offense described in (A) above (excluding convictions that occur within a foreign country that is included on the Department of Commerce's list of ''foreign adversaries'' that is codified in 15 CFR 7.4 as amended); or

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

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

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

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

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

(c) Timing and Scope of Ineligibility

(1) Ineligibility shall begin upon either:

(A) the date of conviction, which shall be the date of conviction by a U.S. Federal or State trial court described in Section VIII(a)(1) or VIII(b)(1) (or the date of the conviction of any trial court in a foreign jurisdiction that is the equivalent of a U.S. Federal or State trial court) that occurs on or after September 23, 2024 regardless of whether the conviction remains under appeal; or

(B) the date of a final judgment (regardless of whether the judgment remains under appeal) or a court-approved settlement described in Section VIII(a)(2) or VIII(b)(2) that occurs on or after September 23, 2024.

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

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

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

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

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

(d) Alternative Exemptions

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

Section IX—Recordkeeping

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

Section X—Definitions

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

(a) ''Affiliate'' means:

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

(2) Any officer, director, partner, employee, or relative (as defined in ERISA section 3(15)), of the person; and

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

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

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

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

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

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

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

(f) ''Insurer'' means an insurance company qualified to do business under the laws of a State, that: (A) has obtained a Certificate of Authority from the insurance commissioner of its domiciliary State which has neither been revoked nor suspended; (B) has undergone and shall continue to undergo an examination by an independent certified public accountant for its last completed taxable year or has undergone a financial examination (within the meaning of the law of its domiciliary State) by the State's

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

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

(h) The term ''Nondiscretionary Trust Services'' means custodial services, services ancillary to custodial services, none of which services are discretionary, duties imposed by any provisions of the Code, and services performed pursuant to directions in accordance with ERISA section 403(a)(1).

(i) The term ''Nondiscretionary Trustee'' of a plan means a trustee whose powers and duties with respect to the plan are limited to the provision of Nondiscretionary Trust Services. For purposes of this exemption, a person who is otherwise a Nondiscretionary Trustee will not fail to be a Nondiscretionary Trustee solely by reason of his having been delegated, by the sponsor of a Pre-Approved Plan, the power to amend such plan.

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

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

(l) A ''Principal Underwriter'' means a principal underwriter as that term is defined in section 2(a)(29) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(29)).

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

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

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

Section XI—Phase-In Period

During the one-year period beginning September 23, 2024, Independent Producers may receive compensation under Section II(b) of this exemption if the Independent Producer complies with the Impartial Conduct Standards set forth in Section VII(a) and the fiduciary acknowledgment set forth in Section VII(b)(1).

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

Lisa M. Gomez,

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

[FR Doc. 2024–08067 Filed 4–24–24; 8:45 am]

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

[Application No. D–12057]

ZRIN 1210–ZA32

Amendment to Prohibited Transaction Exemption 2020–02

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

ACTION: Amendment to Class Exemption PTE 2020–02.

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

DATES: The amendment is effective September 23, 2024.

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

SUPPLEMENTARY INFORMATION:

Background

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

In addition to fiduciary obligations, ERISA has prohibited transaction rules that ''categorically bar[]'' plan fiduciaries from engaging in transactions deemed ''likely to injure the pension plan.'' [3] These prohibitions broadly forbid a fiduciary from ''deal[ing] with the assets of the plan in his own interest or for his own account,'' and ''receiv[ing] any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.'' [4] Congress gave the Department of Labor (the Department) broad authority to grant conditional administrative exemptions from the prohibited transaction provisions, but only if the Department finds that the exemption is (1) administratively feasible for the Department, (2) in the interests of the plan and of its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries of such plan.[5]

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

On December 18, 2020, the Department exercised this authority and adopted PTE 2020–02, a prohibited transaction exemption for investment advice fiduciaries with respect to employee benefit plans and IRAs. This exemption ensured that those saving for retirement could have access to high quality advice by requiring fiduciary advice providers to render advice that is in their plan and IRA customers' best interest in order to receive any compensation that would otherwise be prohibited by ERISA and the Code.

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

At the same time the Department published the Proposed Rule, it also released the proposed amendment to PTE 2020–02 (the Proposed Amendment), proposed amendments to PTEs 75–1, 77–4, 80–83, 83–1, and 86–128 that apply to the provision of investment advice (the Mass Amendment), and proposed amendments to PTE 84–24 and invited

[1] Section 3(21)(A)(ii) is codified at 29 U.S.C. 1002(3)(21)(A)(ii). The provision is in Title I of the ERISA (referred to herein as Title I), which is codified in Title 29 of the U.S. Code. This preamble refers to the codified provisions in Title I by reference to sections of ERISA, as amended, and not by their numbering in Section 29 of the U.S. Code.

[2] ERISA section 404(a).

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

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

[5] ERISA section 408(a), 29 U.S.C. 1108(a).

[6] For purposes of the final rule, the term ''IRA'' is defined as any account or annuity described in Code section 4975(e)(1)(B)—(F), and includes individual retirement accounts, individual retirement annuities, health savings accounts, and certain other tax-advantaged trusts and plans.

[7] 26 U.S.C. 4975(c)(1); *cf. id.* at 4975(f)(5), which defines ''correction'' with respect to prohibited transactions as placing a plan or an IRA in a financial position not worse than it would have been in if the person had acted ''under the highest fiduciary standards.''

[8] Sec. 1, Public Law 98–532, 98 Stat. 2705 (Oct. 19, 1984).

[9] 5 U.S.C. App. 752 (2018).

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

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

all interested persons to submit written comments on each.[12]

The Department received written comments on the Proposed Amendment, and on December 12 and 13, 2023, it held a virtual public hearing where witnesses provided commentary on the Proposed Amendment. After carefully considering the comments it received and the testimony presented at the hearing, the Department is granting the final amendment to PTE 2020–02 that is discussed herein (the Final Amendment) on its own motion pursuant to its authority under ERISA section 408(a) and Code section 4975(c)(2) and in accordance with its exemption procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637 (October 27, 2011)).[13]

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

Comments and Description of the Amendment to PTE 2020–02

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

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

- acknowledge their fiduciary status [17] in writing to the Retirement Investor;
- disclose their services and material conflicts of interest to the Retirement Investor;
- adhere to Impartial Conduct Standards requiring them to:

Æ investigate and evaluate investments, provide advice, and exercise sound judgment in the same way that knowledgeable and impartial professionals would in similar circumstances (the Care Obligation);

Æ never place their own interests ahead of the Retirement Investor's interest, or subordinate the Retirement Investor's interests to their own (the Loyalty Obligation);

Æ charge no more than reasonable compensation and, if applicable, comply with Federal securities laws regarding ''best execution''; and

Æ avoid making misleading statements about investment transactions and other relevant matters;

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

This Final Amendment builds on the existing conditions and:

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

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

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

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

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

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

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

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

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

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

Regulation Best Interest: the Broker-Dealer Standard of Conduct (Regulation Best Interest) [18] in a strong position to comply with the closely aligned revised conditions of PTE 2020–02.

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

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

Applicability Date

The Final Amendment is applicable to transactions pursuant to investment advice provided on or after September 23, 2024 (the ''Applicability Date''). For transactions engaged in pursuant to investment advice recommendations that were provided before the Final Amendment's Applicability Date, the prior version of PTE 2020–02 will remain available for all parties that are currently relying on the exemption.[20]

Several commenters stated that the Proposed Amendment's Applicability Date (60-days after publication in the **Federal Register**) did not provide sufficient time for Financial Institutions and Investment Professionals to fully comply with the amended conditions. In response to these comments, the Department is adding a new Section VI, which provides a phase-in period for the one-year period beginning September 23, 2024. Thus, Financial Institutions and Investment Professionals may receive reasonable compensation under Section I of the amended exemption during this phase-in period if they comply with the Impartial Conduct Standards in Section II(a) and the fiduciary acknowledgment requirement under Section II(b)(1). This one-year phase-in period is the same as the one-year compliance period the Department provided when it originally granted PTE 2020–02.

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

Expanded Exemption Scope

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

> This exemption permits Financial Institutions and Investment Professionals, and their Affiliates and Related Entities, to engage in the following transactions, including as part of a rollover from a Plan to an IRA as defined in Code section 4975(e)(1)(B) or (C), as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B):
> (1) The receipt of reasonable compensation; and
> (2) The purchase or sale of an asset in a riskless principal transaction or a Covered Principal Transaction, and the receipt of a mark-up, mark-down, or other payment.

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

However, as the Department discussed in the preamble to the

[18] 17 CFR § 240.15l–1.

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

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

proposed Mass Amendment,[21] the Department is seeking to provide a single standard of care that would apply universally to all fiduciary investment advice, regardless of the specific type of product or advice provider. This uniform regulatory structure for investment advice will provide greater protection for Retirement Investors and create a level playing field among investment advice providers by ensuring that advice transactions are subject to a common set of standards that are specifically designed to protect Retirement Investors from the inherent dangers posed by conflicts of interest and to ensure prudent advice. These common standards, which are included in both this exemption and the amended PTE 84–24, importantly include the Impartial Conduct Standards, the policies and procedures requirement, and the obligation to conduct annual retrospective reviews, each of which is further described below. In the Department's judgment, the advice transactions that were formerly covered by PTE 77–4 and the other exemptions affected by the Mass Amendment are just as deserving of these core protections as other advice transactions, and the need for protection is just as great.

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

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

Transactions With Parties In Interest

In this Final Amendment, the Department is expanding the scope of the PTE 2020–02 to permit Financial Institutions, Investment Professionals, and their Affiliates and Related Entities, to receive reasonable compensation (including commissions, fees, mark ups, mark downs, and other payments) that would otherwise be prohibited under ERISA and the Code as a result of providing investment advice within the meaning of ERISA section 3(21)(A)(ii), Code section 4975(e)(3)(B), and the final Regulation to Retirement Investors, including as part of a rollover from an employee benefit plan to an IRA. This is a change from the Proposed Amendment, and from the exemption that was finalized in 2020, which granted limited relief for ''covered principal transactions'' and ''riskless principal transactions,'' as those terms were defined in the Proposed Amendment. The Final Amendment provides exemptive relief for all transactions—regardless of whether they are executed on a principal or agent basis. This expansion in the scope of the exemption responds to many commenters' concerns that the Proposed Amendment unduly narrowed the availability of the exemption, including the concerns of those who argued that the language in Section I of the exemption did not sufficiently clarify whether recommendations involving insurance and annuity products were covered transactions.

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

However, other commenters disagreed. Some commenters urged the Department to further narrow the scope of Covered Principal Transactions. For example, one commenter encouraged the Department to add the limitation ''for cash'' to the definition of Covered Principal Transaction, which would prevent in-kind transactions from being treated as covered principal transactions. This commenter asserted that such a change would reduce the complexity and the conflicts of interest that otherwise would be associated with such transactions. Other commenters generally supported the Department's Proposed Amendment with its limited coverage for principal transactions.

Although the Department is expanding the scope of the exemption, the Department continues to be concerned about the heightened conflicts of interest inherent in principal transactions. Principal transactions involve the purchase from, or sale to, a Plan or an IRA of an investment on behalf of the Financial Institution's own account or the account of a person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the Financial Institution. Because an investment advice fiduciary engaging in a principal transaction is involved with both sides of the transaction, a Financial Institution or Investment Professional providing fiduciary investment advice in a principal transaction has a clear and direct conflict of interest.

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

After careful consideration of the comments, the Department is expanding the types of transactions that are covered by the exemption to ensure that Financial Institutions and Investment Professionals can recommend a wide variety of investment products to Retirement Investors. To the extent Financial Institutions and Investment Professionals comply with the stringent standards of care imposed by the Final Amendment and take seriously the exemption's requirements relating to policies and procedures, conflict mitigation, and retrospective review, the Department finds that the Final Amendment is both protective and flexible enough to accommodate a wide

[21] 88 FR 76032.

range of products, including relatively complex and risky investments. However, the Department cautions that, in order to comply with the exemptions' policies and procedures requirements, Financial Institutions selling products on a principal basis must carefully address how they will mitigate the inherent conflicts of interest associated with recommending these products to Retirement Investors.

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

Financial Institutions and Investment Professionals

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

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

The Final Amendment also broadens the definition of the term Financial Institution to include non-bank trustees or custodians that are approved to serve in these capacities under Treasury Regulation 26 CFR 1.408–2(e) (as amended), but only to the extent they are serving as non-bank trustees or custodians with respect to HSAs. Several commenters requested the Department to expand the definition of Financial Institution under the exemption to include these non-bank trustees or custodians. As explained by some commenters, IRS-approved non-bank trustees and custodians are permitted to administer HSAs and are subject to numerous requirements under regulations and guidance issued by the Department of the Treasury.[22] Some commenters stated that these non-bank trustees service a meaningful portion of the HSA market, and argued that without eligibility to use PTE 2020–02, they may be forced to exit the market. According to these commenters, with reduced competition and fewer choices, costs to HSA plan sponsors and participants could increase. One commenter further stated that the failure to include IRS-approved non-bank HSA trustees and custodians in the definition would be inconsistent with the intent of Congress to regulate such entities similarly to other Financial Institutions under ERISA and the Code.

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

Retirement Investors

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

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

Exclusions

The Department is also finalizing its amendment to Section I(c) of the exemption, which limits the availability of PTE 2020–02 in certain circumstances. Specifically, section I(c)(1) excludes from the exemption relief provided to Title I Plans if the Investment Professional, Financial Institution, or any Affiliate providing the investment advice is: (A) the employer whose employees are covered by the Plan; or (B) the Plan's named fiduciary or administrator. However, a named fiduciary or administrator or their Affiliate (including a Pooled Plan Provider (PPP) registered with the Department of Labor under 29 CFR 2510.3–44) may rely on the exemption if it is selected to provide investment advice by a fiduciary who is

[22] According to the commenter, in order for a non-bank trustee or custodian to receive this certification, the entity must submit a written application to the Commissioner of the IRS demonstrating, generally, its ability to act within the accepted rules of fiduciary conduct, its capacity to account for large numbers of accountholders, its fitness to handle funds normally associated with the handling of retirement funds, sufficient net worth, and that its procedures adhere to established rules of fiduciary conduct (including that all employees taking part in the performance of the entity's fiduciary duties are required to be bonded in an amount of at least $250,000). The entity is also required to undergo an annual audit of its books and records by a qualified public accountant to determine, among other things, whether the HSA accounts have been administered in accordance with applicable law. *See* Treasury Regulation 26 CFR 1.408–2(e) (as amended).

Independent [23] of the Financial Institution, Investment Professional, and their Affiliates. The Department received several comments opposed to this exclusion, arguing that Financial Institutions should be able to charge fees for advice to their own employees under the conditions of the exemption. The Department, however, is not modifying this provision, because its position continues to be that employers generally should not use their employees' retirement benefits as a potential source of revenue or profit, without additional safeguards. Employers can always render advice and receive reimbursement for their direct expenses incurred in transactions involving their employees without the need for the exemptive relief provided in this exemption.[24]

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

Pooled Employer Plans and Pooled Plan Providers

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

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

Robo-Advice

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

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

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

[23] As defined in Section V(e), For purposes of subsection I(c)(1), a fiduciary is "Independent" of the Financial Institution and Investment Professional if:

(1) the fiduciary is not the Financial Institution, Investment Professional, or an Affiliate;

(2) the fiduciary does not have a relationship to or an interest in the Financial Institution, Investment Professional, or any Affiliate that might affect the exercise of the fiduciary's best judgment in connection with transactions covered by this exemption; and

(3) the fiduciary does not receive and is not projected to receive within its current Federal income tax year, compensation or other consideration for its own account from the Financial Institution, Investment Professional, or an Affiliate, in excess of two (2) percent of the fiduciary's annual revenues based upon its prior income tax year.

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

[25] 88 FR at 75982.

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

Investment Discretion

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

Impartial Conduct Standards

Care Obligation and Loyalty Obligation

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

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

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

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

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

Other commenters objected to the Impartial Conduct Standards. Some commenters argued that the Department does not have authority to include these conditions in a prohibited transaction exemption. According to these commenters, because the Care Obligation and Loyalty Obligation are based on ERISA's prudence and loyalty requirements in Title I, the Department cannot require these standards to apply

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

when advice is provided to an IRA or other Title II Plan. Some commenters suggested the Department instead rely on the standards finalized by the SEC or the National Association of Insurance Commissioners (NAIC). One commenter stated that the Department is deliberately extending ERISA Title I statutory duties of prudence and loyalty to brokers and insurance representatives who sell to IRA plans, although Title II has no such requirements.

The Department disagrees with these commenters. ERISA section 408(a) and Code section 4975(c)(2) expressly permit the Department (through the Reorganization Plan No. 4 of 1978) to grant ''a conditional or unconditional exemption'' as long as the exemption is ''(A) administratively feasible, (B) in the interests of the plan and of its participants and beneficiaries, and (C) protective of the rights of participants and beneficiaries of the plan.'' [28] Nothing in these provisions forbids the Department from drawing on the same common law standards of prudence and loyalty that have been used in analogous contexts for hundreds of years, requires the Department to limit conditions to novel provisions that Congress did not include anywhere else in ERISA's text, or expresses a preference for including standards taken from other State or Federal regulatory structures while disregarding those set forth in ERISA. These standards are an essential part of ensuring the advice is in the interest of and protective of Retirement Investors and are also administratively feasible and have been central to PTE 2020–02 since it was originally granted. In finalizing the Impartial Conduct Standards in 2020, the Department explained that this condition ''merely recognizes that fiduciaries of IRAs, if they seek to use this exemption for relief from prohibited transactions, should adhere to a best interest standard consistent with their fiduciary status and a special relationship of trust and confidence.'' [29] Additionally, while Title I imposes a duty of care and a duty of loyalty on fiduciaries in all situations, the concept of care and loyalty are not unique to Title I or even to ERISA but are rather foundational principles of trust and agency law. The SEC imposes duties of care and loyalty on investment advisers and broker-dealers. The 2020 NAIC Suitability In Annuity Transactions Model Regulation 275 (the ''NAIC Model Regulation'') also relies on underlying principles of care and loyalty. These core requirements are not singularly reserved for Title I of ERISA and the Department disagrees that it is inappropriate to apply these requirements to investment advice fiduciaries to Title II plans who want to engage in otherwise statutorily prohibited transactions.

The Department received several comments on how this standard applies to insurance sales. A few commenters argued that the proposed revisions to PTE 2020–02 should take a different approach to recognize the unique aspects of its application to the insurance industry. Commenters pointed out differences between the NAIC Model Regulation standard and the exemption's Impartial Conduct Standards. One commenter accused the Department of ''entrapping insurance agents'' by holding them to the fiduciary standard based on their actions. However, a different commenter specifically supported the Department's proposal, stating that NAIC Model Regulation does not require producers to act in the ''best interest of their customers,'' and called out the need for a clear uniform standard.

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

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

However, insurance companies and agents may also rely upon PTE 2020–02 to the same extent as other Financial Institutions and Investment Professionals to receive relief for the receipt of otherwise prohibited compensation as a result of investment recommendations, including commissions. To the extent an insurance company that markets its products through independent agents chooses to rely on PTE 2020–02, the independent insurance agent and the financial institution (*i.e.,* the insurance company) must satisfy the exemption's conditions, including the fiduciary acknowledgement and the Impartial Conduct Standards with respect to that recommendation. In such cases, the insurance company must adopt policies and procedures to ensure it complies with the Impartial Conduct Standards and avoid incentives that place the insurance company's or the independent agent's interests ahead of the Retirement Investor's interest.

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

Under the exemption, the insurance company must:

- adopt and implement prudent supervisory and review mechanisms to safeguard the agent's compliance with the Impartial Conduct Standards when recommending the insurance company's products;
- avoid improper incentives to preferentially recommend the products, riders, and annuity features that are most lucrative for the insurance company at the customer's expense;
- ensure that the agent receives no more than reasonable compensation for its services in connection with the

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

[29] 85 FR 82822

[30] See *supra* at note 19.

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

transaction (*e.g.,* by monitoring market prices and benchmarks for the insurance company's products, services, and agent compensation); and

- adhere to the disclosure and other conditions set forth in the exemption.

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

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

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

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

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

Reasonable Compensation

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

The Department received some comments objecting to the reasonable compensation standard. Some commenters stated that this standard is not specific enough and could chill an Investment Professional's willingness to recommend certain products that carry high commissions. Other commenters argued that this practice would ultimately limit the range of products available to Retirement Investors.

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

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

The reasonable compensation standard applies to all covered transactions under the exemption,

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

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

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

No Materially Misleading Statements

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

The Department received a comment expressing concern that this condition is too vague. The Department disagrees. As the Department explained when it granted PTE 2020–02, ''materially misleading statements are properly interpreted to include statements that omit a material fact necessary in order to make the statements, in light of the circumstances under which they were made, not misleading. Retirement Investors are clearly best served by statements and representations that are free from material misstatements and omissions.'' [35] The Final Amendment merely adds clarity by incorporating this understanding into the exemption's operative text. Numerous courts have similarly recognized that statements can be misleading by virtue of material omissions, as well as by affirmative misstatements.[36] This is not a unique or new concept for Financial Institutions. For example, in adopting Regulation Best Interest, the SEC reminded broker-dealers of their obligations under the anti-fraud provisions of Federal Securities laws for failure to disclose material information to their customers when they have a duty to make such disclosure.[37] Financial Institutions and Investment Professionals best promote the interests of Retirement Investors by ensuring that their communications with their customers are not materially misleading.

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

Disclosure

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

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

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

Based on these comments, the Department has determined not to include a website disclosure requirement as an exemption condition at this time. While the Department may reconsider this decision at some future date based on its experience with the Regulation and related exemptions, any such future amendments would be subject to public notice and comment through a formal rulemaking process. Consistent with the Recordkeeping conditions in Section IV, the Department intends, however, to

[34] *See* 29 CFR 2550.408b–2.

[35] 85 FR 82826.

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

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

regularly request that Financial Institutions provide their investor disclosures to the Department to ensure that they are providing sufficient information in a manner that the Retirement Investor can understand, and that the disclosures are serving their intended purpose.

Fiduciary Acknowledgment

The Department is retaining the requirement in PTE 2020–02 for Financial Institutions to provide a written acknowledgment of fiduciary status to the Retirement Investor. At or before the time a covered transaction (as defined in Section I(b) of the Final Amendment) occurs, the Financial Institution must provide a written acknowledgment that the Financial Institution and its Investment Professionals are providing fiduciary investment advice to the Retirement Investor and are fiduciaries under Title I of ERISA, Title II of ERISA, or both with respect to the investment recommendation. Section II(b)(2) also requires the Financial Institution to provide a written statement of the Care Obligation and Loyalty Obligation owed by the Investment Professional and Financial Institution to the Retirement Investor. This disclosure must also be provided at or before the Financial Institution engages in the transaction.

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

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

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

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

Some commenters expressed concern with the timing of the acknowledgment. These commenters stated that Financial Institutions and Investment Professionals might have to acknowledge fiduciary status before they actually receive compensation and know that they are fiduciaries. Some commenters asked whether this acknowledgment might itself be a misleading statement that would be impermissible under Section II(a)(3) of the exemption. To address this concern, the Department has revised the language in Section II(b)(1) of the Final Amendment to further clarify that the disclosure must be provided ''[a]t or before the time a covered transaction occurs, as defined in Section I(b).'' In response to a specific comment, the Department is further clarifying that, ''[f]or purposes of the disclosures required by Section II(b)(1)-(4), the Financial Institution or Investment Professional is deemed to engage in a covered transaction on the later of (A) the date the recommendation is made or (B) the date the Financial Institution or Investment Professional becomes entitled to compensation (whether now or in the future) by reason of making the recommendation.'' This is revised from the Proposed Amendment, which would have required the disclosure to acknowledge fiduciary status ''when making an investment recommendation.''

The Department is making these clarifications to confirm that the Financial Institution does not have to provide a fiduciary acknowledgment at its first meeting with the Retirement

Investor. Instead, the fiduciary acknowledgment must be made at or before the time the covered transaction occurs.

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

The Department also received many comments regarding whether the proposed fiduciary acknowledgment and statement of Best Interest standard amounted to an enforceable contract with the Retirement Investor to adhere to the requirements of PTE 2020–02. As several commenters noted, however, PTE 2020–02 does not impose any contract or warranty requirements on Financial Institutions or Investment Professionals. Instead, it simply requires up-front clarity about the nature of the relationship and services being provided. In marked contrast to the 2016 rulemaking, the Department has imposed no obligation on Financial Institutions or Investment Professionals to enter into enforceable contracts with or to provide enforceable warranties to their customers. The only remedies for violations of the exemption's conditions, and for engaging in a non-exempt prohibited transaction, are those provided by Title I of ERISA, which specifically provides a right of action for fiduciary violations with respect to ERISA-covered plans, and Title II of ERISA, which provides for imposition of the excise tax under Code section 4975. Nothing in the exemption compels Financial Institutions to make contractually enforceable commitments, and as far as the exemption provides, they could expressly disclaim any enforcement rights other than those specifically provided by Title I of ERISA or the Code, without violating any of the exemption's conditions.

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

The Department has a statutory obligation to ensure that any exemptions from the prohibited transaction provisions are ''administratively feasible,'' ''in the interests of,'' and ''protective'' of the ''rights'' of Retirement Investors. The fiduciary acknowledgment provides critical support to the Department's ability to make these findings. The Department notes that conditions requiring entities to acknowledge their fiduciary status have become commonplace in recently granted exemptions over the past two years. In this regard, in 2022 and 2023, the Department granted over a dozen exemptions to private parties in which an entity was required to acknowledge its fiduciary status in writing as a requirement for exemptive relief.[39] Written acknowledgement of fiduciary status was required by the Department as early as 1984, when the Department published PTE 84–14,[40] requiring an entity acting as a ''qualified professional asset manager'' (a QPAM) to have ''acknowledged in a written management agreement that it is a fiduciary with respect to each plan that has retained the QPAM.'' [41] Fiduciary investment advice providers to IRAs have always been subject to suit in State courts on State-law theories of liability, and this rulemaking does not alter this reality. This rulemaking does not alter the existing framework for bringing suits under State law against IRA fiduciaries and does not aim to do so. State regulators remain free to structure legal relationships and liabilities as they see fit to the extent not inconsistent with Federal law.

Model Disclosure

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

> We are making investment recommendations to you regarding your retirement plan account or individual retirement account as fiduciaries within the meaning of Title I of the Employee Retirement Income Security Act and/or the Internal Revenue Code, as applicable, which are laws governing retirement accounts. The way we make money or otherwise are compensated creates some conflicts with your financial interests, so we operate under a special rule that requires us to act in your best interest and not put our interest ahead of yours.

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

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

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

[41] PTE 84–14, Part V, Section (a).

Under this special rule's provisions, we must:

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

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

Relationship and Conflict of Interest Disclosure

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

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

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

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

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

Other commenters expressed support for the Department's proposed amendments that would have clarified and tightened the existing PTE 2020–02 disclosure requirements. These commenters supported ensuring that investors have sufficient information to make informed decisions about the costs of an investment advice transaction and about the significance and severity of the investment advice fiduciary's conflicts of interest. Some commenters also supported the proposed requirement for the disclosures to be written in plain English.

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

Some commenters were particularly concerned about the proposed requirement that Retirement Investors have the ''right to obtain specific information regarding costs, fees, and compensation, described in dollar amounts, percentages, formulas'' upon request based on the potential burden of such disclosures. Others supported the requirement, including one commenter stating that such information is necessary for Retirement Investors to make an informed judgment as to the costs of a transaction. After consideration of the comments, the Department has determined that the requirements to disclose material fees, costs, conflicts of interest, and services should be sufficient to permit the Retirement Investor to assess both the costs of transactions and the scope and severity of conflicts, without imposing an additional ''upon request'' disclosure obligation.

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

Rollover Disclosure

The Department has also decided to make revisions to the rollover disclosure requirements. Under Section II(b)(5), before engaging in or recommending that a Retirement Investor engage in a rollover from a Plan that is covered by Title I of ERISA, or making a recommendation to a Plan participant or beneficiary as to the post-rollover investment of assets currently held in a

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

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

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

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

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

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

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

The Department received comments expressing concern that the information required for the rollover disclosure will not be available to Financial Institutions. A few commenters urged the Department to address this by requiring plans covered by Title I of ERISA to make more information publicly available on their Forms 5500. Other commenters simply stated that Investment Professionals and Financial Institutions would not be able to comply. As the Department explained in the preamble to the Proposed Amendment, however, Investment Professionals and Financial Institutions should make diligent and prudent efforts to obtain information about the fees, expenses, and investment options offered in the Retirement Investor's Plan account to comply with the amended rollover documentation and disclosure requirement of Section II(b)(5).

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

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

Good Faith and Disclosures Prohibited by Law Exceptions

The Department's Proposed Amendment would have added a new Section II(b)(6), which provides that

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

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

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

Policies and Procedures

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

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

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

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

Accordingly, the Department is maintaining the language largely as proposed. While the Department acknowledges that many firms have already built protective structures based on SEC's Regulation Best Interest, the Investment Advisers Act of 1940,[46] or PTE 2020–02, they should be able to build or rely upon existing systems of supervision and compliance to meet their obligations, rather than build whole new structures, as the SEC

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

[46] 15 U.S.C. 80b–1 *et seq.*

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

The Department believes that Retirement Investors will best be protected by the objective standard provided under PTE 2020–02, which provides a strong benchmark for assessing policies and procedures. The exemption's principles-based standard focuses on whether a reasonable person would conclude that the Financial Institution's policies and procedures are likely to result in recommendations that do not meet the Care Obligation or Loyalty Obligation. This standard is consistent with Regulation Best Interest and provides an appropriate yardstick for assessing compliance while lending additional clarity and rigor to the obligation to manage adverse incentives. In addition, SEC-registered investment advisers are required to ''adopt and implement written policies and procedures reasonably designed to prevent violations, by [the adviser] and [its] supervised persons, of the [Advisers] Act and the rules that the Commission has adopted under the [Advisers Act].'' [48] The approach in PTE 2020–02 provides the flexibility necessary for Financial Institutions to insulate Investment Professionals from conflicts of interest under the wide array of business and compensation models followed in today's marketplace.

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

On the other hand, Financial Institutions must take special care to ensure that training conferences held in vacation destinations are not designed to incentivize recommendations that run counter to Retirement Investor interests. Firms should structure training events to ensure that they are consistent with the Care and Loyalty Obligations. Recommendations to Retirement Investors should be driven by the interests of the investor in a secure retirement. Certainly, Financial Institutions should avoid creating situations where the training is merely incidental to the event, and an imprudent recommendation to a Retirement Investor is the only thing standing between an Investment Professional and a luxury getaway vacation.

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

While the SEC limited its categorical prohibition on sales contests to time-limited contests, as one commenter observed, the SEC has emphasized that the limited prohibition in Regulation Best Interest should not be read as automatically permitting other activities. Instead, the SEC stressed that ''prohibiting certain incentives does not mean that all other incentives are presumptively compliant with Regulation Best Interest.'' [49] The SEC noted that ''other incentives and practices that are not explicitly prohibited are permitted *provided that the broker-dealer establishes reasonably designed policies and procedures to disclose and mitigate the incentives created, and the broker-dealer and its associated persons comply with the Care Obligation and the Disclosure Obligation*'' (emphasis added).[50] In fact, the SEC recognized that if a ''firm determines that the conflicts associated with these practices are too difficult to disclose and mitigate, the firm should consider carefully assessing whether it is able to satisfy its best interest obligation in light of the identified conflict and in certain circumstances, may wish to avoid such practice entirely.'' [51]

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

In the FAQ, the Department wrote that Financial Institutions must take special care in developing and monitoring compensation systems to ensure that their Investment Professionals satisfy the fundamental obligation to provide advice that is in the Retirement Investor's best interest. By carefully designing their compensation structures, Financial Institutions can avoid incentive structures that a reasonable person would view as creating incentives for Investment Professionals to place their interests ahead of the Retirement

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

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

[49] Reg BI Adopting Release at 33397.

[50] *Id.* at 33327.

[51] *Id.* at 33397.

[52] See *supra* note 19.

Investor's interests. Accordingly, Financial Institutions must be careful not to use quotas, bonuses, prizes, or performance standards as incentives that a reasonable person would conclude are likely to encourage Investment Professionals to make recommendations to Retirement Investors that do not meet the Care Obligation and Loyalty Obligation of the Final Amendment. The Financial Institution should aim to eliminate such conflicts to the extent possible, not create them.

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

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

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

Proprietary Products

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

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

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

• Document in writing its limitations on the universe of recommended investments, the Conflicts of Interest associated with any contract, agreement, or arrangement providing for its receipt of third-party payments or associated with the sale or promotion of proprietary products.

• Document any services it will provide to Retirement Investors in exchange for third-party payments, as well as any services or consideration it will furnish to any other party, including the payor, in exchange for the third-party payments.

• Reasonably conclude that the limitations on the universe of recommended investments and Conflicts of Interest will not cause the Financial Institution or its Investment Professionals to receive compensation in excess of reasonable compensation for Retirement Investors as set forth in Section II(a)(2).

• Reasonably conclude that these limitations and Conflicts of Interest will not cause the Financial Institution or its Investment Professionals to recommend imprudent investments; and document in writing the bases for its conclusions.

• Inform the Retirement Investor clearly and prominently in writing that the Financial Institution limits the types of products that it and its Investment Professionals recommend to proprietary products and/or products that generate third-party payments.

Æ In this regard, the notice should not simply state that the Financial Institution or Investment Professional ''may'' limit investment recommendations based on whether the investments are proprietary products or generate third-party payments, without specific disclosure of the extent to which recommendations are, in fact, limited on that basis.

• Clearly explains its fees, compensation, and associated Conflicts of Interest to the Retirement Investor in plain language.

• Ensure that all recommendations are based on the Investment Professional's considerations of factors or interests such as investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor.

• Ensure that, at the time of the recommendation, the amount of compensation and other consideration reasonably anticipated to be paid, directly or indirectly, to the Investment Professional, Financial Institution, or their Affiliates or Related Entities for their services in connection with the recommended transaction is not in excess of reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2).

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

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

Providing Policies and Procedures to the Department

The Department proposed Section II(c)(3) would have required Financial Institutions to provide their complete policies and procedures to the Department within 10 business days of request. One commenter expressed support, noting that this condition would provide a meaningful incentive for Financial Institutions to ensure that policies and procedures are reasonably designed. Another commenter strongly urged the Department to eliminate this condition and instead rely on its subpoena authority, if necessary. One comment requested more time to provide the certification to the Department. In response to these comments, although the Department expects that these reports should already be completed at the time of the request and easily located, it recognizes the possibility of inadvertent non-compliance because of the tight timeline and has modified the requirement in the Final Amendment to give Financial Institutions Insurers 30 days to provide the documentation.

Retrospective Review

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

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

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

The Department received many comments on the retrospective review conditions. Some commenters

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

supported the requirement for Financial Institutions to undertake a regular process to ensure that their policies and procedures are reasonably designed to detect and prevent violations of, and achieve compliance with, the conditions of the exemption.

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

This condition, as drafted, provides important protections for Retirement Investors. The obligation to periodically review the effectiveness of policies and procedures and to determine compliance is critical to ensuring that they achieve their intended protective purposes and are not mere window dressing. Without such periodic assessments, it would be hard for a Financial Institution to have confidence that its oversight structures are working to ensure compliance with the Impartial Conduct Standards. By uniformly requiring retrospective review, the exemption promotes fiduciaries' uniform compliance with the Impartial Conduct Standards, which is an important aim of this rulemaking. Furthermore, the Department has provided guidance on how Financial Institutions can structure their policies and procedures, which should assist Senior Executive Officers in making the required certifications.

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

However, the Department notes that it is within its authority to ensure Financial Institutions engaging in otherwise prohibited transactions comply with the law, including by paying the excise taxes owed on non-exempt prohibited transactions. The amended Retrospective Review requirement is consistent with the Fifth Circuit's reasoning in *Chamber.* The Department is not creating new remedies or causes of action for violations of Title II of ERISA, but merely ensuring that parties comply with the excise taxes Congress specifically imposed on such violations. This approach is wholly consistent with the Fifth Circuit's observation that ''ERISA Title II only punishes violations of the 'prohibited transactions' provision by means of IRS audits and excise taxes.'' [54]

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

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

Another commenter suggested that the Department modify the conditions to expressly provide that these certifications and other obligations should be limited to an obligation of good faith and reasonable diligence in complying with the retrospective review required under Section II(d) of the Proposed Amendment and good faith calculation of any excise taxes payable with respect to such prohibited transactions. The Department is not making the commenter's requested specific text edits but notes that compliance with the Retrospective Review requirement of Section II(d) does not require perfection. For example, Section II(e) specifically allows Financial Institutions to correct violations that they find as part of their retrospective review.

Careful retrospective review of the effectiveness of a Financial Institution's policies and procedures is essential to ensuring compliance with the Impartial Conduct Standards, and necessary for the Department to make its statutory findings to grant this exemption. The review must occur at least annually and must be performed carefully enough that the Senior Executive Officer can make the required certification. In this connection, the Department notes that findings of violations, in litigation or otherwise, do not necessarily mean that the Financial Institution's policies and procedures are inadequate, or that its retrospective review was insufficient. While such findings mean that the specific transaction at issue failed to meet the terms of the exemption, violated the prohibited transaction rules, and would be subject to the excise taxes and any available remedies under ERISA, it does not follow that the Financial Institution's policies and procedures are necessarily deficient. Rather, such violations should be reviewed for lessons learned and to determine if broader corrections are necessary to avoid recurrence. Even strong policies and procedures cannot be perfectly effective in avoiding isolated violations. Another commenter expressed concern that the retrospective review is too focused on the review of the policies and procedures and rather than impose a new, separate requirement, the Department should rely on other regulators' retrospective review requirements, or even turn those requirements into safe harbors. However, such requirements are not universal, and to the extent other regulators at self-regulatory organizations, such as FINRA, require retrospective review, the Financial Institutions would not need to develop whole new systems, but rather could build upon their existing review system to the extent it did not already fully satisfy the requirements of this exemption. The purpose of retrospective review is to assess the compliance of Financial Institutions and Investment Professionals with the specific

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

conditions of this exemption, ERISA, and the Code, as opposed to their compliance with different regulatory regimes, and to ensure corrective changes when necessary. These purposes would not be served by relying entirely on other regulators' review requirements, although the additional compliance burden should be minimal to the extent firms have built strong retrospective review procedures pursuant to such requirements.

Some commenters addressed the requirement that Financial Institutions provide the retrospective review report, certification, and supporting data to the Department within 10 business days of request. One commenter expressed support, noting that this condition would provide a meaningful incentive for Financial Institutions to ensure that policies and procedures are reasonably designed. Others expressed concern. One commenter suggested Financial Institutions should have 30 days to provide the report, certification, and supporting data, consistent with the requirement to provide the Department's policies and procedures upon request. Although the Department expects that these reports should already be completed at the time of the request and easily located, it recognizes the possibility of inadvertent non-compliance because of the tight timeline and has modified the requirement to give Financial Institutions 30 days to provide the documentations.

Self-Correction

Section II(e) of the Final Amendment provides that a non-exempt prohibited transaction will not occur due to a violation of this exemption's conditions with respect to a covered transaction if the following requirements are met: (1) either the violation did not result in investment losses to the Retirement Investor or the Financial Institution made the Retirement Investor whole for any resulting losses; (2) the Financial Institution corrects the violation (3) the correction occurs no later than 90 days after the Financial Institution learned of the violation or reasonably should have learned of the violation; and (4) the Financial Institution notifies the person(s) responsible for conducting the retrospective review during the applicable review cycle and the violation and correction is specifically set forth in the written report of the retrospective review required under subsection II(d)(2). The Department is finalizing the self-correction provision as proposed, except, in response to several comments, the Department is removing the requirement to notify the Department of each violation.

Some commenters questioned the utility of this self-correction provision to advice providers seeking to comply. One commenter expressed specific concern that firms will be inclined to relax their approach to compliance based on the knowledge that, if violations occur and are detected, they can likely invoke the self-correction process and avoid sanctions. Another commenter requested clarification regarding how a Financial Institution would make a Retirement Investor whole for any resulting losses related to a violation of the conditions of the exemption. For example, if a condition has been violated and a rollover occurred, how would a Retirement Investor be made whole? In response to these comments, the Department notes that Financial Institutions are not required to use the self-correction provision. However, if a Financial Institution chooses to self-correct, it must make the Retirement Investor whole for any and all resulting losses. If a rollover recommendation out of a Title I Plan cannot be undone, the Financial Institution should calculate the amount of resulting losses, including estimated investment and tax losses, and restore the Retirement Investor to the position they would have occupied but for the breach.

Some commenters raised concerns about the lack of a materiality threshold, and the requirement that all mistakes be reported and remediated, no matter how minor or inadvertent. In the Department's view, however, the self-correction provisions are measured and proportional to the nature of the injury. They simply require timely correction of the violation of the law and notice to the person responsible for retrospective review of the violation, so that the significance and materiality of the violation can be assessed by the appropriate person responsible for assessing the effectiveness of the firm's compliance oversight. In addition, to address commenters' concern about the burden associated with the self-correction provision, the Department deleted the requirement to report each correction to the Department in this Final Amendment. This change should ease the compliance burden. Furthermore, to the extent Financial Institutions would have been wary of utilizing the self-correction provision because they would have to report each self-correction to the Department, they should feel more comfortable correcting each violation they find that is eligible for self-correction after this modification. The Department notes, however, that it retains the authority to require Financial Institutions to provide evidence of self-corrections as part of its investigation program through the recordkeeping provisions in Section IV.

ERISA Section 3(38) Investment Managers

Several commenters requested broad exceptions to the exemption for investment advice that is provided to sophisticated investors or from advice providers that receive level compensation. The Department is not granting that sort of exception to the general conditions of PTE 2020–02. As discussed above, the amended exemption is broad and flexible and provides Financial Institutions with the flexibility to develop policies and procedures would allow a reasonable person reviewing its incentive practices as a whole to conclude that they do not create an incentive for a Financial Institution or Investment Professional to place their interests ahead of the Retirement Investors' interests. Financial Institutions that provide fiduciary investment advice can determine for themselves how they will comply with all the conditions of the exemption.

Several commenters asked the Department to clarify whether they would become fiduciaries when marketing their services, and specifically whether responding to a request for proposal (RFP) to provide ongoing services as a fiduciary under ERISA section 3(38) would count as providing fiduciary investment advice if the other provisions of the Regulation are satisfied. The Department discussed in the preamble to the Regulation that merely touting the quality of, and providing information about, one's own advisory or management services would not be a covered recommendation (as defined in paragraph (f)(10) of the Regulation) that could lead to fiduciary status. However, to the extent a covered recommendation is made as part of hiring communications, it would be evaluated under all the parts of the Regulation.

A few commenters on the Proposed Amendment expressed concern that if providing a covered recommendation in the context of an RFP could lead to fiduciary status, they might need to comply with PTE 2020–02 merely to get hired, which they believed was unduly burdensome. In this regard, if a covered recommendation is made as part of an RFP process and all parts of the Regulation are satisfied, including the receipt of a ''fee or other compensation, direct or indirect,'' as a result of the fiduciary investment advice provided in

the context of the RFP, a prohibited transaction would occur.

In response to these comments, the Department added a new section II(f) to the Final Amendment. The provision states that to the extent a Financial Institution or Investment Professional provides fiduciary investment advice to a Retirement Investor as part of its response to an RFP to provide investment management services as an ERISA section 3(38) investment manager and subsequently is hired to act as an investment manager to the Retirement Investor, it may receive compensation as a result of the advice under this exemption if it complies solely with the Impartial Conduct Standards set forth in Section II(a).

ERISA Section 3(38) investment managers are fiduciaries because by definition they must have the power to manage, acquire, or dispose of a plan's assets, and they are required by statute to acknowledge their fiduciary status. To respond to the concern expressed by the commenters, the Department has determined that parties that are ultimately hired to provide investment management services pursuant to an RFP should be able to rely on this exemption for the provision of investment advice in the hiring process as long as they comply with the Impartial Conduct Standards. The Department notes that ERISA 3(38) investment managers have discretion with respect to the investment of plan assets; therefore, they could not rely on PTE 2020–02 for the ongoing provision of investment management services after they are hired. Section II(f) is limited to the prohibited transaction associated with providing fiduciary investment advice in connection with the hiring process and does not relieve the investment manager from its obligation to refrain from engaging in any non-exempt prohibited transactions in the ongoing performance of its activities as an investment manager.

Eligibility

The Department proposed to modify the eligibility provisions in Section III, which identify circumstances under which an Investment Professional or Financial Institution will become ineligible to rely on the exemption for a 10-year period. The Department proposed expanding ineligibility to include Financial Institutions that are Affiliates, rather than members of the more limited ''Controlled Group'' as defined in PTE 2020–02, and the Proposed Amendment also enumerated specific crimes (including foreign crimes) that could cause ineligibility in Section III(a). The Department also proposed to broaden the scope of the crimes that would have caused ineligibility by providing that a Financial Institution or Investment Professional becomes ineligible upon conviction of any of the specific enumerated crimes including foreign crimes, regardless of the underlying conduct, as opposed to only ''crimes arising out of such person's provision of investment advice to Retirement Investors'' as provided in PTE 2020–02.

In the Proposed Amendment, the Department also proposed to add new ineligibility triggers that would make a Financial Institution or Investment Professional ineligible to rely on the exemption due to a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330 and pay the resulting excise taxes imposed by Code section 4975 in connection with non-exempt prohibited transactions involving investment advice under Code section 4975(e)(3)(B).

The Department also proposed making clarifying changes to the timing of the ineligibility provision that is set forth in Section III(b). The Department proposed that all entities would have become ineligible six months after the conviction date, the date the Department issued a written determination regarding a foreign conviction, or the date the Department issued a written ineligibility notice regarding other misconduct. As proposed, this six-month period would have replaced the one-year winding down period (referred to as the Transition Period in this Final Amendment). Furthermore, the Department clarified in the Proposed Amendment that ineligibility remains in effect until the occurrence of the earliest of the following events: (A) a subsequent judgment reversing a person's conviction, (B) 10 years after the person became ineligible or is released from imprisonment, if later, or (C) the Department grants an individual exemption permitting reliance on this exemption, notwithstanding the conviction.

The Department also proposed changes to Section III(c), which provided an opportunity to be heard. These proposed changes would have removed the separate opportunity to be heard by the Department that would have been granted following conviction by a U.S. Federal or State court and proposed providing an opportunity to be heard when the conviction is by a foreign court pursuant to proposed Section III(c)(1).

Section III(c)(2) of the Proposed Amendment provided that the Department would have issued a written warning letter regarding the conduct and thereafter would have allowed Financial Institutions and Investment Professionals that have engaged in conduct described in proposed Section III(a)(2) to have had the opportunity to cure the behavior and to be heard in an evidentiary hearing by the Department. Following the proposed hearing, the Department would have decided whether to issue a written ineligibility notice for conduct described in proposed Section III(a)(2).

Lastly, the Department proposed adding the heading ''Alternative exemptions'' in Section III(d), which is now Section III(c) in this Final Amendment, that would have described how a Financial Institution may continue business after becoming ineligible. The Final Amendment specifies that a Financial Institution or Investment Professional that is ineligible to rely on this exemption may rely on an existing statutory or separate class prohibited transaction exemption if one is available or may request an individual prohibited transaction exemption from the Department. Several commenters asserted that the proposed changes to the eligibility provisions of the exemption would have: greatly altered the ability of fiduciaries to reasonably rely on PTE 2020–02; substantially broadened the conditions under which a fiduciary would be ineligible for reliance on PTE 2020–02; resulted in reduced choice and access for Retirement Investors; caused market disruption; been punitive; and provided the Department with the sole ability, for which it lacks the authority, to make Financial Institutions and Investment Professionals ineligible from providing fiduciary investment advice. A few commenters pointed to the Department's experience with ineligibility under PTE 84–14 Section I(g), though some argued that the Department did not sufficiently analyze the difference between the parties affected by PTE 84–14 and retail investors receiving investment advice. A few commenters argued the ineligibility provisions exceeded the Department's authority. One commenter claimed that Congress did not intend for the Department to have this degree of power. Another claimed the Department was granting to itself the ability to impose a ''death penalty'' on Financial Institutions. Generally, commenters requested that the Department not finalize the proposed amendments to the ineligibility provision; alternatively, they requested that the Department apply the changes only prospectively if

the Department moves forward with them.

As explained further below, the Department continues to believe these eligibility provisions ensure that Financial Institutions provide strong oversight of Investment Professionals and that both the Financial Institution and the Investment Professional can be expected to ensure compliance with the exemption. Because of its supervisory responsibilities, and its control over the design and implementation of the policies and procedures, the Financial Institution's commitment to compliance is critical to the success of this exemption. While an occasional violation of the exemption will not result in disqualification for 10 years, Section III helps ensure that the Financial Institutions and Investment Professionals are willing and able to comply with the conditions of this exemption and protect investors from misconduct.

As required by ERISA section 408(a) and Code section 4975(c)(2), the Department may only grant exemptions that are protective of and in the interests of plan participants and beneficiaries. As the Department explained when it originally granted PTE 2020–02, ''[t]he Department has determined that limiting eligibility in this manner serves as an important safeguard in connection with this very broad grant of relief from the self-dealing prohibitions of ERISA and the Code in this exemption.'' [55] Therefore, after consideration of the comments the Department has determined to retain the eligibility provision of Section III with several important modifications discussed below.

Scope of Ineligibility

Several commenters claimed the Proposed Amendment's expansion of the conditions for ineligibility to encompass not only the fiduciary but also any affiliate regardless of that affiliate's relationship with the fiduciary or its activity is regulatory overreach by the Department that unnecessarily exposes every fiduciary to an additional compliance risk. Some commenters argued that the exemption's definition of the term ''Affiliate'' is overly broad and creates an unreasonably large network of persons, most of whom will have absolutely no connection to the recommendations provided to Retirement Investors. These commenters were concerned that the actions of these Affiliates can cause ineligibility and drive financial services workers and companies out of business to the detriment of the Retirement Investors relying on their investment advice services. Other commenters stated that the proposed expansion of the scope of the ineligibility provisions is problematic and would have led to unintended consequences.

Some commenters additionally stated the ineligibility provisions lack a proper nexus between the circumstances of the offense and the fiduciary services performed for the affected plans and requested the Department to concentrate the determination for ineligibility exclusively on the activities of the fiduciary itself and on any entity that is controlled by the fiduciary. Some commenters requested that the Department use the term ''Control Group'' in the ineligibility provisions of the Final Amendment, because it is less confusing and more well-defined than the term ''Affiliate.'' Another commenter recommended that the eligibility provisions focus on criminal conduct that involves the investment management of retirement assets and which exclusively involves (i) the fiduciary and (ii) any affiliate that the fiduciary controls or over which the fiduciary exercises a controlling influence. One commenter provided specific examples of how broadly ''Affiliate'' could be interpreted.

One commenter claimed that the Department has not expressed any justification for imposing ineligibility when an investment advice entity's affiliate is convicted of a crime unrelated to the transactions covered by the exemption. This commenter stated that ERISA section 411 does not impute convictions to affiliates or relatives and only provides for the disqualification of persons convicted of specified crimes from serving as a ''fiduciary'' or as a ''consultant or adviser to an employee benefit plan, including but not limited to any entity whose activities are in whole or substantial part devoted to providing goods or services to any employee benefit plan.''

After consideration of these comments, the Department has determined to return to the use of the term ''Controlled Group'' in the Final Amendment for purposes of determining ineligibility under the exemption and has revised Section III(a) accordingly. The Final Amendment also adds Section III(a)(3) to the exemption, which defines Controlled Group by stating that an entity is in the same Controlled Group as a Financial Institution if the entity (including any predecessor or successor to the entity) would be considered to be in the same ''controlled group of corporations'' as the Financial Institution or ''under common control'' with the Financial Institution as those terms are defined in Code section 414(b) and (c) (and any regulations issued thereunder).

However, the Department is retaining in the Final Amendment the proposed broader definition of crimes that cause ineligibility, because the Department remains concerned that the limitation of ''arising out of . . . provision of investment advice'' is too narrow. The crimes listed as disqualifying are extraordinarily serious. Implicit in some of the comments is the notion that the Department and Retirement Investors need not be concerned about serious crimes if they involved non-plan assets or non-advisory financial activities, such as asset management. In the Department's view, however, the commission of a serious crime, such as a felony involving embezzlement, price fixing, or criminal fraud, calls into question the parties' commitment to compliance with the law, loyalty to their customers, and insistence on appropriate oversight structures. In such circumstances, it would be imprudent for the Department to disregard the previous felonies on the basis that the crimes were aimed at another class of customers or parties. When Financial Institutions and Investment Professionals engage in such crimes, there is ample cause for concern, and little reason for either the Department or the Retirement Investor to be sanguine about future compliance with the terms of the exemption. In such circumstances, it is appropriate to insist that the parties seek an individual exemption at that point, which permits the Department to consider the specific facts of the crime, the possible need for additional exemption conditions, or the loss of the exemption, without grant of a new individual exemption.

Foreign Convictions

Several commenters claimed that the Department has no basis for expanding the ineligibility provisions to include conduct by foreign affiliates and that including foreign affiliates is overbroad and will create unintended consequences, especially because the conduct that could lead to ineligibility does not need to relate directly to the provision of investment advice. These commenters claimed that disqualification would occur even where the only connection between the investment advice entity and the entity convicted of a foreign crime is a small, indirect ownership interest. The commenters stated that ineligibility will occur for conduct that is completely unrelated to the provision of fiduciary investment advice and for conduct in

[55] 85 FR 82841

which the fiduciary has not participated and about which it has no knowledge. One commenter asserted that a Financial Institution should not be disqualified for foreign activities unless such activities are convictions for disqualifying crimes under ERISA section 411.

Several commenters focused on the inclusion of foreign crimes and stated that the proposed changes to the ineligibility provisions raise serious questions of fairness, national security, and U.S. sovereignty. These commenters claimed that ineligibility could result from the conviction of an affiliate in a foreign court for violation of foreign law without due process protections or the same level of due process afforded in the United States. Some commenters expressed concern that the proposed change sets up a false equivalence between and among foreign jurisdictions and that it is not credible to assume that the judicial systems of certain countries will be impartial and have criminal procedures and due process safeguards as afforded in U.S. Federal and State courts. Some commenters stated that it is not clear that the Department is equipped to make the ''substantially equivalent'' determination and could result in inconsistency and unfairness as well as, in some cases, a lack of due process. One commenter agreed that investment transactions that include retirement assets are increasingly likely to involve entities that may reside or operate in jurisdictions outside the U.S. and that reliance on PTE 2020–02 therefore must appropriately be tailored to address criminal activity, whether occurring in the U.S. or in a foreign jurisdiction but this commenter nonetheless had concerns with the potential lack of due process in foreign jurisdictions.

Other commenters were concerned that some foreign courts could become vehicles for hostile governments to achieve political ends as opposed to dispensing justice and potentially hostile foreign governments could interfere in the retirement marketplace for supposed wrongdoing that is wholly unrelated to managing retirement assets and these governments could potentially assert political influence over fiduciary advice providers that want to avoid a criminal conviction. One commenter recommended that the Proposed Amendment's foreign crime ''substantially equivalent'' standard be amended so that ineligibility for a foreign criminal conviction applies only when the factual record of such conviction, when applied to United States Federal criminal law, would highly likely lead also to a criminal conviction in the U.S., as determined under appropriate regulatory authority by the Department's Office of the Solicitor.

The Department notes these commenters' concerns, and as noted above, has reduced the scope of any possible disqualification by limiting the provision to the Controlled Group. However, the Department is retaining the inclusion of foreign convictions in the Final Amendment. Financial Institutions increasingly have a global reach, in their affiliations and in their investment transactions. Retirement assets are often involved in transactions that take place in entities that operate in foreign jurisdictions therefore making the criminal conduct of foreign entities relevant to eligibility under PTE 2020–02. An ineligibility provision that is limited to U.S. Federal and State convictions would ignore these realities and provide insufficient protection for Retirement Investors. Moreover, foreign crimes of the type enumerated in the exemption call into question a firm's culture of compliance just as much as domestic crimes and are signs of potential serious compliance and integrity failures, whether prosecuted domestically or in foreign jurisdictions.

The Department does not expect that questions regarding ''substantially equivalent'' will arise frequently, and even less so with the Final Amendment's use of the term ''Controlled Group'' instead of ''Affiliate,'' as discussed above. But, when these questions do arise, impacted entities may contact the Office of Exemption Determinations for guidance, as they have done for many years in connection with the eligibility provisions under the QPAM Exemption, PTE 84–14.[56] As discussed in more detail below, the one-year Transition Period that has been added to the exemption and the ability to apply for an individual exemption provide affected parties with both the time and the opportunity to address with the Department any issues about the relevance of any specific foreign conviction and its applicability to ongoing relief pursuant to PTE 2020–02. Financial Institutions and Investment Professionals should interpret the scope of the eligibility provision broadly with respect to foreign convictions and consistent with the Department's statutorily mandated focus on the protection of Plans in ERISA section 408(a) and Code section 4975(c)(2). In situations where a crime raises particularly unique issues related to the substantial equivalence of the foreign Criminal Conviction, the Financial Institutions and Investment Professionals may seek the Department's views regarding whether the foreign crime, conviction, or misconduct is substantially equivalent to a U.S. Federal or State crime. However, any Financial Institution and Investment Professional submitting a request for review should do so promptly, and whenever possible, before a judgment is entered in a foreign conviction.

In the context of the PTE 84–14 Qualified Professional Asset Manager (QPAM) exemption, which has similar disqualification provisions, the Department is not aware of any potentially disqualifying foreign convictions having occurred in foreign nations that are intended to harm U.S.-based Financial Institutions and believes the likelihood of such an occurrence is rare. Further, the types of foreign crimes of which the Department is aware from recent PTE 84–14 QPAM individual exemption requests for relief from convictions have consistently related to the subject Financial Institution's management of financial transactions and/or culture of compliance. The underlying foreign crimes in those individual exemption requests have included: aiding and abetting tax fraud in France (PTE 2016–10, 81 FR 75147 (October 28, 2016) corrected at 88 FR 85931 (December 11, 2023), and PTE 2016–11, 81 FR 75150 (October 28, 2016) corrected at 89 FR 23612 (April 4, 2024)); attempting to peg, fix, or stabilize the price of an equity in anticipation of a block offering in Japan (PTE 2023–13, 88 FR 26336 (April 28, 2023)); illicit solicitation and money laundering for the purposes of aiding tax evasion in France (PTE 2019–01, 84 FR 6163 (February 26, 2019)); and spot/futures-linked market price manipulation in South Korea (PTE 2015–15, 80 FR 53574 (September 4, 2015)).[57]

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

[57] On December 12, 2018, Korea's Seoul High Court for the 7th Criminal Division (the Seoul High Court) reversed the Korean Court's decision and declared the defendants not guilty; subsequently, Korean prosecutors appealed the Seoul High Court's decision to the Supreme Court of Korea., On

However, to address the concern expressed in the public comments that convictions have occurred in foreign nations that are intended to harm U.S.-based Financial Institutions, the Department has revised Section III(a)(1)(B) in the Final Amendment to exclude foreign convictions that occur within foreign jurisdictions that are included on the Department of Commerce's list of ''foreign adversaries.'' [58] Therefore, the Department will not consider foreign convictions that occur under the jurisdiction of the listed ''foreign adversaries'' as an ineligibility event. To reflect this change, the Department has added the phrase ''excluding convictions and imprisonment that occur within foreign countries that are included on the Department of Commerce's list of 'foreign adversaries' that is codified in 15 CFR 7.4'' to Section III(a)(1)(B).

Due Process

The Department received several comments regarding the conduct described in Section III(a)(2) as involving ''engaging in a systematic pattern or practice'' that can cause ineligibility and the ineligibility notice process. Generally, the comments argued that the Department had given itself too much authority to disqualify parties based on its own factual determinations without affording them sufficient due process protections and had also reserved for itself the sole authority to determine ineligibility without external review and without ensuring due process.

A few commenters claimed that the Proposed Amendment has a procedural due process flaw that renders it unconstitutional under Article III of the Constitution, the Due Process Clause of the Fifth Amendment, and the Seventh Amendment. These commenters assert that courts have found that the sanction of depriving an entity of its ability to engage in its business is analogous to a criminal penalty and that only after sufficient due process can an individual be barred from engaging in an otherwise legal practice. These commenters express doubts about the ability of an administrative agency, like the Department, to assert this power without substantial additional procedural protections. Other commenters contended that the proposed process would have resulted in disqualification without any judicial recourse and that, by leaving too much discretion to the Department, would create uncertainty and adversely affect the availability of Retirement Investors to get sound advice. Some commenters asserted that the Department's ineligibility process was insufficient because it did not provide a chance for a hearing before an impartial administrative judge or Article III judge, no express right of appeal, and no formal procedures to present evidence, and provided the Department the sole discretion to prohibit the Investment Professional or Financial Institution from relying on PTE 2020–02.

Some commenters also stated that while the six-month notice period provided in the Proposed Amendment may be adequate time to send a notice to Retirement Investors, it is insufficient time for a Financial Institution to determine an alternative means of complying with ERISA in order to continue to provide advice to Retirement Investors. These commenters requested that the Department modify the Proposed Amendment to provide for at least 12 months to wind-down advice or to find an alternative means of complying with ERISA following a finding of ineligibility. One commenter additionally claimed that it was problematic that the opportunity to be heard and to challenge a disqualification based upon a domestic conviction had been eliminated. Another commenter urged the Department to eliminate the opportunity to cure misconduct from the exemption. This commenter claimed that this provision undermines compliance and accountability by reassuring Investment Professionals and firms that, even if they engage in a ''systemic pattern or practice'' of violating the conditions of the exemption, or even provide materially misleading information to the Department related to their conduct under the exemption, they will have the opportunity to cure and continue to rely on the exemption. The commenter asserted that Investment Professionals and firms who have engaged in these types of conduct will not desist from such misconduct during the lengthy cure period and, as a result, this provision threatens to expose Retirement Investors to continued harm. The commenter also requested that the Department eliminate any provision allowing Investment Professionals who are found ineligible to rely on PTE 2020–02 to nevertheless rely on other prohibited transaction exemptions or seek an individual transaction exemption from the Department. The commenter claimed that these provisions conflict with a proper regulatory approach that should seek to protect the public and deter misconduct by foreclosing exemptive relief to those Investment Professionals and firms who are demonstrably unfit to enjoy it.

After consideration of the comments and to address commenters' due process concerns, the Department has determined to modify Section III(a)(2) of the ineligibility provisions. As amended, Section III(a)(2) of the Final Amendment describes disqualifying conduct, which will be subject to a one-year Transition Period, instead of the six-month period originally proposed. The changes to the disqualifying conduct provisions of the exemption will remove the discretion of the Department from the ineligibility determination process regarding the occurrence of the Prohibited Misconduct under Section III(a)(2) while adding protections to the exemption by conditioning disqualification on determinations in court proceedings. Ineligibility under amended Section III(a)(2) will result from a Financial Institution or an Investment Professional being found in a final judgment or court-approved settlement in a Federal or State criminal or civil court proceeding brought by the Department, the Department of the Treasury, the IRS, the SEC, the Department of Justice, the Federal Reserve, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Commodity Futures Trading Commission, a State insurance or securities regulator, or State attorney general to have participated in one or more of the following categories of conduct irrespective of whether the court specifically considers this exemption or its terms: (A) engaging in a systematic pattern or practice of

December 21, 2023, the Supreme Court of Korea affirmed the reversal of the Korean Conviction, and it dismissed all judicial proceedings against DSK.

[58] 15 CFR 7.4. The list of foreign adversaries currently includes the following foreign governments and non-government persons: The People's Republic of China, including the Hong Kong Special Administrative Region (China); the Republic of Cuba (Cuba); the Islamic Republic of Iran (Iran); the Democratic People's Republic of Korea (North Korea); the Russian Federation (Russia); and Venezuelan politician Nicola´s Maduro (Maduro Regime). The Secretary of Commerce's determination is based on multiple sources, including the National Security Strategy of the United States, the Office of the Director of National Intelligence's 2016–2019 Worldwide Threat Assessments of the U.S. Intelligence Community, and the 2018 National Cyber Strategy of the United States of America, as well as other reports and assessments from the U.S. Intelligence Community, the U.S. Departments of Justice, State and Homeland Security, and other relevant sources. The Secretary of Commerce periodically reviews this list in consultation with appropriate agency heads and may add to, subtract from, supplement, or otherwise amend the list. Section III(a)(1)(B) of the Final Amendment will automatically adjust to reflect amendments the Secretary of Commerce makes to the list.

conduct that violates the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; (B) intentionally engaging in conduct that violates the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; (C) engaging in a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330 or pay the resulting excise taxes imposed by Code section 4975 in connection with non-exempt prohibited transactions involving investment advice as defined under Code section 4975(e)(3)(B); or (D) providing materially misleading information to the Department, the Department of the Treasury, the Internal Revenue Service, the Securities and Exchange Commission, the Department of Justice, the Federal Reserve, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Commodity Futures Trading Commission, a State insurance or securities regulator, or State attorney general in connection with the conditions of this exemption.

In making this change to the Final Amendment, the Department has kept the same four triggers that it proposed in Section III(a)(2) of the Proposed Amendment. Rather than relying solely on the Department to determine whether a covered entity had engaged in one of these four triggers, however, the Department has determined that it is appropriate to limit eligibility to instances where a court has determined that a Financial Institution or Investment Professional has engaged in certain identified conduct. This underlying conduct is unchanged from the proposal. The Department agrees that relying on a determination from a court more appropriately balances the due process concerns raised by some comments. The Department also agrees with other commenters who emphasized that this identified conduct is a significant cause for concern, and that it is appropriate to condition ineligibility on a determination the Financial Institution or Investment Professional have engaged in this behavior.

Under this Final Amendment, ineligibility under Section III(a)(2) will operate in a similar manner to ineligibility for a criminal conviction defined in Section III(a)(1), as ineligibility will be immediate, subject to the timing and scope of the ineligibility provisions in Section III(b), including the One-Year Transition Period. Specifically, a Financial Institution or an Investment Professional will only become ineligible after it has been determined in a final judgment or a court-approved settlement that the conduct set forth in Section III(a)(2) has occurred. By removing the Opportunity to be Heard and Ineligibility Notice process and providing that ineligibility is triggered only after a conviction, a court's final judgment, or a court-approved settlement, the Financial Institution, an entity in the same Controlled Group as the Financial Institution, or an Investment Professional will have the due process that is afforded in formal legal proceedings. Additionally, having ineligibility occur only after a conviction, court's final judgment, or court-approved settlement provides those entities and persons confronting ineligibility with ample notice and time to prepare for their ineligibility and operations during the ensuing One-Year Transition Period discussed below. An ineligible Financial Institution or Investment Professional would again become eligible to rely on this exemption if there is a subsequent judgment reversing the conviction or final judgment.

Timing of Ineligibility and One-Year Transition Period

Several commenters expressed concern that the ineligibility provisions would apply retrospectively and urged the Department to confirm that ineligibility under the exemption would occur only on a prospective basis after finalization of the amended exemption. Additionally, some commenters asserted that the six-month period provided in the Proposed Amendment following ineligibility would be insufficient for Financial Institutions and Investment Professionals to prepare for any inability to provide retirement investment advice for a fee, determine an alternative means of complying with ERISA, and to prepare and submit an individual exemption application. One commenter argued that the change in the Proposed Amendment from a one-year transition period to six months was unduly punitive and contended that shortening the period would only mean that Retirement Investors would lose access to a trusted adviser sooner rather than later, generally for reasons entirely unrelated to the services provided to the Retirement Investor. Another commenter stated that providing a longer 12-month period would enable Financial Institutions to find alternative compliant means to help Retirement Investors and would enable Retirement Investors to continue to receive investment recommendations in their best interest.

One commenter claimed that the sudden real or impending loss of significant numbers of providers, or even a handful of the largest among them, as the result of their disqualification would cause chaos among plans, which would have no more than six months to find suitable replacements and impose harm on the Retirement Investors who had hired a disqualified firm. Another commenter argued that reducing the timing of ineligibility from one year to six months after a finding of ineligibility would make it more unlikely that the disqualified person could timely obtain an individual prohibited transaction exemption. The commenter stated that the result was especially significant because the Department was simultaneously proposing to eliminate alternative paths for exemptive relief for providing fiduciary investment advice under other class exemptions, making PTE 2020–02 the only available class exemption.

In response to these comments, the Department confirms that ineligibility under Section III will be prospective and only convictions, final judgments, or court-approved settlements occurring after the Applicability Date of the Final Amendment exemption will cause ineligibility. The proposed six-month period before ineligibility begins has been removed from the amended exemption and amended Section III(b) requires ineligibility for the Financial Institution or Investment Professional to begin immediately upon the date of conviction, final judgment, or court-approved settlement that occurs on or after the Applicability Date of the exemption. The Department has replaced the six-month lag period for beginning of ineligibility with a One-Year Transition Period in Section III(b)(2) to provide Financial Institutions and Investment Professionals ample time to prepare for loss of the exemptive relief of PTE 2020–02, determine alternative means for compliance, prepare and protect Retirement Investors, and apply to the Department for an individual exemption.

The Final Amendment provides that relief under the exemption during the One-Year Transition Period is available for a maximum period of one year after the Ineligibility Date if the Financial Institution and the Investment Professional provides notice to the Department at *IIAWR@dol.gov* within 30 days after ineligibility begins under Section III(b)(1). No relief will be available for any transactions (including past transactions) affected during the One-Year Transition Period unless the Financial Institution and the Investment

Professional complies with all the conditions of the exemption during such one-year period. The Department notes that it included the One-Year Transition Period in the Final Amendment to reduce the costs and burdens associated with the possibility of ineligibility, and to give Financial Institutions and Investment Professionals ample opportunity to apply for individual exemptions with appropriate protective conditions.

Financial Institutions and Investment Professionals may continue to rely on the exemption, as long as they comply with all of the exemption's conditions during that year. The One-Year Transition Period begins on the date of the conviction, the final judgment (regardless of whether that judgment remains under appeal), or court approved settlement. Financial Institutions or Investment Professionals that become ineligible to rely on this exemption may rely on a statutory prohibited transaction exemption if one is available or may seek an individual prohibited transaction exemption from the Department. In circumstances where the Financial Institution or Investment Professional becomes ineligible, the Department believes the interests of Retirement Investors are best protected by the procedural protections, public record, and notice and comment process associated with individual exemption applications. Through the process of an individual exemption application, the Department has unique authority to efficiently gather evidence, consider the issues, and craft protective conditions that meet the statutory standard. If the Department concludes, consistent with the statutory standards set forth in ERISA section 408(a) and Code section 4975(c)(2), that an individual exemption is appropriate, Retirement Investors remain free to make their own independent determinations whether to engage in transactions with the Financial Institution or Investment Professional.

As provided under Section III(c), a Financial Institution or Investment Professional that is ineligible to rely on this exemption may request an individual prohibited transaction exemption from the Department. The Department encourages any Financial Institution or Investment Professional facing allegations that could result in ineligibility to begin the individual exemption application process as soon as possible. If the applicant becomes ineligible and the Department has not granted a final individual exemption, the Department will consider granting retroactive relief, consistent with its policy as set forth in 29 CFR 2570.35(d), which may require retroactive exemptions to include additional prospective conditions.

Form 5330

The Department received several comments arguing that the imposition of ineligibility under Section III(a)(2)(C) based on the Financial Institution's failure to timely report any non-exempt prohibited transaction on IRS Form 5330 filing requirements and paying the associated excise tax payment is unworkable. These commenters generally stated that the provision constituted overreach by the Department because it has no statutory or regulatory enforcement authority to base ineligibility on the IRS' Form 5330 filing requirements. Other commenters claimed that Congress did not intend to give this kind of authority to the Department when it gave the Department the authority to grant prohibited transaction exemptions. The commenters stated that the Department has no legitimate need for this information and if Congress intended to give the Department this authority, it would have done so directly. One commenter questioned whether it would be a violation of the exemption if a Financial Institution or Investment Professional did not file a Form 5330 based on advice of an accountant or attorney.

After considering these comments, the Department is retaining Section III(a)(2)(C)'s provisions for ineligibility based on the Financial Institution's or Investment Professional's engaging in a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330 or pay the resulting excise taxes imposed by Code section 4975 in connection with non-exempt prohibited transactions involving investment advice as defined under Code section 4975(e)(3)(B). The excise tax is the Congressionally imposed sanction for engaging in non-exempt prohibited transaction and provides a powerful incentive for compliance with the participant-protective terms of this exemption. Insisting on compliance with the statutory obligation to pay the excise tax provides an important safeguard for compliance with the tax obligation when violations occur and focuses the Institution's attention on instances where the conditions of this exemption have been violated, resulting in a non-exempt prohibited transaction. Moreover, the failure to satisfy this condition calls into question the Financial Institution's or Investment Professional's commitment to regulatory compliance, as is critical to ensuring adherence to the conditions of this exemption including the Impartial Conduct Standards.

By including this provision in the Final Amendment, the Department does not claim authority to impose taxes under the Code, and leaves responsibility for collecting the excise tax and managing related filings to the IRS. The Department merely asserts its clear authority to grant conditional or unconditional exemptions under ERISA section 408(a) and Code section 4975(c). Since an obligation already exists to file the Form 5330 when parties engage in non-exempt prohibited transactions, the Department is merely conditioning relief in the exemption on their compliance with existing law. The condition provides important protections to Retirement Investors by enhancing the existing protections of PTE 2020–02.

As discussed above, this Final Amendment provides that ineligibility under Section III(a)(2)(C) occurs following a court's finding or determination that Financial Institutions or Investment Professionals engaged in a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330 or pay the resulting excise taxes imposed by Code section 4975. Triggering a Financial Institution or an Investment Professional's ineligibility only after a court has found the conduct occurred removes the Department from the determination process and provides the Financial Institution and Investment Professional with the due process protections inherent in the judicial process. Ineligibility grounded on failures under this condition call into question the Financial Institution or an Investment Professional's ability to provide advice for a fee that complies with the obligations of this exemption, including the Care Obligation and the Loyalty Obligation.

Alternative Exemptions

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

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

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

Recordkeeping

Section IV provides that the Financial Institution must maintain for a period of six years following the covered transaction records demonstrating compliance with this exemption and make such records available to the extent permitted by law, including 12 U.S.C. 484, to any authorized employee of the Department or the Department of the Treasury, which includes the Internal Revenue Service.

While the Department proposed a broader recordkeeping condition in the Proposed Amendment, the Department has determined to maintain the recordkeeping condition as it is currently in PTE 2020–02. The Department is clarifying the language to confirm that records must be made available to authorized employees of the Internal Revenue Service as part of the Department of the Treasury. This clarification was in the preamble to the December 2020 grant of PTE 2020–02, and the Department is now adding it to the operative text.

Although the proposed broader recordkeeping condition is consistent with other exemptions, the Department understands commenters' concerns that broader access to the documents could have a counterproductive impact on the formulation and documentation of appropriate firm oversight and control of recommendations by Investment Professionals. Although the Final Amendment narrows the recordkeeping obligation, uses this narrower recordkeeping, the Department intends to monitor Financial Institutions' compliance with the exemption closely and may revisit this to expand the recordkeeping requirement as appropriate. Future amendments would be preceded by notice and an opportunity for public comment.

Executive Order 12866 and 13563 Statement

Executive Orders 12866 [59] and 13563 [60] direct agencies to assess all costs and benefits of available regulatory alternatives. If regulation is necessary, agencies must choose a regulatory approach that maximizes net benefits, including potential economic, environmental, public health and safety effects; distributive impacts; and equity. Executive Order 13563 emphasizes the importance of quantifying costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

Under Executive Order 12866, ''significant'' regulatory actions are subject to review by the Office of Management and Budget (OMB). As amended by Executive Order 14094,[61] entitled ''Modernizing Regulatory Review,'' section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as any regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of $200 million or more (adjusted every three years by the Administrator of the Office of Information and Regulatory Affairs (OIRA) for changes in gross domestic product); or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, Territorial, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise legal or policy issues for which centralized review would meaningfully further the President's priorities or the principles set forth in the Executive order, as specifically authorized in a timely manner by the Administrator of OIRA in each case.

It has been determined that this amendment is significant within the meaning of section 3(f)(1) of the Executive Order. Therefore, the Department has provided an assessment of the amendment's costs, benefits, and transfers, and OMB has reviewed the rulemaking.

Paperwork Reduction Act

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

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

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

The Department is amending PTE 2020–02 to revise the required disclosures to Retirement Investors receiving advice and to provide more guidance for Financial Institutions and Investment Professionals complying with the Impartial Conduct Standards and implementing the policies and procedures. This rulemaking is intended to align with other regulators' rules and standards of conduct. These requirements are ICRs subject to the PRA. Readers should note that the burden discussed below conforms to the requirements of the PRA and is not the incremental burden of the changes.[62]

1.1 Preliminary Assumptions

In the analysis discussed below, a combination of personnel would perform the tasks associated with the ICRs at an hourly wage rate of $65.99 for clerical personnel, $165.71 for a legal professional, and $228.00 for a financial advisor.[63]

[59] 58 FR 51735 (Oct. 4, 1993).

[60] 76 FR 3821 (Jan. 21, 2011).

[61] 88 FR 21879 (Apr. 6, 2023).

[62] For a more detailed discussion of the marginal costs associated with the amendments to PTE 2020–02, refer to the Regulatory Impact Analysis (RIA) in the Notice of Final Rulemaking published elsewhere in today's edition of the **Federal Register**.

[63] Internal Department calculation based on 2023 labor cost data and adjusted for inflation to reflect

In the proposal, the Department received several comments on the Department's labor cost estimate, particularly the cost for legal support, remarking that it was too low. The Department assumes that tasks involving legal professionals will be completed by a combination of legal professionals, likely consisting of attorneys, legal support staff, and other professionals and in-house and out-sourced individuals. The labor cost associated with these tasks is estimated to be $165.71, which is the Department's estimated labor cost for an in-house attorney. The Department understands that some may feel this estimate is comparatively low to their experience, especially when hiring an outside ERISA legal expert. However, the Department has chosen this cost estimate understanding that it is meant to be an average, blended, or typical rate from a verifiable and repeatable source.

For the purposes of this analysis, the Department assumes that the percent of Retirement Investors who are in employer-sponsored plans receiving electronic disclosures would be similar to the percent of plan participants receiving electronic disclosures under the Department's 2002 and 2020 electronic disclosure safe harbors.[64] Accordingly, the Department estimates that 96.1 percent of the disclosures sent to Retirement Investors will be sent electronically, and the remaining 3.9 percent will be sent by mail.[65]

One commenter suggested that this assumption overstates the use of electronic disclosures for IRA owners and that 60 percent would be more appropriate. The Department is not able to substantiate that suggestion but understands that IRA owners could be different than plan participants in regard to electronic delivery of documents. In response, the Department reevaluated its estimate. In this analysis, the Department assumes that approximately 71.8 percent of IRA owners will receive disclosures electronically, and the remaining 28.2 percent sent by mail.[66]

Furthermore, the Department estimates that communications between businesses (such as disclosures sent from one Financial Institution to another) will be 100 percent electronic.

For disclosures sent by mail, the Department estimates that entities will incur a cost of $0.68 [67] for postage and $0.05 per page for material and printing costs.

1.2 Affected Entities

The Department expects the same 18,632 entities that are affected by the existing PTE 2020–02 will be affected by the amendments to the PTE. The number of entities by type and size are summarized in the table below.[68]

TABLE 1—AFFECTED ENTITIES BY TYPE AND SIZE

	Small	Large	Total
Broker-Dealer	431	1,489	1,920
Retail	302	1,018	1,319
Non-Retail	129	471	600
Registered Investment Adviser	2,989	13,409	16,398
SEC	228	7,806	8,035
Retail	85	4,859	4,944
Non-Retail	144	2,947	3,091
State	2,760	5,603	8,363
Retail	2,192	4,450	6,642
Non-Retail	568	1,153	1,721
Insurer	71	13	84
Robo-Adviser	10	190	200
Non-Bank Trustee	31	0	31
Total	3,531	15,101	18,632

Note: Values displayed are rounded to whole numbers; therefore, parts may not sum.

In addition, the amendments may affect banks and credit unions selling non-deposit investment products. There are 4,614 federally insured depository institutions in the United States, consisting of 4,049 commercial banks and 565 savings institutions.[69] Additionally, there are 4,645 federally insured credit unions.[70] In 2017, the GAO estimated that approximately two percent of credit unions have private deposit insurance.[71] Based on this estimate, the Department estimates that there are approximately 95 credit unions with private deposit insurance and 4,740 credit unions in total.[72]

In the proposal, the Department estimated that no banks or credit unions would be impacted by the amendments to PTE 2020–02. The Department requested comment on what other types

2024 wages. For a description of the Department's methodology for calculating wage rates, see *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf.*

[64] 67 FR 17263 (Apr. 9, 2002); 85 FR 31884 (May 27, 2020).

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

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

[67] United States Postal Service, *First-Class Mail,* United States Postal Service (2023), *https://www.usps.com/ship/first-class-mail.htm.*

[68] For more information on how the number of each type and size of entity is estimated, refer to the Affected Entity section of the RIA in the Notice of Final Rulemaking published elsewhere in today's edition of the **Federal Register**.

[69] Federal Deposit Insurance Corporation, *Statistics at a Glance – as of September 30, 2023, https://www.fdic.gov/analysis/quarterly-banking-profile/statistics-at-a-glance/2023mar/industry.pdf.*

[70] National Credit Union Administration, *Quarterly Credit Union Data Summary 2023 Q3, https://ncua.gov/files/publications/analysis/quarterly-data-summary-2023-Q3.pdf.*

[71] GAO, *Private Deposit Insurance: Credit Unions Largely Complied with Disclosure Rules, But Rules Should be Clarified,* (March 29, 2017), *https://www.gao.gov/products/gao-17-259.*

[72] The total number of credit unions is calculated as: 4,645 federally insured credit unions/(100%–2% of credit unions that are privately insured) = 4,740 total credit unions. The number of private credit unions is estimated as: 4,740 total credit unions − 4,645 federally insured credit unions = 95 credit unions with private deposit insurance.

of activities banks or credit unions may engage in that would require reliance on PTE 2020–02. The Department did not receive any comments on this topic. However, the Department revisited a comment it received on PTE 2020–02 in 2020. This comment suggested that banks may be providing investment advice outside of networking arrangements, such as recommendations to roll over assets from a plan or IRA or advice to invest in deposit products.[73] The Department agrees that, if the recommendation meets the facts and circumstances test for individualized best interest advice, or the adviser acknowledges fiduciary status, such transactions will require banks to comply with PTE 2020–02. The Department notes that some banks may need to comply with PTE 2020–02. However, the Department believes that in such cases, the banks, or their separately identifiable department or division, would be registered investment advisers and already included in the estimate of affected entities.[74]

The Department recognizes that the rulemaking may change the number of Financial Institutions who choose to rely on PTE 2020–02. Consistent with its initial analysis in 2020, the proposal assumed that all entities eligible to rely on the existing PTE 2020–02 were relying on it. However, one commenter indicated that some entities eligible to use PTE 2020–02 had determined that their business practices did not trigger fiduciary status or modified their business practices to avoid relying upon it. The definitional changes in this rulemaking may now require these entities to now rely on PTE 2020–02. These entities will incur the full compliance costs of PTE 2020–02. In response to this concern, this analysis assumes that 30 percent of currently eligible entities would begin to rely on PTE 2020–02 in response to the rulemaking.[75]

1.3 Costs Associated With Disclosures for Investors, Production and Distribution

1.3.1 Costs Associated With Drafting and Modifying Relationship and Conflict of Interest Disclosure

Section II(b) currently requires Financial Institutions to provide certain disclosures to Retirement Investors before engaging in a transaction pursuant to the exemption. These disclosures include:

- a written acknowledgment that the Financial Institution and its Investment Professionals are fiduciaries;
- a written description of the services to be provided and any material conflicts of interest of the Investment Professional and Financial Institution; and
- documentation of the Financial Institution and its Investment Professional's conclusions as to whether a rollover is in the Retirement Investor's best interest, before engaging in a rollover or offering recommendations on post-rollover investments.

The Department is finalizing the disclosure conditions from the proposal with some modifications. In the proposal, the Department proposed requiring a written statement informing the investor of their right to obtain a written description of the Financial Institution's written policies and procedures and information regarding costs, fees, and compensation. The Department received several comments regarding its estimate of the number of annual requests per firm, and the cost burdens associated with the Provision of Disclosures. After reviewing the comments and existing disclosures associated with the rulemaking, the Department has removed this requirement. The modifications to the disclosure requirements included in the final rulemaking are described below.

The following estimates reflect the ongoing paperwork burdens of the affected entities. Broker-dealers, registered investment advisers, and insurance companies that relied on the existing exemption were required to prepare certain disclosures under the existing PTE 2020–02. The estimates below reflect the paperwork burden these entities would incur to modify the current disclosures. This analysis does not include the transition costs already incurred for the existing PTE 2020–02 exemption.

Written Acknowledgement of Fiduciary Status

Of the 70 percent of the broker-dealers, registered investment advisers, and insurance companies assumed to be currently reliant on the existing exemption, the Department assumes that 10 percent will need to update their disclosures and that it will take a legal professional at a Financial Institution, on average, 10 minutes to update existing disclosures.

Robo-advisers, non-bank trustees, and newly reliant broker-dealers, registered investment advisers, and insurance companies will need to draft the acknowledgement. The Department estimates that it will take a legal professional at these entities, on average, 30 minutes to draft the acknowledgement. Updating and drafting the acknowledgement is estimated to result in an estimated hour burden of 3,090 hours with an equivalent cost of $512,106.[76]

TABLE 2—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE FIDUCIARY ACKNOWLEDGEMENT

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Create Disclosure (Legal)	2,876	$476,531	0	$0

[73] Comment letter received from the American Bankers Association on the *Notification of Proposed Class Exemption: Improving Advice for Workers & Retirees,* (August 2020).

[74] For more information on the Department's consideration of banks and credit unions, refer to the Affected Entity section of the RIA in the Notice of Final Rulemaking published elsewhere in today's edition of the **Federal Register**.

[75] The Department is not aware of any source to determine the percent of firms currently eligible, but not using PTE 2020–02, but which now need to use the exemption. In response to the lack of information the Department selected a meaningful percent of firms that would be in this category, in order to provide an estimate of the cost to comply with PTE 2020–02. As a point of reference, each percentage point change to this assumption results in a 0.28 percentage point change in the estimated total cost of compliance for PTE 2020–02.

[76] The number of Financial Institutions needing to update their written acknowledgement is estimated as: (1,920 broker-dealers × 10% × (100%−30%)) + (8,035 SEC-registered investment advisers × 10% × (100%−30%)) + (8,363 State-registered investment advisers × 10% × (100%−30%)) + (84 insurers × 10% × (100%−30%)) = 1,288 Financial Institutions updating existing disclosures. The number of Financial Institutions needing to draft their written acknowledgement is estimated as: 200 robo-advisers + 31 non-bank trustees + (1,920 broker-dealers × 30%) + (8,035 SEC-registered investment advisers × 30%) + (8,363 State-registered investment advisers × 30%) + (84 insurers × 30%) = 5,751 Financial Institutions drafting new disclosures. The burden is estimated as: (1,288 Financial Institutions × (10 minutes ÷ 60 minutes hours)) + (5,751 Financial Institutions × (30 minutes ÷ 60 minutes hours) = 3,090 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: 3,090 burden hours × $165.71 = $512,106. Note: Due to rounding, values may not sum.

TABLE 2—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE FIDUCIARY ACKNOWLEDGEMENT—Continued

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Update Disclosure (Legal)	215	35,575	0	0
Total	3,090	512,106	0	0

Written Statement of the Care Obligation and Loyalty Obligation

As amended, PTE 2020–02 requires Financial Institutions to provide investors with a Written Statement of the Care Obligation and Loyalty Obligation disclosure. As presented in more detail in the preamble, this disclosure defines the Care Obligation and Loyalty Obligation as related to the investor's relationship with the Investment Professional.

Most registered investment advisers and broker-dealers with retail investors already provide disclosures that the Department expects will satisfy these requirements.[77]

The Department expects that the written statement of Care Obligation and Loyalty Obligation will not take a significant amount of time to prepare and will be uniform across clients. The Department assumes that a legal professional employed by a broker-dealer or registered investment adviser, on average, will take 30 minutes to modify existing disclosures and that it will take insurers, robo-advisers, and non-bank trustees, on average, one hour to prepare the statement. This results in an hour burden of 9,474 hours with an equivalent cost of $1,569,868.[78]

TABLE 3—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE STATEMENT OF THE CARE AND LOYALTY OBLIGATION

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	9,474	$1,569,868	0	$0
Total	9,474	1,569,868	0	0

Relationship and Conflict of Interest Disclosure

The rulemaking also revises on the existing requirement for a written description of the services provided to also require a statement on whether the Retirement Investor would pay for such services, directly or indirectly, including through third-party payments. This disclosure is consistent with the disclosure requirements under Regulation Best Interest. Accordingly, the Department expects that retail broker-dealers will not incur a cost to satisfy this requirement.

For all other Financial Institutions which relied on the existing exemption (*i.e.* 70 percent of non-retail broker-dealers, registered investment advisers, and insurance companies), the Department assumes it will take a legal professional 30 minutes to update existing disclosures to include this information. Robo-advisers, non-bank trustees, and newly reliant non-retail broker-dealers, registered investment advisers, and insurance companies will need to draft the Relationship and Conflict of Interest disclosure, which the Department estimates will take a legal professional at a large institution five hours and a legal professional at a small institution one hour, on average, to prepare such a draft.[79] This results in an estimated hour burden of 28,738 hours with an equivalent cost of $4,762,239.[80]

[77] Form CRS Relationship Summary; Amendments to Form ADV, 84 FR 33492 (July 12, 2019).

[78] The burden is estimated as: [(1,920 broker-dealers + 16,398 registered investment advisers) × (30 minutes ÷ 60 minutes hours)] + [(84 insurers + 200 robo-advisers + 31 non-bank trustees) × hour] = 9,474 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: 9,474 burden hours × $165.71 = $1,569,868. Due to rounding values may not sum.

[79] The Department estimates that 10 robo-advisers and 31 non-bank trustees are considered small entities.

[80] The number of Financial Institutions needing to update their written description of services to comply with the Relationship and Conflict of Interest disclosure is estimated as: 84 insurers + ((16,398 registered investment advisers + 600 non-retail broker-dealers) × (100%-30%)) = 11,983 Financial Institutions updating existing disclosures. The number of Financial Institutions needing to draft their Relationship and Conflict of Interest disclosure is estimated as: (200 robo-advisers + 31 non-bank trustees) + ((600 non-retail broker-dealers + 16,398 registered investment advisers) × 30%) = 5,330 Financial Institutions drafting new disclosures. Of these entities, there are 976 small entities and 4,354 large entities. The hours burden is calculated as: ((11,563 entities updating × 30 minutes) + ((976small entities drafting × 1 hour) + (4,354 large entities drafting × 5 hours)) = 28,738 burden hours. The labor rate is applied as: 28,738 burden hours × $165.71 = $4,762,239. Due to rounding values may not sum.

TABLE 4—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE RELATIONSHIP AND CONFLICT OF INTEREST DISCLOSURE

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	28,738	$4,762,239	0	$0
Total	28,738	4,762,239	0	0

1.3.2 Costs Associated With the Provision of Relationship and Conflict of Interest Disclosures

As discussed above, the Department estimates that 96.1 percent of the disclosures sent to Retirement Investors will be sent electronically and that approximately 72 percent of IRA owners will receive disclosures electronically.

The Department estimates that approximately 44.6 million Plan participants and 67.8 million IRA owners will receive disclosures annually, of which, 20.9 million (1.7 million Retirement Investors and 19.1 million IRA owners) will receive paper disclosures.[81] The Department estimates that preparing and sending each disclosure would take a clerical worker, on average, five minutes, resulting in an hour burden of 1,737,781 hours with an equivalent cost of $114,676,201.[82]

TABLE 5—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED PREPARING AND SENDING DISCLOSURES

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Clerical	1,737,781	$114,676,201	1,737,781	$114,676,201
Total	1,737,781	114,676,201	1,737,781	114,676,201

The Department assumes that the disclosures would require four pages in total, resulting in a material and postage cost of $18,350,973.[83]

TABLE 6—MATERIAL AND POSTAGE COST ASSOCIATED WITH SENDING DISCLOSURES

Activity	Year 1		Subsequent years	
	Pages	Cost	Pages	Cost
Material Cost	4	$18,350,973	4	$18,350,973
Total	4	18,350,973	4	18,350,973

1.3.3 Costs Associated With the Rollover Disclosures

The proposal proposed requiring disclosures for all rollovers, including those from plans to IRAs, from IRAs to other IRAs and from plans to plans. In the Final Amendment, the rollover disclosure will only be required for rollovers from a Plan that is covered by Title I, or recommendation to a Plan participant or beneficiary as to the post-rollover investment of assets currently held in a Plan that is covered by Title I. According to Cerulli Associates, in 2022, almost 4.5 million defined contribution (DC) plan accounts with $779 billion in assets were rolled over to an IRA.[84]

As a best practice, the SEC already encourages firms to record the basis for significant investment decisions, such as rollovers, although doing so is not required under Regulation Best Interest or the Advisers Act. In addition, some firms may voluntarily document significant investment decisions to demonstrate compliance with applicable law, even if not required. SIFMA commissioned Deloitte to conduct a survey of its member firms to learn how they expected to implement Regulation Best Interest. The survey was conducted by December 31, 2019, prior to Regulation Best Interest's effective date of June 30, 2020. Just over half (52 percent) of the broker-dealers surveyed indicated they will require their financial advisers to provide the rationale documentation for rollover recommendations.[85]

The Department estimates that documenting each rollover

[81] This is estimated as (44,593,228 × 3.9%) + (67,781,000 × 28.2%) = 20,853,378 paper disclosures. Due to rounding values may not sum.

[82] This burden is estimated as: [(20,853,378 disclosures × (5 minutes ÷ 60 minutes hours)] = 1,737,781 hours. The labor cost is estimated as: [(20,853,378 disclosures × (5 minutes ÷ 60 minutes hours)] × $65.99 = $114,676,201. Due to rounding values may not sum.

[83] The material and postage cost is estimated as: (20,853,378 disclosures × 4 pages × $0.05) + (20,853,378 disclosures × $0.68 postage) = $18,350,973. Due to rounding values may not sum.

[84] According to Cerulli, in 2022, there were 4,485,059 DC plan-to-IRA rollovers and 707,104 DC plan-to-DC plan rollovers. (*See* Cerulli Associates, *U.S. Retirement End-Investor 2023: Personalizing the 401(k) Investor Experience,* Exhibit 6.02. The Cerulli Report.) These account estimates may include health savings accounts, Archer medical savings accounts, or Coverdell education savings accounts.

[85] Deloitte, *Regulation Best Interest: How Wealth Management Firms are Implementing the Rule Package,* Deloitte, (Mar. 6, 2020).

[86] The burden is estimated as: (4,485,059 rollovers × 48% × 49% × (30 minutes ÷ 60 minutes

recommendation will require 30 minutes for a personal financial adviser whose firms currently do not require rollover documentations and five minutes for financial advisers whose firms already require them to do so. This results in a labor cost estimate of $142.0 million.[86]

TABLE 7—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE ROLLOVER DOCUMENTATION

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Financial Adviser	622,676	$141,970,058	622,676	$141,970,058
Total	622,676	141,970,058	622,676	141,970,058

These rollover disclosures are expected to be two pages in length and accompany other documentation associated with the transactions at no additional postage cost. The materials cost is estimated as $0.05 per page, totaling $8,571 annually.[87]

TABLE 8—MATERIAL AND POSTAGE COST ASSOCIATED WITH THE ROLLOVER DISCLOSURE

Activity	Year 1		Subsequent years	
	Pages	Cost	Pages	Cost
Material Cost	2	$8,571	2	$8,571
Total	2	8,571	2	8,571

1.4 Costs Associated With Annual Report of Retrospective Review

PTE 2020–02 currently requires Financial Institutions to conduct a retrospective review at least annually that is reasonably designed to prevent violations of, and achieve compliance with, the conditions of this exemption, the Impartial Conduct Standards, and the policies and procedures governing compliance with the exemption. The retrospective review must include a discussion of any self-corrections of violations.

Many of the entities affected by PTE 2020–02 likely already have retrospective review requirements. Broker-dealers are subject to similar annual review and certification requirements under FINRA Rule 3110, FINRA Rule 3120,[89] and FINRA Rule 3130;[90] SEC-registered investment advisers are already subject to retrospective review requirements under SEC Rule 206(4)–7; and insurance companies in many states are already subject to state insurance law based on the NAIC Model Regulation.[91] Accordingly, in this analysis, the Department assumes that these entities will incur minimal costs to meet this requirement.

In 2018, the Investment Adviser Association estimated that 92 percent of SEC-registered investment advisers voluntarily provide an annual compliance program review report to senior management.[92] The Department assumes that State-registered investment advisers exhibit similar retrospective review patterns as SEC-registered investment advisers. Accordingly, the Department estimates that eight percent, or 1,312 investment advisers advising retirement plans will incur costs associated with producing a retrospective review report.

The Department assumes that only 0.8 percent of registered investment advisers and ten percent of all other Financial Institutions will incur the total costs of producing the retrospective review report. This is estimated to take a legal professional five hours for small firms and 10 hours for large firms. This results in an annual hour burden of 3,156 hours and an equivalent cost burden of $522,907.[93]

Financial Institutions that already produce retrospective review reports voluntarily or in accordance with other regulators' rules likely will spend additional time to fully comply with this exemption condition such as revising their current retrospective review reports. This is estimated to take a financial professional one hour for small firms and two hours for large firms. This results in an annual hour

hours)) + (4,485,059 rollovers × 52% × 49% × (5 minutes ÷ 60 minutes hours)) = 622,676 hours. A labor rate of $228.00 is used for a personal financial adviser. The labor rate is applied in the following calculation: 622,676 burden hours × $228.00 = $141,970,058. Due to rounding values may not sum.

[87] The material and postage cost is estimated as: (4,485,059 rollovers × 49% involving advice × 3.9% disclosures mailed × $0.05 per page × 2 pages = $8,571. Note, the total values may not equal the sum of the parts due to rounding.

[88] *Rule 3110. Supervision,* FINRA Manual, *https://www.finra.org/rules-guidance/rulebooks/finra-rules/3110.*

[89] *Rule 3120. Supervisory Control System,* FINRA Manual, *https://www.finra.org/rules-guidance/rulebooks/finra-rules/3120.*

[90] *Rule 3130. Annual Certification of Compliance and Supervisory Processes,* FINRA Manual, *https://www.finra.org/rules-guidance/rulebooks/finra-rules/3130.*

[91] NAIC Model Regulation, Section 6.C.(2)(i) (The same requirement is found in the NAIC Suitability in Annuity Transactions Model Regulation (2010), Section 6.F.(1)(f).)

[92] *2018 Investment Management Compliance Testing Survey,* Investment Adviser Association (Jun. 14, 2018), *https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/publications/2018-Investment-Management_Compliance-Testing-Survey-Results-Webcast_pptx.pdf.*

[93] The burden is estimated as: [(431 small broker-dealers + (2,989 small registered-investment advisers × 8%) + 71 small insurers + 10 small robo-advisers + 30 small non-bank trustees) × 10% × 5 hours] + [(1,489 large broker-dealers + (13,409 large registered-investment advisers × 8%) + 13 large insurers + 190 large robo-advisers + 1 large non-bank trustee) × 10% × 10 hours] = 3,156 hours. The equivalent cost is estimated as: {[(431 small broker-dealers + (2,989 small registered-investment advisers × 8%) + 71 small insurers + 10 small robo-advisers + 30 small non-bank trustees) × 10% × 5 hours] + [(1,489 large broker-dealers + (13,409 large registered-investment advisers × 8%) + 13 large insurers + 190 large robo-advisers + 1 large non-bank trustee) × 10% × 10 hours]} × $165.71 = $522,907.

burden of 33,103 hours and an equivalent cost burden of $5,485,436.[94]

In addition to conducting the audit and producing a report, Financial Institutions also will need to review the report and certify the exemption. This is estimated to take the certifying officer two hours for small firms and four hours for large firms. This results in an hour burden of 67,467 and an equivalent cost burden of $13,375,426.[95]

TABLE 10—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE RETROSPECTIVE REVIEW

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	36,258	$6,008,343	36,258	$6,008,343
Senior Executive Staff	67,467	13,375,426	67,467	13,375,426
Total	103,726	19,383,769	103,726	19,383,769

1.5 Costs Associated With Written Policies and Procedures

Under the original exemption, Financial Institutions were already required to maintain their policies and procedures. Financial Institutions who are not covered under the existing exemption may need to develop policies and procedures. The Department estimates that, for entities newly reliant upon PTE 2020–02 due to this rulemaking, this requirement will take legal professionals 40 hours at a large firm and 20 hours at a small firm in the first year.[96] Retail broker-dealers and all registered investment advisors should have policies and procedures in place to satisfy other regulators that can be amended to comply with this rulemaking. The Department estimates it will take 10 hours for small firms and 20 hours for large firms to amend their policies and procedures. The Department estimates the requirement to result in an hour burden of 111,864 with an equivalent cost of $18,536,977 in the first year.[97]

TABLE 11—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH DEVELOPING POLICIES AND PROCEDURES

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	111,864	$18,536,977	0	$0
Total	111,864	18,536,977	0	0

[94] The burden is estimated as: [(431 small broker-dealers + (2,989 small registered-investment advisers × 8%) + 71 small insurers + 10 small robo-advisers + 30 small non-bank trustees) × 90% × 2 hours] + [(1,489 large broker-dealers + (13,409 large registered-investment advisers × 8%) + 13 large insurers + 190 large robo-advisers + 1 large non-bank trustee)) × 90% × 4 hours] = 33,103 hours. The equivalent cost is estimated as: {[(431 small broker-dealers + (2,989 small registered-investment advisers × 8%) + 71 small insurers + 10 small robo-advisers + 30 small non-bank trustees) × 90% × 2 hours] + [(1,489 large broker-dealers + (13,409 large registered-investment advisers × 8%) + 13 large insurers + 190 large robo-advisers + 1 large non-bank trustee)) × 90% × 4 hours]} × $165.71 = $5,485,436.

[95] The burden is estimated as: [(431 small broker-dealers + (2,989 small registered-investment advisers × 8%) + 71 small insurers + 10 small robo-advisers + 30 small non-bank trustees) × 2 hours] + [(1,488 large broker-dealers + (13,409 large registered-investment advisers × 8%) + 13 large insurers + 190 large robo-advisers + 1 large non-bank trustee)) × 4 hours] = 67,467 hours. The equivalent cost is estimated as: {[(431 small broker-dealers + (2,989 small registered-investment advisers × 8%) + 71 small insurers + 10 small robo-advisers + 30 small non-bank trustees) × 2 hours] + [(1,489 large broker-dealers + (13,409 large registered-investment advisers × 8%) + 13 large insurers + 190 large robo-advisers + 1 large non-bank trustee)) × 4 hours]} × $198.25 = $13,375,426.

[96] The Department estimates that 3,531 entities, consisting of 302 retail broker-dealers, 129 non-Retail broker-dealers, 85 SEC-registered Retail registered investment advisers, 144 SEC-registered non-Retail registered investment advisers, 2,192 state registered Retail registered investment advisers, 568 state registered Non-Retail registered investment advisers, 71 insurers and insurance agents, 10 robo-advisers, and 31 non-bank trustees, are considered small entities.

[97] The burden is estimated as follows: [(302 small retail broker-dealers + 85 small SEC-registered retail registered investment advisers + 144 small SEC-registered non-retail registered investment advisers + 2,192 small state registered retail registered investment advisers + 568 small state registered non-retail registered investment advisers) × 30% newly reliant on the PTE × 10 hours] + {[(1,018 large retail broker-dealers + 129 small non-retail broker-dealers + 4,859 large SEC-registered retail registered investment advisers + 2,947 large SEC-registered non-retail registered investment advisers + 4,450 large state registered retail registered investment advisers + 1,153 large state registered non-retail registered investment advisers + 71 insurers) × 30% newly reliant on the PTE] + (10 small robo-advisers + 30 small non-bank trustees) × 20 hours} + {[(471 large non-retail broker-dealers + 13 large insurers) × 30% newly reliant on the PTE] + 190 large robo-advisers + 1 large non-bank trustee) × 40 hours]} = 111,864 hours. The labor rate is applied in the following calculation: 111,864 burden hours × $165.71 = $18,536,977. Note, the total values may not equal the sum of the parts due to rounding.

The Final Amendment requires Financial Institutions to review policies and procedures at least annually and to update them as needed to ensure they remain prudently designed, effective, and current. This includes a requirement to update and modify the policies and procedures, as appropriate, after considering the findings in the retrospective review report. For entities currently covered by PTE 2020–02, the Department estimates that it will take a legal professional an additional five hours for all entities covered under the existing and amended exemption. The Department expects that in the first year, only entities already reliant on PTE 2020–02 will satisfy this requirement but all entities will be required to satisfy it in subsequent years. The Department estimates this will result an estimated first year hour burden of 65,559 with an equivalent cost of $10,863,864. In subsequent years, this will result in an annual hour burden of 93,161 hours with an equivalent cost of $15,437,780 in subsequent years.[98]

TABLE 12—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH REVIEWING AND UPDATING POLICIES AND PROCEDURES

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	65,559	$10,863,864	93,161	$15,437,780
Total	65,559	10,863,864	93,161	15,437,780

The amendments will require Financial Institutions to provide their complete policies and procedures to the Department upon request. Based on the number of cases in the past and current open cases that would merit such a request, the Department estimates that the Department would request 165 policies and procedures in the first year and 50 policies and procedures in subsequent years. The Department estimates that it will take a clerical worker 15 minutes to prepare and send their complete policies and procedures to the Department resulting in an hourly burden of approximately 41 hours in the first year, with an equivalent cost of $2,722.[99] In subsequent years, the Department estimates that the requirement would result in an hour burden of approximately 13 hours with an equivalent cost of $825.[100] The Department assumes Financial Institutions would send the documents electronically and thus would not incur costs for postage or materials.

TABLE 13—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH PROVIDING POLICIES AND PROCEDURES TO THE DEPARTMENT

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Clerical	41	$2,722	13	$825
Total	41	2,722	13	825

1.6 Overall Summary

The paperwork burden estimates are summarized as follows:

Type of Review: Revision of an existing collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Fiduciary Transaction Exemption.

OMB Control Number: 1210–0163.

Affected Public: Business or other for-profit institution.

Estimated Number of Respondents: 18,632.

Estimated Number of Annual Responses: 114,609,171.

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

Estimated Total Annual Burden Hours: 2,599,221.

Estimated Total Annual Burden Cost: $18,359,543.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) [101] imposes certain requirements on rules subject to the notice and comment requirements of section 553(b)

[98] The burden is estimated as follows: The first-year cost of updating policies and procedures for plans that currently have policies & procedures: [(302 small Retail broker-dealers + 85 small SEC-registered Retail registered investment advisers + 144 small SEC-registered non-retail registered investment advisers + 2,192 small state registered retail registered investment advisers + 568 small state registered non-retail registered investment advisers) × 30% newly reliant on the PTE ×× 10 hours] + {[(1,018 large Retail broker-dealers + 129 small Non-Retail broker-dealers + 4,859 large SEC-registered Retail registered investment advisers + 2,947 large SEC-registered Non-Retail registered investment advisers + 4,450 large state registered Retail registered investment advisers + 1,153 large state registered non-retail registered investment advisers + 71 insurers) × 30% newly reliant on the PTE] + (10 small robo-adviser) × 20 hours} + {[(471 large Non-Retail broker-dealers + 13 large insurers) × 70% already reliant on the PTE] + 190 large robo-advisers) = 14,143 entities × 5 hours = 65,559 hours. The labor rate is applied in the following calculation: 65,559 hours × $165.71 = $10,863,864. In subsequent years the cost of updating is calculated as: (All 18,632 affected entities × 5 hours) = 93,161 burden hours. The labor rate is applied in the following calculation: 93,161 burden hours × $165.71 burden hours = $15,437,780. Note, the total values may not equal the sum of the parts due to rounding.

[99] The burden is estimated as: (165 × (15 minutes ÷ 60 minutes hours)) = 41 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: (165 × (15 minutes ÷ 60 minutes hours)) × $65.99 = $2,722. Note, the total values may not equal the sum of the parts due to rounding.

[100] The burden is estimated as: (50 × (15 minutes ÷ 60 minutes hours)) = 13 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: (50 × (15 minutes ÷ 60 minutes hours)) × $65.99 = $825. Note, the total values may not equal the sum of the parts due to rounding.

[101] 5 U.S.C. 601 *et seq.*

of the Administrative Procedure Act or any other law.[102] Under section 604 of the RFA, agencies must submit a final regulatory flexibility analysis (FRFA) of a final rulemaking that is likely to have a significant economic impact on a substantial number of small entities, such as small businesses, organizations, and governmental jurisdictions. This amended exemption, along with related amended exemptions and a rule amendment published elsewhere in this issue of the **Federal Register**, is part of a rulemaking regarding the definition of fiduciary investment advice, which the Department has determined likely will have a significant economic impact on a substantial number of small entities. The impact of this amendment on small entities is included in the FRFA for the entire project, which can be found in the related notice of rulemaking found elsewhere in this edition of the **Federal Register**.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 [103] requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a final rule that may result in an expenditure of $100 million or more (adjusted annually for inflation with the base year 1995) in any 1 year by state, local, and tribal governments, in the aggregate, or by the private sector.

For purposes of the Unfunded Mandates Reform Act, this exemption is expected to have an impact on the private sector. For the purposes of the exemption the regulatory impact analysis published with the final rule shall meet the UMRA obligations.

Federalism Statement

Executive Order 13132 outlines fundamental principles of federalism. It also requires Federal agencies to adhere to specific criteria in formulating and implementing policies that have ''substantial direct effects'' on the states, the relationship between the national government and states, or on the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that have these federalism implications must consult with State and local officials and describe the extent of their consultation and the nature of the concerns of State and local officials in the preamble to the final Regulation. Notwithstanding this, Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA.

The Department has carefully considered the regulatory landscape in the states and worked to ensure that its regulations would not impose obligations on impacted industries that are inconsistent with their responsibilities under state law, including the obligations imposed in states that based their laws on the NAIC Model Regulation. Nor would these regulations impose obligations or costs on the state regulators. As discussed more fully in the final Regulation and in the preamble to PTE 84–24, there is a long history of shared regulation of insurance between the States and the Federal government. The Supreme Court addressed this issue and held that ''ERISA leaves room for complementary or dual federal or state regulation'' of insurance.[104] The Department designed the final Regulation and exemptions to complement State insurance laws.[105]

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

General Information

The attention of interested persons is directed to the following:

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

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

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

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

The Department is granting the following amendment on its own motion, pursuant to its authority under ERISA section 408(a) and Code section 4975(c)(2) and in accordance with procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637 (October 27, 2011)).[106]

Prohibited Transaction Exemption 2020–02, Improving Investment Advice for Workers & Retirees

Section I — Transactions

(a) In General

ERISA Title I (Title I) and the Internal Revenue Code (the Code) prohibit

[102] 5 U.S.C. 601(2), 603(a); *see* 5 U.S.C. 551.

[103] Public Law 104–4, 109 Stat. 48 (Mar. 22, 1995).

[104] *See John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank,* 510 U.S. 86, 98 (1993).

[105] *See BancOklahoma Mortg. Corp.* v. *Capital Title Co., Inc.,* 194 F.3d 1089 (10th Cir. 1999) (stating that McCarran-Ferguson Act bars the application of a Federal statute only if (1) the Federal statute does not specifically relate to the business of insurance; (2) a State statute has been enacted for the purpose of regulating the business of insurance; and (3) the Federal statute would invalidate, impair, or supersede the State statute); *Prescott Architects, Inc.* v. *Lexington Ins. Co.,* 638 F. Supp. 2d 1317 (N.D. Fla. 2009); *see also U.S.* v. *Rhode Island Insurers' Insolvency Fund,* 80 F.3d 616 (1st Cir. 1996). The Supreme Court has held that to ''impair'' a State law is to hinder its operation or ''frustrate [a] goal of that law.'' *Humana Inc. V. Forsyth,* 525 U.S. 299, 308 (1999).

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

fiduciaries, as defined therein, that provide investment advice to Plans and individual retirement accounts (IRAs) from receiving compensation that varies based on their investment advice and compensation that is paid from third parties. Title I and the Code also prohibit fiduciaries from engaging in purchases and sales with Plans or IRAs on behalf of their own accounts (principal transactions). This exemption permits Financial Institutions and Investment Professionals who comply with the exemption's conditions to receive otherwise prohibited compensation when providing fiduciary investment advice to Retirement Investors and engaging in principal transactions with Retirement Investors, as described below.

Specifically, this exemption provides relief from the prohibitions of ERISA section 406(a)(1)(A), (D), and 406(b), and the sanctions imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(A), (D), (E), and (F), to Financial Institutions and Investment Professionals that provide fiduciary investment advice and engage in the conditions described in Section I, in accordance with the conditions set forth in Section II and are eligible pursuant to Section III, subject to the definitional terms and recordkeeping requirements in Sections IV and V. This exemption is available to allow Financial Institutions and Investment Professionals to receive reasonable compensation for recommending a broad range of investment products to Retirement Investors, including insurance and annuity products.

(b) Covered Transactions

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

(1) The receipt, directly or indirectly, of reasonable compensation; and

(2) The purchase or sale of an investment product to or from a Retirement Investor, and the receipt of payment, including a mark-up or mark-down.

(c) Exclusions

This exemption is not available if:

(1) The Plan is covered by Title I of ERISA and the Investment Professional, Financial Institution, or any Affiliate is:

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

(B) the Plan's named fiduciary or administrator; provided, however, that a named fiduciary or administrator or their Affiliate, including a Pooled Plan Provider (PPP) registered with the Department of Labor under 29 CFR 2510.3–44, may rely on the exemption if it is selected to provide investment advice by a fiduciary who is Independent of the Financial Institution, Investment Professional, and their Affiliates; or

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

Section II—Investment Advice Arrangement

Section II(a) requires Investment Professionals and Financial Institutions to comply with Impartial Conduct Standards, including a Care Obligation and Loyalty Obligation, when providing fiduciary investment advice to Retirement Investors. Section II(b) requires Financial Institutions to acknowledge fiduciary status under Title I and/or the Code, and provide Retirement Investors with a written statement of the Care Obligation and Loyalty Obligation, a written description of the services they will provide and all material facts relating to Conflicts of Interest that are associated with their recommendations, and a rollover disclosure (if applicable). Section II(c) requires Financial Institutions to adopt policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards and other conditions of this exemption. Section II(d) requires the Financial Institution to conduct a retrospective review, at least annually, that is reasonably designed to detect and prevent violations of, and achieve compliance with, the Impartial Conduct Standards and the terms of this exemption. Section II(e) allows Financial Institutions to correct certain violations of the exemption conditions and continue to rely on the exemption for relief.

(a) Impartial Conduct Standards

The Financial Institution and Investment Professional must comply with the following ''Impartial Conduct Standards'':

(1) Investment advice must, at the time it is provided, satisfy the Care Obligation and Loyalty Obligation. As defined in Section V(b), to meet the Care Obligation, advice must reflect the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor. As defined in Section V(h), to meet the Loyalty Obligation, the advice must not place the financial or other interests of the Investment Professional, Financial Institution or any Affiliate, Related Entity, or other party ahead of the interests of the Retirement Investor or subordinate the Retirement Investor's interests to their own. For example, in choosing between two commission-based investments offered and available to the Retirement Investor on a Financial Institution's product menu, it would be impermissible for the Investment Professional to recommend the investment that is worse for the Retirement Investor but better or more profitable for the Investment Professional or the Financial Institution. Similarly, in recommending whether a Retirement Investor should pursue a particular investment strategy through a brokerage or advisory account, the Investment Professional must base the recommendation on the Retirement Investor's financial interests, rather than any competing financial interests of the Investment Professional. For example, an Investment Professional generally could not recommend that the Retirement Investor enter into an arrangement requiring the Retirement Investor to pay an ongoing advisory fee to the Investment Professional, if the Retirement Investor's interests were better served by the payment of a one-time commission to buy and hold a long-term investment. In making recommendations as to account type, it is important for the Investment Professional to ensure that the recommendation carefully considers the reasonably expected total costs over time to the Retirement Investor, and that the Investment Professional base its recommendations on the financial interests of the Retirement Investor and avoid subordinating those interests to the Investment Professional's competing financial interests.

(2)(A) The compensation received, directly or indirectly, by the Financial Institution, Investment Professional, their Affiliates and Related Entities for their services must not exceed reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2); and (B) as required by the Federal securities laws,

the Financial Institution and Investment Professional must seek to obtain the best execution of the investment transaction reasonably available under the circumstances; and

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

(b) Disclosure

At or before the time a covered transaction occurs, as described in Section I(b) of this exemption, the Financial Institution must provide, in writing, the disclosures set forth in paragraphs (1)–(4) below to the Retirement Investor. For purposes of the disclosures required by Section II(b)(1)–(4), the Financial Institution or Investment Professional is deemed to engage in a covered transaction on the later of (A) the date the recommendation is made or (B) the date the Financial Institution or Investment Professional becomes entitled to compensation (whether now or in the future) by reason of making the recommendation.

(1) A written acknowledgment that the Financial Institution and its Investment Professionals are providing fiduciary investment advice to the Retirement Investor and are fiduciaries under Title I of ERISA, Title II of ERISA, or both with respect to the recommendation;

(2) A written statement of the Care Obligation and Loyalty Obligation, described in Section II(a), that is owed by the Investment Professional and Financial Institution to the Retirement Investor;

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

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

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

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

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

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

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

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

(D) the different levels of services and investments available under the Plan and the recommended investment or account.

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

(7) Investment Professionals and Financial Institutions may rely in good faith on information and assurances from the other entities that are not Affiliates as long as they do not know or have reason to know that such information is incomplete or inaccurate.

(8) The Financial Institution is not required to disclose information pursuant to this Section II(b) if such disclosure is otherwise prohibited by law.

(c) Policies and Procedures

(1) The Financial Institution establishes, maintains, and enforces written policies and procedures prudently designed to ensure that the Financial Institution and its Investment Professionals comply with the Impartial Conduct Standards and other exemption conditions.

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

(3) Financial Institutions must provide their complete policies and procedures to the Department upon request within 30 days of request.

(d) Retrospective Review

(1) The Financial Institution conducts a retrospective review, at least annually, that is reasonably designed to detect and prevent violations of, and achieve compliance with the conditions of this exemption, including the Impartial Conduct Standards and the policies and procedures governing compliance with the exemption. The Financial Institution must update the policies and procedures as business, regulatory, and legislative changes and events dictate, to ensure that the policies and procedures remain prudently designed, effective, and compliant with Section II(c).

(2) The methodology and results of the retrospective review must be reduced to a written report that is provided to a Senior Executive Officer of the Financial Institution.

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

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

(B) The Financial Institution has filed (or will file timely, including extensions) Form 5330 reporting any non-exempt prohibited transactions discovered by the Financial Institution in connection with investment advice covered under Code section 4975(e)(3)(B), corrected those transactions, and paid any resulting excise taxes owed under Code section 4975(a) or (b);

(C) The Financial Institution has written policies and procedures that meet the requirements set forth in Section II(c); and

(D) The Financial Institution has a prudent process to modify such policies and procedures as required by Section II(d)(1).

(4) The review, report, and certification must be completed no later than six months after the end of the period covered by the review.

(5) The Financial Institution must retain the report, certification, and

supporting data for a period of six years and make the report, certification, and supporting data available to the Department within 30 days of request to the extent permitted by law (including 12 U.S.C. 484 regarding limitations on visitorial powers for national banks).

(e) Self-Correction

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

(1) Either the violation did not result in investment losses to the Retirement Investor or the Financial Institution made the Retirement Investor whole for any resulting losses;

(2) The Financial Institution corrects the violation;

(3) The correction occurs no later than 90 days after the Financial Institution learned of the violation or reasonably should have learned of the violation; and

(4) The Financial Institution notifies the person(s) responsible for conducting the retrospective review during the applicable review cycle and the violation and correction is specifically set forth in the written report of the retrospective review required under subsection II(d)(2).

(f) ERISA Section 3(38) Investment Managers

To the extent a Financial Institution or Investment Professional provides fiduciary investment advice to a Retirement Investor as part of its response to a request for proposal to provide investment management services under section 3(38) of ERISA, and is subsequently hired to act as investment manager to the Retirement Investor, it may receive compensation as a result of the advice under this exemption, provided that it complies with the Impartial Conduct Standards as set forth in Section II(a). This paragraph does not relieve the Investment Manager, however, from its obligation to refrain from engaging in any non-exempt prohibited transactions in the ongoing performance of its activities as an Investment Manager.

Section III—Eligibility

(a) General

Subject to the timing and scope of ineligibility provisions set forth in subsection (b), an Investment Professional or Financial Institution will become ineligible to rely on this exemption with respect to any covered transaction, if on or after September 23, 2024, the Financial Institution, an entity in the same Controlled Group as the Financial Institution, or an Investment Professional has been:

(1) Convicted by either:

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

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

(2) Found or determined in a final judgment or court-approved settlement in a Federal or State criminal or civil court proceeding brought by the Department, the Department of the Treasury, the Internal Revenue Service, the Securities and Exchange Commission, the Department of Justice, the Federal Reserve, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Commodity Futures Trading Commission, a State insurance or securities regulator, or State attorney general to have participated in one or more of the following categories of conduct irrespective of whether the court specifically considers this exemption or its terms:

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

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

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

(D) provided materially misleading information to the Department, the Department of the Treasury, the Internal Revenue Service, the Securities and Exchange Commission, the Department of Justice, the Federal Reserve, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Commodity Futures Trading Commission, a State insurance or securities regulator, or State attorney general in connection with the conditions of this exemption.

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

(b) Timing and Scope of Ineligibility

(1) Ineligibility shall begin upon either:

(A) the date of a conviction, which shall be the date of conviction by a U.S. Federal or State trial court described in Section III(a)(1) (or the date of the conviction of any trial court in a foreign jurisdiction that is the equivalent of a U.S. Federal or State trial court) that occurs on or after September 23, 2024, regardless of whether that conviction remains under appeal; or

(B) the date of a final judgment (regardless of whether the judgment remains under appeal) or a court-approved settlement described in Section III(a)(2) that occurs on or after September 23, 2024.

(2) One-Year Transition Period. A Financial Institution or Investment Professional that becomes ineligible under Section III(a) may continue to rely on this exemption for up to 12 months after its ineligibility begins as determined under subsection (1) if the Financial Institution or Investment Professional provides notice to the Department at *IIAWR@dol.gov* within 30 days after ineligibility begins.

(3) A person will become eligible to rely on this exemption again only upon the earliest occurrence of the following:

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

(B) 10 years after the person became ineligible under Section III(b)(1) or, if later, 10 years after the person was released from imprisonment as a result

of a crime described in Section III(a)(1); or

(C) the effective date of an individual prohibited transaction exemption (under which the Department may impose additional conditions) permitting the person to continue to rely on this exemption.

(c) Alternative Exemptions

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

Section IV—Recordkeeping

The Financial Institution must maintain for a period of six years following the covered transaction records demonstrating compliance with this exemption and make such records available to the extent permitted by law, including 12 U.S.C. 484, to any authorized employee of the Department or the Department of the Treasury, which includes the Internal Revenue Service.

Section V—Definitions

(a) ''Affiliate'' means:

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

(2) Any officer, director, partner, employee, or relative (as defined in ERISA section 3(15)), of the Investment Professional or Financial Institution; and

(3) Any corporation or partnership of which the Investment Professional or Financial Institution is an officer, director, or partner.

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

(c) A ''Conflict of Interest'' is an interest that might incline a Financial Institution or Investment Professional—consciously or unconsciously—to make a recommendation that is not distinterested.

(d) ''Financial Institution'' means an entity that is not suspended, barred or otherwise prohibited (including under Section III of this exemption) from making investment recommendations by any insurance, banking, or securities law or regulatory authority (including any self-regulatory organization), that employs the Investment Professional or otherwise retains such individual as an independent contractor, agent or registered representative, and that is:

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

(2) A bank or similar financial institution supervised by the United States or a state, or a savings association (as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1)));

(3) An insurance company qualified to do business under the laws of a state, that: (A) has obtained a Certificate of Authority from the insurance commissioner of its domiciliary state which has neither been revoked nor suspended; (B) has undergone and shall continue to undergo an examination by an independent certified public accountant for its last completed taxable year or has undergone a financial examination (within the meaning of the law of its domiciliary state) by the state's insurance commissioner within the preceding five years, and (C) is domiciled in a state whose law requires that an actuarial review of reserves be conducted annually and reported to the appropriate regulatory authority;

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

(5) A non-bank trustee or non-bank custodian approved under Treasury Regulation 26 CFR 1.408–2(e) (as amended), but only to the extent they are serving in these capacities with respect to Health Savings Accounts (HSAs), or

(6) An entity that is described in the definition of Financial Institution in an individual exemption granted by the Department after the date of this exemption that provides relief for the receipt of compensation in connection with investment advice provided by an investment advice fiduciary under the same conditions as this class exemption.

(e) For purposes of subsection I(c)(1), a fiduciary is ''Independent'' of the Financial Institution and Investment Professional if:

(1) the fiduciary is not the Financial Institution, Investment Professional, or an Affiliate;

(2) the fiduciary does not have a relationship to or an interest in the Financial Institution, Investment Professional, or any Affiliate that might affect the exercise of the fiduciary's best judgment in connection with transactions covered by this exemption; and

(3) the fiduciary does not receive and is not projected to receive within its current Federal income tax year, compensation or other consideration for its own account from the Financial Institution, Investment Professional, or an Affiliate, in excess of two (2) percent of the fiduciary's annual revenues based upon its prior income tax year.

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

(g) ''Investment Professional'' means an individual who:

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

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

(3) Satisfies the Federal and State regulatory and licensing requirements of insurance, banking, and securities laws (including self-regulatory organizations) with respect to the covered transaction, as applicable, and is not disqualified or barred from making investment recommendations by any insurance, banking, or securities law or regulatory authority (including any self-regulatory organization and by the Department under Section III of this exemption).

(h) Advice meets the ''Loyalty Obligation'' if, with respect to the Retirement Investor, such advice does not place the financial or other interests of the Investment Professional, Financial Institution or any Affiliate, Related Entity, or other party ahead of the interests of the Retirement Investor, or subordinate the Retirement Investor's interests to those of the Investment Professional, Financial Institution or

any Affiliate, Related Entity, or other party.

(i) ''Plan'' means any employee benefit plan described in ERISA section 3(3) and any plan described in Code section 4975(e)(1)(A).

(j) A ''Pooled Plan Provider'' or ''PPP'' means a pooled plan provider described in ERISA section 3(44).

(k) A ''Related Entity'' means any party that is not an Affiliate and (i) has an interest in an Investment Professional or Financial Institution that may affect the exercise of the fiduciary's best judgment as a fiduciary, or (ii) in which the Investment Professional or Financial Institution has an interest that may affect the exercise of the fiduciary's best judgment as a fiduciary.

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

(m) A ''Senior Executive Officer'' is any of the following: the chief compliance officer, the chief executive officer, president, chief financial officer, or one of the three most senior officers of the Financial Institution.

Section VI—Phase-In Period

During the one-year period beginning September 23, 2024, Financial Institutions and Investment Professionals may receive compensation under Section I of this exemption if the Financial Institution and Investment Professional comply with the Impartial Conduct Standards set forth in Section II(a) and the fiduciary acknowledgment requirement set forth in Section II(b)(1).

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

Lisa M. Gomez,

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

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