DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Parts 2509, 2510, and 2550

RIN 1210–AB32

Definition of the Term ''Fiduciary''; Conflict of Interest Rule—Retirement Investment Advice

AGENCY: Employee Benefits Security Administration, Department of Labor

ACTION: Final rule.

SUMMARY: This document contains a final regulation defining who is a ''fiduciary'' of an employee benefit plan under the Employee Retirement Income Security Act of 1974 (ERISA or the Act) as a result of giving investment advice to a plan or its participants or beneficiaries. The final rule also applies to the definition of a ''fiduciary'' of a plan (including an individual retirement account (IRA)) under the Internal Revenue Code of 1986 (Code). The final rule treats persons who provide investment advice or recommendations for a fee or other compensation with respect to assets of a plan or IRA as fiduciaries in a wider array of advice relationships.

DATES: *Effective date:* The final rule is effective June 7, 2016.

Applicability date: April 10, 2017. As discussed more fully below, the Department of Labor (Department or DOL) has determined that, in light of the importance of the final rule's consumer protections and the significance of the continuing monetary harm to retirement investors without the rule's changes, an applicability date of April 10, 2017, is adequate time for plans and their affected financial services and other service providers to adjust to the basic change from non-fiduciary to fiduciary status. The Department has also decided to delay the application of certain requirements of certain of the exemptions being finalized with this rule. That action, described in more detail in the final exemptions published elsewhere in this issue of the **Federal Register**, will allow firms and advisers to benefit from the relevant exemptions without having to meet all of the exemptions' requirements for a limited time.

FOR FURTHER INFORMATION CONTACT: For Questions Regarding the Final Rule: Contact Luisa Grillo-Chope, Office of Regulations and Interpretations, Employee Benefits Security Administration (EBSA), (202) 693–8825. (Not a toll-free number). For Questions Regarding the Final Prohibited Transaction Exemptions: Contact Karen Lloyd, Office of Exemption Determinations, EBSA, 202–693–8824. (Not a toll free number). For Questions Regarding the Regulatory Impact Analysis: Contact G. Christopher Cosby, Office of Policy and Research, EBSA, 202–693–8425. (Not a toll-free number).

SUPPLEMENTARY INFORMATION:

I. Executive Summary

A. Purpose of the Regulatory Action

Under ERISA and the Code, a person is a fiduciary to a plan or IRA to the extent that the person engages in specified plan activities, including rendering ''investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan . . . [.]'' ERISA safeguards plan participants by imposing trust law standards of care and undivided loyalty on plan fiduciaries, and by holding fiduciaries accountable when they breach those obligations. In addition, fiduciaries to plans and IRAs are not permitted to engage in ''prohibited transactions,'' which pose special dangers to the security of retirement, health, and other benefit plans because of fiduciaries' conflicts of interest with respect to the transactions. Under this regulatory structure, fiduciary status and responsibilities are central to protecting the public interest in the integrity of retirement and other important benefits, many of which are tax-favored.

In 1975, the Department issued regulations that significantly narrowed the breadth of the statutory definition of fiduciary investment advice by creating a five-part test that must, in each instance, be satisfied before a person can be treated as a fiduciary adviser. This regulatory definition applies to both ERISA and the Code. The Department created the five-part test in a very different context and investment advice marketplace. The 1975 regulation was adopted prior to the existence of participant-directed 401(k) plans, the widespread use of IRAs, and the now commonplace rollover of plan assets from ERISA-protected plans to IRAs. Today, as a result of the five-part test, many investment professionals, consultants, and advisers [1] have no obligation to adhere to ERISA's fiduciary standards or to the prohibited transaction rules, despite the critical role they play in guiding plan and IRA investments. Under ERISA and the Code, if these advisers are not fiduciaries, they may operate with conflicts of interest that they need not disclose and have limited liability under federal pension law for any harms resulting from the advice they provide. Non-fiduciaries may give imprudent and disloyal advice; steer plans and IRA owners to investments based on their own, rather than their customers' financial interests; and act on conflicts of interest in ways that would be prohibited if the same persons were fiduciaries. In light of the breadth and intent of ERISA and the Code's statutory definition, the growth of participant-directed investment arrangements and IRAs, and the need for plans and IRA owners to seek out and rely on sophisticated financial advisers to make critical investment decisions in an increasingly complex financial marketplace, the Department believes it is appropriate to revisit its 1975 regulatory definition as well as the Code's virtually identical regulation. With this regulatory action, the Department will replace the 1975 regulations with a definition of fiduciary investment advice that better reflects the broad scope of the statutory text and its purposes and better protects plans, participants, beneficiaries, and IRA owners from conflicts of interest, imprudence, and disloyalty.

The Department has also sought to preserve beneficial business models for delivery of investment advice by separately publishing new exemptions from ERISA's prohibited transaction rules that would broadly permit firms to continue to receive many common types of fees, as long as they are willing to adhere to applicable standards aimed at ensuring that their advice is impartial and in the best interest of their customers. Rather than create a highly prescriptive set of transaction-specific exemptions, the Department instead is publishing exemptions that flexibly accommodate a wide range of current types of compensation practices, while minimizing the harmful impact of conflicts of interest on the quality of advice.

In particular, the Department is publishing a new exemption (the ''Best Interest Contract Exemption'') that would provide conditional relief for common compensation, such as commissions and revenue sharing, that an adviser and the adviser's employing firm might receive in connection with

[1] By using the term ''adviser,'' the Department does not intend to refer only to investment advisers registered under the Investment Advisers Act of 1940 or under state law. For example, as used herein, an adviser can be an individual or entity who is, among other things, a representative of a registered investment adviser, a bank or similar financial institution, an insurance company, or a broker-dealer.

investment advice to retail retirement investors.[2]

In order to protect the interests of the plan participants and beneficiaries, IRA owners, and plan fiduciaries, the exemption requires the Financial Institution to acknowledge fiduciary status for itself and its Advisers. The Financial Institutions and Advisers must adhere to basic standards of impartial conduct. In particular, under this standards-based approach, the Adviser and Financial Institution must give prudent advice that is in the customer's best interest, avoid misleading statements, and receive no more than reasonable compensation. Additionally, Financial Institutions generally must adopt policies and procedures reasonably designed to mitigate any harmful impact of conflicts of interest, and disclose basic information about their conflicts of interest and the cost of their advice. Level Fee Fiduciaries that receive only a level fee in connection with advisory or investment management services are subject to more streamlined conditions, including a written statement of fiduciary status, compliance with the standards of impartial conduct, and, as applicable, documentation of the specific reason or reasons for the recommendation of the Level Fee arrangements.

If advice is provided to an IRA investor or a non-ERISA plan, the Financial Institution must set forth the standards of fiduciary conduct and fair dealing in an enforceable contract with the investor. The contract creates a mechanism for IRA investors to enforce their rights and ensures that they will have a remedy for advice that does not honor their best interest. In this way, the contract gives both the individual adviser and the financial institution a powerful incentive to ensure advice is provided in accordance with fiduciary norms, or risk litigation, including class litigation, and liability and associated reputational risk.

This principles-based approach aligns the adviser's interests with those of the plan participant or IRA owner, while leaving the individual adviser and employing firm with the flexibility and discretion necessary to determine how best to satisfy these basic standards in light of the unique attributes of their business. The Department is similarly publishing amendments to existing exemptions for a wide range of fiduciary advisers to ensure adherence to these basic standards of fiduciary conduct. In addition, the Department is publishing a new exemption for ''principal transactions'' in which advisers sell certain investments to plans and IRAs out of their own inventory, as well as an amendment to an existing exemption that would permit advisers to receive compensation for extending credit to plans or IRAs to avoid failed securities transactions.

This broad regulatory package aims to require advisers and their firms to give advice that is in the best interest of their customers, without prohibiting common compensation arrangements by allowing such arrangements under conditions designed to ensure the adviser is acting in accordance with fiduciary norms and basic standards of fair dealing. The new exemptions and amendments to existing exemptions are published elsewhere in today's edition of the **Federal Register**.

Some comments urged the Department to publish yet another proposal before moving to publish a final rule. As noted elsewhere, the proposal published in the **Federal Register** on April 20, 2015 (2015 Proposal)[3] benefitted from comments received on an earlier proposal issued in 2010 (2010 Proposal),[4] and this final rule reflects the Department's careful consideration of the extensive comments received on the 2015 Proposal. The Department believes that the changes it has made in response to those comments are consistent with reasonable expectations of the affected parties and, together with the prohibited transaction exemptions being finalized with this rule, strike an appropriate balance in addressing the need to modernize the fiduciary rule with the various stakeholder interests. As a result, the Department does not believe a third proposal and comment period is necessary. To the contrary, after careful consideration of the public comments and in light of the importance of the final rule's consumer protections and the significance of the continuing monetary harm to retirement investors without the rule's changes, the Department has determined that it is important for the final rule to become effective on the earliest possible date. Making the rule effective will provide certainty to plans, plan fiduciaries, plan participants and beneficiaries, IRAs, and IRA owners that the new protections afforded by the final rule are now officially part of the law and regulations governing their investment advice providers. Similarly, the financial services providers and other affected service providers will also have certainty that the rule is final and that will remove uncertainty as an obstacle to allocating capital and resources toward transition and longer term compliance adjustments to systems and business practices.

To the extent the public comments were based on concerns about compliance and interpretive issues arising after publication of the final rule, the Department fully intends to support advisers, plan sponsors and fiduciaries, and other affected parties with extensive compliance assistance activities. The Department routinely provides such assistance following its issuance of highly technical or significant guidance. For example, the Department's compliance assistance Web page, at *http://www.dol.gov/ebsa/compliance_assistance.html,* provides a variety of tools, including compliance guides, tips, and fact sheets, to assist parties in satisfying their ERISA obligations. Recently, the Department added broad assistance for regulated parties on the Affordable Care Act regulations, at *www.dol.gov/ebsa/healthreform/.* The Department also intends to be accessible to affected parties who wish to contact the Department with individual questions about the final rule. For example, this final rule specifically provides directions on contacting the Department for further information about the final rule. See ''For Further Information Contact'' at the beginning of this Notice. Although the Department expects advisers and firms to make reasonable and good faith efforts to comply with the rule and applicable exemptions, the Department expects to initially emphasize these sorts of compliance assistance activities as opposed to using investigations and enforcement actions as a primary implementation tool as employee benefit plans, plan sponsors, plan fiduciaries, advisers, firms and other affected parties make the transition to the new regulatory regime.

B. Summary of the Major Provisions of the Final Rule

After careful consideration of the issues raised by the written comments and hearing testimony and the extensive public record, the Department is adopting the final rule contained herein.[5] The final rule contains modifications to the 2015 Proposal to address comments seeking clarification

[2] For purposes of the exemption, retail investors generally include individual plan participants and beneficiaries, IRA owners, and plan fiduciaries not described in section 2510.3–21(c)(1)(i) of this rule (banks, insurance carriers, registered investment advisers, broker-dealers, or independent fiduciaries that hold, manage, or control $50 million or more).

[3] 80 FR 21928 (Apr. 20, 2015).

[4] 75 FR 65263 (Oct. 22, 2010).

[5] ''Comments'' and ''commenters'' as used in this Notice generally include written comments, petitions and hearing testimony.

of certain provisions in the proposal and delineating the differences between the final rule's operation in the plan and IRA markets. The final rule amends the regulatory definition of fiduciary investment advice in 29 CFR 2510.3–21 (1975) to replace the restrictive five-part test with a new definition that better comports with the statutory language in ERISA and the Code.[6] Similar to the proposal, the final rule first describes the kinds of communications that would constitute investment advice and then describes the types of relationships in which such communications give rise to fiduciary investment advice responsibilities.

Specifically, paragraph (a)(1) of the final rule provides that person(s) render investment advice if they provide for a fee or other compensation, direct or indirect, certain categories or types of advice. The listed types of advice are—

- A recommendation as to the advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property, or a recommendation as to how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred, or distributed from the plan or IRA.
- A recommendation as to the management of securities or other investment property, including, among other things, recommendations on investment policies or strategies, portfolio composition, selection of other persons to provide investment advice or investment management services, selection of investment account arrangements (*e.g.,* brokerage versus advisory); or recommendations with respect to rollovers, distributions, or transfers from a plan or IRA, including whether, in what amount, in what form, and to what destination such a rollover, transfer or distribution should be made.

Paragraph (a)(2) establishes the types of relationships that must exist for such recommendations to give rise to fiduciary investment advice responsibilities. The rule covers: Recommendations by person(s) who represent or acknowledge that they are acting as a fiduciary within the meaning of 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 advice recipient; and recommendations directed to a specific advice recipient or recipients regarding the advisability of a particular investment or management decision with respect to securities or other investment property of the plan or IRA.

Paragraph (b)(1) describes when a communication, based on its context, content, and presentation, would be viewed as a ''recommendation,'' a fundamental element in establishing the existence of fiduciary investment advice. Paragraph (b)(1) provides that ''recommendation'' means a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action. The determination of whether a ''recommendation'' has been made is an objective rather than subjective inquiry. In addition, the more individually tailored the communication is to a specific advice recipient or recipients about, for example, a security, investment property, or investment strategy, the more likely the communication will be viewed as a recommendation. Providing a selective list of securities as appropriate for an advice recipient would be a recommendation as to the advisability of acquiring securities even if no recommendation is made with respect to any one security. Furthermore, a series of actions, directly or indirectly (*e.g.,* through or together with any affiliate), that may not constitute recommendations when viewed individually may amount to a recommendation when considered in the aggregate. It also makes no difference whether the communication was initiated by a person or a computer software program.

Paragraph (b)(2) sets forth non-exhaustive examples of certain types of communications which generally are not ''recommendations'' under that definition and, therefore, are not fiduciary communications. Although the proposal classified these examples as ''carve-outs'' from the scope of the fiduciary definition, they are better understood as specific examples of communications that are non-fiduciary because they fall short of constituting ''recommendations.'' The paragraph describes general communications and commentaries on investment products such as financial newsletters, which, with certain modifications, were identified as carve-outs under paragraph (b) of the 2015 Proposal, certain activities and communications in connection with marketing or making available a platform of investment alternatives that a plan fiduciary could choose from, and the provision of information and materials that constitute investment education or retirement education. With respect to investment education in particular, the final rule expressly describes in detail four broad categories of non-fiduciary educational information and materials, including (A) plan information, (B) general financial, investment, and retirement information, (C) asset allocation models, and (D) interactive investment materials. Additionally, in response to comments on the proposal, the final rule allows educational asset allocation models and interactive investment materials provided to participants and beneficiaries in plans to reference specific investment alternatives under conditions designed to ensure the communications are presented as hypothetical examples that help participants and beneficiaries understand the educational information and not as investment recommendations. The rule does not, however, create such a broad safe harbor from fiduciary status for such ''hypothetical'' examples in the IRA context for reasons described below.

Paragraph (c) describes and clarifies conduct and activities that the Department determined should not be considered investment advice activity, even if the communications meet the regulation's definition of ''recommendation'' and satisfy the criteria established by paragraph (a). As noted in the proposal, the regulation's general definition of investment advice, like the statute, sweeps broadly, avoiding the weaknesses of the 1975 regulation. At the same time, however, as the Department acknowledged in the proposal, the broad test could sweep in some relationships that are not appropriately regarded as fiduciary in nature and that the Department does not believe Congress intended to cover as fiduciary relationships. Thus, included in paragraph (c) is a revised version of the ''counterparty'' carve-out from the proposal that excludes from fiduciary investment advice communications in arm's length transactions with certain plan fiduciaries who are licensed financial professionals (broker-dealers, registered investment advisers, banks, insurance companies, etc.) or plan fiduciaries who have at least $50 million under management. Other exclusions in the final rule include a revised version of the swap transaction carve-out in the proposal, and an expanded version of the carve-out in the proposal for plan sponsor employees.

Because the proposal referred to all of the instances of non-fiduciary communications set forth in (b)(2) and

[6] For purposes of readability, this rulemaking republishes 29 CFR 2510.3–21 in its entirety, as revised, rather than only the specific amendments to this section.

(c) as ''carve-outs,'' regardless of whether the communications would have involved covered recommendations even in the absence of a carve-out, a number of commenters found the use of the term confusing. In particular, they worried that the provisions could be read to create an implication that any communication that did not technically meet the conditions of a specific carve-out would automatically meet the definition of investment advice. This was not the Department's intention, however, and the Department no longer uses the term ''carve-out'' in the final regulation. Even if a particular communication does not fall within any of the examples and exclusions set forth in (b)(2) and (c), it will be treated as a fiduciary communication only if it is an investment ''recommendation'' of the sort described in paragraphs (a) and (b)(1). All of the provisions in paragraphs (b) and (c) continue to be subject to conditions designed to draw an appropriate line between fiduciary and non-fiduciary communications and activities, consistent with the statutory text and purpose.

Except for minor clarifying changes, paragraph (d)'s description of the scope of the investment advice fiduciary duty, and paragraph (e) regarding the mere execution of a securities transaction at the direction of a plan or IRA owner, remained mostly unchanged from the 1975 regulation. Paragraph (f) also remains unchanged from the two prior proposals and articulates the application of the final rule to the parallel definitions in the prohibited transaction provisions of Code section 4975. Paragraph (g) includes definitions. Paragraph (h) describes the effective and applicability dates associated with the final rule, and paragraph (i) includes an express provision acknowledging the savings clause in ERISA section 514(b)(2)(A) for state insurance, banking, or securities laws.

In the Department's view, this structure is faithful to the remedial purpose of the statute, but avoids burdening activities that do not implicate relationships of trust.

As noted elsewhere, in addition to the final rule in this Notice, the Department is simultaneously publishing a new Best Interest Contract Exemption and a new Exemption for Principal Transactions, and revising other exemptions from the prohibited transaction rules of ERISA and the Code.

C. Benefit-Cost Assessment

Tax-preferred retirement savings, in the form of private-sector, employer-sponsored retirement plans, such as 401(k) plans, and IRAs, are critical to the retirement security of most U.S. workers. Investment professionals play an important role in guiding their investment decisions. However, these professional advisers often are compensated in ways that create conflicts of interest, which can bias the investment advice that some render and erode plan and IRA investment results.

Since the Department issued its 1975 rule, the retirement savings market has changed profoundly. Individuals, rather than large employers, are increasingly responsible for their investment decisions as IRAs and 401(k)-type defined contribution plans have supplanted defined benefit pensions as the primary means of providing retirement security. Financial products are increasingly varied and complex. Retail investors now confront myriad choices of how and where to invest, many of which did not exist or were uncommon in 1975. These include, for example, market-tracking, passively managed and so-called ''target-date'' mutual funds; exchange traded funds (ETFs) (which may be leveraged to multiply market exposure); hedge funds; private equity funds; real estate investment trusts (both traded and non-traded); various structured debt instruments; insurance products that offer menus of direct or formulaic market exposures and guarantees from which consumers can choose; and an extensive array of derivatives and other alternative investments. These choices 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. Many of these products are marketed directly to retail investors via email, Web site pop-ups, mail, and telephone. All of this creates the opportunity for retail investors to construct and pursue financial strategies closely tailored to their unique circumstances—but also sows confusion and increases the potential for very costly mistakes.

Plan participants and IRA owners often lack investment expertise and must rely on experts—but are unable to assess the quality of the expert's advice or guard against conflicts of interest. Most have no idea how advisers are compensated for selling them products. Many are bewildered by complex choices that require substantial financial expertise and welcome advice that appears to be free, without knowing that the adviser is compensated through indirect third-party payments creating conflicts of interest or that opaque fees over the life of the investment will reduce their returns. The consequences are growing as baby boomers retire and move money from plans, where their employer has both the incentive and the fiduciary duty to facilitate sound investment choices, to IRAs, where both good and bad investment choices are more numerous and much advice is conflicted. These rollovers are expected to approach $2.4 trillion cumulatively from 2016 through 2020.[7] Because advice on rollovers is usually one-time and not ''on a regular basis,'' it is often not covered by the 1975 standard, even though rollovers commonly involve the most important financial decisions that investors make in their lifetime. An ERISA plan investor who rolls her retirement savings into an IRA could lose 6 to 12 and possibly as much as 23 percent of the value of her savings over 30 years of retirement by accepting advice from a conflicted financial adviser.[8] Timely regulatory action to redress advisers' conflicts is warranted to avert such losses.

In the retail IRA marketplace, growing consumer demand for personalized advice, together with competition from online discount brokerage firms, has pushed brokers to offer more comprehensive guidance services rather than just transaction support. Unfortunately, their traditional compensation sources—such as brokerage commissions, revenue shared by mutual funds and funds' asset managers, and mark-ups on bonds sold from their own inventory—can introduce acute conflicts of interest. What is presented to an IRA owner as trusted advice is often paid for by a financial product vendor in the form of a sales commission or shelf-space fee, without adequate counter-balancing consumer protections to ensure that the advice is in the investor's best interest.

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

[8] 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 Regulatory Impact Analysis, comments on the 2015 NPRM Regulatory Impact Analysis, and testimony at the DOL 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. For details, see U.S. Department of Labor, Fiduciary Investment Advice Regulatory Impact Analysis, (2016), Section 3.2.4 at *www.dol.gov/ebsa.*

Likewise in the plan market, pension consultants and advisers that plan sponsors rely on to guide their decisions often avoid fiduciary status under the five-part test in the 1975 regulation, while receiving conflicted payments. Many advisers do put their customers' best interest first and there are many good practices in the industry. But the balance of research and evidence indicates the aggregate harm from the cases in which consumers receive bad advice based on conflicts of interest is large.

As part of the 2015 Proposal, the Department conducted an in-depth economic assessment of current market conditions and the likely effects of reform and conducted and published a detailed regulatory impact analysis, U.S. Department of Labor, Fiduciary Investment Advice Regulatory Impact Analysis, (Apr. 2015), pursuant to Executive Order 12866 and other applicable authorities. That analysis examined a broad range of evidence, including public comments on the 2010 Proposal; a growing body of empirical, peer-reviewed, academic research into the effect of conflicts of interest in advisory relationships; a recent study conducted by the Council of Economic Advisers, The Effects of Conflicted Investment Advice on Retirement Savings (Feb. 2015), at *www.whitehouse.gov/sites/default/files/docs/cea_coi_report_final.pdf;* and some other countries' early experience with related reform efforts, among other sources. Taken together, the evidence demonstrated that advisory conflicts are costly to retail and plan investors.

The Department's regulatory impact analysis of its final rulemaking finds that conflicted advice is widespread, causing serious harm to plan and IRA investors, and that disclosing conflicts alone would fail to adequately mitigate the conflicts or remedy the harm. By extending fiduciary status to more advice and providing flexible and protective PTEs that apply to a broad array of compensation arrangements, the final rule and exemptions will mitigate conflicts, support consumer choice, and deliver substantial gains for retirement investors and economic benefits that more than justify its costs.

Advisers' conflicts of interest take a variety of forms and can bias their advice in a variety of ways. For example, advisers and their affiliates often profit more when investors select some mutual funds or insurance products rather than others, or engage in larger or more frequent transactions. Advisers can capture varying price spreads from principal transactions and product providers reap different amounts of revenue from the sale of different proprietary products. Adviser compensation arrangements, which often are calibrated to align their interests with those of their affiliates and product suppliers, often introduce serious conflicts of interest between advisers and retirement investors. Advisers often are paid substantially more if they recommend investments and transactions that are highly profitable to the financial industry, even if they are not in investors' best interests. These financial incentives sometimes bias the advisers' recommendations. Many advisers do not provide biased advice, but the harm to investors from those that do can be large in many instances and is large on aggregate.

Following such biased advice can inflict losses on investors in several ways. They may choose more expensive and/or poorer performing investments. They may trade too much and thereby incur excessive transaction costs. They may chase returns and incur more costly timing errors, which are a common consequence of chasing returns.

A wide body of economic evidence supports the Department's finding that the impact of these conflicts of interest on retirement investment outcomes is large and negative. The supporting evidence includes, among other things, statistical comparisons of investment performance in more and less conflicted investment channels, experimental and audit studies, government reports documenting abuse, and economic theory on the dangers posed by conflicts of interest and by the asymmetries of information and expertise that characterize interactions between ordinary retirement investors and conflicted advisers. In addition, the Department conducted its own analysis of mutual fund performance across investment channels and within variable annuity sub-accounts, producing results broadly consistent with the academic literature.

A careful review of the evidence, which consistently points to a substantial failure of the market for retirement advice, suggests that IRA holders receiving conflicted investment advice can expect their investments to underperform by an average of 50 to 100 basis points per year over the next 20 years. The underperformance associated with conflicts of interest—in the mutual funds segment alone—could cost IRA investors between $95 billion and $189 billion over the next 10 years and between $202 billion and $404 billion over the next 20 years.

While these expected losses are large, they represent only a portion of what retirement investors stand to lose as a result of adviser conflicts. The losses quantified immediately above pertain only to IRA investors' mutual fund investments, and with respect to these investments, reflect only one of multiple types of losses that conflicted advice produces. The estimate does not reflect expected losses from so-called timing errors, wherein investors invest and divest at inopportune times and underperform pure buy-and-hold strategies. Such errors can be especially costly. Good advice can help investors avoid such errors, for example, by reducing panic-selling during large and abrupt downturns. But conflicted advisers often profit when investors choose actively managed funds whose deviation from market results (*i.e.,* positive and negative ''alpha'') can magnify investors' natural tendency to trade more and ''chase returns,'' an activity that tends to produce serious timing errors. There is some evidence that adviser conflicts do in fact magnify timing errors.

The quantified losses also omit losses that adviser conflicts produce in connection with IRA investments other than mutual funds. Many other products, including various annuity products, among others, involve similar or larger adviser conflicts, and these conflicts are often equally or more opaque. Many of these same products exhibit similar or greater degrees of complexity, magnifying both investors' need for good advice and their vulnerability to biased advice. As with mutual funds, advisers may steer investors to products that are inferior to, or costlier than, similar available products, or to excessively complex or costly product types when simpler, more affordable product types would be appropriate. Finally, the quantified losses reflect only those suffered by retail IRA investors and not those incurred by plan investors, when there is evidence that the latter suffer losses as well. Data limitations impede quantification of all of these losses, but there is ample qualitative and in some cases empirical evidence that they occur and are large both in instance and on aggregate.

Disclosure alone has proven ineffective to mitigate conflicts in advice. Extensive research has demonstrated that most investors have little understanding of their advisers' conflicts of interest, and little awareness of what they are paying via indirect channels for the conflicted advice. Even if they understand the scope of the advisers' conflicts, many consumers are not financial experts and therefore, cannot distinguish good advice or investments from bad. The same gap in expertise that makes investment advice necessary and important frequently also prevents investors from recognizing bad advice or understanding advisers' disclosures. Some research suggests that even if disclosure about conflicts could be made simple and clear, it could be ineffective—or even harmful.

This final rule and exemptions aim to ensure that advice is in consumers' best interest, thereby rooting out excessive fees and substandard performance otherwise attributable to advisers' conflicts, producing gains for retirement investors. Delivering these gains will entail some compliance costs,—mostly, the cost incurred by new fiduciary advisers to avoid prohibited transactions and/or satisfy relevant PTE conditions—but the Department has attempted to minimize compliance costs while maintaining an enforceable best interest standard.

The Department expects compliance with the final rule and exemptions to deliver large gains for retirement investors by reducing, over time, the losses identified above. Because of data limitations, as with the losses themselves, only a portion of the expected gains are quantified in this analysis. The Department's quantitative estimate of investor gains from the final rule and exemptions takes into account only one type of adviser conflict: the conflict that arises from variation in the share of front-end loads that advisers receive when selling different mutual funds that charge such loads to IRA investors. Published research provides evidence that this conflict erodes investors' returns. The Department estimates that the final rule and exemptions, by mitigating this particular type of adviser conflict, will produce gains to IRA investors worth between $33 billion and $36 billion over 10 years and between $66 and $76 billion over 20 years.

These quantified potential gains do not include additional potentially large, expected gains to IRA investors resulting from reducing or eliminating the effects of conflicts in IRA advice on financial products other than front-end-load mutual funds or the effect of conflicts on advice to plan investors on any financial products. Moreover, in addition to mitigating adviser conflicts, the final rule and exemptions raise adviser conduct standards, potentially yielding additional gains for both IRA and plan investors. The total gains to retirement investors thus are likely to be substantially larger than these particular, quantified gains alone.

The final exemptions include strong protections calibrated to ensure that adviser conflicts are fully mitigated such that advice is impartial. If, however, advisers' impartiality is sometimes compromised, gains to retirement investors consequently will be reduced correspondingly.

The Department estimates that the cost to comply with the final rule and exemptions will be between $10.0 billion and $31.5 billion over 10 years with a primary estimate of $16.1 billion, mostly reflecting the cost incurred by affected fiduciary advisers to satisfy relevant consumer-protective PTE conditions. Costs generally are estimated to be front-loaded, reflecting a substantial amount of one-time, start-up costs. The Department's primary 10-year cost estimate of $16.1 billion reflects the present value of $5.0 billion in first-year costs and $1.5 billion in subsequent annual costs. These estimates account for start-up costs in the first year following the final regulation's and exemptions' initial applicability. The Department understands that in practice some portion of these start-up costs may be incurred in advance of or after that year. These cost estimates may be overstated insofar as they generally do not take into account potential cost savings from technological innovations and market adjustments that favor lower-cost models. They may be understated insofar as they do not account for frictions that may be associated with such innovations and adjustments.

Just as with IRAs, there is evidence that conflicts of interest in the investment advice market also erode the retirement savings of plan participants and beneficiaries. For example, the U.S. Government Accountability Office (GAO) found that defined benefit pension plans using consultants with undisclosed conflicts of interest earned 1.3 percentage points per year less than other plans. Other GAO reports have found that adviser conflicts may cause plan participants to roll plan assets into IRAs that charge high fees or 401(k) plan officials to include expensive or underperforming funds in investment menus. A number of academic studies find that 401(k) plan investment options underperform the market, and at least one study attributes such underperformance to excessive reliance on funds that are proprietary to plan service providers who may be providing investment advice to plan officials that choose the investment options.

The final rule and exemptions' positive effects are expected to extend well beyond improved investment results for retirement investors. The IRA and plan markets for fiduciary advice and other services may become more efficient as a result of more transparent pricing and greater certainty about the fiduciary status of advisers and about the impartiality of their advice. There may be benefits from the increased flexibility that the final rule and related exemptions will provide with respect to fiduciary investment advice currently falling within the ambit of the 1975 regulation. The final rule's defined boundaries between fiduciary advice, education, and sales activity directed at independent fiduciaries with financial expertise may bring greater clarity to the IRA and plan services markets. Innovation in new advice business models, including technology-driven models, may be accelerated, and nudged away from conflicts and toward transparency, thereby promoting healthy competition in the fiduciary advice market.

A major expected positive effect of the final rule and exemptions in the plan advice market is improved compliance and the associated improved security of ERISA plan assets and benefits. Clarity about advisers' fiduciary status will strengthen the Department's ability to quickly and fully correct ERISA violations, while strengthening deterrence.

A large part of retirement investors' gains from the final rule and exemptions represents improvements in overall social welfare, as some resources heretofore consumed inefficiently in the provision of financial products and services are freed for more valuable uses. The remainder of the projected gains reflects transfers of existing economic surplus to retirement investors, primarily from the financial industry. Both the social welfare gains and the distributional effects can promote retirement security, and the distributional effects more fairly allocate a larger portion of the returns on retirement investors' capital to the investors themselves. Because quantified and additional unquantified investor gains from the final rule and exemptions comprise both welfare gains and transfers, they cannot be netted against estimated compliance costs to produce an estimate of net social welfare gains. Rather, in this case, the Department concludes that the final rule and exemptions' positive social welfare and distributional effects together justify their cost.

A number of comments on the Department's 2015 Proposal, including those from consumer advocates, some independent researchers, and some independent financial advisers, largely endorsed its accompanying impact analysis, affirming that adviser conflicts cause avoidable harm and that the proposal would deliver gains for retirement investors that more than justify compliance costs, with minimal or no unintended adverse consequences. In contrast, many other comments, including those from most of the financial industry (generally excepting only comments from independent financial advisers), strongly criticized the Department's analysis and conclusions. These comments collectively argued that the Department's evidence was weak, that its estimates of conflicts' negative effects and the proposal's benefits were overstated, that its compliance cost estimates were understated, and that it failed to anticipate predictable adverse consequences including increases in the cost of advice and reductions in its availability to small investors, which the commenters said would depress saving and exacerbate rather than reduce investment mistakes. Some of these comments took the form of or were accompanied by research reports that collectively offered direct, sometimes technical critiques of the Department's analysis, or presented new data and analysis that challenged the Department's conclusions. The Department took these comments into account in developing this analysis of its final rule and exemptions. Many of these comments were grounded in practical operational concerns which the Department believes it has alleviated through revisions to the 2015 Proposal reflected in this final rule and exemptions. At the same time, however, many of the reports suffered from analytic weaknesses that undermined the credibility of some of their conclusions.

Many comments anticipating sharp increases in the cost of advice neglected the costs currently attributable to conflicted advice including, for example, indirect fees. Many exaggerated the negative impacts (and neglected the positive impacts) of recent overseas reforms and/or the similarity of such reforms to the 2015 Proposal. Many implicitly and without support assumed rigidity in existing business models, service levels, compensation structures, and/or pricing levels, neglecting the demonstrated existence of low-cost solutions and potential for investor-friendly market adjustments. Many that predicted that only wealthier investors would be served appeared to neglect the possibility that once the fixed costs of serving wealthier investors was defrayed, only the relatively small marginal cost of serving smaller investors would remain for affected firms to bear in order to serve these consumers.

The Department expects that, subject to some short-term frictions as markets adjust, investment advice will continue to be readily available when the final rule and exemptions are applicable, owing to both flexibilities built into the final rule and exemptions and to the conditions and dynamics currently evident in relevant markets, Moreover, recent experience in the United Kingdom suggests that potential gaps in markets for financial advice are driven mostly by factors independent of reforms to mitigate adviser conflicts. Commenters' conclusions that stem from an assumption that advice will be unavailable therefore are of limited relevance to this analysis. Nonetheless, the Department notes that these commenters' claims about the consequences of the rule would still be overstated even if the availability of advice were to decrease. Many commenters arguing that costlier advice will compromise saving exaggerated their case by presenting mere correlation (wealth and advisory services are found together) as evidence that advice causes large increases in saving. Some wrongly implied that earlier Department estimates of the potential for fiduciary advice to reduce retirement investment errors—when accompanied by very strong anti-conflict consumer protections—constituted an acknowledgement that conflicted advice yields large net benefits.

The negative comments that offered their own original analysis, and whose conclusions contradicted the Department's, also are generally unpersuasive on balance in the context of this present analysis. For example, these comments collectively neglected important factors such as indirect fees, made comparisons without adjusting for risk, relied on data that are likely to be unrepresentative, failed to distinguish conflicted from independent advice, and/or presented as evidence median results when the problems targeted by the 2015 Proposal and the proposal's expected benefits are likely to be concentrated on one side of the distribution's median.

In light of the Department's analysis, its careful consideration of the comments, and responsive revisions made to the 2015 Proposal, the Department stands by its analysis and conclusions that adviser conflicts are inflicting large, avoidable losses on retirement investors, that appropriate, strong reforms are necessary, and that compliance with this final rule and exemptions can be expected to deliver large net gains to retirement investors. The Department does not anticipate the substantial, long-term unintended consequences predicted in the negative comments.

In conclusion, the Department's analysis indicates that the final rule and exemptions will mitigate adviser conflicts and thereby improve plan and IRA investment results, while avoiding greater than necessary disruption of existing business practices. The final rule and exemptions will deliver large gains to retirement investors, reflecting a combination of improvements in economic efficiency and worthwhile transfers to retirement investors from the financial industry, and a variety of other economic benefits, which, in the Department's view, will more than justify its costs.

The following accounting table summarizes the Department's conclusions:

TABLE I—PARTIAL GAINS TO INVESTORS AND COMPLIANCE COSTS ACCOUNTING TABLE

Category	Primary estimate	Low estimate	High estimate	Year dollar	Discount rate (%)	Period covered
Partial Gains to Investors (Includes Benefits and Transfers)						
Annualized	$3,420	$3,105	....	2016	7	April 2017–April 2027.
Monetized ($millions/year)	4,203	3,814	....	2016	3	April 2017–April 2027.

TABLE I—PARTIAL GAINS TO INVESTORS AND COMPLIANCE COSTS ACCOUNTING TABLE—Continued

Category	Primary estimate	Low estimate	High estimate	Year dollar	Discount rate (%)	Period covered
Gains to Investors Notes: The DOL expects the final rulemaking to deliver large gains for retirement investors. Because of limitations of the literature and other available evidence, only some of these gains can be quantified: up to $3.1 or $3.4 billion (annualized over Apr. 2017–Apr. 2027 with a 7 percent discount rate) or up to $3.8 or $4.2 billion (annualized over Apr. 2017–Apr. 2027 with a 3 percent discount rate). These estimates focus only on how load shares paid to brokers affect the size of loads IRA investors holding load funds pay and the returns they achieve. These estimates assume the rule will eliminate (rather than just reduce) underperformance associated with the practice of incentivizing broker recommendations through variable front-end-load sharing. If, however, the rule's effectiveness in reducing underperformance is substantially below 100 percent, these estimates may overstate these particular gains to investors in the front-end-load mutual fund segment of the IRA market. However, these estimates account for only a fraction of potential conflicts, associated losses, and affected retirement assets. The total gains to IRA investors attributable to the rule may be higher than the quantified gains alone for several reasons. For example, the proposal is expected to yield additional gains for IRA investors, including potential reductions in excessive trading and associated transaction costs and timing errors (such as might be associated with return chasing), improvements in the performance of IRA investments other than front-load mutual funds, and improvements in the performance of ERISA plan investments.						
The partial-gains-to-investors estimates include both economic efficiency benefits and transfers from the financial services industry to IRA holders.						
The partial gains estimates are discounted to April 2016.						
Compliance Costs						
Annualized	$1,960	$1,205	$3,847	2016	7	April 2017–April 2027.
Monetized ($millions/year)	1,893	1,172	3,692	2016	3	April 2017–April 2027.
Notes: The compliance costs of the final include the cost to BDs, Registered Investment Advisers, insurers, and other ERISA plan service providers for compliance reviews, comprehensive compliance and supervisory system changes, policies and procedures and training programs updates, insurance increases, disclosure preparation and distribution to comply with exemptions, and some costs of changes in other business practices. Compliance costs incurred by mutual funds or other asset providers have not been estimated.						
Insurance Premium Transfers						
Annualized	$73			2016	7	April 2017–April 2027.
Monetized ($millions/year)	73			2016	3	April 2017–April 2027.
From/To	From: Insured service providers without claims.			To: Insured service providers with claims—funded from a portion of the increased insurance premiums.		

II. RULEMAKING BACKGROUND

A. The Statute and Existing Regulation

ERISA is a comprehensive statute designed to protect the rights and interests of plan participants and beneficiaries, the integrity of employee benefit plans, and the security of retirement, health, and other critical benefits. The broad public interest in ERISA-covered plans is reflected in the Act's imposition of stringent fiduciary responsibilities on parties engaging in important plan activities, as well as in the tax-favored status of plan assets and investments. One of the chief ways in which ERISA protects employee benefit plans is by requiring that plan fiduciaries comply with fundamental obligations rooted in the law of trusts. In particular, plan fiduciaries must manage plan assets prudently and with undivided loyalty to the plans, their participants, and beneficiaries.[9] In addition, they must refrain from engaging in ''prohibited transactions,'' which the Act does not permit, absent an applicable statutory or administrative exemption, because of the dangers posed by the transactions that involve significant conflicts of interest.[10] Prohibited transactions include sales and exchanges between plans and parties with certain connections to the plan such as fiduciaries, other service providers, and employers of the plan's participants. They also specifically include self-dealing and other conflicted transactions involving plan fiduciaries. ERISA includes various exemptions from these provisions for certain types of transactions, and administrative exemptions on an individual or class basis may be granted if the Department finds the exemption to be in the interests of plan participants, protective of their rights, and administratively feasible.[11] When fiduciaries violate ERISA's fiduciary duties or the prohibited transaction rules, they may be held personally liable for any losses to the investor resulting from the breach.[12] Violations of the prohibited transaction rules are subject to excise taxes under the Code or civil penalties under ERISA.[13]

The Code also protects individuals who save for retirement through tax-favored accounts that are not generally covered by ERISA, such as IRAs, through a more limited regulation of fiduciary conduct. Although ERISA's statutory fiduciary obligations of prudence and loyalty do not govern the fiduciaries of IRAs and other plans not covered by ERISA, these fiduciaries are subject to prohibited transaction rules under the Code. The statutory exemptions in the Code apply and the Department of Labor has been given the statutory authority to grant administrative exemptions under the Code.[14] In this context, however, the sole statutory sanction for engaging in the illegal transactions is the assessment of an excise tax enforced by the Internal Revenue Service (IRS). Thus, unlike participants in plans covered by Title I of ERISA, IRA owners do not have a statutory right to bring suit against

[9] ERISA section 404(a).

[10] ERISA section 406 and Code section 4975.

[11] ERISA section 408 and Code section 4975.

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

[13] Code section 4975 and ERISA section 502(i).

[14] Under Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1, 92 Stat. 3790, the authority of the Secretary of the Treasury to issue regulations, rulings, opinions, and exemptions under section 4975 of the Code has been transferred, with certain exceptions not here relevant, to the Secretary of Labor.

fiduciaries under ERISA for violation of the prohibited transaction rules.

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

The statutory definition contained in section 3(21)(A) of ERISA deliberately casts a wide net in assigning fiduciary responsibility with respect to plan assets. Thus, ''any authority or control'' over plan assets is sufficient to confer fiduciary status, and any person who renders ''investment advice for a fee or other compensation, direct or indirect'' is an investment advice fiduciary, regardless of whether they have direct control over the plan's assets, and regardless of their status as an investment adviser or broker under the federal securities laws. The statutory definition and associated fiduciary responsibilities were enacted to ensure that plans can depend on persons who provide investment advice for a fee to make recommendations that are prudent, loyal, and untainted by conflicts of interest. In the absence of fiduciary status, persons who provide investment advice would neither be subject to ERISA's fundamental fiduciary standards, nor accountable under ERISA or the Code for imprudent, disloyal, or tainted advice, no matter how egregious the misconduct or how substantial the losses. Plans, individual participants and beneficiaries, and IRA owners often are not financial experts and consequently must rely on professional advice to make critical investment decisions. The broad statutory definition, prohibitions on conflicts of interest, and core fiduciary obligations of prudence and loyalty all reflect Congress' recognition in 1974 of the fundamental importance of such advice to protect savers' retirement nest eggs. In the years since then, the significance of financial advice has become still greater with increased reliance on participant-directed plans and self-directed IRAs for the provision of retirement benefits.

In 1975, the Department issued a regulation, at 29 CFR 2510.3–21(c), defining the circumstances under which a person is treated as providing ''investment advice'' to an employee benefit plan within the meaning of section 3(21)(A)(ii) of ERISA (the ''1975 regulation''), and the Department of the Treasury issued a virtually identical regulation under the Code.[15] The regulation narrowed the scope of the statutory definition of fiduciary investment advice by creating a five-part test that must be satisfied before a person can be treated as rendering investment advice for a fee. Under the regulation, for advice to constitute ''investment advice,'' an adviser who is not a fiduciary under another provision of the statute must—(1) render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing, or selling securities or other property (2) on a regular basis (3) pursuant to a mutual agreement, arrangement, or understanding with the plan or a plan fiduciary that (4) the advice will serve as a primary basis for investment decisions with respect to plan assets, and that (5) the advice will be individualized based on the particular needs of the plan or IRA. The regulation provides that an adviser is a fiduciary with respect to any particular instance of advice only if he or she meets each and every element of the five-part test with respect to the particular advice recipient or plan at issue.

The market for retirement advice has changed dramatically since the Department promulgated the 1975 regulation. Perhaps the greatest change is the fact that individuals, rather than large employers and professional money managers, have become increasingly responsible for managing retirement assets as IRAs and participant-directed plans, such as 401(k) plans, have supplanted defined benefit pensions. In 1975, private-sector defined benefit pensions—mostly large, professionally managed funds—covered over 27 million active participants and held assets totaling almost $186 billion. This compared with just 11 million active participants in individual account defined contribution plans with assets of just $74 billion.[16] Moreover, the great majority of defined contribution plans at that time were professionally managed, not participant-directed. In 1975, 401(k) plans did not yet exist and IRAs had just been authorized as part of ERISA's enactment the prior year. In contrast, by 2013 defined benefit plans covered just over 15 million active participants, while individual account-based defined contribution plans covered nearly 77 million active participants—including about 63 million active participants in 401(k)-type plans that are at least partially participant-directed.[17] By 2013, 97 percent of 401(k) participants were responsible for directing the investment of all or part of their own account, up from 86 percent as recently as 1999.[18] Also, in mid-2015, more than 40 million households owned IRAs.[19] At the same time, the variety and complexity of financial products have increased, widening the information gap between advisers and their clients. Plan

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[15] The 1975 regulation provides in relevant part:

(c) Investment advice. (1) A person shall be deemed to be rendering ''investment advice'' to an employee benefit plan, within the meaning of section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974 (the Act) and this paragraph, only if:

(i) Such person renders advice to the plan as to the value of securities or other property, or makes recommendation as to the advisability of investing in, purchasing, or selling securities or other property; and

(ii) Such person either directly or indirectly (*e.g.,* through or together with any affiliate)—

(A) 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; or

(B) Renders any advice described in paragraph (c)(1)(i) of this section on a regular basis to the plan pursuant to a mutual agreement, arrangement or understanding, written or otherwise, between such person and the plan or a fiduciary with respect to the plan, that such services will serve as a primary basis for investment decisions with respect to plan assets, and that such person will render individualized investment advice to the plan based on the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments.

40 FR 50842 (Oct. 31, 1975). The Department of the Treasury issued a virtually identical regulation, at 26 CFR 54.4975–9(c), which interprets Code section 4975(e)(3). 40 FR 50840 (Oct. 31, 1975). Under section 102 of Reorganization Plan No. 4 of 1978, the authority of the Secretary of the Treasury to interpret section 4975 of the Code has been transferred, with certain exceptions not here relevant, to the Secretary of Labor. References in this document to sections of ERISA should be read to refer also to the corresponding sections of the Code.

[16] U.S. Department of Labor, *Private Pension Plan Bulletin Historical Tables and Graphs,* (Dec. 2014), at *http://www.dol.gov/ebsa/pdf/historicaltables.pdf.*

[17] U.S. Department of Labor, *Private Pension Plan Bulletin Abstract of 2013 Form 5500 Annual Reports,* (Sep. 2015), at *http://www.dol.gov/ebsa/pdf/2013pensionplanbulletin.pdf.*

[18] U.S. Department of Labor, *Private Pension Plan Bulletin Historical Tables and Graphs, 1975–2013,* (Sep. 2015), at *http://www.dol.gov/ebsa/pdf/historicaltables.pdf.*

[19] Holden, Sarah, and Daniel Schrass. *The Role of IRAs in US Households' Saving for Retirement, 2015.* ICI Research Perspective 22, no. 1 (Feb. 2016).

fiduciaries, plan participants, and IRA investors must often rely on experts for advice, but are often unable to assess the quality of the expert's advice or effectively guard against the adviser's conflicts of interest. This challenge is especially true of small retail investors who typically do not have financial expertise and can ill-afford lower returns to their retirement savings caused by conflicts. As baby boomers retire, they are increasingly moving money from ERISA-covered plans, where their employer has both the incentive and the fiduciary duty to facilitate sound investment choices, to IRAs where both good and bad investment choices are myriad and advice that is conflicted is commonplace. As noted above, these rollovers are expected to approach $2.4 trillion over the next 5 years. These trends were not apparent when the Department promulgated the 1975 rule.

These changes in the marketplace, as well as the Department's experience with the rule since 1975, support the Department's efforts to reevaluate and revise the rule through a public process of notice and comment rulemaking. As the marketplace for financial services has developed in the years since 1975, the five-part test now undermines, rather than promotes, the statute's text and purposes. The narrowness of the 1975 regulation allows advisers, brokers, consultants, and valuation firms to play a central role in shaping plan and IRA investments, without ensuring the accountability that Congress intended for persons having such influence and responsibility. Even when plan sponsors, participants, beneficiaries, and IRA owners clearly rely on paid advisers for impartial guidance, the regulation allows many advisers to avoid fiduciary status and disregard ERISA's fiduciary obligations of care and prohibitions on disloyal and conflicted transactions. As a consequence, these advisers can steer customers to investments based on their own self-interest (*e.g.,* products that generate higher fees for the adviser even if there are identical lower-fee products available), give imprudent advice, and engage in transactions that would otherwise be prohibited by ERISA and the Code without fear of accountability under either ERISA or the Code.

Instead of ensuring that trusted advisers give prudent and unbiased advice in accordance with fiduciary norms, the 1975 regulation erects a multi-part series of technical impediments to fiduciary responsibility. The Department is concerned that the specific elements of the five-part test—which are not found in the text of the Act or Code—work to frustrate statutory goals and defeat advice recipients' legitimate expectations. In light of the importance of the proper management of plan and IRA assets, it is critical that the regulation defining investment advice draws appropriate distinctions between the sorts of advice relationships that should be treated as fiduciary in nature and those that should not. The 1975 regulation does not do so. Instead, the lines drawn by the five-part test frequently permit evasion of fiduciary status and responsibility in ways that undermine the statutory text and purposes.

One example of the five-part test's shortcomings is the requirement that advice be furnished on a ''regular basis.'' As a result of the requirement, if a small plan hires an investment professional on a one-time basis for an investment recommendation on a large, complex investment, the adviser has no fiduciary obligation to the plan under ERISA. Even if the plan is considering investing all or substantially all of the plan's assets, lacks the specialized expertise necessary to evaluate the complex transaction on its own, and the consultant fully understands the plan's dependence on his professional judgment, the consultant is not a fiduciary because he does not advise the plan on a ''regular basis.'' The plan could be investing hundreds of millions of dollars in plan assets, and it could be the most critical investment decision the plan ever makes, but the adviser would have no fiduciary responsibility under the 1975 regulation. While a consultant who regularly makes less significant investment recommendations to the plan would be a fiduciary if he satisfies the other four prongs of the regulatory test, the one-time consultant on an enormous transaction has no fiduciary responsibility.

In such cases, the ''regular basis'' requirement, which is not found in the text of ERISA or the Code, fails to draw a sensible line between fiduciary and non-fiduciary conduct, and undermines the law's protective purposes. A specific example is the one-time purchase of a group annuity to cover all of the benefits promised to substantially all of a plan's participants for the rest of their lives when a defined benefit plan terminates or a plan's expenditure of hundreds of millions of dollars on a single real estate transaction with the assistance of a financial adviser hired for purposes of that one transaction. Despite the clear importance of the decisions and the clear reliance on paid advisers, the advisers would not be fiduciaries. On a smaller scale that is still immensely important for the affected individual, the ''regular basis'' requirement also deprives individual participants and IRA owners of statutory protection when they seek specialized advice on a one-time basis, even if the advice concerns the investment of all or substantially all of the assets held in their account (*e.g.,* as in the case of an annuity purchase or a rollover from a plan to an IRA or from one IRA to another).

Under the five-part test, fiduciary status can also be defeated by arguing that the parties did not have a *mutual* agreement, arrangement, or understanding that the advice would serve as a *primary basis* for investment decisions. Investment professionals in today's marketplace frequently market retirement investment services in ways that clearly suggest the provision of tailored or individualized advice, while at the same time disclaiming in fine print the requisite ''mutual'' understanding that the advice will be used as a primary basis for investment decisions.

Similarly, there appears to be a widespread belief among broker-dealers that they are not fiduciaries with respect to plans or IRAs because they do not hold themselves out as registered investment advisers, even though they often market their services as financial or retirement planners. The import of such disclaimers—and of the fine legal distinctions between brokers and registered investment advisers—is often completely lost on plan participants and IRA owners who receive investment advice. As shown in a study conducted by the RAND Institute for Civil Justice for the Securities and Exchange Commission (SEC), consumers often do not read the legal documents and do not understand the difference between brokers and registered investment advisers, particularly when brokers adopt such titles as ''financial adviser'' and ''financial manager.'' [20]

Even in the absence of boilerplate fine print disclaimers, however, it is far from evident how the ''primary basis'' element of the five-part test promotes the statutory text or purposes of ERISA and the Code. If, for example, a prudent plan fiduciary hires multiple specialized advisers for an especially complex transaction, it should be able to rely upon all of the consultants' advice,

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

regardless of whether one could characterize any particular consultant's advice as primary, secondary, or tertiary. Presumably, paid consultants make recommendations—and retirement investors seek their assistance—with the hope or expectation that the recommendations could, in fact, be relied upon in making important decisions. When a plan, participant, beneficiary, or IRA owner directly or indirectly pays for advice upon which it can rely, there appears to be little statutory basis for drawing distinctions based on a subjective characterization of the advice as ''primary,'' ''secondary,'' or other.

In other respects, the current regulatory definition could also benefit from clarification. For example, a number of parties have argued that the regulation, as currently drafted, does not encompass paid advice as to the selection of money managers or mutual funds. Similarly, they have argued that the regulation does not cover advice given to the managers of pooled investment vehicles that hold plan assets contributed by many plans, as opposed to advice given to particular plans. Parties have even argued that advice was insufficiently ''individualized'' to fall within the scope of the regulation because the advice provider had failed to prudently consider the ''particular needs of the plan,'' notwithstanding the fact that both the advice provider and the plan agreed that individualized advice based on the plan's needs would be provided, and the adviser actually made specific investment recommendations to the plan. Although the Department disagrees with each of these interpretations of the 1975 regulation, the arguments nevertheless suggest that clarifying regulatory text would be helpful.

As noted above, changes in the financial marketplace have further enlarged the gap between the 1975 regulation's effect and the congressional intent as reflected in the statutory definition. With this transformation, plan participants, beneficiaries, and IRA owners have become major consumers of investment advice that is paid for directly or indirectly. Increasingly, important investment decisions have been left to inexpert plan participants and IRA owners who depend upon the financial expertise of their advisers, rather than professional money managers who have the technical expertise to manage investments independently. In today's marketplace, many of the consultants and advisers who provide investment-related advice and recommendations receive compensation from the financial institutions whose investment products they recommend. This gives the consultants and advisers a strong reason, conscious or unconscious, to favor investments that provide them greater compensation rather than those that may be most appropriate for the participants. Unless they are fiduciaries, however, these consultants and advisers are free under ERISA and the Code, not only to receive such conflicted compensation, but also to act on their conflicts of interest to the detriment of their customers. In addition, plans, participants, beneficiaries, and IRA owners now have a much greater variety of investments to choose from, creating a greater need for expert advice. Consolidation of the financial services industry and innovations in compensation arrangements have multiplied the opportunities for self-dealing and reduced the transparency of fees.

The absence of adequate fiduciary protections and safeguards is especially problematic in light of the growth of participant-directed plans and self-directed IRAs, the gap in expertise and information between advisers and the customers who depend upon them for guidance, and the advisers' significant conflicts of interest.

When Congress enacted ERISA in 1974, it made a judgment that plan advisers should be subject to ERISA's fiduciary regime and that plan participants, beneficiaries, and IRA owners should be protected from conflicted transactions by the prohibited transaction rules. More fundamentally, however, the statutory language was designed to cover a much broader category of persons who provide fiduciary investment advice based on their functions and to limit their ability to engage in self-dealing and other conflicts of interest than is currently reflected in the 1975 regulation's five-part test. While many advisers are committed to providing high-quality advice and always put their customers' best interests first, the 1975 regulation makes it far too easy for advisers in today's marketplace not to do so and to avoid fiduciary responsibility even when they clearly purport to give individualized advice and to act in the client's best interest, rather than their own.

B. The 2010 Proposal

On October 22, 2010, the Department published the 2010 Proposal in the **Federal Register** that would have replaced the five-part test with a new definition of what counted as fiduciary investment advice for a fee. At that time, the Department did not propose any new prohibited transaction exemptions and acknowledged uncertainty regarding whether existing exemptions would be available, but specifically invited comments on whether new or amended exemptions should be proposed. The 2010 Proposal also provided exclusions or limitations for conduct that would not result in fiduciary status. The general definition included the following types of advice: (1) Appraisals or fairness opinions concerning the value of securities or other property; (2) recommendations as to the advisability of investing in, purchasing, holding or selling securities or other property; and (3) recommendations as to the management of securities or other property. Reflecting the Department's longstanding interpretation of the 1975 regulations, the 2010 Proposal made clear that investment advice under the proposal includes advice provided to plan participants, beneficiaries and IRA owners as well as to plan fiduciaries.

Under the 2010 Proposal, a paid adviser would have been treated as a fiduciary if the adviser provided one of the above types of advice and either: (1) Represented that he or she was acting as an ERISA fiduciary; (2) was already an ERISA fiduciary to the plan by virtue of having control over the management or disposition of plan assets, or by having discretionary authority over the administration of the plan; (3) was already an investment adviser under the Investment Advisers Act of 1940 (Advisers Act); or (4) provided the advice pursuant to an agreement, arrangement or understanding that the advice may be considered in connection with plan investment or asset management decisions and would be individualized to the needs of the plan, plan participant or beneficiary, or IRA owner. The 2010 Proposal also provided that, for purposes of the fiduciary definition, relevant fees included any direct or indirect fees received by the adviser or an affiliate from any source. Direct fees are payments made by the advice recipient to the adviser including transaction-based fees, such as brokerage, mutual fund or insurance sales commissions. Indirect fees are payments to the adviser from any source other than the advice recipient such as revenue sharing payments with respect to a mutual fund.

The 2010 Proposal included specific provisions for the following actions that the Department believed should not result in fiduciary status. In particular, a person would not have become a fiduciary by—

1. Providing recommendations as a seller or purchaser with interests adverse to the plan, its participants, or IRA owners, if the advice recipient reasonably should have known that the adviser was not providing impartial investment advice and the adviser had not acknowledged fiduciary status.

2. Providing investment education information and materials in connection with an individual account plan.

3. Marketing or making available a menu of investment alternatives that a plan fiduciary could choose from, and providing general financial information to assist in selecting and monitoring those investments, if these activities include a written disclosure that the adviser was not providing impartial investment advice.

4. Preparing reports necessary to comply with ERISA, the Code, or regulations or forms issued thereunder, unless the report valued assets that lack a generally recognized market, or served as a basis for making plan distributions.

The 2010 Proposal applied to the definition of an ''investment advice fiduciary'' in section 4975(e)(3)(B) of the Code as well as to the parallel ERISA definition. The 2010 Proposal, like this final rule, applies to both ERISA-covered plans and certain non-ERISA plans, such as individual retirement accounts.

In the preamble to the 2010 Proposal, the Department also noted that it had previously interpreted the 1975 regulation as providing that a recommendation to a plan participant on how to invest the proceeds of a contemplated plan distribution was not fiduciary investment advice. Advisory Opinion 2005–23A (Dec. 7, 2005). The Department specifically asked for comments as to whether the final rule should cover such recommendations as fiduciary advice.

The Department made special efforts to encourage the regulated community's participation in this rulemaking. The 2010 Proposal prompted a large number of comments and a vigorous debate. The Department received over 300 comment letters. A public hearing on the 2010 Proposal was held in Washington, DC on March 1 and 2, 2011, at which 38 speakers testified. In addition to an extended comment period, additional time for comments was allowed following the hearing. The transcript of that hearing was made available for additional public comment and the Department received over 60 additional comment letters. The Department also participated in many meetings requested by various interested stakeholders. Many of the comments concerned the Department's conclusions regarding the likely economic impact of the 2010 Proposal, if adopted. A number of commenters urged the Department to undertake additional analysis of expected costs and benefits particularly with regard to the 2010 Proposal's coverage of IRAs. After consideration of these comments and in light of the significance of this rulemaking to the retirement plan service provider industry, plan sponsors and participants, beneficiaries and IRA owners, the Department decided to take more time for review and to issue a new proposed regulation for comment. On September 19, 2011 the Department announced that it would withdraw the 2010 Proposal and propose a new rule defining the term ''fiduciary'' for purposes of section 3(21)(A)(ii) of ERISA and section 4975(e)(3)(B) of the Code.

C. The 2015 Proposal

On April 20, 2015, the Department published in the **Federal Register** a Notice withdrawing the 2010 Proposal and issuing the 2015 Proposal, a new proposed amendment to 29 CFR 2510.3–21(c). On the same date, the Department published proposed new and amended exemptions from ERISA's and the Code's prohibited transaction rules designed to allow certain broker-dealers, insurance agents and others that act as investment advice fiduciaries to nevertheless continue to receive common forms of compensation that would otherwise be prohibited, subject to appropriate safeguards.

The 2015 Proposal made many revisions to the 2010 Proposal, although it also retained aspects of that proposal's essential framework. Paragraph (a)(1) of the 2015 Proposal set forth the following types of advice, which, when provided in exchange for a fee or other compensation, whether directly or indirectly, and given under circumstances described in paragraph (a)(2), would be ''investment advice'' unless one of the ''carve-outs'' in paragraph (b) applied. The listed types of advice were—(i) a recommendation as to the advisability of acquiring, holding, disposing of, or exchanging securities or other property, including a recommendation to take a distribution of benefits or a recommendation as to the investment of securities or other property to be rolled over or otherwise distributed from the plan or IRA; (ii) a recommendation as to the management of securities or other property, including recommendations as to the management of securities or other property to be rolled over or otherwise distributed from the plan or IRA; (iii) an appraisal, fairness opinion, or similar statement whether verbal or written concerning the value of securities or other property if provided in connection with a specific transaction or transactions involving the acquisition, disposition, or exchange, of such securities or other property by the plan or IRA; or (iv) a recommendation of a person who is also going to receive a fee or other compensation to provide any of the types of advice described in paragraphs (i) through (iii) above.

As provided in paragraph (a)(2) of the 2015 Proposal, unless a carve-out applied, a category of advice listed in the proposal would constitute ''investment advice'' if the person providing the advice, either directly or indirectly (*e.g.,* through or together with any affiliate)—(i) represents or acknowledges that it is acting as a fiduciary within the meaning of the Act or Code with respect to the advice described in paragraph (a)(1); or (ii) renders the advice pursuant to a written or verbal agreement, arrangement or understanding that the advice is individualized to, or that such advice is specifically directed to, the advice recipient for consideration in making investment or management decisions with respect to securities or other property of the plan or IRA.

The 2015 Proposal included several carve-outs for persons who do not represent that they are acting as ERISA fiduciaries, some of which were included in some form in the 2010 Proposal but many of which were not. Subject to specified conditions, these carve-outs covered—

(1) statements or recommendations made to a ''large plan investor with financial expertise'' by a counterparty acting in an arm's length transaction;

(2) offers or recommendations to plan fiduciaries of ERISA plans to enter into a swap or security-based swap that is regulated under the Securities Exchange Act or the Commodity Exchange Act;

(3) statements or recommendations provided to a plan fiduciary of an ERISA plan by an employee of the plan sponsor if the employee receives no fee beyond his or her normal compensation;

(4) marketing or making available a platform of investment alternatives to be selected by a plan fiduciary for an ERISA participant-directed individual account plan;

(5) the identification of investment alternatives that meet objective criteria specified by a plan fiduciary of an ERISA plan or the provision of objective financial data to such fiduciary;

(6) the provision of an appraisal, fairness opinion or a statement of value to an Employee Stock Ownership Plan

(ESOP) regarding employer securities, to a collective investment vehicle holding plan assets, or to a plan for meeting reporting and disclosure requirements; and

(7) information and materials that constitute ''investment education'' or ''retirement education.''

The 2015 Proposal applied the same definition of ''investment advice'' to the definition of ''fiduciary'' in section 4975(e)(3) of the Code and thus applied to investment advice rendered to IRAs. ''Plan'' was defined in the proposal to mean any employee benefit plan described in section 3(3) of the Act and any plan described in section 4975(e)(1)(A) of the Code. For ease of reference the proposal defined the term ''IRA'' inclusively to mean any account described in Code section 4975(e)(1)(B) through (F), such as an individual retirement account described under Code section 408(a) and a health savings account described in section 223(d) of the Code.[21] Under paragraph (f)(1) of the proposal, a recommendation was defined as a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action. The Department specifically requested comments on whether the Department should adopt the standards that the Financial Industry Regulatory Authority (FINRA) uses to define ''recommendation'' for purposes of the suitability rules applicable to brokers.

Many of the differences between the 2015 Proposal and the 2010 Proposal reflect the input of commenters on the 2010 Proposal as part of the public notice and comment process. For example, some commenters argued that the 2010 Proposal swept too broadly by making investment recommendations fiduciary in nature simply because the adviser was a plan fiduciary for purposes unconnected with the advice or an investment adviser under the Advisers Act. In their view, such status-based criteria were in tension with the Act's functional approach to fiduciary status and would have resulted in unwarranted and unintended compliance issues and costs. Other commenters objected to the lack of a requirement for these status-based categories that the advice be individualized to the needs of the advice recipient. The 2015 Proposal incorporated these suggestions: An adviser's status as an investment adviser under the Advisers Act or as an ERISA fiduciary for reasons unrelated to advice were not explicit factors in the definition. In addition, the 2015 Proposal provided that unless the adviser represented that he or she is a fiduciary with respect to advice, the advice must be provided pursuant to a written or verbal agreement, arrangement, or understanding that the advice is individualized to, or that such advice is specifically directed to, the recipient for consideration in making investment or management decisions with respect to securities or other property of the plan or IRA.

Furthermore, under the 2015 Proposal, the carve-outs that treat certain conduct as non-fiduciary in nature were modified, clarified, and expanded in response to comments to the 2010 Proposal. For example, the carve-out for certain valuations from the definition of fiduciary investment advice was modified and expanded. Under the 2010 Proposal, appraisals and valuations for compliance with certain reporting and disclosure requirements were not treated as fiduciary investment advice. The 2015 Proposal additionally provided a carve-out from fiduciary treatment for appraisal and fairness opinions for ESOPs regarding employer securities. Although, the Department remained concerned about valuation advice concerning an Employee Stock Ownership Plan's (ESOP's) purchase of employer stock and about a plan's reliance on that advice, the Department concluded, at the time, that the concerns regarding valuations of closely held employer stock in ESOP transactions raised issues that were more appropriately addressed in a separate regulatory initiative. Additionally, the carve-out for valuations conducted for reporting and disclosure purposes was expanded to include reporting and disclosure obligations outside of ERISA and the Code, and was applicable to both ERISA plans and IRAs.

The Department took significant steps to give interested persons an opportunity to comment on the new proposal and proposed related exemptions. The 2015 Proposal and proposed related exemptions initially provided for 75-day comment periods, ending on July 6, 2015, but the Department extended the comment periods to July 21, 2015. The Department held a public hearing in Washington, DC on August 10–13, 2015, at which over 75 speakers testified. The transcript of the hearing was made available on September 8, 2015, and the Department provided additional opportunity for interested persons to submit comments on the proposal and proposed related exemptions or transcript until September 24, 2015. A total of over 3,000 comment letters were received on the new proposals. There were also over 300,000 submissions made as part of 30 separate petitions submitted on the proposal. These comments and petitions came from consumer groups, plan sponsors, financial services companies, academics, elected government officials, trade and industry associations, and others, both in support of, and in opposition to, the proposed rule and proposed related exemptions.

III. Coordination With Other Federal Agencies and Other Regulators

Many comments throughout the rulemaking have emphasized the need to harmonize the Department's efforts with potential rulemaking and rulemaking activities under the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. Law No. 111–203, 124 Stat. 1376 (2010) (Dodd-Frank Act), in particular, the SEC's standards of care for providing investment advice and the Commodity Futures Trading Commission's (CFTC) business conduct standards for swap dealers. In addition, some commenters questioned the adequacy of coordination with other agencies regarding IRA products and services in particular. They argued that subjecting SEC-regulated investment advisers and broker-dealers to a special set of ERISA rules for plans and IRAs could lead to additional costs and complexities for individuals who may have several different types of accounts at the same financial institution some of which may be subject only to the SEC rules, and others of which may be subject to both SEC rules and new regulatory requirements under ERISA.

Other commenters questioned the extent to which the Department had engaged with federal and state securities, insurance and banking regulators to ensure that regulatory regimes already in place would not be adversely affected. They expressed concern that subjecting parties to overlapping regulatory requirements from multiple oversight organizations would make compliance difficult and costly. One commenter asserted, however, that when service providers are subject to different legal standards of conduct, the easiest compliance approach is to meet the higher standard of care, which would benefit consumers, even outside the context of plans and IRAs.

[21] The Department solicited comments on whether it is appropriate for the regulation to cover the full range of these arrangements. These non-ERISA plan arrangements are tax-favored vehicles under the Code like IRAs, but are not specifically intended like IRAs for retirement savings.

In the course of developing the 2015 Proposal, the final rule, and the related prohibited transaction exemptions, the Department has consulted with staff of the SEC; other securities, banking, and insurance regulators, the U.S. Treasury Department's Federal Insurance Office, and FINRA, the independent regulatory authority of the broker-dealer industry, to better understand whether the rule and exemptions would subject investment advisers and broker-dealers who provide investment advice to requirements that create an undue compliance burden or conflict with their obligations under other federal laws. As part of this consultative process, SEC staff has provided technical assistance and information with respect to the agencies' separate regulatory provisions and responsibilities, retail investors, and the marketplace for investment advice. Some commenters argued that the SEC's regulation of advisers and brokers is sufficient. Other commenters noted, however, that plans and IRAs invest in more products than those regulated by the SEC alone, and asserted that the regulatory framework under ERISA and the Code was more protective of retirement investors. Some commenters also questioned the extent to which the SEC's disclosure framework would adequately protect retirement investors. Others thought the Department should coordinate with the SEC on the initiative and some advocated for a uniform fiduciary standard to lessen confusion about various standards of care owed to investors.

Commenters were also divided when it came to FINRA, with some commenters contending that FINRA sufficiently regulates brokers and that the Department should incorporate FINRA concepts or defer to FINRA and SEC regulation under the federal securities laws. Other commenters expressed concern about relying on FINRA and SEC regulations and guidance, in part, because FINRA's guidance would not be directly applicable to an array of ERISA investment advisers that are not subject to FINRA rules or SEC oversight.

In pursuing its consultations with other regulators, the Department aimed to avoid conflict with other federal laws and minimize duplicative provisions between ERISA, the Code and federal securities laws. However, the governing statutes do not permit the Department to make the obligations of fiduciary investment advisers under ERISA and the Code identical to the duties of advice providers under the securities laws. ERISA and the Code establish consumer protections for some investment advice that does not fall within the ambit of federal securities laws, and vice versa. Even if each of the relevant agencies were to adopt an identical definition of ''fiduciary,'' the legal consequences of the fiduciary designation would vary between agencies because of differences in the specific duties and remedies established by the different federal laws at issue. ERISA and the Code place special emphasis on the elimination or mitigation of conflicts of interest and adherence to substantive standards of conduct, as reflected in the prohibited transaction rules and ERISA's standards of fiduciary conduct. The specific duties imposed on fiduciaries by ERISA and the Code stem from legislative judgments on the best way to protect the public interest in tax-preferred benefit arrangements that are critical to workers' financial and physical health. The Department has taken great care to honor ERISA and the Code's specific text and purposes.

At the same time, the Department has worked hard to understand the impact of the 2015 Proposal and the final rule on firms subject to the federal securities and other laws, and to take the effects of those laws into account so as to appropriately calibrate the impact of the rule on those firms. The final rule reflects these efforts. In the Department's view, it neither undermines, nor contradicts, the provisions or purposes of the securities laws, but instead works in harmony with them. The Department has coordinated—and will continue to coordinate—its efforts with other federal agencies to ensure that the various legal regimes are harmonized to the fullest extent possible.

The Department has also consulted with the Department of the Treasury, particularly on the subject of IRAs. Although the Department has responsibility for issuing regulations and prohibited transaction exemptions under section 4975 of the Code, which applies to IRAs, the IRS maintains general responsibility for enforcing the tax laws. The IRS' responsibilities extend to the imposition of excise taxes on fiduciaries who participate in prohibited transactions.[22] As a result, the Department and the IRS share responsibility for combating self-dealing by fiduciary investment advisers to tax-qualified plans and IRAs. Paragraph (f) of the final regulation, in particular, recognizes this jurisdictional intersection.

The Department received comments from the North American Securities Administrators Association (NASAA), whose membership includes all U.S. state securities regulators. NASAA generally supported the proposal and the Department's goal of enhancing the standard of care available to retirement investors, including those who invest through IRAs. NASAA said the proposal is an important step in raising the standard of care available to retirement investors, and paves the way for additional regulatory initiatives to raise the standard of care for investors in general. NASAA asked that the Department include language in its final rule that explicitly acknowledges that state securities laws are not superseded or preempted and remain subject to the ERISA section 514(b)(2)(A) savings clause. NASAA also offered suggestions on individual substantive provisions of the proposal. For example, NASAA suggested the final rule prohibit pre-dispute binding arbitration agreements with respect to individual contract claims.[23]

The National Association of Insurance Commissioners (NAIC) also submitted a comment stating that it recognizes that oversight of the retirement plans marketplace is a shared regulatory responsibility, and has been so for decades. The NAIC agreed that state insurance regulators, the DOL, SEC and FINRA, each have an important role in the administration and enforcement of standards for retirement plans and products within their jurisdiction. It said that state insurance regulators share the DOL's commitment to protect, educate and empower consumers as they make important decisions to provide for their retirement security. The NAIC noted that the states have acted to implement a robust set of consumer protection and education standards for annuity and insurance transactions, have extensive enforcement authority to examine companies, revoke producer and company licenses to operate, as well as to collect and analyze industry data, and have a strong record of protecting consumers, especially seniors, from inappropriate sales practices or unsuitable products. The NAIC pointed out that it is important that the approaches regulators take within their respective regulatory framework be as consistent as possible, and that it would carefully evaluate the stakeholder input on the proposal submitted during the

[22] Reorganization Plan No. 4 of 1978.

[23] The NASAA comment on pre-dispute binding arbitration concerns a provision in the Best Interest Contract Exemption, not this rule. The arbitration provision in the exemption and the comments on the provision are discussed in the preamble to the final exemption published elsewhere in today's **Federal Register**.

comment period and looked forward to further discussions with DOL.

Comments were submitted by the National Conference of Insurance Legislators and the National Association of Governors suggesting further dialogue with the NAIC, insurance legislators, and other state officials to ensure the federal and state approaches to consumer protection in this area are consistent and compatible.

The Department carefully considered the comments that were submitted by interested state regulators, and had meetings during the comment period on the 2015 Proposal with NASAA staff and with the NAIC (including insurance commissioners and NAIC staff). The Department also received input on the interaction between state and federal regulation of investment advice from various groups and organizations that are subject to state insurance or securities regulations. The Department's obligation and overriding objective in developing regulations implementing ERISA (and the relevant prohibited transaction provisions in the Code) is to achieve the consumer protection objectives of ERISA and the Code. The Department believes the final rule reflects that obligation and objective while also reflecting that care was taken to craft the rule so that it does not require people subject to state banking, insurance or securities regulation to take steps that would conflict with applicable state statutory or regulatory requirements. The Department notes that ERISA section 514 expressly saves state regulation of insurance, banking, or securities from ERISA's express preemption provision. The Department agrees that it would be appropriate for the final rule to include an express provision acknowledging the savings clause in ERISA section 514(b)(2)(A) for state insurance, banking, and securities laws to emphasize the fact that those state regulators all have important roles in the administration and enforcement of standards for retirement plans and products within their jurisdiction. Accordingly, the final rule includes a new paragraph (i).

IV. The Provisions of the Final Rule and Public Comments

After carefully evaluating the full range of public comments and extensive record developed on the proposal, the final rule as described below amends the definition of investment advice in 29 CFR 2510.3–21 (1975) to replace the restrictive five-part test with a new definition that better comports with the statutory language in ERISA and the Code. Some commenters offered general support for, or opposition to, the Department's proposal to replace the 1975 regulation's five-part test. The Department did not attempt to separately identify or discuss these general comments in this Notice, although the preamble, in its entirety, addresses the reasons for undertaking this regulatory initiative and the rationales for the Department's specific regulatory choices. Most commenters, however, gave the Department feedback on the specific provisions of the proposal and whether they believed them to be preferable to the 1975 regulation.

Several commenters argued for withdrawal of the proposed rule stating that the proposal neither demonstrated a compelling need for regulatory action nor employed the least burdensome method to effect any necessary change. They believed that to make the rule and exemptions workable, such significant modifications were necessary that a second re-proposal was required. Some comments suggested that the Department should engage in extensive testing of the rule and exemptions before going final, for example, via focus groups or a negotiated rulemaking process. Some commenters complained that the Administrative Procedures Act requires that a decision to re-propose be based on the public record and that informal comments from the Department suggested that the Department had prejudged that issue before evaluating all the public comments. Another commenter disagreed and maintained that the proposal should be finalized since the Department had followed the proper regulatory process and no one, in testimony or comment, had made a credible argument for any change that is ''material'' enough to warrant a re-proposal. Moreover, a number of organizations also offered nearly unqualified support for the rule, and endorsed the Department's efforts in moving forward with the proposal. Although some organizations expressed concern about the rule's complexity and posited possible attendant high compliance costs and uncertain legal liabilities, they deemed these costs justified by moving to a higher standard for investors. Other commenters pointed to specific demographic groups and noted their need for the increased protections offered by the rule. One international organization articulated the hope that efforts in the United States may influence its government to similarly act to hold persons offering financial advice to a fiduciary duty. The Department believes it has engaged in sufficient public outreach to establish a valid and comprehensive public record as detailed above in discussions of the 2010 Proposal and the re-proposal in 2015 to substantiate promulgating a final rule at this time. In the Department's judgment, this final rulemaking, which follows a robust regulatory process, fulfills the Department's mission to protect, educate, and empower retirement investors as they face important choices in saving for retirement in their IRAs and employee benefit plans.

The final rule largely adopts the general structure of the 2015 Proposal but with modifications in response to commenters seeking changes or clarifications of certain provisions in the proposal. Similar to the proposal, the final rule in paragraph (a)(1) first describes the kinds of communications that would constitute investment advice. Then paragraph (a)(2) sets forth the types of relationships that must exist for such recommendations to give rise to fiduciary investment advice responsibilities. The rule covers: Recommendations by a person who represents or acknowledges that it is acting as a fiduciary within the meaning of 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 advice recipient; and recommendations directed to a specific advice recipient or recipients regarding the advisability of a particular investment or management decision with respect to securities or other investment property of the plan or IRA. Paragraph (b)(1) describes when a communication based on its context, content, and presentation would be viewed as a ''recommendation,'' a fundamental element in establishing the existence of fiduciary investment advice. Paragraph (b)(2) sets forth examples of certain types of communications which are not ''recommendations'' under that definition. The examples include certain activities that were classified as ''carve-outs'' under the proposal, but which are better understood as not constituting investment ''recommendations'' in the first place. Paragraph (c) describes and clarifies conduct and activities that the Department determined should not be considered investment advice activity although they may otherwise meet the criteria established by paragraph (a). Thus, paragraph (c) includes communications and activities that were appropriately classified as ''carve-outs'' under the proposal. Paragraph (c) also adds to, clarifies, or modifies certain of the ''carve-outs'' in response to public comments. Except for minor clarifying changes, paragraph (d)'s description of the scope of the investment advice fiduciary duty, and paragraph (e) regarding the mere execution of a securities transaction at the direction of a plan or IRA owner, remain unchanged from the 1975 regulation. Paragraph (f) also remains unchanged from paragraph (e) of the proposal and articulates the application of the final rule to the parallel definitions in the prohibited transaction provisions of Code section 4975. Paragraph (g) includes definitions. Paragraph (h) describes the effective and applicability dates associated with the final rule, and paragraph (i) includes an express provision acknowledging the savings clause in ERISA section 514(b)(2)(A) for state insurance, banking, and securities laws.

Under the final rule, whether a ''recommendation'' has occurred is a threshold issue and the initial step in determining whether investment advice has occurred. The 2015 Proposal included a definition of recommendation in paragraph (f)(1): ''[A] communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action.'' The Department received a wide range of comments that asked that the final rule include a clearer statement of when particular communications rise to the level of covered investment ''recommendations.'' As described more fully below, the Department, in response, has added a new section to the regulation that is intended to clarify the standard for determining whether a person has made a ''recommendation'' covered by the final rule.

A. 29 CFR 2510.3–21(a)(1)—Categories and Types of Fiduciary Advice

Paragraph (a) of the final rule states that a person renders investment advice with respect to moneys or other property of a plan or IRA described in paragraph (g)(6) of the final rule if such person provides the types of advice described in paragraphs (a)(1)(i) or (ii). The final rule revises and clarifies this provision from the 2015 Proposal in the manner described below. Specifically, paragraph (a)(1) of the final rule provides that person(s) provide investment advice if they provide for a fee or other compensation certain categories or types of investment recommendations. The listed types of advice are—

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

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

The final rule thus maintains the general structure of the 2015 Proposal, but the operative text of the rule includes several changes to clarify the provisions. In addition, the Department reserves the possible coverage of appraisals, fairness opinions, and similar statements for a future rulemaking project.

In general, paragraph (a)(1)(i) covers recommendations regarding the investment of plan or IRA assets, including recommendations regarding the investment of assets that are being rolled over or otherwise distributed from plans to IRAs. Paragraph (a)(1)(ii) covers recommendations regarding investment management of plan or IRA assets. In response to comments that the term ''management'' should be clarified, the Department included text from the 1975 regulation and added additional examples to clarify the scope of the definition. In particular, the management recommendations covered by (a)(1)(ii) include recommendations on rollovers, distributions, and transfers from a plan or IRA, including recommendations on whether to take a rollover, distribution, or transfer; recommendations on the form of the rollover, distribution, or transfer; and recommendations on the insurance issuer or investment provider to receive the rollover, distribution or transfer. Some commenters expressed concern that advice providers could avoid fiduciary responsibility for recommendations to roll over plan assets, for example, to a mutual fund provider by not including in that recommendation any advice on how to invest the assets after they are rolled over. The revisions to paragraph (a)(1)(ii) are intended to make clear that such recommendations would be investment advice covered by the rule.

In addition, (a)(1)(ii) has been amended to include recommendations on the selection of persons to perform investment advice or investment management services. The proposal had contained a separate provision covering recommendations to hire investment advisers, but that provision has been merged into paragraph (a)(1)(ii) as one type of recommendation on management of investments. The Department may have contributed to some commenters' uncertainty about the breadth of the proposal and whether it covered recommendations of persons providing investment management services by setting forth the recommendation of fiduciary investment advisers as a separate provision of the rule, rather than as merely one example of a recommendation on investment management. The Department has always viewed the recommendation of persons to perform investment management services for plans or IRAs as investment advice. The final rule more clearly and simply sets forth the scope of the subject matter covered by the rule. Below is a more detailed discussion of various comments that relate to these changes.

(1) Recommendations With Respect to Moneys or Other Property

Several commenters argued that the language of the proposal referring to advice regarding ''moneys or other property'' of the plan was sufficiently broad that it could be read to cover advice on purchasing insurance policies that do not have an investment component. Those commenters observed that such a reading of the proposal did not appear to be what the Department intended, and, moreover, asserted that a regulation defining ''investment advice'' as having such scope would likely exceed the Department's authority. Thus, they asked that the final rule confirm that advice as to the purchase of health, disability, and term life insurance policies to provide benefits to plan participants or IRA owners would not be fiduciary investment advice within the meaning of ERISA section 3(21)(A)(ii). Other commenters asked whether the rule would apply to 403(b) plans, SIMPLE–IRA plans, SEPs, fraternal benefit societies, and health savings accounts. Lastly, many commenters requested clarification as to whether and when traditional service providers such as lawyers, actuaries, and accountants would become subject to the final rule and argued that such service providers should not become fiduciaries under the rule merely because they provide professional assistance in connection with a particular investment transaction.[24]

It was not the intent of the proposal to treat as fiduciary investment advice, advice as to the purchase of health, disability, and term life insurance policies to provide benefits to plan participants or IRA owners if the policies do not have an investment component. The Department believes it would depart from a plain and natural reading of the term ''investment advice'' to conclude that recommendations to purchase group health and disability insurance constitute investment advice. The definition of an ''investment advice'' fiduciary in ERISA itself, as adopted in 1974, uses the same terms as the proposal to define an investment advice fiduciary—a person that renders ''investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan.'' The Department's 1975 regulation implementing that definition similarly covers ''investment advice'' regarding ''securities or other property.''

The Department is not aware of any substantial concern or confusion regarding whether the 1975 regulation covered recommendations to purchase health, disability, or term life insurance policies. Additionally, the Securities Exchange Act of 1934 in section 3(a)(35) uses the term ''securities and other property'' to define ''investment discretion,'' and the Investment Company Act of 1940 in section 2(a)(20) refers to ''securities or other property'' in defining an ''investment adviser.'' The Department does not believe that these statutory provisions have created the type of confusion that commenters attached to the Department's proposal. Thus, 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 he or she is functionally exercising discretionary control over the management or administration of the plan within the meaning of the fiduciary definition 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, the Department's 1975 regulation, or the prior proposals are 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.

As a result, and to expressly make this point, the Department has modified the final rule to make it clear that, in order to render investment advice with respect to moneys or other property of a plan or IRA, the adviser must make a recommendation with respect to the advisability of acquiring, holding, disposing or exchanging securities or other ''investment'' property. The Department similarly modified the final rule to make it clear that the covered recommendation must concern the management or manager of securities or other ''investment'' property to fall under that prong of the investment advice fiduciary definition. Further, the Department added new paragraph (g)(4) to define investment property as expressly not including health or disability insurance policies, term life insurance policies, or other assets to the extent that they do not include an investment component.

A few commenters argued that bank certificates of deposit (CDs) and other similar bank deposit accounts should not be treated as investments for purposes of the rule and communications regarding them should not be treated as investment advice because the purposes for which plan and IRA investors use them do not present the same concerns about conflicts of interest as other covered investment recommendations. The commenters also argued, similar to other commenters in other industries, that educational communications from bank branch personnel to customers about bank products will be impaired if possibly subject to ERISA rules governing fiduciary investment advice.

In the Department's view, the definition of investment property in paragraph (g)(4) should include bank CDs and similar investment products. The Department does not see any basis for differentiating advice regarding investments in CDs, including investment strategies involving CDs (*e.g.,* laddered CD portfolios), from other investment products. To the extent an adviser will receive a fee or other compensation as a result of a recommended investment in a CD, that communication presents the type of conflict of interest that is the focus of the rule. With respect to educational communications regarding bank products, just as with other investment products, the Department has emphasized in the final rule the fundamental requirement that a recommendation is necessary for a communication to be considered investment advice. Specifically, the Department has included a new paragraph (b)(1) defining recommendation for purposes of the rule, and paragraph (b)(2) provides detailed examples of communications involving investment education and general communications that do not constitute investment recommendations. Whether a recommendation occurs in any particular instance would be a determination based on facts and circumstances.

Many commenters questioned the application of the proposal in connection with recommendations of proprietary investment products. These commenters objected that the proposal would make recommending proprietary products on a commission basis a per se violation of ERISA's fiduciary duties and the fiduciary self-dealing prohibitions, and contended the proposal was flawed by a ''bias'' against proprietary products. Some of these commenters raised specific issues related to insurers marketing their own insurance products and contended that subjecting insurers to fiduciary investment advice duties would impede their ability to give participants and IRA owners guidance about lifetime income guarantees and other insurance features in their proprietary products. Commenters suggested that some mechanism, for example, a requirement to disclose potential conflicts of interest or a specific carve-out for proprietary and/or insurance products, was needed to ensure that affected providers can market purely proprietary investment products. These commenters argued that the potential for ''conflict of interest'' abuses is limited in the case of proprietary products because it is obvious to consumers that companies and their agents are marketing ''their'' products. Several other commenters, however, disagreed and argued that proprietary or affiliated investment products present substantial conflicts of interest resulting in biased advice that is detrimental to investors. These commenters argued that the Department should narrowly define provisions of the proposal designed to address advisers whose business involves proprietary or limited menu products to mitigate this potential conflict of interest.

[24] Some commenters argued that the final rule should not apply to IRAs because the Department lacked regulatory authority over IRAs. The Department's authority to issue this final rule and to make it applicable to IRAs under section 4975 of the Code is discussed in detail elsewhere in this Notice and in the preamble to the final Best Interest Contract exemption published elsewhere in today's **Federal Register**.

A couple of commenters recommended that the Department consider these proprietary product issues in the context of fraternal benefit societies exempt from tax under section 503(c)(8) of the Code, including those engaged in religious and benevolent activities, suggesting that a carve-out or similar exception is needed to protect these not-for-profit organizations because their religious and benevolent activities have been funded in large part through the sale of insurance and financial products to fraternal lodge members.

The Department does not believe that it is appropriate for a rule defining fiduciary investment advice to provide special treatment for sales and marketing of proprietary products. The Department agrees that a person's status as a fiduciary investment adviser presents inherent conflicts with sales and marketing activities that restrict recommendations to only proprietary products. The fact that conflicts of interest may be inherent in the sale and marketing of proprietary products, in the Department's view, would not be a compelling basis for excluding those communications from a rule designed to protect consumers from just such conflicts of interest. Rather, the Department believes that the model reflected in the ERISA statutory structure is the way, at least in the retail market, to acknowledge and address the fact that providers of proprietary products will, in selling their products, engage in communications and activities that constitute fiduciary investment advice under the final rule.

Specifically, just as ERISA contains broadly protective rules and prohibited transaction restrictions with carefully crafted exemptions, including conditions designed to mitigate possible abuses, the Department believes a generally applicable definition of fiduciary investment advice focused on investment ''recommendations,'' coupled with carefully crafted exemptions from the prohibited transaction rules, is also the appropriate solution in this context. In addition, with respect to institutional investors and plan fiduciaries with financial expertise, the Department has included in the final rule a special provision under which sales communications and activities in arm's length transactions with such persons would not constitute fiduciary investment advice. Insurers and others selling proprietary products can rely on that provision when dealing with such financially sophisticated plan fiduciaries. The Best Interest Contract Exemption also specifically addresses advice concerning proprietary products, and provides a means for firms and advisers to recommend such products, while safeguarding retirement investors from the dangers posed by conflicts of interest.

With respect to fraternal benefit societies, the concerns raised by these commenters regarding the proposed rule largely mirrored the concerns raised by other sellers of proprietary products. The fact that an organization is exempt from tax under the Code or that it has an educational or charitable mission does not, in the Department's view, provide a basis for excluding investment advice provided to retirement investors by those organizations from fiduciary duties. Similarly, if fraternal benefit societies adopt business structures and compensation arrangements that present self-dealing concerns and financial conflicts of interest, the fact that revenues from sales may be used, in part, for religious and benevolent activities is not, in the Department's view, a basis for treating such sales differently from other sales under the prohibited transaction provisions of ERISA and the Code. Rather, those societies can avail themselves of the same provisions in the final rule and final exemptions as are available to other sellers of proprietary products.

Some commenters similarly argued that advisers to SIMPLE–IRA plans and SEPs should be excluded from coverage under the rule. However, such arrangements established or maintained by a private sector employer for its employees are ''employee benefit plans'' within the meaning of section 3(3) of ERISA, and, as such, are subject to the protections of the prohibited transaction rules. Such plans use IRAs as their investment and funding vehicles. In light of the fact that the 2015 Proposal covered investment advice with respect to the assets of employee benefit plans and IRAs, the Department does not see any basis for excluding employee benefit plans like SIMPLE–IRA plans and SEPs from the scope of the final rule. Nor is there any reason to believe that the small employers that rely upon such plans for the provision of benefits, and their employees, are any less in need of the rule's protections. The Department's authority to issue this rulemaking, including its application to IRAs is discussed more fully below.

With respect to 403(b) plans, because the final rule defines investment advice fiduciary for ''plans'' covered under Title I of ERISA or Code section 4975 (*e.g.,* IRAs), and because 403(b) plans are not included in the definition of ''plan'' under Code section 4975, only 403(b) plans covered under Title I of ERISA are within the scope of this final rule. Specifically, a plan under section 403(b) of the Code (''403(b) plan'') is a retirement plan for employees of public schools, employees of certain tax-exempt organizations, and certain ministers. Under a 403(b) plan, employers may purchase for their eligible employees annuity contracts or establish custodial accounts invested only in mutual funds for the purpose of providing retirement income. Under ERISA section 4(b)(1) and (2), ''governmental plans'' and ''church plans'' generally are excluded from coverage under Title I of ERISA. Therefore, Code section 403(b) contracts and custodial accounts purchased or provided under a program that is either a ''governmental plan'' under section 3(32) of ERISA or a non-electing ''church plan'' under section 3(33) of ERISA are not subject to the final rule. Similarly, the Department in 1979 issued a ''safe harbor'' regulation at 29 CFR 2510.3–2(f) which states that a program for the purchase of annuity contracts or custodial accounts in accordance with section 403(b) of the Code and funded solely through salary reduction agreements or agreements to forego an increase in salary are not ''established or maintained'' by an employer under section 3(2) of the Act, and, therefore, are not employee pension benefit plans that are subject to Title I, provided that certain factors are present. Those non-Title I 403(b) plans would also be outside the scope of the final rule. A 403(b) plan established or maintained by a tax-exempt organization, however, would fall outside of the safe harbor regulation and would be a ''pension plan'' within the meaning of section 3(2) of ERISA that would be covered by Title I pursuant to section 4(a) of ERISA.

Several commenters also asserted that it was unclear whether investment advice under the scope of the proposal would include the provision of information and plan services that traditionally have been performed in a non-fiduciary capacity. The Department agrees that actuaries, accountants, and attorneys, who historically have not been treated as ERISA fiduciaries for plan clients, would not become fiduciary investment advisers by reason of providing actuarial, accounting, and legal services. The Department does not believe anything in the 2010 or 2015 Proposals, or the final rule, suggested a different conclusion. Rather, in the Department's view, the provisions in the final rule defining investment advice make it clear that attorneys, accountants, and actuaries would not be treated as investment advice fiduciaries merely because they provide such professional assistance in connection with a particular investment transaction. Only when these professionals act outside their normal roles and recommend specific investments in connection with particular investment transactions, or otherwise engage in the provision of fiduciary investment advice as defined under the final rule, would they be subject to the fiduciary definition. Similarly, the final rule does not alter the principle articulated in ERISA Interpretive Bulletin 75–8, D–2 at 29 CFR 2509.75–8 (1975). Under the bulletin, the plan sponsor's human resources personnel or plan service providers who have no power to make decisions as to plan policy, interpretations, practices or procedures, but who perform purely administrative functions for an employee benefit plan, within a framework of policies, interpretations, rules, practices and procedures made by other persons, are not thereby investment advice fiduciaries with respect to the plan.

(2) Recommendations on Rollovers, Benefit Distributions or Transfers From Plan or IRA

Paragraph (a)(1)(i) and (ii) of the final rule specifically includes recommendations concerning the investment, management, or manager of securities or other investment property to be rolled over, transferred, or distributed from the plan or IRA, including recommendations how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred, or distributed from the plan or IRA and recommendations with respect whether, in what amount, in what form, and to what destination such a rollover, transfer or distribution should be made. The final rule thus supersedes the Department's position in Advisory Opinion 2005–23A (Dec. 7, 2005) that it is not fiduciary advice to make a recommendation as to distribution options even if accompanied by a recommendation as to where the distribution would be invested.

The comments on this issue tended to mirror the comments submitted on this same question the Department posed in its 2010 Proposal. Some commenters, mainly those representing consumers, stated that exclusion of recommendations on rollovers and benefit distributions from the final rule would fail to protect participant accounts from conflicted advice in connection with one of the most significant financial decisions that participants make concerning retirement savings. These comments particularly noted the critical nature of retirement and rollover decisions and the existence of incentives for advice and investment providers to steer plan participants into higher cost, subpar investments. Other commenters, mainly those representing financial services providers, argued that including such communications as fiduciary investment advice would significantly restrict the type of investment education that would be provided regarding rollover and plan distributions by employers and other plan service providers because of concerns about possible fiduciary liability and prohibited transactions. They argued that such potential fiduciary liability would disrupt the routine process that occurs when a worker leaves a job and contacts a financial services firm for help rolling over a 401(k) balance, and the firm explains the investments it offers and the benefits of a rollover. They also asserted that plan sponsors and plan service providers would stop assisting participants and beneficiaries with these important decisions, including recommendations to keep retirement savings in the plan or advice regarding lifetime income products and investment strategies. Some commenters claimed that the proposal would discourage or impede rollovers into IRAs or other vehicles that give them access to annuities and other lifetime income products that often are unavailable in their 401(k) plans. The commenters argued that such a result would conflict with the Department's recent guidance and initiatives designed to enhance the availability of lifetime income products in 401(k) and similar employer-sponsored defined contribution pension plans. Other commenters questioned the legal authority of the Department to classify rollover advice as fiduciary in nature. Others asked that the Department exclude rollover recommendations into IRAs when there is no accompanying recommendation on how to invest the funds once in the IRA. Other commenters asked for clarifications or broad exclusions in various specific circumstances, such as advice with respect to benefit distributions that are required by tax law such as required minimum distributions. Others asked that the principles of FINRA guidance on rollovers under Notice 13–45 be incorporated in the advice definition and suggested that compliance with the guidance could act as a safe harbor for rollover advice.

The Department continues to believe that decisions to take a benefit distribution or engage in rollover transactions are among the most, if not the most, important financial decisions that plan participants and beneficiaries, and IRA owners are called upon to make. The Department also continues to believe that advice provided at this juncture, even if not accompanied by a specific recommendation on how to invest assets, should be treated as investment advice under the final rule. The final rule thus adopts the provision in the proposal and supersedes Advisory Opinion 2005–23A. The advisory opinion failed to consider that advice to take a distribution of assets from a plan is actually advice to sell, withdraw, or transfer investment assets currently held in a plan. Thus, a distribution recommendation involves either advice to change specific investments in the plan or to change fees and services directly affecting the return on those investments. Even if the assets will not be covered by ERISA or the Code when they are moved outside the plan or IRA, the recommendation to change the plan or IRA investments is investment advice under ERISA and the Code. Thus, recommendations on distributions (including rollovers or transfers into another plan or IRA) or recommendations to entrust plan or IRA assets to a particular IRA provider would fall within the scope of investment advice in this regulation, and would be covered by Title I of ERISA, including the enforcement provisions of section 502(a). Further, in the Department's view, recommendations to take a distribution or rollover to an IRA and recommendations not to take a distribution or to keep assets in a plan should be treated the same in terms of evaluating whether the communication constitutes fiduciary investment advice.

The Department acknowledges commenters' concerns that some employers and service providers could restrict the type of investment education they provide regarding rollovers and plan distributions based on concerns about fiduciary liability. Accordingly, the final rule (like the 2015 Proposal) includes provisions that describe in detail the distinction between recommendations that are fiduciary investment advice and educational and informational materials. For example, the provisions specifically state that educational materials can describe the terms or operation of the plan or IRA, inform a plan fiduciary, plan participant, beneficiary, or IRA owner about the benefits of plan or IRA participation, the benefits of increasing plan or IRA contributions, the impact of preretirement withdrawals on retirement income, retirement income needs, varying forms of distributions, including rollovers, annuitization and other forms of lifetime income payment options (*e.g.,* immediate annuity, deferred annuity, or incremental purchase of deferred annuity), advantages, disadvantages and risks of different forms of distributions, or describe investment objectives and philosophies, risk and return characteristics, historical return information or related prospectuses of investment alternatives under the plan or IRA. The provisions also state that education includes information on general methods and strategies for managing assets in retirement (*e.g.,* systematic withdrawal payments, annuitization, guaranteed minimum withdrawal benefits), including those offered outside the plan or IRA. Similarly, the rule states that education includes interactive materials, such as questionnaires, worksheets, software, and similar materials, that provide a plan fiduciary, plan participant or beneficiary, or IRA owner the means to: estimate future retirement income needs and assess the impact of different asset allocations on retirement income; or to use various types of educational information to evaluate distribution options, products, or vehicles. Accordingly, the Department believes that the rule enables employers and service providers to continue to provide important educational information without undue risk that the conduct could be characterized as fiduciary investment advice under the final rule.

To the extent that an individual adviser goes beyond providing education and gives investment advice in a particular case, the Department does not believe it is appropriate to broadly exempt those communications from fiduciary liability. Moreover, the Department believes that such an exemption would be especially inappropriate in cases where a service provider offers educational services that systematically exceed the boundaries of education. In such cases, when firms or individuals make specific investment recommendations to plan participants, they should adhere to basic fiduciary norms of prudence and loyalty, and take appropriate measures to protect plan participants and beneficiaries from the potential harm caused by conflicts of interest.

Comments from various sources also expressed concern about employers and plan sponsors becoming fiduciary investment advisers as a result of educational communications and activities designed to inform employees about plans, plan investments, distribution options, retirement planning, and similar subjects. In many cases, those comments were submitted by financial services companies that might be engaged by an employer as opposed to the employer itself.

In the Department's view, in the case of an employer or other plan sponsor, an employer or plan sponsor would not become an investment advice fiduciary merely because the employer or plan sponsor engaged a service provider to provide investment advice or because a service provider engaged to provide investment education crossed the line and provided investment advice in a particular case. On the other hand, whether the service provider renders fiduciary advice or non-fiduciary education, the final rule does not change the well-established fiduciary obligations that arise in connection with the selection and monitoring of plan service providers. These issues were discussed in the 1996 Interpretive Bulletin (IB 96–1) on investment education (that many commenters urged the Department to adopt in full as the final rule). Specifically, as pointed out in the preamble to the proposal, although IB 96–1 would be formally removed from the CFR and replaced by the final rule, paragraph (e) of IB 96–1 provides generalized guidance under sections 405 and 404(c) of ERISA with respect to the selection by employers and plan fiduciaries of investment educators and the limits of their responsibilities. Specifically, paragraph (e) states:

As with any designation of a service provider to a plan, the designation of a person(s) to provide investment educational services or investment advice to plan participants and beneficiaries is an exercise of discretionary authority or control with respect to management of the plan; therefore, persons making the designation must act prudently and solely in the interest of the plan participants and beneficiaries, both in making the designation(s) and in continuing such designation(s). See ERISA sections 3(21)(A)(i) and 404(a), 29 U.S.C. 1002 (21)(A)(i) and 1104(a). In addition, the designation of an investment adviser to serve as a fiduciary may give rise to co-fiduciary liability if the person making and continuing such designation in doing so fails to act prudently and solely in the interest of plan participants and beneficiaries; or knowingly participates in, conceals or fails to make reasonable efforts to correct a known breach by the investment advisor. See ERISA section 405(a), 29 U.S.C. 1105(a). The Department notes, however, that, in the context of an ERISA section 404(c) plan, neither the designation of a person to provide education nor the designation of a fiduciary to provide investment advice to participants and beneficiaries would, in itself, give rise to fiduciary liability for loss, or with respect to any breach of part 4 of Title I of ERISA, that is the direct and necessary result of a participant's or beneficiary's exercise of independent control. 29 CFR 2550.404c–1(d). The Department also notes that a plan sponsor or fiduciary would have no fiduciary responsibility or liability with respect to the actions of a third party selected by a participant or beneficiary to provide education or investment advice where the plan sponsor or fiduciary neither selects nor endorses the educator or adviser, nor otherwise makes arrangements with the educator or adviser to provide such services.

The Department explained in the preamble to the 2015 Proposal that, unlike the remainder of the IB 96–1, this text does not belong in the investment advice regulation, and since the principles articulated in paragraph (e) are generally understood and accepted, re-issuing the paragraph as a stand-alone IB does not appear necessary or appropriate. *See* 80 FR 21944.

Although not specifically raised by these comments, it is important to emphasize that ERISA section 404(c) and the Department's regulations thereunder do not limit the liability of fiduciary investment advisers for the provision of investment advice regardless of whether or not they provide that advice pursuant to a statutory or administrative exemption. In fact, the statutory exemption in ERISA section 408(b)(14) and the administrative exemptions being finalized with this rule generally require the fiduciary investment adviser to specifically assume and acknowledge fiduciary responsibility for the provision of investment advice. ERISA section 404(c) provides relief for acts which are the direct and necessary result of a participant's or beneficiary's exercise of control. Although a participant or beneficiary may direct a transaction in his or her account pursuant to fiduciary investment advice, that direction would not mean that any imprudence in the advice or self-dealing violation by the fiduciary investment adviser in connection with the advice was the direct and necessary result of the participant's action. Accordingly, section 404(c) of ERISA would not provide any relief from liability for a fiduciary investment adviser for investment advice provided to a participant or beneficiary. This position is consistent with the position the Department took regarding the application of section 404(c) of ERISA to managed accounts in participant-directed individual account plans. *See* 29 CFR 2550.404c–1, paragraphs (f)(8) and (f)(9).

Moreover, in the case of an employer or plan sponsor, neither the employer, plan sponsor, nor their employees ordinarily receive fees or other compensation in connection with the educational services and materials that they provide to plan participants and beneficiaries. Thus, even if they crossed the line from education to actual investment advice, the absence of a fee or other compensation would generally preclude a finding that the communication constituted fiduciary investment advice. It is important to note, however, that communications from the plan administrator or other person in a fiduciary capacity would be subject to ERISA's general prudence duties notwithstanding the fact that the communications may not result in the person also becoming a fiduciary under ERISA's investment advice provisions.[25]

In response to the comments suggesting that the Department adopt FINRA Notice 13–45 as a safe harbor for communications on benefit distributions, the FINRA notice did not purport to define a line between education and advice. The final rule seeks to ensure that all investment advice to retirement investors adheres to fiduciary norms, particularly including advice as critically important as recommendations on how to manage a lifetime of savings held in a retirement plan and on whether to roll over plan accounts. Following FINRA and SEC guidance on best practices is a good way for advisers to look out for the interests of their customers, but it does not give them a pass from ERISA fiduciary status.

With respect to the tax code provisions regarding required minimum distributions, the Department agrees with commenters that merely advising a participant or IRA owner that certain distributions are required by tax law would not constitute investment advice. Whether such ''tax'' advice is accompanied by a recommendation that constitutes ''investment advice'' would depend on the particular facts and circumstances involved.

(3) Recommendations on the Management of Securities or Other Investment Property

As in the 2015 Proposal, paragraph (a)(1)(ii) of the final rule provides that a recommendation as to the ''management'' of securities or other investment property is fiduciary investment advice. Some commenters contended this provision could be read very broadly and asked for clarification as to the scope of activities covered by the term. These commenters were concerned that ''management'' could be read as duplicative of paragraph (a)(1)(i) of the proposal, which concerned recommendations on the ''investment'' of plan or IRA assets. The Department also received comments seeking clarification regarding this provision's impact on, for example, foreign exchange transactions, the internal operation of stable value funds, and options trading. Others questioned whether the recommendation of a general investment strategy or recommending use of a class of investment products fall within the meaning of the term ''management'' of plan or IRA assets, even in cases where a particular product is not recommended.

The Department agrees that further clarification of the concept of ''management'' in the final rule would be helpful. Accordingly, the final rule includes text from the 1975 regulation that gives examples of ''investment management'' that the Department believes will clarify the difference between investment recommendations and investment management recommendations. Specifically, the final rule includes text that describes management of securities or other investment property, as including, among other things, recommendations on investment policies or strategies, portfolio composition, or recommendations on distributions, including rollovers, from a plan or IRA. The final rule also adds another example to make it clear that recommendations to move from commission-based accounts to advisory fee based accounts would be fiduciary investment advice under this provision. As explained above and more fully below, the final rule also includes recommendations on the selection of other persons to provide investment advice or investment management services in this provision rather than in a separate provision.

The new text is consistent with FINRA guidance that makes it clear that recommendations on investment strategy are subject to the federal securities laws' ''suitability'' requirements regardless of whether the recommendation results in a securities transaction or even references a specific security or securities. Specifically, FINRA explained this requirement in a set of FAQs on Rule 2111:

The rule explicitly states that the term ''strategy'' should be interpreted broadly. The rule would cover a recommended investment strategy regardless of whether the recommendation results in a securities transaction or even references a specific security or securities. For instance, the rule would cover a recommendation to purchase securities using margin or liquefied home equity or to engage in day trading, irrespective of whether the recommendation results in a transaction or references particular securities. The term also would capture an explicit recommendation to hold a security or securities. While a decision to hold might be considered a passive strategy, an explicit recommendation to hold does constitute the type of advice upon which a customer can be expected to rely. An explicit recommendation to hold is tantamount to a ''call to action'' in the sense of a suggestion that the customer stay the course with the investment. The rule would apply, for example, when an associated person meets with a customer during a quarterly or annual investment review and explicitly advises the customer not to sell any securities in or make any changes to the account or portfolio. . . . (footnotes omitted)

FINRA Rule 2111 (Suitability) FAQ (available at *www.finra.org/industry/faq-finra-rule-2111-suitability-faq*). The Department agrees that recommendations on investment strategies for a fee or other compensation with respect to assets of an employee benefit plan or IRA should be fiduciary investment advice under ERISA. The final rule includes text that makes this clear.

Some commenters suggested that the concept of ''management'' covered only proxy voting, and pointed to the preamble to the 2010 Proposal which stated that the ''management of securities or other property'' would

[25] The Department has acknowledged that a plan sponsor may wish merely to provide office space or make computer terminals available for use by a service provider that has been selected by a participant or beneficiary to provide investment education using interactive materials. The Department said that whether a plan sponsor or fiduciary has effectively endorsed or made an arrangement with a particular service provider is an inherently factual inquiry that depends upon all the relevant facts and circumstances. The Department explained, however, that a uniformly applied policy of providing office space or computer terminals for use by participants or beneficiaries who have independently selected a service provider to provide investment education would not, in and of itself, constitute an endorsement of or an arrangement with the service provider. See Preamble to Interpretative Bulletin 96–1, 61 FR 29586, 29587–88, June 11, 1996.

include advice and recommendations as to the exercise of rights appurtenant to shares of stock (*e.g.,* voting proxies). 75 FR 65266 (Oct. 22, 2010). As discussed elsewhere in this Notice, the concept of investment management recommendations is not that limited. Nonetheless, the Department has long viewed the exercise of ownership rights as a fiduciary responsibility because of its material effect on plan investment goals. 29 CFR 2509.08–2 (2008). Consequently, recommendations on the exercise of proxy or other ownership rights are appropriately treated as fiduciary in nature. Accordingly, the final rule's inclusion of advice regarding the management of securities or other property within the term ''investment advice'' in paragraph (a)(1)(ii) covers recommendations as to proxy voting and the management of retirement assets. As with other types of investment advice, guidelines or other information on voting policies for proxies that are provided to a broad class of investors without regard to a client's individual interests or investment policy, and which are not directed or presented as a recommended policy for the plan or IRA to adopt, would not rise to the level of fiduciary investment advice under the final 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 Securities Exchange Act of 1934, for example soliciting a shareholder vote on the election of directors and the approval of other corporate action, would not constitute fiduciary investment advice under the rule from the person who creates or distributes the proxy statement.

With respect to the comments seeking clarification of this provision's application to foreign exchange transactions, the internal operation of stable value funds, and options trading, the Department does not believe there is a need for special clarification. For example, recommendations on foreign exchange transactions and options trading clearly can involve recommendations on investment policies or strategies and portfolio composition. Whether any particular communication rises to the level of a recommendation would depend, as with any other communication to a plan or IRA investor, on context, content, and presentation. Thus, merely explaining the general importance of maintaining a diversified portfolio or describing how options work would not generally meet the regulation's definition of a covered ''recommendation.'' But if, on the other hand, the adviser recommends that the investor change the composition of her portfolio or pursue an option strategy, the adviser makes a recommendation covered by the rule. Similarly, a recommendation to transition from a commissionable account to a fee-based account would constitute a recommendation on the management of assets covered by the rule, and compensation received as a result of that recommendation could be a prohibited transaction for which an exemption would be required. The impact of the final rule in this regard should largely be limited to retail retirement investors because, to the extent the communications involve sophisticated financial professional or large money managers, the final rule's provision that allows such communications to be excluded from fiduciary investment advice should address the commenters' request for clarification.

(4) Recommendations on Selection of an Investment Adviser or Investment Manager

The proposal included paragraph (a)(1)(iv) that separately treated recommendations on the selection of investment advisers for a fee as fiduciary investment advice. In the Department's view, the current 1975 regulation already covered such advice, as well as recommendations on the selection of other persons providing investment management services. The Department continues to believe that such recommendations should be treated as fiduciary in nature but concluded that presenting such hiring recommendations as a separate provision may have created some confusion among commenters, as discussed above.

Many commenters expressed concern about the effect of the proposal's paragraph (a)(1)(iv) on a service or investment provider's solicitation efforts on its own (or an affiliate's) behalf to potential clients, including routine sales or promotion activity, such as the marketing or sale of one's own products or services to plans, participants, or IRA owners. These commenters argued that the provision in the proposal could be interpreted broadly enough to capture as investment advice nearly all marketing activity that occurs during initial conversations with plan fiduciaries or other potential clients associated with hiring a person who would either manage or advise as to plan assets. Service providers argued that the proposal could preclude them from being able to provide information and data on their services to plans, participants, and IRA owners, during the sales process in a non-fiduciary capacity. For example, commenters questioned whether the mere provision of a brochure or a sales presentation, especially if targeted to a specific market segment, plan size, or group of individuals, could be fiduciary investment advice under the 2015 Proposal based on the express or implicit recommendation to hire the service provider. Commenters stated that a similar issue exists in the distribution and rollover context regarding a sales pitch to participants about potential retention of an adviser to provide retirement investment services outside of the plan.

Many commenters were also concerned that the provision would treat responses to requests for proposal (RFP) as investment advice, especially in cases where the RFP requires some degree of individualization in the response or where specific representations were included about the quality of services being offered. For example, a service provider may include a sample fund line up or discuss specific products or services as part of its RFP presentation. Commenters argued that this or similar individualization should not trigger fiduciary status in an RFP context. A specific example of this issue is whether and how providers can respond to inquiries concerning the mapping of plan investments, in which case they often are asked to provide specific examples of alternative investments; a few commenters indicated that the Department should clarify application of the rule in this context. Other commenters stated that the proposed regulation conflates two separate acts—(i) the recommendation to hire the adviser and (ii) the recommendation to make particular investments or to pursue particular investment strategies. Some commenters said the proposal would create a fiduciary obligation for the adviser to tell the potential investor if some other adviser could provide the same services for lower fees, for example. They described such an obligation as unprecedented and not commercially viable.

Some other commenters argued that recommendations on the engagement of an adviser is not ''investment'' advice at all, and suggested that the final rule should be limited to an adviser's recommendation on investments and services. These commenters explained that plan fiduciaries commonly look to existing consultants, attorneys, and other professionals for referrals to other service providers, and that service providers should not be stifled in their ability to refer other service providers, including advisers. Commenters also offered suggestions for possible conditions that the Department could impose to ensure there is no abuse in this context, for example requiring that the plan fiduciary enter into a separate contract or arrangement with the other service provider, that the referring provider disclose that its referral is not a recommendation or endorsement, or that the referring party be far removed from the ultimate recommendation or advice. Finally, some commenters requested that the Department state that the provision would not apply to specific types of referrals, for example a recommendation to hire ''an'' adviser rather than any particular adviser, referrals to non-fiduciary service providers, and recommendations to a colleague.

The Department continues to believe that the recommendation of another person to be entrusted with investment advice or investment management authority over retirement assets is often critical to the proper management and investment of those assets and should be fiduciary in nature. Recommendations of investment advisers or managers are no different than 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 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. That decision thus is clearly part of a prudent investment analysis, and advice on that subject is, in the Department's view, fairly characterized as investment advice. Failing to include such advice within the scope of the final rule carries the risk of creating a significant gap or loophole.

It was not the intent of the Department, however, that one could become a fiduciary merely by engaging in the normal activity of marketing oneself or an affiliate as a potential fiduciary to be selected by a plan fiduciary or IRA owner, without making an investment recommendation covered by (a)(1)(i) or (ii). Thus, the final rule was revised to state, as an example of a covered recommendation on investment management, a recommendation on the selection of ''other persons'' to provide investment advice or investment management services. Accordingly, a person or firm can tout the quality of his, her, or its own advisory or investment management services or those of any other person known by the investor to be, or fairly identified by the adviser as, an affiliate, without triggering fiduciary obligations.

However, the revision in the final rule does not, and should not be read to, exempt a person from being a fiduciary with respect to any of the investment recommendations covered by paragraphs (a)(1)(i) or (ii). The final rule draws a line between an adviser's marketing of the value of its own advisory or investment management services, on the one hand, and making recommendations to retirement investors on how to invest or manage their savings, on the other. An adviser can recommend that a retirement investor enter into an advisory relationship with the adviser without acting as a fiduciary. But when the adviser recommends, for example, that the investor pull money out of a plan or invest in a particular fund, that advice is given in a fiduciary capacity even if part of a presentation in which the adviser is also recommending that the person enter into an advisory relationship. The adviser also could not recommend that a plan participant roll money out of a plan into investments that generate a fee for the adviser, but leave the participant in a worse position than if he 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 final rule.

Some commenters stated that it is common practice for some service providers, such as recordkeepers, to be asked by customers to provide a list of names of investment advisers with whom the recordkeepers have existing relationships (*e.g.,* systems interfaces). The commenters asked that the final rule expressly address when such ''simple referrals'' constitute a recommendation of an investment adviser or investment manager covered by the rule. The Department does not believe a specific exclusion for ''referrals'' is an appropriate way to address this concern. Rather, the issue presented by these comments, in the Department's view, is more properly treated as a question about when a ''referral'' rises to the level of a ''recommendation,'' and whether the recommendation was given for a fee or other compensation as the rule requires. As described above, the final rule has a new provision that further defines the term ''recommendation.'' That definition requires that the communication, ''based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action.'' Whether a referral rises to the level of a recommendation, then, depends on the content, context, and manner of presentation. If, in context, the investor would reasonably believe that the service provider is recommending that the plan base its hiring decision on the specific list provided by the adviser, and the service provider receives compensation or referral fees for providing the list, the communication would be fiduciary in nature.

With respect to the question about whether a general recommendation to hire ''an adviser'' would constitute fiduciary investment advice even if the recommendation did not identify any particular person or group of persons to engage, the Department does not intend to cover such a recommendation within the prong of the final rule that requires a recommendation of an unaffiliated person. While it is possible that such a communication could be presented in a way that constituted a recommendation regarding the management of securities or other investment property, it seems unlikely, in most circumstances, for such a general recommendation to result in the person's receipt of a fee or compensation that would give rise to a prohibited transaction requiring compliance with the conditions of an exemption.

There was also concern that recommendations of service providers who themselves are not fiduciary investment advisers or investment managers, for example, because of a carve-out under the proposal, may be considered fiduciary advice whereas the underlying activity of the recommended service provider would not. The Department did not intend the proposal to reach recommendations of persons to provide services that did not constitute fiduciary investment advice or fiduciary investment management services. Although the Department agrees that potential conflicts of interest may exist with respect to recommendations to hire non-fiduciary service providers (*e.g.,* recommendations to hire a particular firm to execute securities transactions on a non-discretionary basis or to act as a recordkeeper with respect to investments), the Department concluded that a more expansive definitional approach could result in coverage of recommendations that fell outside the scope of investment ''management'' and cause undue uncertainty about the fiduciary definition's application to particular hiring recommendations. Accordingly, the final rule was not expanded to include recommendations of such other service providers within the scope of recommendations regarding management of plan or IRA assets.

(5) Appraisals and Valuations

After carefully reviewing the comments, the Department has concluded that the issues related to valuations are more appropriately addressed in a separate regulatory initiative. Therefore, unlike the proposal, the final rule does not address appraisals, fairness opinions, or similar statements concerning the value of securities or other property in any way. Consequently, in the absence of regulations or other guidance by the Department, appraisals, fairness opinions and other similar statements will not be considered fiduciary investment advice for purposes of the final rule.

Paragraph (a)(1)(iii) of the 2015 Proposal, like the 1975 regulation, which included advice as to ''the value of securities or other property,'' covered certain appraisals and valuation reports. However, it was considerably more focused than the 2010 Proposal. Responding to comments to the 2010 Proposal, the 2015 Proposal in paragraph (a)(1)(iii) covered only appraisals, fairness opinions, or similar statements that relate to a particular investment transaction. Under paragraph (b)(5)(iii), the proposal also expanded the 2010 Proposal's carve-out for general reports or statements of value provided to satisfy required reporting and disclosure rules under ERISA or the Code. In this manner, the proposal focused on instances where the plan or IRA owner is looking to the appraiser for advice on the market value of an asset that the investor is considering to acquire, dispose, or exchange. The proposal also contained a carve-out at paragraph (b)(5)(ii) specifically addressing valuations or appraisals provided to an investment fund (*e.g.,* collective investment fund or pooled separate account) holding assets of various investors in addition to at least one plan or IRA. In paragraph (b)(5)(i) of the proposal, the Department decided not to extend fiduciary coverage to valuations, fairness opinions, or appraisals for ESOPs relating to employer securities because it concluded that its concerns in this space raise unique issues that would be more appropriately addressed in a separate regulatory initiative.

Many commenters requested that the Department narrow the scope of this provision of the proposal, or alternatively, expand the carve-outs on valuations to clarify that routine or ministerial, non-discretionary valuation functions that are necessary and appropriate to plan administration or integral to the offering and reporting of investment products are not fiduciary advice. Commenters also requested an explanation of what was meant by ''in connection with a specific transaction'' and explained that many appraisals support fairness opinions that fiduciary investment managers render in connection with specific transactions. Some commenters asked that the Department remove valuations of all types from the definition of investment advice because, in their view, valuations and appraisals are conceptually different from investment advice in that they involve questions of fact as to what an investment ''is'' worth, rather than qualitative assessments of what investment ''should'' be held, how they ''should'' be managed, and who ''should'' be hired. Further these commenters believe that the Department had not established the abuse that it is attempting to curb with this provision. Other commenters suggest that the Department reserve the issue of valuations pending further study. Other commenters suggested that the Department make certain exceptions for valuations provided to ESOPs regardless of whether the valuation is conducted on a transactional basis or if independent plan fiduciaries engaged the valuation provider. Some others suggested that the current professional standards for appraisers are sufficient or that the Department should develop its own.

Other commenters agree with the Department that appraisal and valuation information is extremely important to plans when acquiring or disposing of assets. Some also expressed concern that valuations can steer participants toward riskier assets at the point of distribution.

It continues to be the Department's opinion that, in many transactions, a proper appraisal of hard-to-value assets is the single most important factor in determining the prudence of the transaction. Accordingly, the Department believes that employers and participants could benefit from the imposition of fiduciary standards on appraisers when they value assets in connection with investment transactions. The Department believes that this is particularly true in the employer security valuation context in which the Department has seen some extreme cases of abuse. In the case of closely-held companies, ESOP trustees typically rely on professional appraisers and advisers to value the stock, often do not proceed with a transaction in the absence of an appraisal, and sometimes engage in little or no negotiation over price. In these cases, the appraiser effectively determines the price the plan pays for the stock with plan assets. Unfortunately, in investigations and enforcement actions, the Department has seen many instances of improper ESOP appraisals—often involving most or all of a plan's assets—resulting in hundreds of millions of dollars in losses.

After carefully considering the comments, the Department is persuaded that ESOP valuations present special issues that should be the focus of a separate project. The Department also believes that piecemeal determinations as to inclusions or exclusions of particular valuations may produce unfair or inconsistent results. Accordingly, rather than single out ESOP appraisers for special treatment under the final rule, the Department has concluded that it is preferable to broadly address appraisal issues generally in a separate project so that it can ensure consistent treatment of appraisers under ERISA's fiduciary provisions. Given the common issues and problems appraisers face, it is quite likely that the comments and issues presented to the Department by ESOP appraisers will be relevant to other appraisers as well.

B. 29 CFR 2510.3–21(a)(2)—The Circumstances Under Which Advice Is Provided

As provided in paragraph (a)(2) of the final rule, a person would be considered a fiduciary investment adviser in connection with a recommendation of a type listed paragraph (a)(1) of the final rule, if the recommendation is made either directly or indirectly (*e.g.,* through or together with any affiliate) by a person who:

(i) Represents or acknowledges that it is acting as a fiduciary within the meaning of the Act or Code with respect to the advice described in paragraph (a)(1);

(ii) Renders the advice pursuant to a written or verbal agreement, arrangement or understanding that the advice is based on the particular investment needs of the advice recipient; or

(iii) Directs the advice to a specific advice recipient or recipients regarding the advisability of a particular investment or management decision with respect to securities or other investment property of the plan or IRA.

As in the proposal, under paragraph (a)(2)(i) of the final rule, advisers who claim fiduciary status under ERISA or the Code are required to honor their words. They may not say they are acting as fiduciaries and later argue that the advice was not fiduciary in nature. Several commenters focused on the provision in the proposal covering investment recommendations ''if the person providing the advice, either directly or indirectly (*e.g.,* through or together with an affiliate)'' acts in one of the three ways specified. With respect to representations of fiduciary status, comments said that the Department should change the final rule to require ''direct'' representations in this context. They argued that the representation should be made only by the person or entity that will be the investment advice fiduciary and that a loose reference by an affiliate should not suffice, nor should acknowledgement of fiduciary status by one party extend such status to such fiduciary's affiliates. One commenter suggested that this provision be clarified by requiring the representation or acknowledgement of fiduciary status to be ''with respect to a particular account and a particular recommendation or series of recommendations.'' A few commenters asked whether the provision requires the person to explicitly use the word ''fiduciary'' or to refer to ERISA or the Code in describing his or her status, or whether the Department intended to include characterizations that imply fiduciary status are included, for example words and phrases such as ''trusted adviser,'' ''personalized advice,'' or that advice will be in the client's ''best interest.'' One commenter asked whether the acknowledgement of fiduciary status had to be in writing.

The Department does not agree that the suggested changes are necessary or appropriate. In general, it has been the longstanding view of the Department that when an individual acts as an employee, agent or registered representative on behalf of an entity engaged to provide investment advice to a plan, that individual, as well as the entity, would be investment advice fiduciaries under the final rule. The Department's intent also is to ensure that persons holding themselves out as fiduciaries with respect to investment advice to retirement investors cannot deny their fiduciary status if a dispute subsequently arises, but rather must honor their words. There is no one formulation that must be used to trigger fiduciary status in this regard, but rather the question is whether the person was reasonably understood to hold itself out as a fiduciary with respect to communications with the plan or IRA investor. If a person or entity does not want investment-related communications to be treated as fiduciary in nature, it should exercise care not to suggest otherwise. Moreover, some of the suggested changes with respect to affiliates could encourage ''bait and switch'' tactics where a person encourages individuals to seek fiduciary investment advice from an affiliate, but then later claims those communications are not relevant unless expressly ratified by the person in direct communications with an advice recipient. This is particularly true given the interrelated nature of affiliated financial service companies and their operations, and the likelihood that ordinary retirement investors will not know the details of a corporate family's legal structure or draw fine lines between different segments of the same corporate family. On the other hand, the mere fact that an affiliate acknowledged its fiduciary status for purposes other than rendering advice (for example, as a trustee) would not constitute a representation or acknowledgement that the person was acting as a fiduciary ''with respect to'' that person's investment-related communications.

The proposal alternatively required that ''the advice be rendered pursuant to a written or verbal agreement, arrangement or understanding that the advice is individualized to, or that such advice is specifically directed to, the advice recipient for consideration in making investment or management decisions with respect to the plan or IRA.'' Commenters focused on several aspects of this provision. First, they argued that the ''specifically directed'' and ''individualized'' prongs were unclear, overly broad, and duplicative, because any advice that was individualized would also be specifically directed at the recipient. Second, they said it was not clear whether there had to be an agreement, arrangement, or understanding that advice was specifically directed to a recipient, and, if so, what would be required for such an agreement, arrangement or understanding to exist. They expressed concern about fiduciary status possibly arising from a subjective belief of a participant or IRA investor. And third, they requested modification of the phrase ''for consideration,'' believing the phrase was overly broad and set the threshold too low for requiring that recommendations be made for the purpose of making investment decisions. A number of other commenters explicitly endorsed the phrases ''specifically directed,'' and ''individualized to,'' believing that these are appropriate and straightforward thresholds to attach fiduciary status.

As explained in the preamble to the 2015 Proposal, the parties need not have a subjective meeting of the minds on the extent to which the advice recipient will actually rely on the advice, but the circumstances surrounding the relationship must be such that a reasonable person would understand that the nature of the relationship is one in which the adviser is to consider the particular needs of the advice recipient. 80 FR 21940. The Department agrees, however, that the provision in the proposal could be improved and clarified. The final rule changes this provision in two respects. First, the phrase ''for consideration'' has been removed from the provision. After reviewing the comments, the Department believes that clause as drafted was largely redundant to the provisions in paragraph (a)(1) of the proposal and that the final rule sets forth the subject matter areas to which a recommendation must relate to constitute investment advice. The final rule thus revises the condition to require that advice be ''directed to'' a specific advice recipient or recipients regarding the advisability of a particular investment or management decision.'' Second, although the preamble to the proposal stated that the ''specifically directed to'' provision, like the individualized advice provision, required that there be an agreement, arrangement or understanding that advice was specifically directed to the recipient, the Department agrees that using that terminology for both the individualized advice prong and the specifically directed to prong serves no useful purpose for defining fiduciary investment advice. The point of the proposal's language concerning advice specifically directed to an individual was to distinguish specific investment recommendations to an individual from ''recommendations made to the general public, or to no one in particular.'' 75 FR 21940. Examples included general circulation newsletters, television talk show commentary, and remarks in speeches and presentations at conferences. The final rule now includes a new provision (paragraph (b)(2)) to make clear that such general communications generally are not advice because they are not recommendations within the meaning of the final rule. A showing that an adviser directed a specific investment recommendation to a specific person necessarily carries with it a reasonable basis for both the adviser and the advice recipient to understand what the adviser was doing. The Department thus agrees with the commenters who said this element of the condition was unnecessary and could lead to confusion. The Department does not view this change as enlarging the definition of investment advice from what was set forth in the proposal.

As the Department indicated in the preamble to the proposed regulation, advisers should not be able to specifically direct investment recommendations to individual persons, but then deny fiduciary responsibility on the basis that they did not, in fact, consider the advice recipient's individual needs or intend that the recipient base investment decisions on their recommendations. Nor should they be able to continue the practice of advertising advice or counseling that is one-on-one or tailored to the investor's individual needs and then use boilerplate language to disclaim that the investment recommendations are fiduciary investment advice.

C. 29 CFR 2510.3–21(b)—Definition of Recommendation

Paragraph (b)(1) describes when a communication based on its context, content, and presentation would be viewed as a ''recommendation,'' a fundamental element in establishing the existence of fiduciary investment advice. Paragraph (b)(2) sets forth examples of certain types of communications which are not ''recommendations'' under that definition. With respect to paragraph (b) in the final rule, the Department noted in the proposal that the proposed general definition of investment advice was intentionally broad to avoid weaknesses of the 1975 regulation and to reflect the broad sweep of the statutory text. But, at the same time, the Department recognized that, standing alone, it could sweep in some relationships that are not appropriately regarded as fiduciary in nature. The proposal included ''carve-outs'' to exclude certain specified communications and activities from the scope of the definition of investment advice. Various public comments expressed concern or confusion regarding several of the carve-outs. The commenters said certain conduct under the carve-outs did not seem to fall within the scope of the general definition such that a ''carve-out'' was not necessary. They also expressed concern that classifying such conduct as within a ''carve-out'' might carry an implication that anything that did not technically meet the conditions of the carve-out would automatically meet the definition of investment advice. The Department agrees that the ''carve-out'' approach, both as a structural matter and as a matter of terminology, was not the best way to address the issue of delineating the scope of fiduciary investment advice. Accordingly, the final rule in paragraphs (b) (and (c) discussed below) uses an alternative approach, more analogous to that used by FINRA in addressing a similar issue under the securities laws, that involves expanding the definition of what constitutes a ''recommendation.''

(1) Communications and Activities That Constitute Recommendations

In the Department's view, whether a ''recommendation'' has occurred is a threshold issue and the initial step in determining whether investment advice has occurred. The proposal included a definition of recommendation in paragraph (f)(1): ''[A] communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action.'' For example, FINRA Policy Statement 01–23 sets forth guidelines to assist brokers in evaluating whether a particular communication could be viewed as a recommendation, thereby triggering application of FINRA's Rule 2111 that requires that a firm or associated person have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer.[26] In the proposal, the Department specifically solicited comments on whether it should adopt some or all of the standards developed by FINRA in defining communications that rise to the level of a recommendation for purposes of distinguishing between investment education and investment advice under ERISA.

[26] FINRA Rule 2111 requires, in part, that a broker-dealer or associated person ''have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer, based on the information obtained through the reasonable diligence of the [firm] or associated person to ascertain the customer's investment profile.'' In a set of FAQs on Rule 2111, FINRA explained that ''[i]n general, a customer's investment profile would include the customer's age, other investments, financial situation and needs, tax status, investment objectives, investment experience, investment time horizon, liquidity needs and risk tolerance. The rule also explicitly covers recommended investment strategies involving securities, including recommendations to 'hold' securities.''

Some commenters argued that the definition captured too broad a range of communications, citing as an example use of the term ''suggestion'' in the proposed definition and argued that it could be read so broadly that nearly every casual conversation between an adviser and a client could constitute investment advice. The commenters suggested that the definition require a ''clear and affirmative endorsement'' of a particular course of action. Some argued that their concerns could be addressed by formally adopting and citing FINRA standards as the operative text in the rule because they consider FINRA's standards to be appropriate in the context of defining fiduciary investment advice. Further, this would create consistency for service providers who must comply with both ERISA's and FINRA's requirements. Other commenters opposed wholesale adoption of FINRA standards because the final rule then would be subject to future changes or interpretations of the FINRA guidance that might not be consistent with the purposes of the conflict of interest rule. They also argued that such an approach would introduce ambiguities into the final rule because the concepts and terminology in the FINRA guidance pertained primarily to transactions involving brokers and securities, and those concepts and terminology might not be easily applied to other types of investment advisers and other types of investment advice transactions. For example, the FINRA guidance applies to recommendations to invest in securities, but the ERISA rule would also cover recommendations regarding investment advisory services.

In the final rule, the initial threshold of whether a person is a fiduciary by virtue of providing investment advice continues to be whether that person makes a recommendation as to the various activities described in paragraphs (a)(1)(i) and (ii). Paragraph (b)(1) of the final rule continues to define ''recommendation'' for purposes of paragraph (a) as a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action. Thus, communications that require the adviser to comply with suitability requirements under applicable securities or insurance laws will be viewed as a recommendation. The final rule also includes additional text intended to clarify the nature of communications that would constitute recommendations. The final rule makes it clear that the determination of whether a ''recommendation'' has been made is an objective rather than subjective inquiry. The final rule mirrors the FINRA guidance in stating that 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. It also tracks SEC staff guidance in explaining that advice about securities for purposes of the Investment Advisers Act includes providing a selective list of securities as appropriate for an investor even if no recommendation is made with respect to any one security.[27] Furthermore, the final rule conforms to the FINRA guidance under which a series of actions, directly or indirectly (*e.g.,* through or together with any affiliate), that may not constitute recommendations when viewed individually may amount to a recommendation when considered in the aggregate. It also adopts the FINRA position that it makes no difference in determining the existence of a recommendation whether the communication was initiated by a person or a computer software program.

With respect to the comments that emphasized the breadth of the term ''suggestion,'' the Department notes that the same term is used in the FINRA guidance and securities laws and related regulations to define and establish standards related to investment recommendations. Accordingly, the Department does not believe the use of that term in the rule reasonably carries the risk alleged by some commenters. Nonetheless, the final rule includes new text to emphasize that there must be an investment ''recommendation'' as a threshold issue and initial step in determining whether investment advice has occurred, and clarifies that a recommendation requires that there be a call to action that a reasonable person would believe was a suggestion to make or hold a particular investment or pursue a particular investment strategy.

With respect to comments that suggested adopting the FINRA standard for recommendation, in the Department's view, FINRA guidance does not specifically define the term recommendation in a way that can be directly incorporated into the final rule. The Department agrees with commenters that strictly adopting FINRA guidance would mean that the final rule could be subject to changes in FINRA interpretations announced in the future and not reviewed or separately adopted by the Department as the appropriate ERISA standard. The Department, however, as described both here and elsewhere in the preamble, has taken an approach to defining ''recommendation'' that is consistent with and based upon FINRA's approach.

(2) Communications and Activities That Do Not Constitute Recommendations

To further clarify the meaning of recommendation, the Department has stated that the rendering of services or materials in conformance with paragraphs (b)(2)(i) through (iv) would not be treated as a recommendation for purposes of the final rule. These paragraphs describe services or materials that provide general communications and commentary on investment products such as financial newsletters, which, with certain modifications, were identified as carve-outs under paragraph (b) of the proposal, such as marketing or making available a menu of investment alternatives that a plan fiduciary could choose from, identifying investment alternatives that meet objective criteria specified by a plan fiduciary, and providing information and materials that constitute investment education or retirement education.

Before discussing the specific carve-outs themselves, many commenters suggested that the Department clarify the relationship between the fiduciary definition under paragraph (a)(1) and (2) of the proposal and the carve-outs. Some commenters suggested that conduct described in certain carve-outs would not have been fiduciary in nature to begin with under the general definition of investment advice in the proposal under paragraph (a)(1) and (2). Others suggested that the Department clarify that the carve-outs are interpretative examples and do not imply that any particular conduct is otherwise fiduciary in nature.

As the Department described in the proposal, the purpose of the carve-outs was to highlight that in many circumstances, plan fiduciaries, participants, beneficiaries, and IRA owners may receive recommendations that, notwithstanding the general definition set forth in paragraph (a) of the proposal, should not be treated as fiduciary investment advice. The Department believed that the conduct and information described in those carve-outs were beneficial for plans, plan fiduciaries, participants, beneficiaries and IRA owners and wanted to make it clear that the furnishing of the described information would not be considered investment advice. However, the Department agrees with many of the commenters that much of the conduct and information described in the proposal for certain of the carve-outs did not meet the technical definition of investment advice under paragraph (a)(1) and (2) of the proposal such that they should be excluded from that definition. Some were more in the nature of examples of education or other information which would not rise to the level of a recommendation to begin with. Thus, the final rule retains these provisions, with changes made in response to comments, but presents them as examples to clarify the definition of recommendation and does not characterize them as carve-outs.

(i) Platform Providers and Selection and Monitoring Assistance

Paragraph (b)(2)(i) and (ii) of the final rule is directed to service providers, such as recordkeepers and third-party administrators, that offer a ''platform'' or selection of investment alternatives to participant-directed individual account plans and plan fiduciaries of these plans who choose the specific investment alternatives that will be made available to participants for investing their individual accounts. Paragraph (b)(2)(i) makes clear that such persons would not make recommendations covered under paragraph (b)(1) simply by making available, without regard to the individualized needs of the plan or its participants and beneficiaries, a platform of investment vehicles from which plan participants or beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts, as long as the plan fiduciary is independent of the person who markets or makes available the investment alternatives and the person discloses in writing to the plan fiduciary that they are not undertaking to provide impartial investment advice or to give advice in a fiduciary capacity. For purposes of this paragraph, a plan participant or beneficiary will not be considered a plan fiduciary. Paragraph (b)(2)(ii) additionally makes clear that certain common activities that platform providers may carry out to assist plan fiduciaries in selecting and monitoring the investment alternatives that they make available to plan participants are not recommendations. Under paragraph (b)(2)(ii), identifying offered investment alternatives meeting objective criteria specified by the plan fiduciary,

[27] See Report entitled ''Regulation of Investment Advisers by the U.S. Securities and Exchange Commission,'' dated March 2013, prepared by the Staff of the Investment Adviser Regulation Office, Division of Investment Management, U.S. Securities and Exchange Commission (available at *www.sec.gov/about/offices/oia/oia_investman/rplaze-042012.pdf.*).

responding to RFPs, or providing objective financial data regarding available alternatives to the plan fiduciary would not cause a platform provider to be a fiduciary investment adviser.

These two paragraphs address certain common practices that have developed with the growth of participant-directed individual account plans and recognize circumstances where the platform provider and the plan fiduciary clearly understand that the provider has financial or other relationships with the offered investment alternatives and is not purporting to provide impartial investment advice. They also accommodate the fact that platform providers often provide general financial information that falls short of constituting actual investment advice or recommendations, such as information on the historic performance of asset classes and of the investment alternatives available through the provider. The provisions also reflect the Department's agreement with commenters that a platform provider who merely identifies investment alternatives using objective third-party criteria (*e.g.,* expense ratios, fund size, or asset type specified by the plan fiduciary) to assist in selecting and monitoring investment alternatives should not be considered to be making investment recommendations.

As an initial matter, while the provisions in paragraphs (b)(2)(i) and (b)(2)(ii) of the final rule are intended to facilitate the effective and efficient operation of plans by plan sponsors, plan fiduciaries and plan service providers, the Department reiterates its longstanding view, recently codified in 29 CFR 2550.404a–5(f) and 2550.404c–1(d)(2)(iv) (2010), that ERISA plan fiduciaries selecting the platform or investment alternatives are always responsible for prudently selecting and monitoring providers of services to the plan or designated investment alternatives offered under the plan.

Commenters requested confirmation that these provisions cover related services that are ''bundled'' with investment platforms. They claimed such services are an integral part of the platform offering. Some of these commenters focused on third-party administrative services and other assistance in connection with establishing a plan and its platform, such as standardized form 401(k) plans and information on investment options. Other commenters stated that platform providers must be able to communicate and explain services such as elective managed account programs, Qualified Default Investment Alternatives (QDIAs), investment adviser/manager options for participants, and non-affiliated registered investment adviser services that will provide platform selection and monitoring services. In response, the Department believes that much of this information described by these commenters does not involve an investment recommendation within the meaning of the rule. Further, other provisions in the final rule, such as the provisions on education, and selection and monitoring assistance, more directly address the issues raised by the commenters. Accordingly, the Department did not make any change in this provision based on these comments.

Several commenters also noted that the ''platform'' concept was not defined in the proposal, and stated that it was unclear, for example, whether the term ''platform'' encompassed a variety of lifetime income investment options, including group or individual annuities, or whether some other criteria also applied to the assessment of whether a proposed investment lineup constituted a platform (*e.g.,* that the lineup not be limited to proprietary products or that it have a certain number of investment alternatives). In developing the final rule, the Department has neither limited the type of investment alternatives (*e.g.,* by excluding lifetime income products) nor mandated a specific number of alternatives that may be offered by a platform provider on its platforms. The Department anticipates that the marketplace will influence both the investment alternatives and the size of platforms offered by platform providers to plans while plan fiduciaries retain their responsibility for selection of their plan's investment alternatives. The Department agrees with the commenters' acknowledgement that specific recommendations as to underlying investments on a platform would continue, of course, to be fiduciary investment advice.

Commenters also sought clarification as to the persons who could rely on both of the carve-outs relating to platform providers. As finalized by the Department, the language of the provisions in paragraphs (b)(2)(i) and (b)(2)(ii) of the final rule does not categorize or limit the persons who are engaged in the activities or communications. The language of these provisions deals with the activities themselves rather than classifying types of service providers that may evolve with market changes.

Some commenters requested clarification of the language requiring that the platform must be ''without regard to the individual needs of the plan'' in paragraph (b)(3) of the proposal. Commenters believe that platform providers often beneficially offer to plan sponsors one or more sample investment platforms that are tailored to the needs of plans in different industries or market segments. They believe some level of customization or individualization (an act they referred to as ''segmentation'') should be permitted as offering the full array of product alternatives to every plan could be counter-productive to helping plan sponsors, especially in the small employer segment of the market. The commenters claimed that these winnowed bundles are not individualized offerings for particular plans, but rather are targeted categories of investments for different general types of plans in different market segments.

The Department generally agrees with these commenters that the marketing and making available of platforms segmented based on objective criteria would not result in providing fiduciary advice solely by virtue of the segmentation. Thus, for example, a platform provider who offers different platforms for small, medium, and large plans would not be providing investment advice merely because of this segmentation. In the Department's view, this type of activity is more akin to product development and is within the provider's discretion as a matter of business judgment, the same as if the provider decided not to offer platforms at all. Plan fiduciaries always are free to deal with vendors who do not design and offer platforms by market segment. Of course, a provider could find itself providing investment advice depending on the particular marketing technique used to promote a segmented platform. For example, if a provider were to communicate to the plan fiduciary of a small plan that a particular platform has been designed for small plans in general, and is appropriate for this plan in particular, the communication would likely constitute advice based on the individual needs of the plan and, therefore, very likely would be considered a recommendation.

In response to the Department's request for comment on whether the platform provider provision as it appeared in the proposal should be limited to large plans, many commenters opposed such a limitation arguing that the platform provider provision was needed to preserve assistance to small plan sponsors with respect to the composition of investment platforms in 401(k) and similar individual account plans. The final rule does not limit the platform provider provision to large plans.

Several commenters also asked the Department to clarify that the platform provider carve-out is available in the 403(b) plan marketplace. Since 403(b) plans are not subject to section 4975 of the Code, this issue is relevant only for 403(b) plans that are subject to Title I of ERISA. In the Department's view, a 403(b) plan that is subject to Title I of ERISA would be an individual account plan within the meaning of ERISA section 3(34) for purposes of the final rule. Thus, the platform provider provision is available with respect to such Title I plans.

Other commenters asked that the platform provider provision be generally extended to apply to IRAs. In the IRA context, however, there typically is no separate independent fiduciary who interacts with the platform provider to protect the interests of the account owners, or who is responsible for selecting the investments included in the platform. In the Department's view, when a firm or adviser narrows the wide universe of potential investments in the marketplace to a limited lineup that it holds out for consideration by an individual IRA owner, the fiduciary status of the communication is best evaluated under the general ''recommendation'' test, rather than under the specific exclusion for platform providers communicating with independent plan fiduciaries. Without an independent plan fiduciary overseeing the investment lineup and signing off on any disclaimers of reliance on the advice, there is too great a danger that the exclusion would effectively shield fiduciary recommendations from treatment as such, even though the IRA owner reasonably understood the communications as constituting individualized recommendations on how to manage assets for retirement. The Department is of a similar view with respect to plan participants who have individually directed brokerage accounts. Consequently, the final rule declines to extend application of the platform provider provisions to plan participants and beneficiaries, and IRAs.

Nonetheless, the Department notes that the separate provision in the final rule regarding transactions with independent plan fiduciaries with financial expertise would be available for persons providing advice to IRAs and plans regarding investment platforms. With respect to employee benefit plans in particular, the Department notes that the 2014 ERISA Advisory Council recently conducted a study and issued a report on ''outsourcing'' employee benefit plan services with a particular focus on functions that historically have been handled by employers, such as ''named fiduciary'' responsibilities. The Council report includes the following observation:

Outsourcing of benefit plan functions, administrative, investment and otherwise, is a practice that predates ERISA. However, its prevalence and scope have grown significantly since ERISA's passage, and has accelerated over the last ten years. Certain functions by their nature must be outsourced to a third party (*e.g.,* auditing a plan's financial statements), while others for practical reasons have been outsourced by most plan sponsors (*e.g.,* defined contribution recordkeeping). In addition, there appears to be an emerging trend toward outsourcing functions that have traditionally been exercised by plan sponsors or other employer fiduciaries (*e.g.,* administrative committee, investment committee, etc.), including functions such as investment fund selection, discretionary plan administration, and investment strategy. There also have been trends towards using multiple employer plan arrangements as a mechanism to ''outsource'' the provision of retirement plan benefits, particularly in the small company market.

The Council's report is available at *http://www.dol.gov/ebsa/publications/2014ACreport3.html.* Accordingly, the Department believes the provision in the final rule on transactions with independent plan fiduciaries with financial expertise is consistent with and could facilitate this trend in the fiduciary investment advice area, including transactions involving selection and monitoring of investment platforms.

Several commenters asked the Department to clarify whether the platform provider carve-out would cover a response to a RFP if the response were to contain a sample plan investment line-up based on the existing investment alternatives under the plan, the size of the plan or sponsor, or some combination of both. According to the commenters, responding to RFPs in this manner is a common practice when the plan fiduciary does not specify any, or sufficient, objective criteria, such as fund expense ratio, size of fund, type of asset, market capitalization, or credit quality. The commenters essentially argued that the plan's current investment line-up effectively serves as a proxy for objective criteria specified by the plan fiduciary. The commenters did admit, however, that even though such RFP responses typically present the line-ups as just ''samples,'' the responses customarily identify specific investment alternatives by name and are quite individualized to the needs of the requesting plan. The commenters, of course, emphasized that the plan fiduciary is under no obligation to hire the platform provider or to adopt the sample line-up of investments even if hired.

In response to these comments, minor changes were made to the proposal to accommodate such RFP responses, but with some protections for plan fiduciaries to prevent abuse. It was never the intent of the Department to displace common RFP practices related to platforms. The Department recognizes that RFPs can be a valuable cost-saving mechanism for plans by fostering competition among interested plan service providers, which can redound to the benefit of plan participants and beneficiaries in the form of lower costs for comparable services. Indeed, it is for this very reason that plan fiduciaries often use RFPs as part of the process of satisfying their duty of prudence under ERISA. On the other hand, without something more to counterbalance the RFP response with a sample line-up identifying investments by name, such communication could be viewed as suggesting the appropriateness of specific investments to the plan fiduciary—which, of course, would constitute a clear call to action to the fiduciary thereby triggering fiduciary status.

As revised, the platform provider provisions now explicitly clarify that a RFP response with a sample line-up of investments is not a ''recommendation'' for purposes of the final rule. Such treatment, however, is conditioned on written notification to the plan fiduciary that the person issuing the RFP response is not undertaking to provide impartial investment advice or to give advice in a fiduciary capacity. Further, the RFP response containing the sample line-up must disclose whether the person identifying the investment alternatives has a financial interest in any of the alternatives, and if so the precise nature of such interest. Collectively, these disclosures will put the plan fiduciary on notice that it should not have an expectation of trust in the RFP response and that composition of the sample line-up may be influenced by financial incentives not necessary aligned with the best interests of the plan and its participants.[28]

[28] In the Department's view, platform providers may have a financial incentive to recommend proprietary funds or an otherwise limited menu based on such non-aligned financial interests. In fact, researchers have found evidence that platform providers act on this conflict of interest, and that

Commenters also requested that the platform provider carve-out be extended to allow the platform provider to furnish for the plan fiduciary's consideration the objective criteria that the plan fiduciary may wish to adopt. Commenters state that plan sponsors are often unsure of what criteria are appropriate and that a service provider's objective assistance is often critical by suggesting factors that may be considered in evaluating and selecting investments. Although the Department does not believe that general advice as to the types to qualitative and quantitative criteria that similarly situated plan fiduciaries might consider in selecting and monitoring investment alternatives will ordinarily rise to the level of a recommendation of a particular investment, the Department does not believe it can craft text for this example that adequately addresses the potential for abuse and steering that could arise, and, therefore, believes the issue of whether such communications are investment advice would best be left to an examination on a case-by-case basis under the definition of recommendation provided by paragraph (b)(1) and educational communications under paragraphs (b)(2)(iii) and (b)(2)(iv).

(ii) Investment Education

The proposal under paragraph (b)(6) carved out investment education from the definition of investment advice. Paragraph (b)(6) of the proposal incorporated much of the Department's earlier Interpretive Bulletin, 29 CFR 2509.96–1 (IB 96–1), issued in 1996, but with important exceptions relating to communications regarding specific investment options available under the plan or IRA. Consistent with IB 96–1, paragraph (b)(6) of the proposal made clear that furnishing or making available the specified categories of information and materials to a plan, plan fiduciary, plan participant or beneficiary, or IRA owner does not constitute the rendering of investment advice, irrespective of who provides the information (*e.g.,* plan sponsor, fiduciary or service provider), the frequency with which the information is shared, the form in which the information and materials are provided (*e.g.,* on an individual or group basis, in writing or orally, via a call center, or by way of video or computer software), or whether an identified category of information and materials is furnished or made available alone or in combination with other categories of investment or retirement information and materials identified in paragraph (b)(6), or the type of plan or IRA involved. As a departure from IB 96–1, a condition of the carve-out was that the asset allocation models and interactive investment materials could not include or identify any specific investment product or specific investment alternative available under the plan or IRA. The Department understood that not incorporating these provisions of IB 96–1 into the proposal represented a significant change in the information and materials that may constitute investment education. Accordingly, the Department specifically invited comments on whether the change was appropriate. The final rule largely adopts the proposal's provision on investment education, but, as discussed below, differentiates between education provided in the plan and IRA markets and includes minor edits to expressly confirm that merely providing information to IRA and plan investors about features, terms, fees and expenses, and other characteristics of investment products available to the IRA or plan investor falls within the ''plan information'' category of investment education under the final rule.

This subject received extensive input from a range of stakeholders with varying perspectives on how to draw the line between investment advice and investment education. Many commenters representing consumers and retail investors urged the Department not to create a carve-out that would allow investment advice to be presented as non-fiduciary ''education.'' These commenters cautioned that the final rule should not create a carve-out that is so broad that it covers communications or behavior that may fairly be interpreted by plan participants as ''advice'' rather than education. They cited the current practice by investment advice providers who present their services as individually tailored or ''one-on-one'' advice, but then use boilerplate disclaimers to avoid fiduciary responsibility for the advice under the Department's current ''five-part'' test regulation as a consumer protection failure that should not be repeated. Other commenters representing a range of interests and stakeholders expressed concern that the rule, and presumably the education carve-out, would adversely affect the availability of information to plan participants and beneficiaries, and IRA owners about the general characteristics and options available under the plan or IRA and general education about investments and retirement savings strategies.

There was general consensus, however, that investment education and financial literacy tools are valuable resources for retail retirement investors, that there is a difference between educational communications and activities, and that certain communications and activities should be subject to fiduciary standards as investment advice. Commenters, however, held varying views as to how the final rule should define the line between investment education and investment advice. A substantial number of the comments expressing concern about the proposal's impact on the availability of investment education to retail retirement investors appeared to be based on a misunderstanding of the proposal. For example, some commenters expressed concern that product providers could not provide general descriptions or information about their products and services without the communication being treated as investment advice under the rule. The proposal, as noted above, adopted almost without change an Interpretive Bulletin issued by the Department in 1996. IB 96–1 had been almost uniformly supported by the financial services industry. Admittedly IB 96–1 was issued against the backdrop of the current five-part test so that some of the commenters may have been less interested in its specifics because the five-part test allowed them to avoid fiduciary status for communications that fell outside the scope of non-fiduciary ''education'' as described in the IB 96–1. Nonetheless, IB 96–1 received substantial support from commenters as drawing an appropriate line between investment advice and investment education. IB 96–1 and, by extension, the proposal which adopted the IB, recognized four categories of non-fiduciary education:

○ *Information and materials that describe investments or plan alternatives without specifically recommending particular investments*

plan participants suffer as a result. In a study examining the menu of mutual fund options offered in a large sample of defined contribution plans, underperforming non-propriety funds are more likely to be removed from the menu than propriety funds. Similarly, the study found that platform providers are substantially more likely to add their own funds to the menu, and the probability of adding a proprietary fund is less sensitive to performance than the probability of adding a non-proprietary fund. The study also concluded that proprietary funds do not perform better in later periods, which indicates that they are left on the menu for the benefit of the service provider and not due to additional information the service provider would have about their own funds. *See* Pool, Veronika, Clemens Sialm, and Irina Stefanescu, *It Pays to Set the Menu: Mutual Fund Investment Options in 401(K) Plans* (August 14, 2015) Journal of Finance, Forthcoming (avaialble at SSRN: *http://ssrn.com/abstract =2112263* or *http://dx.doi.org/10.2139/ssrn.2112263*).

or strategies. Thus, for example, a firm/adviser would not act as an investment advice fiduciary merely by virtue of describing the investment objectives and philosophies of plan investment options, mutual funds, or other investments; their risk and return characteristics; historical returns; the fees associated with the investment; distribution options; contract features; or similar information about the investment.

○ *General financial, investment, and retirement information.* Similarly, one would not become a fiduciary merely by providing information on standard financial and investment concepts, such as diversification, risk and return, tax deferred investments; historic differences in rates of return between different asset classes (*e.g.,* equities, bonds, cash); effects of inflation; estimating future retirement needs and investment time horizons; assessing risk tolerance; or general strategies for managing assets in retirement. All of this is non-fiduciary education as long as the adviser doesn't cross the line to recommending a specific investment or investment strategy.

○ *Asset allocation models.* Here too, without acting as a fiduciary, firms and advisers can provide information and materials on hypothetical asset allocations as long as they are based on generally accepted investment theories, explain the assumptions on which they are based, and don't cross the line to making specific investment recommendations or referring to specific products (*i.e.,* recommending that the investor purchase specific assets or follow very specific investment strategies).

○ *Interactive investment materials.* Again, without acting as a fiduciary, firms and advisers can provide a variety of questionnaires, worksheets, software, and similar materials that enable workers to estimate future retirement needs and to assess the impact of different investment allocations on retirement income, as long as the adviser meets conditions similar to those described for asset allocation models. These interactive materials can even consider the impact of specific investments, as long as the specific investments are specified by the investor, rather than the firm/adviser.

The Department, accordingly, disagrees with commenters who contended that the 2015 Proposal would make such communications and activities fiduciary investment advice. In the Department's view the proposal was clear that investment education included providing information and materials that describe investments or plan alternatives without specifically recommending particular investments or strategies. Nonetheless, some of the text in the proposal that covered this point appeared under the heading ''Plan Information'' and commenters may have failed to fully appreciate the fact that information about investment alternatives available under the plan or IRA was included in that section. Accordingly, the Department added text to that section to emphasize that element in the final rule.

Furthermore, some comments from groups representing employers that sponsor plans, expressed concern that the proposal would lead employers to stop providing education about their plans to their employees. In the Department's view, since only investment advice for a fee or compensation falls within the fiduciary definition, the fact that employers do not generally receive compensation in connection with their educational communications provides employers with a high level of confidence that their educational activities would not constitute investment advice under the rule. In that regard, the Department does not believe that incidental economic advantages that may accrue to the employer by reason of sponsorship of an employee benefit plan would constitute fees or compensation within the meaning of the rule. For example, the Department does not believe that an employer would be receiving a fee or compensation under the rule merely because the plan is structured so the employer does not pay plan expenses that are paid out of an ERISA budget account funded with revenue sharing generated by investments under the plan.

Related comments similarly expressed concern that employers may not engage service providers to provide investment education to their plan participants and beneficiaries because of concern that the vendors may be investment advice fiduciaries under the rule, and the employers would have a fiduciary obligations or co-fiduciary liability in connection with the activities of those vendors. They contended that, without a blanket carve-out for plan sponsors and service providers that operate call centers to assist participants and IRA owners, educational assistance or similar participant outreach would be dramatically reduced or eliminated because, notwithstanding appropriate training and supervision, the plan sponsors and service providers could not be certain that individual communications would not carry potential fiduciary liability if individual communications actually crossed the line to give fiduciary investment advice. They similarly recommended that a blanket carve-out was necessary to protect against investment advice claims and litigation from participants and IRA owners dissatisfied with decisions they made with the benefit of education provided by the plan sponsor or service provider.

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. In light of the investment education provisions in the final rule, the Department does not believe the rule significantly expands the obligations or potential liabilities of plan sponsors in this regard. It also bears emphasis that the chief consequence of making covered investment recommendations, rather than merely providing non-fiduciary education is that the fiduciary must give recommendations that are prudent and in the participants' best interest. The Department does not believe it would be appropriate to create a rule that relieves service providers from fiduciary responsibility when they in fact make such recommendations and thereby provide investment advice for a fee, nor would it be appropriate to have a rule that relieved plan sponsors or service providers from having to address complaints from participants and IRA owners that they in fact provided imprudent investment advice or provided investment advice tainted by prohibited self-dealing. The Department believes that such steps would be particularly inappropriate in the case of service providers who are paid to provide participant assistance services.

The final rule is intended to reflect the Department's continued view that the statutory reference to ''investment advice'' is not meant to encompass general investment information and educational materials, but rather is targeted at more specific recommendations and advice on the investment of plan and IRA assets. Further, as explained above, the Department agrees with those commenters who argued that classifying this provision as a ''carve-out'' was a misnomer because the educational activity covered by the provision are not investment recommendations in the first place. As a result, although the substance of the proposal is largely unchanged in this final rule, the ''investment education'' provision in paragraph (b)(2)(iv) of the rule is presented as an example of what would not constitute a recommendation within the meaning of paragraph (b)(2).

The final rule in paragraph (b)(2)(iv) divides investment education information and materials which will not be treated as recommendations into the same four general categories as set forth in the proposal: (A) Plan information; (B) general financial, investment, and retirement information; (C) asset allocation models; and (D) interactive investment materials. The final regulation also adopts the provision from the proposal (also in IB 96–1) stating that there may be other examples of information, materials and educational services which, if furnished, would not constitute investment advice or recommendations within the meaning of the final regulation and that no inference should be drawn regarding materials or information which are not specifically included in paragraph (b)(2)(iv).

Paragraph (b)(2)(iv), like the proposal, makes clear that the distinction between non-fiduciary education and fiduciary advice applies equally to information provided to plan fiduciaries as well as information provided to plan participants and beneficiaries, and IRA owners, and that it applies equally to participant-directed plans and other plans. In addition, the provision applies without regard to whether the information is provided by a plan sponsor, fiduciary, or service provider.

The Department did not receive adverse comments on the provisions in the proposal that were intended to make it clear that investment education included the provision of information and education relating to retirement income issues that extend beyond a participant's or beneficiary's date of retirement. Some commenters explicitly encouraged education in the context of fixed and variable annuities and other lifetime income products. Accordingly, paragraph (b)(2)(iv) of the final rule, as with the proposal, includes specific language to make clear that the provision of certain general information that helps an individual assess and understand retirement income needs past retirement and associated risks (*e.g.,* longevity and inflation risk), or explains general methods for the individual to manage those risks both within and outside the plan, would not result in fiduciary status.

Similarly, the Department does not believe that any change in the regulatory text or addition of a specific safe harbor is necessary to address commenters' concerns regarding distinguishing advice from education in the context of benefit distribution decisions. As to the comments that suggested the Department expressly adopt FINRA's guidance in its Notice 13–45 as the standard for non-fiduciary educational information and materials, the Department does not agree that such an express incorporation of specific FINRA guidance into the regulation is advisable. In addition to the obvious problems that can arise from a federal agency adopting guidance from a self-regulatory organization as a formal regulation with the force of law, the Department is concerned that some of that guidance under the FINRA notice encompasses communications regarding individual investment alternatives or benefit distribution options that would be fiduciary investment advice under the final rule. Moreover, to the extent the commenters found the FINRA guidance useful because it allows descriptions of the typical four options available to participants when retiring—leaving the money in his former employer's plan, if permitted; rolling over the assets to his new employer's plan if available; rolling over to an IRA; or cashing out—those options, including discussions of the advantages and disadvantages of each are already clearly permitted under the education provision. The Department also believes the final rule contains appropriate examples of activities with respect to particular products sufficient to make it clear that education can convey information about investment concepts, such as annuities and lifetime income products, and does not believe amending the regulatory text to specifically emphasize or encourage particular classes of investment or benefit products would improve the provision.

The main focus of the commenters expressing concern, many representing financial services providers, about the education provisions in the proposal was the one substantive change the proposal made to the Department's IB 96–1. Specifically, the proposal did not allow asset allocation models and interactive investment materials to identify specific investment alternatives and distribution options unless they were affirmatively inserted into the interactive materials by the plan participant, beneficiary or IRA owner. A few commenters supported this change. They argued that participants are highly vulnerable to subtle, but powerful, influences by advisers when they receive asset allocation information. They believe that ordinary participants may view these models, particularly when accompanied by references to specific investments, as investment recommendations even if the provider does not intend it as advice and even if the provider includes caveats or statements about the availability of other products. In contrast, other commenters argued—particularly with respect to ERISA-covered plans—that it is a mistake to prohibit the use of specific investment options in asset allocation models used for educational purposes. They said this information is a critical step to ''connect the dots'' for retirement investors in understanding how to apply educational tools to the specific options or options available in their plan or IRA. They claimed that the inability to reference specific investment options in asset allocation models and interactive materials would greatly undermine the effectiveness of these models and materials as educational tools. They said that without the ability to include specific investment products, participants could have a hard time understanding how the educational materials relate to specific investment options. Further, some commenters argued that the Department had presented no evidence that there is actual abuse under the guidance in IB 96–1 that would support a change. With the change, the commenters asserted that the Department has effectively shifted the obligation to populate asset allocation models to plan participants, who for a variety of reasons are unlikely to do so, thereby significantly undermining what has become a valuable tool for participants.

Many commenters suggested ideas for how to address this issue. Some told the Department that it should not depart from the original IB 96–1 on this point. Some commenters argued that the value that plan participants and beneficiaries, and IRA owners, get from having specific investment options identified in asset allocation models and interactive materials was so important that the Department should adopt a safe harbor specifically for communications designed to assist plan participants and beneficiaries and IRA owners with decisions regarding investment alternatives and distribution options. Others suggested that the final rule should permit the identification of designated investment alternatives (DIAs) in asset allocation models with restrictions such as fee neutrality across the presented options, allow the selection of the investment options for the model by an independent third party, or require the model to offer at least three DIAs within each asset class (which may require some plans to increase the number of DIAs available in each asset class).

Some commenters drew a distinction between ERISA-covered plans and IRAs, and agreed with the Department's concern about permitting specific product references to be treated as non-fiduciary education when associated with asset allocation guidance for IRA customers. In the ERISA plan context, a separate fiduciary is responsible for overseeing the funds on the plan lineup and for making sure that the plan's designated investment alternatives are prudent and otherwise consistent with ERISA's standards. Potential ''steering'' by use of an asset allocation model can be effectively constrained by an already approved menu of DIAs, but no analogous protection exists for IRA investors. An adviser's limited explanation of how specific plan-designated alternatives line up with particular asset categories, without more, is far less likely to be perceived by the investor as an investment recommendation—and far less prone to abuse—than is an IRA adviser's discussion of particular asset allocations tied to specific investment products chosen by the adviser or his firm. In the IRA context, the adviser both presents the customer with an allocation and populates the allocation with specific products that the adviser or his firm screened from the entire universe of investments. A broad safe harbor for such communications could permit advisers to steer customers by effectively making specific investment recommendations under the guise of education, with no fiduciary protection.

Some commenters proposed different solutions for the presentation of specific investments to IRA owners. These proposed solutions tried to introduce somewhat analogous protections for IRA owners as for plan participants by making the identification of specific investment alternatives contingent on investment platforms selected or approved by independent third parties. Other commenters sought to eliminate the concern about asset allocation models and interactive materials being used to steer IRA investors to particular products that generated better fees for investment providers by requiring the available investment options to be ''fee neutral'' or paid for on a fixed basis.

After evaluation of the comments and considerations above, the Department has made the following adjustments in the final rule. Paragraphs (b)(2)(iv)(C)(*4*) and (b)(2)(iv)(D)(*6*) now provide that asset allocation models and interactive investment materials can identify a specific investment product or specific alternative available under plans if (1) the alternative is a designated investment alternative under an employee benefit plan (as described in section 3(3) of the Act); (2) the alternative is subject to fiduciary oversight by a plan fiduciary independent of the person who developed or markets the investment alternative or distribution option; (3) the asset allocation models and interactive investment materials identify all the other designated investment alternatives available under the plan that have similar risk and return characteristics, if any; and (4) the asset allocation models and interactive investment materials are accompanied by a statement that identifies where information on those investment alternatives may be obtained; including information described in paragraph (b)(2)(iv)(A) of this regulation and, if applicable, paragraph (d) of 29 CFR 2550.404a–5. When these conditions are satisfied with respect to asset allocation or interactive investment materials, the communications can be appropriately treated as non-fiduciary ''education'' rather than fiduciary investment recommendations, and the interests of plan participants are protected by fiduciary oversight and monitoring of the DIAs as required under paragraph (f) of 29 CFR 2550.404a–5 and paragraph (d)(2)(iv) of 29 CFR 2550.404c–1.

In this connection, it is important to emphasize that a responsible plan fiduciary would also have, as part of the ERISA obligation to monitor plan service providers, an obligation to evaluate and periodically monitor the asset allocation model and interactive materials being made available to the plan participants and beneficiaries as part of any education program.[29] That evaluation should include an evaluation of whether the models and materials are in fact unbiased and not designed to influence investment decisions towards particular investments that result in higher fees or compensation being paid to parties that provide investments or investment-related services to the plan. In this context and subject to the conditions above, the Department believes such a presentation of a specific designated investment alternative in a hypothetical example would not rise to the level of a recommendation within the meaning of paragraph (b)(1).

The Department does not agree that the same conclusion applies in the case of presentations of specific investments to IRA owners because of the lack of review and prudent selection of the presented options by an independent plan fiduciary, and because of the likelihood that such ''guidance'' or ''education'' amounts to specific investment recommendations in the IRA context. The Department was not able to reach the conclusion that it should create a broad safe harbor from fiduciary status for circumstances in which the IRA provider effectively narrows the entire universe of investment alternatives available to IRA owners to just a few coupled with asset allocation models or interactive materials.

When an adviser couples a suggestion of a particular asset allocation with specific investment options that the adviser has specifically selected from the entire universe of investments, he is doing more than explaining how the limited designated investment alternatives available under a plan's design fit the various categories in an asset allocation model. Instead, the adviser is pointing out particular investments for special consideration, and likely making a ''recommendation'' within the meaning of the rule about an investment in which he has a financial interest. In the Department's view, such recommendations should be subject to a best interest standard, not treated as falling within a potential loophole for specific investment recommendations that need not adhere to basic fiduciary norms. If the adviser were treated as a non-fiduciary, the Department could not readily import the other protective conditions applicable to such plan communications to IRA communications. For example, there would not necessarily be any other fiduciary exercising oversight over the adviser's recommendation. Additionally, the Department was unable to conclude that disclosures analogous to the disclosures regarding DIAs under 29 CFR 2550.404a–5 could be made available about the vast universe of other comparable investment alternatives available under an IRA.

Similarly, because the provision is limited to DIAs available under employee benefit plans, the use of asset allocation models and interactive materials with specific investment alternatives available through a self-directed brokerage account is not covered by the ''education'' provision in the final rule. Such communications lack the safeguards associated with DIAs, and pose many of the same problems and dangers as identified with respect to IRAs.

These tools and models are important in the IRA and self-directed brokerage account context, just as in the plan context more generally. An asset

[29] *See* 29 CFR 2550.404a–5(f) and 2550.404c–1(d)(2)(iv).

allocation model for an IRA could still qualify as ''education'' under the final rule, for example, if it described a hypothetical customer's portfolio as having certain percentages of investments in equity securities, fixed-income securities and cash equivalents. The asset allocation could also continue to be ''education'' under the final rule if it described a hypothetical portfolio based on broad-based market sectors (*e.g.,* agriculture, construction, finance, manufacturing, mining, retail, services, transportation and public utilities, and wholesale trade). The asset allocation model would have to meet the other criteria in the final and could not include particular securities. In the Department's view, as an allocation becomes narrower or more specific, the presentation of the portfolio gets closer to becoming a recommendation of particular securities.[30] Although the Department is open to continuing a dialog on possible approaches for additional regulatory or other guidance in this area, when advisers use such tools and models to effectively recommend particular investments, they should be prepared to adhere to fiduciary norms and to make sure their investment recommendations are in the investors' best interest.

(iii) General Communications

Many commenters, as the Department noted above, expressed concern about the phrase ''specifically directed'' in the proposal under paragraph (a)(2)(ii) and asked that the Department clarify the application of the final rule to certain communications including casual conversations with clients about an investment, distribution, or rollovers; responding to participant inquiries about their investment options; ordinary sales activities; providing research reports; sample fund menus; and other similar support activities. For example, they were concerned about communications made in newsletters, media commentary, or remarks directed to no one in particular. Commenters specifically raised the issue of whether on-air personalities like Dave Ramsey, Jim Cramer, or Suze Orman would be treated as fiduciary investment advisers based on their broadcast communications. The concern is unfounded. With respect to media personalities, the rule is focused on ensuring that paid investment professionals make recommendations that are in the best interest of retirement investors, not on regulating journalism or the entertainment industry. Nonetheless, and although the Department believes that the definition of ''recommendation'' in the proposal sufficiently distinguished such communications from investment advice, the Department has concluded that it would be helpful if the final rule more expressly addressed these types of communications to alleviate commenters' continuing concerns. Thus, the final rule includes a new ''general communications'' paragraph (b)(2)(iii) as an example of communications that are not considered recommendations under the definition. This paragraph affirmatively excludes from investment advice the furnishing of general communications that a reasonable person would not view as an investment recommendation, including general circulation newsletters; television, radio, and public media talk show commentary; remarks in widely attended speeches and conferences; research reports prepared for general distribution; general marketing materials; general market data, including data on market performance, market indices, or trading volumes; price quotes; performance reports; or prospectuses.

In developing this paragraph, the Department adapted some terms from FINRA guidance addressing a similar issue under the suitability rules for brokers. See, for example, FINRA Rule 2111 (Suitability) (FAQs available at *www.finra.org/industry/faq-finra-rule-2111-suitability-faq#_edn3*). The FAQs provide guidance on FINRA Rule 2111 that consolidates the questions and answers in Regulatory Notices 12–55, 12–25 and 11–25.[31] See also RDM Infodustries, Inc., SEC Staff No-Action Letter (Mar. 25, 1996).

The Department notes that the requirement that a reasonable person would not view the materials as a recommendation is a recognition that even though the list includes very common communications that we do think could fairly be interpreted to cover communications that are investment recommendations under paragraph (b)(1), the label on the document or communication is not determinative under the final rule because there may be circumstances in which a person uses a label for a communications from the list but the communication nonetheless clearly meets the requirements of a recommendation under paragraph (b)(1).[32] The Department does not intend to suggest by this proviso that all general communications always present a question about whether a reasonable person could fairly view the communication as an investment recommendation. For example, even though on-air personalities may suggest that viewers buy or sell particular stocks or engage in particular investment courses of action, the Department does not believe that a reasonable person could fairly conclude that such communications constitute actionable investment advice or recommendations within the meaning of the rule.

D. 29 CFR 2510.3–21(c)—Persons Not Deemed Investment Advice Fiduciaries

Paragraph (c) of the final rule provides that certain communications and activities shall not be deemed to be fiduciary investment advice within the meaning of section 3(21)(A)(ii) of the Act. This paragraph incorporates, with modifications, the ''carve-outs'' from the proposal that addressed counterparty transactions, swaps transactions, and

[30] In the Department's view, this approach in general terms is consistent with FINRA guidance on the application of the ''suitability'' standard to asset allocation models. Compare FAQ 4.7 in FINRA Rule 2111 (Suitability) FAQ (available at *www.finra.org/industry/faq-finra-rule-2111-suitability-faq*).

[31] Endnote 2 in the FAQs included the following citations: SEC Adoption of Rules Under Section 15(b)(10) of the Exchange Act, 32 FR 11637, 11638 (Aug. 11, 1967) (noting that the SEC's now-rescinded suitability rule would not apply to ''general distribution of a market letter, research report or other similar material''); Suitability Requirements for Transactions in Certain Securities, 54 FR 6693, 6696 (Feb. 14, 1989) (stating that proposed SEC Rule 15c2–6, which would have required documented suitability determinations for speculative securities, ''would not apply to general advertisements not involving a direct recommendation to the individual''); *DBCC* v. *Kunz,* No. C3A960029, 1999 NASD Discip. LEXIS 20, at * 63 (NAC July 7, 1999) (stating that, under the facts of the case, the mere distribution of offering material, without more, did not constitute a recommendation triggering application of the suitability rule), aff'd, 55 S.E.C. 551, 2002 SEC LEXIS 104 (2002); *FINRA Interpretive Letter, Mar. 4, 1997* (''[T]he staff agrees that a reference to an investment company or an offer of investment company shares in an advertisement or piece of sales literature would not by itself constitute a 'recommendation' for purposes of [the suitability rule].''). *See also* Regulatory Notice 10–06, at 3–4 (providing guidance on recommendations made on blogs and social networking Web sites); Notice to Members 01–23 (announcing the guiding principles and providing examples of communications that likely do and do not constitute recommendations); *Michael F. Siegel,* Exchange Act Rel. No. 58737, 2008 SEC LEXIS 2459, at *21–27 (Oct. 6, 2008) (applying the guiding principles to the facts of the case to find a recommendation), *aff'd in relevant part,* 592 F.3d 147 (D.C. Cir.), *cert. denied,* 130 S.Ct. 3333 (2010).

[32] *See* NASD (Predecessor to FINRA) Notice to Members 01–23, April 2001, which provided examples of electronic communications which may or may not be within the definition of recommendation for purposes of the suitability rule but concludes that ''many other types of electronic communications are not easily characterized . . . and changes to the factual predicates upon which these examples are based (or the existence of additional factors) could alter the determination of whether similar communications may or may not be viewed as 'recommendations' for purposes of the suitability rule.''

certain employee communications. The final rule does not use the term ''carve-outs,'' as in the proposal, but these provisions still recognize circumstances in which plans, plan fiduciaries, plan participants and beneficiaries, IRAs, and IRA owners may receive recommendations the Department does not believe should be treated as fiduciary investment advice notwithstanding the general definition set forth in paragraph (a) of the final rule. Each of the provisions has been modified from the proposal to address public comments and refine the provision.

(1) Transactions With Independent Plan Fiduciaries With Financial Expertise

Paragraph (b)(1)(i) of the proposed rule provided a carve-out (referred to as the ''seller's'' or ''counterparty'' carve-out) from the general definition for incidental advice provided in connection with an arm's length sale, purchase, loan, or bilateral contract between an expert plan investor and the adviser. The exclusion also applied in connection with an offer to enter into such an arm's length transaction, and when the person providing the advice acts as a representative, such as an agent, for the plan's counterparty. In particular, paragraph (b)(1)(i) of the proposal provided a carve-out for incidental advice provided in connection with counterparty transactions with a plan fiduciary with financial expertise. As a proxy for financial expertise the rule required that the advice recipient be a fiduciary of a plan with 100 or more participants or have responsibility for managing at least $100 million in plan assets. Additional conditions applied to each of these two categories of sophisticated investors that were intended to ensure the parties understood the non-fiduciary nature of the relationship.

Some commenters on the 2015 Proposal offered threshold views on whether the Department should include a seller's carve-out as a general matter or whether, for example, an alternative approach such as requiring specific disclosures would be preferable. Others strongly supported the inclusion of a seller's carve-out, believing it to be a critical component of the proposal. As explained in the proposal, the purpose of the proposed carve-out was to avoid imposing ERISA fiduciary obligations on sales pitches that are part of arm's length transactions where neither side assumes that the counterparty to the plan is acting as an impartial or trusted adviser. The premise of the proposed carve-out was that both sides of such transactions understand that they are acting at arm's length, and neither party expects that recommendations will necessarily be based on the buyer's best interests, or that the buyer will rely on them as such.

Consumer advocates generally agreed with the Department's views expressed in the preamble that it was appropriate to limit the carve-out to large plans and sophisticated asset managers. These commenters encouraged the Department to retain a very narrow and stringent carve-out. They argued that the communications to participants and retail investors are generally presented as advice and understood to be advice. Indeed, both FINRA and state insurance law commonly require that recommendations reflect proper consideration of the investment's suitability in light of the individual investor's particular circumstances, regardless of whether the transaction could be characterized as involving a ''sale.'' Additionally commenters noted that participants and IRA owners cannot readily ascertain the nuanced differences among different types of financial professionals (including differences in legal standards that apply to different professionals) or easily determine whether advice is impartial or potentially conflicted, or assess the significance of the conflict. Similar points were made concerning advice in the small plan marketplace.

These commenters expressed concern, shared by the Department, that allowing investment advisers to claim non-fiduciary status as ''sellers'' across the entire retail market would effectively open a large loophole by allowing brokers and other advisers to use disclosures in account opening agreements, investor communications, advertisements, and marketing materials to avoid fiduciary responsibility and accountability for investment recommendations that investors rely upon to make important investment decisions. Just as financial service companies currently seek to disclaim fiduciary status under the five-part test through standardized statements disclaiming the investor's right to rely upon communications as individualized advice, an overbroad seller's exception could invite similar statements that recommendations are made purely in a sales capacity, even as oral communications and marketing materials suggest expert financial assistance upon which the investor can and should rely.

On the other hand, many commenters representing financial services providers argued for extending the ''seller's'' carve-out to include transactions in the market composed of smaller plans and individual participants, beneficiaries and IRA owners. These commenters contended that the lines drawn in the proposal were based on a flawed assumption that representatives of small plans and individual investors cannot understand the difference between a sales pitch and advice. They argued that failure to extend the carve-out to these markets will limit the ability of small plans and individual investors to obtain advice and to choose among a variety of services and products that are best suited to their needs. They also argued that there is no statutory basis for distinguishing the scope of fiduciary responsibility based on plan size. Some commenters suggested that the Department could extend the carve-out to individuals that meet financial or net worth thresholds or to ''accredited investors,'' ''qualified purchasers,'' or ''qualified clients'' under federal securities laws. Some commenters also requested that the Department expand the persons and entities that would be considered ''sophisticated'' fiduciaries for purposes of the carve-out, for example asking that banks, savings and loan associations, and insurance companies be explicitly covered. Others alternatively argue that the carve-out should be expanded to fiduciaries of participant-directed plans regardless of plan size, which they said is not a reliable predictor for financial sophistication, or if the plan is represented by a financial expert such as an ERISA section 3(38) investment manager or an ERISA qualified professional asset manager. Other commenters asked that the carve-out be expanded to all proprietary products on the theory that investors generally understand that a person selling proprietary products is going to be making recommendations that are biased in favor of the proprietary product. Others suggested that the Department could address its concern about retail investor confusion by requiring specified disclosures, warranties, or representations to investors or small plan fiduciaries.

Other commenters argued that communications by product manufacturers and other financial services providers directed to financial intermediaries who then directly advise plans, participants, beneficiaries or IRA owners should not be investment advice within the meaning of the rule. Some commenters referred to this as ''wholesaling'' activities or ''daisy chain'' relationships. Some assert that a wholesaler's suggestions or recommendations about funds and sample plan line-ups, even if viewed as specifically directed and provided to an acknowledged fiduciary, are distinguishable because they are made to non-discretionary intermediaries who have no discretion over a plan's or investor's investment choices. Other commenters similarly stressed that the intermediary is the person or entity with a nexus to the IRA owner or plan, which also benefits from an ERISA fiduciary to protect its participants, while the wholesaler has contractual privity with financial entities that may be investment advisers registered with the SEC, rather than with the ultimate plan or IRA owner. One commenter focused on whether the wholesaler's advice is provided to a professional investment adviser, whether acting in an ERISA section 3(21) nondiscretionary or 3(38) discretionary capacity, rather than to a plan or IRA owner. Some commenters argued that the original preparer of model portfolios similarly should not be treated as a fiduciary investment adviser when the model is used by a financial intermediary with a direct relationship with the plan and its participants.

Some commenters sought elimination of the requirement that counterparties obtain a representation concerning the plan fiduciary's sophistication. They argued that a counterparty's reasonable belief as to such sophistication should be sufficient or that there should be a presumption of such sophistication absent clear evidence otherwise. Finally, commenters questioned the requirement that no direct fee may be paid by the plan in connection with the transaction. Some argued that the condition should be removed, while others asked for clarification of what constitutes a fee for this purpose, for example whether it includes payments through plan assets and whether ''direct'' fees include the receipt of asset management or incentive fees received from a fund or other investment manager.

The Department does not believe it would be consistent with the language or purposes of ERISA section 3(21) to extend this exclusion to advice given to small retail employee benefit plan investors or IRA owners. The Department explained its rationale in the preamble to the proposal. In summary, retail investors were not included in this carve-out because (1) the Department did not believe the relationships fit the arm's length characteristics that the seller's carve-out was designed to preserve; (2) the Department did not believe disclaimers of adviser status were effective in alerting retail investors to nature and consequences of the conflicting financial interests; (3) IRA owners in particular do not have the benefit of a menu selected or monitored by an independent plan fiduciary; (4) small business sponsors of small plans are more like retail investors compared to large companies that often have financial departments and staff dedicated to running the company's employee benefit plans; (5) it would be inconsistent with congressional intent under ERISA section 408(b)(14) to create such a broad carve-out, as most recently reflected in enactment of a statutory provision that placed substantial conditions on the provision of investment advice to individual participants and IRA owners; and (6) there were other more appropriate ways to ensure that such retail investors had access to investment advice, such as prohibited transaction exemptions, and investment education. In addition, and perhaps more fundamentally, the Department rejects the purported dichotomy between a mere ''sales'' recommendation, on the one hand, and advice, on the other in the context of the retail market for investment products. As reflected in financial service industry marketing materials, the industry's comment letters reciting the guidance they provide to investors, and the obligation to ensure that recommended products are at least suitable to the individual investor, sales and advice go hand in hand in the retail market. When plan participants, IRA owners, and small businesses talk to financial service professionals about the investments they should make, they typically pay for, and receive, advice.

The Department continues to believe for all of those reasons that it would be an error to provide a broad ''seller's'' exemption for investment advice in the retail market. Recommendations to retail investors and small plan providers are routinely presented as advice, consulting, or financial planning services. In fact, in the securities markets, brokers' suitability obligations generally require a significant degree of individualization. Most retail investors and many small plan sponsors are not financial experts, are unaware of the magnitude and impact of conflicts of interest, and are unable effectively to assess the quality of the advice they receive. IRA owners are especially at risk because they lack the protection of having a menu of investment options chosen by an independent plan fiduciary charged to protect their interests. Similarly, small plan sponsors are typically experts in the day-to-day business of running an operating company, not in managing financial investments for others. In this retail market, such an exclusion would run the risk of creating a loophole that would result in the rule failing to make any real improvement in consumer protections because it could be used by financial service providers to evade fiduciary responsibility for their advice through the same type of boilerplate disclaimers that some advisers use to avoid fiduciary status under the current ''five-part test'' regulation.

The Department also is not prepared to conclude that written disclosures, including models developed by the Department, are sufficient to address investor confusion about financial conflicts of interest. Although some commenters urged the Department to focus on the delivery of comprehensive disclosures to investors as preferable to imposing a fiduciary duty with related exemptions and offered various views on format, content, e-disclosure, cost, and related issues, the Department was not persuaded. Other commenters, however, countered with the view that disclosure is not sufficient as a substitute for the establishment of an affirmative fiduciary duty. Disclosure alone has proven ineffective to mitigate conflicts in advice. Extensive research has demonstrated that most investors have little understanding of their advisers' conflicts of interest, and little awareness of what they are paying via indirect channels for the conflicted advice. Even if they understand the scope of the advisers' conflicts, many consumers are not financial experts and therefore, cannot distinguish good advice or investments from bad. The same gap in expertise that makes investment advice necessary and important frequently also prevents investors from recognizing bad advice or understanding advisers' disclosures. As noted above in the summary ''Benefit-Cost Assessment,'' some research suggests that even if disclosure about conflicts could be made simple and clear, it could be ineffective—or even harmful. In addition to problems with the effectiveness of such disclosures, the possibility of inconsistent oral representations raises questions about whether any boilerplate written disclosure could ensure that the person's financial interest in the transaction is effectively communicated as being in conflict with the interests of the advice recipient.

Further, the Department is not prepared to adopt the approach suggested by some commenters that the provision be expanded to include individual retail investors through an accredited or sophisticated investor test that uses wealth as a proxy for the type of investor sophistication that was the basis for the Department proposing some relationships as non-fiduciary. The Department agrees with the commenters that argued that merely concluding someone may be wealthy enough to be able to afford to lose money by reason of bad advice should not be a reason for treating advice given to that person as non-fiduciary.[33] Nor is wealth necessarily correlated with financial sophistication. Individual investors may have considerable savings as a result of numerous factors unrelated to financial sophistication, such as a lifetime of thrift and hard work, inheritance, marriage, business successes unrelated to investment management, or simple good fortune.

In developing this provision of the final rule, the Department carefully considered the comments from several financial services providers who argued that the Department's proposal violated traditional legal principles that they say recognize the right of businesses to market their products and services. These comments also argued that the proposal's protection for retail investors somehow disrespected the ability of retail investors to differentiate bad advice from good advice. The Department does not believe these comments have merit or require the adoption of a broad based ''seller's'' exception for the retail market. None of the commenters pointed to any provision in the federal securities laws containing a ''seller's'' carve-out or similar concept used to draw distinctions between advice relationships that are fiduciary from non-fiduciary under the federal securities laws. See also NAIC Model Regulation 275 on application of suitability standards to recommendations to retail investors involving annuity product transactions (available at *www.naic.org/store/free/MDL-275.pdf*). That fact too undermines the strength of the argument that investment recommendations provided to a retirement investor should be subject to a broad ''seller's'' exemption under Title I of ERISA.

Moreover, the Department does not believe there is merit to the arguments that traditional legal principles support such a broad-based carve out from fiduciary status. The commenters' arguments, in the Department's view, essentially ask the Department to adopt a modified version of a ''caveat emptor'' or ''buyer beware'' principle that once prevailed under traditional contract law. That principle does not govern regulation of modern market relationships, particularly in regulated industries, and is incongruent to what, absent a regulatory exemption of the sort requested by the commenters, would be a fiduciary relationship subject to the highest legal standards of trust and loyalty. It is particularly incongruent with a statutory scheme that is designed to protect the interests of workers in tax-preferred assets that support their financial security and physical health, and that broadly prohibits conflicted transactions because of the dangers they pose, unless the Department grants an exemption based on express findings that the exemption is in the interest of participants and IRA owners and protective of their interests. Also, while some commenters supporting such a broad carve out have suggested that an enhanced disclosure regime would protect investors from conflicts of interest, as described elsewhere in this Notice in more detail, their arguments are not persuasive. A disclosure regime, standing alone, would not obviate conflicts of interest in investment advice even if it were possible to flawlessly disclose complex fee and investment structures.

Nonetheless, the Department agrees with the commenters that criticized the proposal with arguments that the criteria in the proposal were not good proxies for appropriately distinguishing non-fiduciary communications taking place in an arm's length transaction from instances where customers should reasonably be able to expect investment recommendations to be unbiased advice that is in their best interest. The Department notes that the definition of investment advice in the proposal expressly required a recommendation directly to a plan, plan fiduciary, plan participant, or IRA owner. The use of the term ''plan fiduciary'' in the proposal was not intended to suggest that ordinary business activities among financial institutions and licensed financial professionals should become fiduciary investment advice relationships merely because the institution or professional was acting on behalf of an ERISA plan or IRA. The ''100 participant plan'' threshold was borrowed from annual reporting provisions in ERISA that were designed to serve different purposes related to simplifying reporting for small plans and reducing administrative burdens on small businesses that sponsor employee benefit plans. The ''$100 million in assets under management'' threshold was a better proxy for the type of financial capabilities the carve-out was intended to capture, but it failed to include a range of financial services providers that fairly could be said to have the financial capabilities and understanding that was the focus of the carve-out.

Thus, after carefully evaluating the comments, the Department has concluded that the exclusion is better tailored to the Department's stated objective by requiring the communications to take place with plan or IRA fiduciaries who are independent from the person providing the advice and are either licensed and regulated providers of financial services or plan fiduciaries with responsibility for the management of $50 million in assets. This provision does not require that the $50 million be attributable to only one plan, but rather allows all the plan and non-plan assets under management to be included in determining whether the threshold is met. Such parties should have a high degree of financial sophistication and may often engage in arm's length transactions in which neither party has an expectation of reliance on the counterparty's recommendations. The final rule revises and re-labels the carve-out in a new paragraph (c)(1) that provides that a person shall not be deemed to be a fiduciary within the meaning of section 3(21)(A)(ii) of the Act solely because of the provision of any advice (including the provision of asset allocation models or other financial analysis tools) to an independent person who is a fiduciary of the plan or IRA (including a fiduciary to an investment contract, product, or entity that holds plan assets as determined pursuant to sections 3(42) and 401 of the Act and 29 CFR 2510.3–101) with respect to an arm's length sale, purchase, loan, exchange, or other transaction involving the investment of

[33] The Department continues to believe that a broad based ''seller's'' exception for retail investors is not consistent with recent congressional action, the Pension Protection Act of 2006 (PPA). Specifically, the PPA created a new statutory exemption that allows fiduciaries giving investment advice to individuals (pension plan participants, beneficiaries, and IRA owners) to receive compensation from investment vehicles that they recommend in certain circumstances. 29 U.S.C. 1108(b)(14); 26 U.S.C. 4975(d)(17). Recognizing the risks presented when advisers receive fees from the investments they recommend to individuals, Congress placed important constraints on such advice arrangements that are calculated to limit the potential for abuse and self-dealing, including requirements for fee-leveling or the use of independently certified computer models. The Department has issued regulations implementing this provision at 29 CFR 2550.408g–1 and 408g–2. Thus, the PPA statutory exemption remains available to parties that would become investment advice fiduciaries because of the broader definition in this final rule, and the new and amended administrative exemptions published with this final rule (detailed elsewhere) provide alternative approaches to allow beneficial investment advice practices that are similarly designed to meet the statutory requirement that exemptions must be protective of the interests of retirement plan investors.

securities or other property, if the person knows or reasonably believes that they are dealing with a fiduciary of the plan or IRA who is independent from the person providing the advice and who is (1) 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; (2) 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 [34]; (3) an investment adviser registered under the Investment Advisers Act of 1940 or, if not registered as an investment adviser under such 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; (4) a broker-dealer registered under the Securities Exchange Act of 1934; or (5) any other person acting as an independent fiduciary that holds, or has under management or control, total assets of at least $50 million.

Whether a party is ''independent'' for purposes of the final rule will generally involve a determination as to whether there exists a financial interest (*e.g.,* compensation, fees, etc.), ownership interest, or other relationship, agreement or understanding that would limit the ability of the party to carry out its fiduciary responsibility to the plan or IRA beyond the control, direction or influence of other persons involved in the transaction. The Department believes that consideration must be given to all relevant facts and circumstances, including evidence bearing on all relationships between the fiduciary and the other party. For example, if a fiduciary has an interest in or relationship with another party that may conflict with the interests of the plan for which the fiduciary acts or which may otherwise affect the fiduciary's best judgment as a fiduciary, the Department would not regard the person as independent. The nature and degree of any common ownership or control connections would be a relevant circumstance. Thus, parties belonging to a controlled group of corporations as described in Internal Revenue Code section 414(b), under common control as described in Code section 414(c), or that are members of an affiliated service group within the meaning of Code section 414(m), generally would be sufficiently affiliated so that such relationships would affect the fiduciary's best judgment. The Department also would not view the fiduciary as independent if the transaction includes an agreement, arrangement, or understanding with other parties involved in the transaction that is designed to relieve the fiduciary from any responsibility, obligation or duty to the plan or IRA. In other cases, a disqualifying affiliation or other significant relationship may be established by a showing of substantial control and close supervision by a common parent. Similarly, the Department would not regard a person as independent if the person received compensation or fees in connection with the transaction that involved a violation of the prohibitions of section 406(b)(1) of the Act (relating to fiduciaries dealing with the assets of plans in their own interest or for their own account), section 406(b)(2) of the Act (relating to fiduciaries in their individual or in any other capacity acting in any transaction involving the plan on behalf of a party (or representing a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries), or section 406(b)(3) of the Act (relating to fiduciaries receiving consideration for their own personal account from any party dealing with a plan in connection with a transaction involving the assets of the plan). Moreover, if a fiduciary has an interest in or relationship with another party that may affect the fiduciary's best judgment, as described in 29 CFR 2550.408b–2, the Department would not regard the person as independent.

Additional conditions are intended to ensure that this provision in the final rule is limited to circumstances that involve true arm's length transactions between investment professionals or large asset managers who do not have a legitimate expectation that they are in a relationship of trust and loyalty where they fairly can rely on the other person for impartial advice. Specifically, the person must also fairly inform the independent plan fiduciary that the person is not undertaking to provide impartial investment advice, or to give advice in a fiduciary capacity, in connection with the transaction and must fairly inform the independent plan fiduciary of the existence and nature of the person's financial interests in the transaction. The person must know or reasonably believe that the independent fiduciary of the plan or IRA is capable of evaluating investment risks independently, both in general and with regard to particular transactions and investment strategies. The final rule expressly provides that the person may rely on written representations from the plan or independent fiduciary to satisfy this condition. The person must know or reasonably believe that the independent fiduciary is a fiduciary under ERISA or the Code, or both, with respect to the transaction and is responsible for exercising independent judgment in evaluating the transaction (the person may rely on written representations from the plan or independent fiduciary to satisfy this requirement). In the Department's view, this condition is designed to ensure that the parties, including the plan or IRA, understand the nature of their relationships. Finally, the person must not receive a fee or other compensation directly from the plan, or plan fiduciary, for the provision of investment advice (as opposed to other services) in connection with the transaction. If a plan expressly pays a fee for advice, the essence of the relationship is advisory, and subject to the provisions of ERISA and the Code. Thus, the person may not charge the plan a direct fee to act as an adviser with respect to the transaction, and then disclaim responsibility as a fiduciary adviser by asserting that he or she is merely an arm's length counterparty.

In formulating this provision in the final rule, the Department considered FINRA guidance on a similar issue under the federal securities laws. Specifically, FINRA guidance provides that the suitability rule in federal securities law applies to a broker-dealer's or registered representative's recommendation of a security or investment strategy involving a security to a ''customer.'' FINRA's definition of a customer in FINRA Rule 0160 excludes a ''broker or dealer.'' In explaining this exclusion, FINRA has noted that:

[I]n general, for purposes of the suitability rule, the term customer includes a person who is not a broker or dealer who opens a brokerage account at a broker-dealer or purchases a security for which the broker-dealer receives or will receive, directly or indirectly, compensation even though the security is held at an issuer, the issuer's affiliate or a custodial agent (*e.g.,* 'direct application' business,

[34] Exemption (PTE 84–14) permits transactions between parties in interest to a plan and an investment fund in which the plan has an interest provided the fund is managed by a qualified professional plan asset manager (QPAM) that satisfies certain conditions. Among the entities that can qualify as a QPAM is ''an insurance company which is qualified under the laws of more than one state to manage, acquire or dispose of any assets of a plan. . .'' 49 FR 9494.

'investment program' securities, or private placements), or using another similar arrangement. (footnotes omitted) FINRA Rule 2111 (Suitability) FAQ at *www.finra.org/industry/faq-finra-rule-2111-suitability-faq#_edn3.*

The Department's final rule similarly says that recommendations to broker-dealers, registered investment advisers and other licensed financial professionals are not treated as fiduciary investment advice under ERISA and the Code when the rule's conditions are met.

The $50 million threshold in the final rule for ''other plan fiduciaries'' is similarly based upon the definition of ''institutional account'' in FINRA rule 4512(c)(3) to which the suitability rules of FINRA rule 2111 apply and responds to the requests of commenters that the test for sophistication be based on market concepts that are well understood by brokers and advisers. Specifically, FINRA Rule 2111(b) on suitability and FINRA's ''books and records'' Rule 4512(c) both use a definition of ''institutional account,'' which means the account of a bank, savings and loan association, insurance company, registered investment company, registered investment adviser, or any other person (whether a natural person, corporation, partnership, trust or otherwise) with total assets of at least $50 million. Id. at Q&A 8.1. In regard to the ''other person'' category, FINRA's rule had used a standard of at least $10 million invested in securities and/or under management, but revised it to the current $50 million standard. Id. at footnote 80. In addition, the FINRA rule requires: (1) That the broker have ''a reasonable basis to believe the institutional customer is capable of evaluating investment risks independently, both in general and with regard to particular transactions and investment strategies involving a security or securities'' and (2) that ''the institutional customer affirmatively indicates that it is exercising independent judgment.'' [35]

The Department intends that a person seeking to avoid fiduciary status under this exception has the burden of demonstrating compliance with all applicable requirements of the limitation. Whether the burden is met in any particular case will depend on the individual facts and circumstances. For example, with regard to comments asking for clarification regarding the timing of the required disclosures, in particular whether the required representations have to be made on a transaction-by-transaction basis or could be made more generally when establishing the relationship, nothing in the final rule requires the disclosures to be on an individual transaction basis or prohibits the disclosures from being framed to cover a broader range of transactions. Whether particular disclosures satisfy the conditions in the final rule would depend on the transaction or transactions involved and the substance and timing of the disclosures that are being proffered as satisfying the condition.

Finally, although the seller's carve-out is not available under the final rule in the retail market for communications directly to retail investors, the Department notes that the final rule includes other provisions that are more appropriate ways to address some concerns raised by commenters and ensure that small plan fiduciaries, plan participants, beneficiaries, and IRA owners would be able to obtain essential information regarding important decisions they make regarding their investments without the providers of that information crossing the line into providing recommendations that would be fiduciary in nature. Under paragraph (b)(2) of the final rule, platform providers (*i.e.,* persons that provide access to securities or other property through a platform or similar mechanism) and persons that help plan fiduciaries select or monitor investment alternatives for their plans can perform those services without those services being labeled recommendations of investment advice. Similarly, under paragraph (b)(2) of the final rule, general plan information, financial, investment and retirement information, and information and education regarding asset allocation models would all be available to a plan, plan fiduciary, participant, beneficiary, or IRA owner and would not constitute the provision of an investment recommendation, irrespective of who receives that information.

Further, in the absence of a recommendation, nothing in the final rule would make a person an investment advice fiduciary merely by reason of selling a security or investment property to an interested buyer. For example, if a retirement investor asked a broker to purchase a mutual fund share or other security, the broker would not become a fiduciary investment adviser merely because the broker purchased the mutual fund share for the investor or executed the securities transaction. Such ''purchase and sales'' transactions do not include any investment advice component. The final rule has a specific provision in paragraph (e) that expressly confirms that conclusion in connection with the execution of securities transactions by broker-dealers, certain reporting dealers, and banks.

(2) Swap and Security-Based Swap Transactions

The proposal included a ''carve-out'' intended to make it clear that communications and activities engaged in by counterparties to ERISA-covered employee benefit plans in swap and security-based swap transactions did not result in the counterparties becoming investment advice fiduciaries to the plan. As explained in the preamble to the 2015 Proposal, 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 by the Dodd-Frank Act. Section 4s(h) of the Commodity Exchange Act (7 U.S.C. 6s(h)) and section 15F of the Securities Exchange Act of 1934 (15 U.S.C. 78o–10(h) 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. 7 U.S.C. 6s(h)(5). Similar requirements apply for security-based swap transactions. 15 U.S.C 78o–10(h)(4) and (5). The CFTC has issued a final rule to implement these requirements and the SEC has issued a proposed rule that

[35] FINRA has a separate advertising regulation with a different definition for ''institutional communications.'' Under FINRA Rule 2210, an institutional communication ''means any written (including electronic) communication that is distributed or made available only to institutional investors as defined but does not include a firm's internal communications. Institutional investors include banks, savings and loan associations, insurance companies, registered investment companies, registered investment advisors, a person or entity with assets of at least $50 million, government entities, employee benefit plans and qualified plans with at least 100 participants, FINRA member firms and registered persons, and a person acting solely on behalf of an institutional investor.'' See *www.finra.org/industry/issues/faq-advertising.* The Department believes that the FINRA requirements for institutional customers under its suitability and books and records rules serve purposes more analogous to the exemption in the final for sophisticated fiduciary investors.

would cover security-based swaps. 17 CFR 23.400 to 23.451 (2012); 70 FR 42396 (July 18, 2011). 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, Congress did not intend that engaging in regulated conduct as part of a swap or security-based swap transaction with an employee benefit plan would give rise to additional fiduciary obligations or restrictions under Title I of ERISA.

A commenter asked that the Department confirm in the final rule that this provision includes communications and activities in swaps and security-based swaps that are not cleared by a central counterparty. In the view of the Department, there are differences in the characteristics of cleared and uncleared swaps. For example, uncleared swaps can be highly-customizable, bespoke agreements subject to extensive negotiation. In contrast, we understand that cleared swaps and cleared security-based swaps tend to offer greater standardization and increased transparency of terms and pricing. In addition, cleared swaps and cleared security-based swaps may have other beneficial characteristics that may be important to ERISA plans, such as greater liquidity and centrally managed counterparty risk. Thus, there are issues that a plan fiduciary must consider in evaluating whether to engage in a swap transaction through a cleared or uncleared channel. However, the Dodd-Frank Act provisions apply the business conduct standards similarly to cleared and uncleared swap transactions involving employee benefit plans. Accordingly, notwithstanding the difference between cleared and uncleared swap transactions, the Department does not believe the potential consequences under this final rule should be different for cleared versus uncleared swap and security-based swap transactions with respect to whether compliance with the business conduct standards could result in swap dealers, security-based swap dealers, major swap participants, and major security-based swap participants becoming investment advice fiduciaries under the final rule.[36]

Thus, paragraph (c)(2) of the final rule is intended to confirm that persons acting as swap dealers, security-based swap dealers, major swap participants, and major security-based swap participants do not become investment advice fiduciaries as a result of communications and activities conducted during the course of swap or security-based swap transactions regulated under the Dodd-Frank Act provisions in the Commodity Exchange Act or the Securities Exchange Act of 1934 and applicable CFTC and SEC implementing rules and regulations. The provision in the final rule requires in such transactions that (1) in the case of a swap dealer or security-based swap dealer, the person must not be acting as an advisor to the plan, within the meaning of the applicable business conduct standards under the Commodity Exchange Act or the Securities Exchange Act, (2) the employee benefit plan must be represented in the transaction by an independent plan fiduciary,[37] (3) the person does not receive a fee or other compensation directly from the plan or plan fiduciary for the provision of investment advice (as opposed to other services) in connection with the transaction, and (4) before providing any recommendation with respect to a swap or security-based swap transaction or series of transactions, the person providing the recommendation must obtain from the independent fiduciary a written representation that the independent plan fiduciary understands that the person is not undertaking to provide impartial investment advice, or to give advice in a fiduciary capacity, in connection with the transaction and that the independent plan fiduciary is exercising independent judgment in evaluating the recommendation.

Some commenters indicated that the swaps and security-based swaps provision in the proposal was too narrow because it was limited to ''counterparties,'' and, accordingly, did not include other parties with roles in cleared swap or cleared security-based swap transactions. The commenters said it is common for a clearing firm to provide its customers with information, such as valuations, pricing and liquidity information that is important to customers in deciding whether to execute, maintain, or liquidate swap or security-based swap positions, or the collateral supporting these positions. Clearing firms in this context means members of a derivatives clearing organization or members of a clearing agency as compared to the derivatives clearing organization or clearing agency itself. According to this commenter, if clearing firms are deterred from providing these services due to the risk of being a fiduciary under the final rule, customers may receive less information and make less-informed decisions, which decisions could also result in greater risks for the clearing firms. The commenter indicated that as a result, the clearing role, which Congress considered important, could be compromised. The Department understands that a central concern of the comments in this area focused on the possibility that providing valuation, pricing, and liquidity information would constitute fiduciary investment advice under the provision in the 2015 Proposal that included appraisals and valuations. As noted elsewhere in this Notice, that provision was not carried forward in the final rule, but was reserved for future consideration. Thus, providing such valuation, pricing, and liquidity information would not give rise to potential status as an investment advice fiduciary under the final rule. Nonetheless, the commenters asked that clearing firms be expressly included in the swap and security-based swap provision in the final rule. The final rule has been adjusted accordingly.

The Department, however, is not prepared to include a more open-ended class of ''other similar service providers'' in the swap and security-based swap provision in the final rule. It was not clear from the information submitted by the commenter who requested such an expansion of the provision who these service providers

[36] The Department has provided assurances to the CFTC and the SEC that the Department is fully committed to ensuring that any changes to the current ERISA fiduciary advice regulation are carefully harmonized with the final business conduct standards, as adopted by the CFTC and the SEC, so that there are no unintended consequences for swap and security-based swap dealers and major swap and security-based swap participants who comply with the business conduct standards. *See, e.g.,* Letter from Phyllis C, Borzi, Assistant Secretary, Employee Benefits Security Administration, U.S. Department of Labor, to The Hon. Gary Gensler *et al.,* CFTC (Jan. 17, 2012). In this regard, we note that the disclosures required under the business conduct standards, including those regarding material information about a swap or security-based swap concerning 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, do not in the Department's view compel counterparties to ERISA-covered employee benefit plans, other plans or IRAs to make a recommendation for purposes of paragraph (a) of the final rule or otherwise compel them 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 section of this Notice discusses these issues in the context of the express provisions in the final rule on swap and security-based swap transactions and on transactions with independent fiduciaries with financial expertise.

[37] See discussion above on what constitutes ''independence'' under the final rule in the case of provisions that require the plan to be represented by an independent plan fiduciary.

were, what made them similar to other service providers listed in the provision, and why there was an issue regarding their activities or communications giving rise to potential fiduciary investment advice status. For example, based on the descriptions in the comments, the Department agrees that the provision of clearing services by, and communications that ordinarily accompany the provision of clearing services from, a derivatives clearing organization or clearing agency, or a member of a derivatives clearing organization or clearing agency, as those terms are defined in section 1a of the Commodity Exchange Act and section 3(a) of the Securities Exchange Act in connection with clearing a commodity interest transaction as defined in 17 CFR 1.3(yy), including swaps and futures contracts, or in connection with clearing a security-based swap, would not appear to require or typically involve a clearing organization or clearing firm making investment recommendations as that term is defined in the final rule. Rather, it appears that clearing services can be provided in compliance with the Commodity Exchange Act and the Securities Exchange Act without such compliance, by itself, causing a clearing organization or clearing firm to be an investment advice fiduciary under the final rule. Moreover, to the extent issues arise with respect to such ''other similar service providers,'' the provision of the final rule regarding transactions with independent plan fiduciaries with financial expertise would be available.

This same commenter also questioned whether the provisions in the proposal were intended to change the conclusions of Advisory Opinion 2013–01A regarding the fiduciary and party in interest status of certain parties involved in the clearing process, such as clearing firms and clearinghouses. The conclusions in Advisory Opinion 2013–01A did not involve interpretations of the investment advice fiduciary provision in ERISA section 3(21)(A)(ii). Rather, they involved other elements of the fiduciary definition under section 3(21). Accordingly, the final rule does not change the conclusions expressed in the advisory opinion.

Some commenters argued that IRA owners should be able to engage in a swap and security-based swap transaction under appropriate circumstances, assuming the account owner is an ''eligible contract participant.'' The Department notes that IRAs and IRA owners would not appear to be ''special entities'' under the Dodd-Frank Act provisions and transactions with IRAs would not be subject to the business conduct standards that apply to cleared and uncleared swap and security-based swap transactions with employee benefit plans. Moreover, for the same reasons discussed elsewhere in this Notice that the Department declined to adopt a broad ''seller's'' exception for retail retirement investors, the Department does not believe extending the swap and security-based swap provisions to IRA investors is appropriate. Rather, as described below, the Department concluded that it was more appropriate to address this issue in the context of the ''independent plan fiduciary with financial expertise'' provision described elsewhere in this Notice.

Some commenters requested that the swap and security-based swap provision include transactions involving pooled investment funds, and other alternative investments, including specifically futures contracts. The Department does not believe it has an adequate basis for a wholesale expansion of the swaps and security-based swap provision to other classes of investments that are not subject to the business conduct standards in the Dodd-Frank Act regarding swaps and security-based swaps. Rather, the final rule's general provision relating to transactions with ''independent plan fiduciaries with financial expertise'' (paragraph (c)(1)) has been significantly adjusted and expanded from the so-called ''counterparty'' carve-out in the proposal. That provision in the final rule gives an alternative avenue for parties involved in futures, alternative investments, or other investment transactions to conduct the transaction in a way that would ensure they do not become investment advice fiduciaries under the final rule. With respect to pooled investment funds that hold plan assets, the same ''independent plan fiduciary'' provision is available for swap and security-based swap transactions involving pooled investment vehicles managed by independent fiduciaries.

(3) Employees of Plan Sponsors, Plans, or Plan Fiduciaries

Paragraph (c)(3) of the final rule provides that a person is not an investment advice fiduciary if, in his or her capacity as an employee of the plan sponsor of a plan, as an employee of an affiliate of such plan sponsor, as an employee of an employee benefit plan, as an employee of an employee organization, or as an employee of a plan fiduciary, the person provides advice to a plan fiduciary, or to an employee (other than in his or her capacity as a participant or beneficiary of a plan) or independent contractor of such plan sponsor, affiliate, or employee benefit plan, provided the person receives no fee or other compensation, direct or indirect, in connection with the advice beyond the employee's normal compensation for work performed for the employer.

This exclusion from the scope of the fiduciary investment advice definition addresses concerns raised by public comments seeking confirmation that the rule does not include as investment advice fiduciaries employees working in a company's payroll, accounting, human resources, and financial departments, who routinely develop reports and recommendations for the company and other named fiduciaries of the sponsors' plans. The exclusion was revised to make it clear that it covers employees even if they are not the persons ultimately communicating directly with the plan fiduciary (*e.g.,* employees in financial departments that prepare reports for the Chief Financial Officer who then communicates directly with a named fiduciary of the plan). The Department agrees that such personnel of the employer should not be treated as investment advice fiduciaries based on communications that are part of their normal employment duties if they receive no compensation for these advice-related functions above and beyond their normal salary.

Similarly, and as requested by commenters, the exclusion covers communications between employees, such as human resources department staff communicating information to other employees about the plan and distribution options in the plan subject to certain conditions designed to prevent the exclusion from covering employees who are in fact employed to provide investment recommendations to plan participants or otherwise becoming a possible loophole for financial services providers seeking to avoid fiduciary status under the rule. Specifically, the exclusion covers circumstances where an employee of the plan sponsor of a plan, or as an employee of an affiliate of such plan sponsor, provides advice to another employee of the plan sponsor in his or her capacity as a participant or beneficiary of the plan, provided the person's job responsibilities do not involve the provision of investment advice or investment recommendations, the person is not registered or licensed under federal or state securities or insurance laws, the advice they provide does not require the person to be registered or licensed under federal or state securities or insurance laws, and the person receives no fee or other compensation, direct or indirect, in connection with the advice beyond the employee's normal compensation for work performed for the employer. The Department established these conditions to address circumstances where an HR employee, for example, may inadvertently make an investment recommendation within the meaning of the final rule. It also is designed so that it does not cover situations designed to evade the standards and purposes of the final rule. For example, the Department wanted to ensure that the exclusion did not create a loophole through which a person could be detailed from an investment firm, or ''hired'' under a dual employment structure, as part of an arrangement designed to avoid fiduciary obligations in connection with investment advice to participants or insulate recommendations designed to benefit the investment firm. For the reasons discussed elsewhere in this Notice in connection with call center employees, the Department does not believe this exclusion should extend beyond employees of the plan sponsor and its affiliates.

E. 29 CFR 2510.3–21(d), (e), and (f)—Scope, Execution of Securities Transactions, and Applicability Under Internal Revenue Code

(1) Scope of Investment Advice Fiduciary Duty

Paragraph (d) confirms that a person who is a fiduciary with respect to the assets of a plan or IRA by reason of rendering investment advice defined in the general provisions of the final rule shall not be 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 final rule, provided that nothing in paragraph (d) exempts such person from the provisions of section 405(a) of the Act 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 the Act or section 4975(e)(2) of the Code. This provision is unchanged from the current 1975 regulation and the 2015 Proposal. Although this is long-held guidance, there were a number of comments on this provision. Many commenters asked whether the Department could clarify whether parties may limit the scope and timeframe for a fiduciary relationship, including when the fiduciary relationship is terminated. Many commenters asked the Department to clarify the point in time during a transaction when investment advice takes place, such that the fiduciary standard is triggered. Some commenters argued that the parties to the advice arrangement should be able to define fiduciary relationships for themselves, including whether a fiduciary role is intended. Others suggested that there should be a time period during which an investor could reasonably rely upon the advice provided. Other commenters requested clarification as to whether there is an ongoing duty to monitor the advice once it was provided. Other commenters requested clarification on the interaction of the proposal with existing DOL guidance on fiduciary responsibility such as advisory opinions on fee neutrality or the use of independently designed computer models [38] and existing statutory exemptions and regulations thereunder.

The final rule defines the circumstances when a person is providing fiduciary investment advice. Paragraph (d) merely confirms longstanding guidance that, except for co-fiduciary liability under section 405(a) of the Act, being an investment advice fiduciary for certain assets of a plan or IRA does not make that person a fiduciary for all of the assets of the plan or IRA. In response to comments regarding the use of an agreement to define the fiduciary relationship, the Department notes that parties cannot by contract or disclaimer alter the application of the final rule as to whether fiduciary investment advice has occurred in the first instance or will occur during the course of a relationship. In keeping with past guidance, whether someone is a fiduciary for a particular activity is a functional test based on facts and circumstances. The final rule amends the factors to be considered under a functional test for the provision of fiduciary investment advice, but it does not alter the ''facts and circumstances'' nature of the test.

The Department notes that some questions involving temporal issues, such as when an advice recommendation becomes stale if not immediately acted upon, are addressed in the section below discussing the definition of advice for a fee or other compensation, direct or indirect. With respect to commenters' questions about the ongoing duty to monitor advice recommendations, the Department notes that, if the 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 advice recipient's activities to ensure the recommendations remain prudent and appropriate for the plan or IRA.[39] 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.[40]

As has been made clear by the Department, there are a number of ways to provide investment advice without engaging in transactions prohibited by ERISA and the Code because of the conflicts of interest they pose. For example, the adviser can structure the fee arrangement to avoid prohibited conflicts of interest as explained in advisory opinions issued by the Department or the adviser can comply with a statutory exemption such as that provided by section 408(b)(14) of the Act. There is nothing in the final rule that alters these advisory opinions. Additionally, the Department notes that many of the issues raised by commenters in this area were seeking guidance on existing advisory opinions or statutory exemptions and were not comments on the 2015 Proposal. The Department does not believe that this Notice is the appropriate vehicle to address such questions or issue new guidance on those advisory opinions or statutory exemptions. Rather, the Department directs those commenters to that the Advisory Opinion process under ERISA Procedure 76–1.

(2) Execution of Securities Transactions

Paragraph (e) of the final rule provides that a broker or dealer

[38] *See* Advisory Opinions 97–15A and 97–16A, May 22, 1997, and 2001–09A, December 9, 2001.

[39] Nor does the Best Interest Contract Exemption, if applicable, impose such an obligation.

[40] The preamble to the Best Interest Contract Exemption explains that ''when determining the extent of the monitoring to be provided, as disclosed in the contract pursuant to Section II(e) of the exemption, Financial Institutions should carefully consider whether certain investments can be prudently recommended to the individual Retirement Investor, in the first place, without a mechanism in place for the ongoing monitoring of the investment. This is particularly a concern with respect to investments that possess unusual complexity and risk, and that are likely to require further guidance to protect the investor's interests. Without an accompanying agreement to monitor certain recommended investments, or at least a recommendation that the Retirement Investor arrange for ongoing monitoring, the Adviser may be unable to satisfy the exemption's Best Interest obligation with respect to such investments. In addition, the Department expects that the added cost of monitoring investments should be considered by the Adviser and Financial Institution in determining whether certain investments are in the Retirement Investors' Best Interest.''

registered under the Securities Exchange Act of 1934 that executes transactions for the purchase of securities on behalf of a plan or IRA will not be a fiduciary with respect to an employee benefit plan or IRA solely because such person executes transactions for the purchase or sale of securities on behalf of such plan in accordance with the terms of paragraph (e). This provision is unchanged from the current 1975 regulation and the 2015 Proposal. There were only a few comments on this provision. One commenter asked that the provision be extended to include trade orders to foreign broker-dealers and that the provision extend to specifically referenced transactions in fixed income securities, options and currency that are not executed on an agency basis.

The Department has decided not to modify paragraph (e). In the proposal, the Department did not propose an exclusion for the activities requested. Further, this provision modifies all of the prongs of section 3(21)(A) of the Act, not merely section 3(21)(A)(ii) which is the subject of this final rule. Further, the Department believes that the exclusion under paragraph (c)(1) should cover, to a significant degree, the requested changes when the transactions are conducted with sophisticated fiduciaries.

(3) Application to Code Section 4975

Certain provisions of Title I of ERISA, 29 U.S.C. 1001–1108, such as those relating to participation, benefit accrual, and prohibited transactions, also appear in the Code. This parallel structure ensures that the relevant provisions apply to ERISA-covered employee benefit plans, whether or not they are subject to the section 4975 provisions in the Code, and to tax-qualified plans, including 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 Code 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, 29 U.S.C. 1002(21)(A)(ii). The Department's 1975 regulation defining fiduciary investment advice is virtually identical to the regulation that defines the term ''fiduciary'' under the Code. 26 CFR 54.4975–9(c) (1975).

To rationalize the administration and interpretation of the parallel provisions in ERISA and the Code, Reorganization Plan No. 4 of 1978 divided the interpretive and rulemaking authority for these provisions between the Secretaries of Labor and of the Treasury, so that, in general, the agency with responsibility for a given provision of Title I of ERISA would also have responsibility for the corresponding provision in the Code. Among the sections transferred to the Department of Labor were the prohibited transaction provisions and the definition of a fiduciary in both Title I of ERISA and in the Code. ERISA's prohibited transaction rules, 29 U.S.C. 1106–1108, apply to ERISA-covered plans, and the Code's corresponding prohibited transaction rules, 26 U.S.C. 4975(c), apply both to ERISA-covered pension plans that are tax-qualified pension plans, as well as other tax-advantaged arrangements, such as IRAs, that are not subject to the fiduciary responsibility and prohibited transaction rules in ERISA.[41]

A provision of the final rule states that the final rule applies to the parallel provision defining investment advice fiduciary under section 4975(e)(3) of the Internal Revenue Code. Thus, notwithstanding 26 CFR 54.4975–9, the effective and applicability dates provided for in this rule apply to the definition of investment advice fiduciary under both Section 4975(e)(3) of the Code and Section 3(21) of ERISA, and the Department's changes to 29 CFR 2510.3–21 supersede 26 CFR 54.4975–9 as of the effective and applicability dates of this final rule. See below for a discussion of public comments on the scope of the Department's regulatory authority.

F. 29 CFR 2510.3–21(g)—Definitions

(1) For a Fee or Other Compensation, Direct or Indirect

Paragraph (a)(1) of the proposal required that in order to be fiduciary advice, the advice must be in exchange for a fee or other compensation, whether direct or indirect. Paragraph (f)(6) of the proposal provided that fee or other compensation, direct or indirect, means any fee or compensation for the advice received by the person (or by an affiliate) from any source and any fee or compensation incident to the transaction in which the investment advice has been rendered or will be rendered. The proposal referenced the term fee or other compensation as including, for example, brokerage fees, mutual fund and insurance sales commissions.

[41] The Secretary of Labor also was transferred authority to grant administrative exemptions from the prohibited transaction provisions of the Code.

Some commenters expressed support for the definition arguing that it captured more of the indirect payments that pervade the current investment advice marketplace. Others criticized the definition as too broad and possibly sweeping in fees with no intrinsic connection to the advice or resulting transaction. Commenters asked that the Department state that a recommendation is not fiduciary advice until a transaction is entered into and fees have been received. Commenters also asked that the Department state that the advice must be acted upon within a reasonable time frame and that such a requirement be included in the rule. Those commenters expressed concern about possible fiduciary liability in such cases if the advice recipient acts on advice only after market conditions or other relevant facts have changed. Some commenters said the phrase ''incident to the transaction'' was ambiguous, especially in the rollover context where they argued that more than one ''transaction'' occurs during the rollover process. Other commenters expressed concerns that service providers, such as call center employees who receive a salary but are not compensated by an incremental fee based on actions taken by plan participants or IRA owners, would be considered investment advice fiduciaries if their communications included ''investment recommendations'' as defined in the rule. Several commenters focused on certain types of fees or compensation, with some asserting that revenue sharing, asset-based fees paid by mutual funds to their investment advisers, and profits banks earn on deposit and savings accounts should be excluded from the definition. Commenters asked whether the use of ''in exchange for'' was intended to change the Department's prior guidance under section 3(21) of the Act, which provided that any fee or compensation ''incident'' to the transaction was sufficient to establish fiduciary investment advice. Other questions involved issues of timing, such as whether advice that is provided in the hopes of obtaining business but that does not result in a transaction executed by the adviser or an affiliate should give rise to fiduciary status. According to the commenters, this may occur when the advice recipient walks away without engaging in a recommended transaction, but then follows the advice on his or her own and chooses some other way to execute it.

The Department already addressed many of these issues in the preamble to the 2015 Proposal.[42] For example, the Department said that the term includes (1) any fee or compensation for the advice received by the advice provider (or by an affiliate) from any source and (2) any fee or compensation incident to the transaction in which the investment advice has been rendered or will be rendered. The preamble gave examples that included commissions, fees charged on an ''omnibus'' basis (*e.g.,* compensation paid based on business placed or retained that includes plan or IRA business), and compensation received by affiliates. The preamble specifically noted that the definition included fees paid from a mutual fund to an investment adviser affiliate of the person giving advice. The preamble also expressly addressed call center employees who are paid only a salary and said that the Department did not think a general exception was appropriate for such call center employees if, in the performance of their jobs, they make specific investment recommendations to plan participants and IRA owners. Also, as is evident from the discussion in the preamble to the 2015 Proposal which expressly referenced any fee or compensation ''incident'' to the advice transaction, the Department clearly did not intend the proposal's use of the words ''in exchange for'' to limit our guidance under the 1975 rule on the scope of the term ''fee or other compensation.'' Thus, neither the proposal nor the final rule is intended to narrow the Department's view expressed in Advisory Opinion 83–60A, (Nov. 21, 1983) that a fee or other compensation, direct or indirect, includes all fees or compensation incident to the transaction in which investment advice to the plan has been or will be rendered.

To further emphasize these points, however, the Department has revised the text of the final rule. The final rule does not use the phrase ''in exchange for.'' Rather, consistent with the preamble to the 2015 Proposal, the final rule provides that ''fee or other compensation, direct or indirect'' for purposes of this section and section 3(21)(A)(ii) of the Act, means any explicit fee or compensation for the advice received by the person (or by an affiliate) from any source, and any other fee or compensation received from any source in connection with or as a result of the recommended purchase or sale of a security or the provision of investment advice services, including, though not limited to, commissions, loads, finder's fees, revenue sharing payments, shareholder servicing fees, marketing or distribution fees, 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, gifts and gratuities, and expense reimbursements. The final rule also expressly provides that a fee or compensation is paid ''in connection with or as a result of'' advice if the fee or compensation would not have been paid but for the recommended transaction or advisory service or if eligibility for or the amount of the fee or compensation is based in whole or in part on the transaction or service.

With respect to the timing issues presented by some commenters, in the Department's view, if a participant, beneficiary or IRA owner receives investment advice from an adviser, does not open an account with that adviser, but nevertheless acts on the advice through another channel and purchases a recommended investment that pays revenue sharing to the adviser or an affiliate, that revenue sharing would still be treated as paid to the adviser or an affiliate ''in connection with'' the advice for purposes of the final rule. As explained in more detail in the preamble to the Best Interest Contract Exemption, commenters expressed concern that this position could result in a prohibited transaction for which there was no relief because the adviser and financial institution would not be able to satisfy all of the conditions in the exemption. For example, they cited as an example an adviser who was affiliated with the mutual fund recommending an investment in that fund, which the investor followed by executing the transaction through a separate institution unaffiliated with the mutual fund. The Department has addressed this problem in the Best Interest Contract Exemption by providing a method of complying with the exemption in the event that the participant, beneficiary or IRA owner does not open an account with the adviser or otherwise conduct the recommended transaction through the adviser.

(2) Definition of Plan Includes IRAs and Other Non-ERISA Plans

As discussed above, the Department received extensive comments on whether the proposal should apply to other non-ERISA plans covered by Code section 4975, such as Health Savings Accounts (HSAs), Archer Medical Savings Accounts and Coverdell Education Savings Accounts. The Department notes that these accounts are given tax preferences, as are IRAs. Further, some of the accounts, such as HSAs, may have associated investment accounts that can be used as long term savings accounts for retiree health care expenses. HSA funds may be invested in investments approved for IRAs (*e.g.,* bank accounts, annuities, certificates of deposit, stocks, mutual funds, or bonds). The HSA trust or custodial agreement may restrict investments to certain types of permissible investments (*e.g.,* particular investment funds).[43] The Employee Benefit Research Institute (EBRI) estimates that as of December 31, 2014 there were 13.8 million HSAs holding $24.2 billion in assets. Approximately 6 percent of the HSAs had an associated investment account, of which 37 percent ended 2014 with a balance of $10,000 or more.[44] Based on tax preferences, EBRI observes that HSA owners may use the investment-account option as a means to increase savings for retirement, while others may be using it for shorter-term investing.[45] EBRI notes that it has been estimated that about 3 percent of HSA owners invest, and that HSA investments are likely to increase from an estimated $3 billion in 2015 to $40 billion in 2020.[46] These types of accounts also are expressly defined by Code section 4975(e)(1) as plans that are subject to the Code's prohibited transaction rules. Thus, although they generally hold fewer assets and may exist for shorter durations than IRAs, the owners of these accounts and the persons for whom these accounts were established are entitled to receive the same protections from conflicted investment advice as IRA owners. The Department does not agree with the commenters that the owners of these accounts are entitled to less protection than IRA investors. Accordingly, the final rule continues to include these ''plans'' in the scope of the final rule.

G. Scope of Department's Regulatory Authority

The Department received comments arguing that the proposal was inconsistent with the statutory text of ERISA, that the proposal exceeded the Department's regulatory authority under

[42] *See* 80 FR 21928, 21945 (Apr. 20, 2015).

[43] IRS Notice 2004–50, Q&A 65, 2004–33 I.R.B. 196 (8/16/2004).

[44] Paul Fronstin, ''Health Savings Account Balances, Contributions, Distributions, and Other Vital Statistics, 2014: Estimates from the EBRI HSA Database,'' EBRI Issue Brief, no. 416, (Employee Benefit Research Institute, July 2015) at *www.ebri.org/pdf/briefspdf/EBRI_IB_416.July15.HSAs.pdf.*

[45] EBRI Notes, August 2015, Vol. 36, No. 8, (*www.ebri.org/pdf/notespdf/EBRI_Notes_08_Aug15_HSAs-QLACs.pdf*).

[46] *http://www.devenir.com/research/2014-year-end-devenir-hsa-market-research-report/.*

ERISA, and that the Department should publish another proposal before moving to publish a final rule. One commenter argued that the proposed rule would make fiduciaries of broker-dealers whose relationships with customers do not have the hallmarks of a trust relationship. As discussed above, however, ERISA's statutory definition of fiduciary status broadly covers any person that renders investment advice to a plan or IRA for a fee, as broker-dealers frequently do. The final rule honors the broad sweep of the statutory text in a way that the 1975 rule does not.

As courts have recognized, ERISA attaches fiduciary status more broadly than trust law which generally reserves fiduciary status for express trustees. *See, e.g., Mertens* v. *Hewitt Associates,* 508 U.S. 248, 262 (1993) (distinguishing traditional trust law under which only the trustee had fiduciary duties from ERISA which defines ''fiduciary'' in functional terms); *Smith* v. *Provident Bank,* 170 F.3d 609, 613 (6th Cir. 1999) (definition of fiduciary is ''intended to be broader than the common-law definition and does not turn on formal designations or labels''); *Beddall* v. *State Street Bank & Trust Co.,* 137 F.3d 12 (1st Cir. 1998) (''the statute also extends fiduciary liability to functional fiduciaries''); *Acosta* v. *Pacific Enterprises,* 950 F.2d 611, 618 (9th Cir. 1991) (fiduciary status is determined by ''actions, not the official designation''); *Sladek* v. *Bell Systems Mgmt. Pension Plan,* 880 F.2d 972, 976 (7th Cir. 1989); *Donovan* v. *Mercer,* 747 F.2d 304, 305 (5th Cir. 1984); *Eaves* v. *Penn,* 587 F.2d 453, 458–59 (10th Cir. 1978).

Thus, the statute broadly provides that a person is a fiduciary under ERISA if the 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 . . . .'' The statute neither requires an express trust, nor limits fiduciary status to an ongoing advisory relationship. A plan may need specialized advice for a single, unusual and complex transaction, and the paid adviser may fully understand the plan's dependence on his or her professional judgment. As the preamble points out, the ''regular basis'' requirement would mean that the adviser is not a fiduciary with respect to his one-time advice, no matter what the parties' understanding, the significance of the advice to the retirement investor, or the language of the statutory definition, which included no ''regular basis'' requirement.

Nor is the Department bound by the Investment Advisers Act in defining a person's status as a fiduciary adviser under ERISA and the Code. The Investment Advisers Act specifically excludes from the definition of investment adviser ''any broker or dealer whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefore.'' 15 U.S.C. 80b–2(11). Nothing in ERISA, or its legislative history, gives any indication that Congress meant to limit fiduciary investment advisers under Title I of ERISA or the Code to persons who meet the Investment Advisers Act's definition of investment adviser, and commenters have cited no such indication.

Whether a securities broker will be a fiduciary under this regulation depends on the facts and circumstances. If the broker is only executing a purchase or sale at the client's request, then, as both the current rule and the final rule make clear, the broker is not a fiduciary.[47] Additionally, as under the proposal, the broker may also provide general education without becoming a fiduciary. In this way, the final rule is consistent with cases such as *Robinson* v. *Merrill Lynch, Pierce, Fenner & Smith,* 337 F. Supp. 107, 114 (N.D. Ala. 1971) (a broker is not a fiduciary if the broker is merely executing the plaintiff's orders on an open market), and *Lowe* v. *SEC,* 472 U.S. 181 (1985) (publishers of bona fide newspapers, news magazines or business or financial publications of general and regular circulation are not investment advisers under the Investment Advisers Act). It is also consistent with the current regime under which brokers can, and frequently do, act in a fiduciary capacity. *See, e.g., SE.C.* v *Pasternak,* 561 F. Supp. 2d 459, 499–500 (D.N.J. 2008) (following *McAdam* v. *Dean Witter Reynolds, Inc.,* 896 F.2d 750, 767 (3d Cir. 1990)). Accordingly, although the final rule would impose a higher duty of loyalty upon certain brokers when they are compensated in connection with investment actions they recommend, the rule is informed by the breadth of the statutory text and purposes and by those rules currently governing brokers and dealers.

The Department also disagrees with comments that argued that the Dodd-Frank Act somehow prevents the Department from defining the term ''fiduciary investment advice.'' Section 913 of that Act directs the SEC to conduct a study on the standards of care applicable to brokers-dealers and investment advisers, and issue a report containing, among other things:

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

Dodd-Frank Act, sec. 913(d)(1)(B).

Section 913 also authorizes, but does not require, the SEC to issue rules addressing standards of care for broker-dealers and investment advisers for providing personalized investment advice about securities to retail customers. 15 U.S.C. 80b–11(g)(1). Nothing in the Dodd-Frank Act indicates that Congress meant to preclude the Department's regulation of fiduciary investment advice under ERISA or its application of such a regulation to securities brokers or dealers. To the contrary, Dodd-Frank Act specifically directed the SEC to study the effectiveness of existing legal or regulatory standards of care under other federal and state authorities. Dodd-Frank Act, sec. 913(b)(1) and (c)(1). The SEC has also consistently recognized ERISA as an applicable authority in this area, noting ''that advisers entering into performance fee arrangements with employee benefit plans covered by the Employee Retirement Income Security Act of 1974 (''ERISA'') are subject to the fiduciary responsibility and prohibited transaction provisions of ERISA.'' SE.C. Investment Advisers Act Release No. 1732, (July 17, 1998), 63 FR 39022, 39024 (July 21, 1998).

Other comments have stated that that the Department should publish yet another proposal before moving to publish a final rule. The Department disagrees. As noted elsewhere, the 2015 Proposal benefitted from comments received on a proposal issued in 2010. The changes in this final rule reflect the Department's careful consideration of the extensive comments received on both the 2010 Proposal and the second 2015 Proposal. Moreover, the Department believes that such changes are consistent with reasonable expectations of the affected parties and, together with the prohibited transaction exemptions being finalized with this rule, strike an appropriate balance in addressing the need to modernize the fiduciary rule with the various

[47] Subsection (d) of the 1975 regulation, which is preserved in paragraph (e) of the final rule, continues to provide that a broker dealer is not a fiduciary solely by reason of executing specific orders. 29 CFR 2510.3–21(d).

stakeholder interests. As a result a third proposal and comment period is not necessary.

To the extent compliance and interpretive issues arise after publication of the final rule, the Department fully intends to provide advisers, plan sponsors and fiduciaries, and other affected parties with extensive compliance assistance and education, including guidance specifically tailored to small businesses as required under the Small Business Regulatory Enforcement Fairness Act, Pub. Law 104–121 section 212. The Department routinely provides such assistance following its issuance of highly technical or significant guidance. For example, the Department's compliance assistance Web page, at *www.dol.gov/ebsa/compliance_assistance.html,* provides a variety of tools, including compliance guides, tips, and fact sheets, to assist parties in satisfying their ERISA obligations. Recently, the Department added broad support for regulated parties on the Affordable Care Act regulations, at *www.dol.gov/ebsa/healthreform/.* The Department also will provide informal assistance to affected parties who wish to contact the Department with questions or concerns about the final rule. See ''For Further Information Contact,'' at the beginning of this Notice.

Some commenters argued that the Department does not have the power to regulate IRAs, and the broker-dealers who offer them. The Department disagrees. The Reorganization Plan No. 4 of 1978 specifically gives the Department the authority to define ''fiduciary'' under both ERISA and the Code.[48] Section 102(a) of the Reorganization Plan gives the Department ''all authority'' for ''regulations, rulings, opinions, and exemptions under section 4975 [of the Code]'' subject to certain exemptions not relevant here.[49] This includes the definition of ''fiduciary'' at Code section 4975(e)(3) which parallels ERISA section 3(21). In President Carter's message to Congress regarding the Reorganization Plan, he made explicitly clear that as a result of the plan, ''Labor will have statutory authority for fiduciary obligations. . . . Labor will be responsible for overseeing fiduciary conduct under these provisions.''[50]

Some commenters argued that because Congress has amended ERISA without changing the definition of ''fiduciary,'' Congress has implicitly endorsed the five-part test. The Department disagrees. ERISA is an extensive, complex statute that Congress has amended many times since its original enactment in 1974. It does not make sense to say that whenever Congress amended any part of ERISA, it was indicating its approval of all the Secretary's regulations and interpretations. On none of these occasions did Congress amend any part of the fiduciary definition in section 3(21) of ERISA.[51] Courts have upheld agency changes to long-standing regulations as long as ''the new policy is permissible under the statute, . . . there are good reasons for it, and . . . the agency believes it to be better.''[52] Given the evolving retirement savings market—which Congress could not have imagined when it enacted ERISA and which created a significant regulatory gap that runs counter to the congressional purposes underlying ERISA—the Department has concluded that there are good reasons for this change, and that the amended definition is better.

H. Administrative Prohibited Transaction Exemptions

In addition to the final rule in this Notice, the Department is also finalizing elsewhere in this edition of the **Federal Register**, certain administrative class exemptions from the prohibited transaction provisions of ERISA (29 U.S.C. 1106), and the Code (26 U.S.C. 4975(c)(1)) as well as proposed amendments to previously adopted exemptions. The exemptions and amendments would allow, subject to appropriate safeguards, certain broker-dealers, insurance agents and others that act as investment advice fiduciaries to nevertheless continue to receive a variety of forms of compensation that would otherwise violate prohibited transaction rules and trigger excise taxes. The exemptions would supplement statutory exemptions at 29 U.S.C. 1108 and 26 U.S.C. 4975(d), and previously adopted class exemptions.

Investment advice fiduciaries to plans and plan participants must meet ERISA's standards of prudence and loyalty to their plan customers. Such fiduciaries also face excise taxes, remedies, and other sanctions for engaging in certain transactions, such as self-dealing with plan assets or receiving payments from third parties in connection with plan transactions, unless the transactions are permitted by an exemption from ERISA's and the Code's prohibited transaction rules. IRA fiduciaries do not have the same general fiduciary obligations of prudence and loyalty under the statute, but they too must adhere to the prohibited transaction rules or they must pay an excise tax. The prohibited transaction rules help ensure that investment advice provided to plan participants and IRA owners is not driven by the adviser's financial self-interest.

The new exemptions adopted today are the Best Interest Contract Exemption and the Class Exemption for Principal Transactions in Certain Assets between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (the Principal Transactions Exemption). The Best Interest Contract Exemption is specifically designed to address the conflicts of interest associated with the wide variety of payments advisers receive in connection with retail transactions involving plans and IRAs. The Principal Transactions Exemption permits investment advice fiduciaries to sell or purchase certain debt securities and other investments out of their own inventories to or from plans and IRAs. These exemptions require, among other things, that investment advice fiduciaries adhere to certain Impartial Conduct Standards, which are fundamental obligations of fair dealing and fiduciary conduct, and include obligations to act in the customer's best interest, avoid misleading statements, and receive no more than reasonable compensation.

At the same time that the Department has granted these new exemptions, it has also amended existing exemptions to ensure uniform application of the Impartial Conduct Standards.[53] Taken together, the new exemptions and amendments to existing exemptions ensure that plan and IRA investors are consistently protected by Impartial Conduct Standards, regardless of the particular exemption upon which the adviser relies.

The amendments also revoke certain existing exemptions, which provided little or no protections to IRA and non-plan participants, in favor of more uniform application of the Best Interest Contract Exemption in the market for

[48] Reorganization Plan No. 4 of 1978 (5 U.S.C. App. (2000)).

[49] Id. at section 102.

[50] Reorganization Plan, Message of the President.

[51] *See, e.g., Public Citizen* v. *Dep't of Health and Human Servs.,* 332 F.3d 654, 668 (2003) (the ratification doctrine has limited application when Congress has not re-enacted the entire statute at issue or significantly amended the relevant provision).

[52] *FCC* v. *Fox Television Stations, Inc.,* 556 U.S. 502, 515 (2009) ; *see also Home Care Ass'n of America* v. *Weil,* 799 F.3d 1084 (D.C. Cir. 2015), petition for cert. filed Nov. 24, 2015 (15–683); *National Ass'n of Home Builders* v. *EPA,* 682 F.3d 1032, 1036–39 (D.C. Cir. 2012)

[53] The amended exemptions, published elsewhere in this **Federal Register**, include Prohibited Transaction Exemption (PTE) 75–1, Parts II–V; PTE 77–4; PTE 80–83; PTE 83–1: PTE 84–24; and PTE 86–128.

retail investments.[54] With limited exceptions, it is the Department's intent that advice fiduciaries in the retail investment market rely on statutory exemptions or the Best Interest Contract Exemption to the extent that they receive conflicted forms of compensation that would otherwise be prohibited. The new and amended exemptions reflect the Department's view that retirement investors should be protected by a more consistent application of fundamental fiduciary standards across a wide range of investment products and advice relationships, and that retail investors, in particular, should be protected by the stringent protections set forth in the Best Interest Contract Exemption. When fiduciaries have conflicts of interest, they will uniformly be expected to adhere to fiduciary norms and to make recommendations that are in their customer's best interests.

Several commenters asked whether a fiduciary investment adviser would need to utilize the Best Interest Contract Exemption or other prohibited transaction exemptions if the only compensation the adviser receives is a fixed percentage of the value of assets under management. Whether a particular relationship or compensation structure would result in an adviser having an interest that may affect the exercise of its best judgment as a fiduciary when providing a recommendation, in violation of the self-dealing provisions of prohibited transaction rules under section 406(b) of ERISA, depends on the surrounding facts and circumstances. The Department believes that, by itself, the ongoing receipt of compensation calculated as a fixed percentage of the value of a customer's assets under management, where such values are determined by readily available independent sources or independent valuations, typically would not raise prohibited transaction concerns for the adviser. Under these circumstances, the amount of compensation received depends solely on the value of the investments in a client account, and ordinarily the interests of the adviser in making prudent investment recommendations, which could have an effect on compensation received, are consistent with the investor's interests in growing and protecting account investments.

However, the Department notes that a recommendation to a plan participant to take a full or partial distribution from a plan to invest in recommended assets that will generate a fee for the adviser that he would not otherwise receive implicates the prohibited transaction rules, even if the fee going forward is based on a fixed percent of assets under management. In that circumstance, the adviser should use the Best Interest Contract Exemption or other applicable prohibited transaction exemption. Prohibited transaction rules would similarly be implicated by a recommendation to switch from a commission-based account to an account that charges a fixed percent of assets under management. Further, the Department notes that other remunerations (*e.g.,* commissions or revenue sharing), beyond the fixed assets under management fee, received by the adviser or affiliates as a result of investments made pursuant to recommendations or instances of the self-valuation of the assets upon which the fixed management fee was based would potentially raise prohibited transaction issues and therefore require use of the Best Interest Contract Exemption or other prohibited transaction exemptions.[55]

I. Effective Date; Applicability Date

The proposal stated that the final rule and amended and new prohibited transaction exemptions would be effective 60 days after publication in the **Federal Register** and the requirements of the final rule and exemptions would generally become applicable eight months after publication of a final rule and related administrative exemptions.

Commenters asked the Department to provide sufficient time for orderly and efficient adjustments to, for example, recordkeeping systems; internal compliance, monitoring, education, and training programs; affected service provider contracts; compensation arrangements; and other business practices as necessary to make the transition to the new expanded definition of investment advice fiduciary. The commenters also asked that the Department make it clear that the final rule does not apply in connection with advice provided before the effective date of the final rule. Many commenters expressed concern with the provision in the proposal that the final rule and class exemptions would be effective 60 days after their publication in the **Federal Register**, and said the proposed eight month applicability date was wholly inadequate due to the time and budget requirements necessary to make required changes. Some commenters suggested that the effective and applicability dates should be extended to as much as 18 to 36 months (and some suggested even longer, *e.g.,* five years) following publication of the final rule to allow service providers sufficient time to make changes necessary to comply with the new rule and exemptions. Many other commenters asked that the Department provide a grandfather or similar rule for existing contracts or arrangements or a temporary exemption permitting all currently permissible transactions to continue for a certain period of time. As part of these concerns, a few commenters highlighted possible challenges with enforcement, asking that the Department state that good faith and reasonably diligent efforts to comply with the rule and related exemptions would be sufficient for compliance, and one commenter requested a stay on enforcement of the rule for 36 months. Other commenters who supported the rule thought that the effective and applicability dates in the proposal were reasonable and asked that the final rule go into effect promptly in order to reduce ongoing harms to savers.

After careful consideration of the public comments, the Department has determined that it is important for the final rule to become effective on the earliest possible date. The Congressional Review Act provides that significant final rules can be effective 60 days after

[54] The revoked exemptions include PTE 75–1, Parts I(b) and (c); PTE 75–1, Part II(2); and parts of PTE 84–2 and PTE 86–128.

[55] Although compensation based on a fixed percentage of the value of assets under management generally does not require a prohibited transaction exemption, certain practices raise violations that would not be eligible for the relief granted in the Best Interest Contract Exemption. In its ''Report on Conflicts of Interest'' (Oct. 2013), p. 29, FINRA suggests a number of circumstances in which advisers may recommend inappropriate commission- or fee-based accounts as means of promoting the adviser's compensation at the expense of the customer (*e.g.,* recommending a fee-based account to an investor with low trading activity and no need for ongoing monitoring or advice; or first recommending a mutual fund with a front-end sales load, and shortly thereafter, recommending that the customer move the shares into an advisory account subject to asset-based fees). Fee selection and reverse churning continue to be an examination priority for the SEC in 2016. *See www.sec.gov/about/offices/ocie/national-examination-program-priorities-2016.pdf.* Such conduct designed to enhance the adviser's compensation at the Retirement Investor's expense would violate the prohibition on self-dealing in ERISA section 406(b)(1) and Code section 4975(c)(1)(E), and fall short of meeting the Impartial Conduct Standards required for reliance on the Best Interest Contract Exemption and other exemptions. The Department also notes that charging commissions or receiving revenue sharing in addition to an asset management fee may present other compliance issues. See, for example, In the Matter of Wunderlich Securities, Inc., available at *www.sec.gov/litigation/admin/2011/34-64558.pdf,* where the SEC found that clients were overcharged in a ''wrap fee'' investment advisory program because they contracted to pay one bundled or ''wrap'' fee for advisory, execution, clearing, and custodial services, but were charged commissions and other transactional fees that were contrary to the fees disclosed in the clients' written advisory agreements.

publication in the **Federal Register**. The final rule, accordingly, is effective June 7, 2016. Making the rule effective at the earliest possible date will provide certainty to plans, plan fiduciaries, plan participants and beneficiaries, IRAs, and IRA owners that the new protections afforded by the final rule are now officially part of the law and regulations governing their investment advice providers. Similarly, the financial services providers and other affected service providers will also have certainty that the rule is final and not subject to further amendment or modification without additional public notice and comment. The Department expects that this effective date will remove uncertainty as an obstacle to regulated firms allocating capital and other resources toward transition and longer term compliance adjustments to systems and business practices.

The Department has also determined that, in light of the importance of the final rule's consumer protections and the significance of the continuing monetary harm to retirement investors without the rule's changes, that an applicability date of one year after publication of the final rule in the **Federal Register** is adequate time for plans and their affected financial services and other service providers to adjust to the basic change from non-fiduciary to fiduciary status. The Department read the public comments as more generally requesting transition relief in connection with the conditions in the new and amended prohibited transaction exemptions. The Department agrees that is the appropriate place for transition provisions. Those transition provisions are explained in the final prohibited transaction exemptions being published with this final rule. Further, as noted above, consistent with EBSA's longstanding commitment to providing compliance assistance to employers, plan sponsors, plan fiduciaries, other employee benefit plan officials and service providers in understanding and complying with the requirements of ERISA, the Department intends to provide affected parties with significant assistance and support during the transition period and thereafter with the aim of helping to ensure the important consumer protections and other benefits of the final rule and final exemptions are implemented in an efficient and effective manner.

J. Regulatory Impact Analysis; Executive Order 12866

This action is a significant regulatory action and was therefore submitted to the Office of Management and Budget (OMB) for review. The Department prepared an analysis of the potential costs and benefits associated with this action. This analysis is contained in the document, *Fiduciary Investment Advice Final Rule* (2016). A copy of the analysis is available in the rulemaking docket (EBSA–2010–0050) on *www.regulations.gov* and on EBSA's Web site at *www.dol.gov/ebsa,* and the analysis is briefly summarized in the Executive Summary section of this preamble, above.

K. Regulatory Flexibility Analysis

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and which are likely to have a significant economic impact on a substantial number of small entities. Unless the head of an agency certifies that a final rule is not likely to have a significant economic impact on a substantial number of small entities, section 604 of the RFA requires that the agency present a final regulatory flexibility analysis (FRFA) describing the rule's impact on small entities and explaining how the agency made its decisions with respect to the application of the rule to small entities.

The Secretary has determined that this final rule will have a significant economic impact on a substantial number of small entities. The Secretary has separately published a Regulatory Impact Analysis (RIA) which contains the complete economic analysis for this rulemaking including the Department's FRFA for this rule and the related prohibited transaction exemptions also published this issue of the **Federal Register**. This section of this preamble sets forth a summary of the FRFA. The RIA is available at *www.dol.gov/ebsa.*

As noted in section 6.1 of the RIA, the Department has determined that regulatory action is needed to mitigate conflicts of interest in connection with investment advice to retirement investors. The regulation is intended to improve plan and IRA investing to the benefit of retirement security. In response to the proposed rulemaking, organizations representing small businesses submitted comments expressing particular concern with three issues: The carve-out for investment education, the best interest contract exemption, and the carve-out for persons acting in the capacity of counterparties to plan fiduciaries with financial expertise. Section 2 of the RIA contains an extensive discussion of these concerns and the Department's response.

As discussed in section 6.2 of the RIA, the Small Business Administration (SBA) defines a small business in the Financial Investments and Related Activities Sector as a business with up to $38.5 million in annual receipts. In response to a comment received from the SBA's Office of Advocacy on our Initial Regulatory Flexibility Analysis, the Department contacted the SBA, and received from them a dataset containing data on the number of firms by North American Industry Classification System (NAICS) codes, including the number of firms in given revenue categories. This dataset allows the estimation of the number of firms with a given NAICS code that fall below the $38.5 million threshold and would therefore be considered small entities by the SBA. However, this dataset alone does not provide a sufficient basis for the Department to estimate the number of small entities affected by the rule. Not all firms within a given NAICS code would be affected by this rule, because being an ERISA fiduciary relies on a functional test and is not based on industry status as defined by a NAICS code. Further, not all firms within a given NAICS code work with ERISA-covered plans and IRAs.

Over 90 percent of broker-dealers, registered investment advisers, insurance companies, agents, and consultants are small businesses according to the SBA size standards (132 CFR 121.201). Applying the ratio of entities that meet the SBA size standards to the number of affected entities, based on the methodology described at greater length in the RIA, the Department estimates that the number of small entities affected by this rule is 2,414 BDs, 16,524 registered investment advisers, 395 insurers, and 3,358 other ERISA service providers.

For purposes of the RFA, the Department continues to consider an employee benefit plan with fewer than 100 participants to be a small entity. Further, while some large employers may have small plans, in general small employers maintain most small plans. The definition of small entity considered appropriate for this purpose differs, however, from a definition of small business that is based on size standards promulgated by the SBA. These small pension plans will benefit from the rule, because as a result of the rule, they will receive non-conflicted advice from their fiduciary service providers. The 2013 Form 5500 filings show nearly 595,000 ERISA covered retirement plans with less than 100 participants.

Section 6.5 of the RIA summarizes the projected reporting, recordkeeping, and other compliance costs of the rule, which are discussed in detail in section 5 of the RIA. Among other things, the Department concludes that it is likely that some small service providers may find that the increased costs associated with ERISA fiduciary status outweigh the benefits of continuing to service the ERISA plan market or the IRA market. The Department does not believe that this outcome will be widespread or that it will result in a diminution of the amount or quality of advice available to small or other retirement savers, because other firms are likely to fill the void and provide services the ERISA plan and IRA market. It is also possible that the economic impact of the rule on small entities would not be as significant as it would be for large entities, because anecdotal evidence indicates that small entities do not have as many business arrangements that give rise to conflicts of interest. Therefore, they would not be confronted with the same costs to restructure transactions that would be faced by large entities.

Section 5.3.1 of the RIA includes a discussion of the changes to the proposed rule and exemptions that are intended to reduce the costs affecting both small and large business. These include elimination of data collection and annual disclosure requirements in the Best Interest Contract Exemption, and changes to the implementation of the contract requirement in the exemption. Section 7 of the RIA discusses significant regulatory alternatives considered by the Department and the reasons why they were rejected.

L. Paperwork Reduction Act

In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)), the Department's amendment to its 1975 rule that defines when a person who provides investment advice to an employee benefit plan or IRA becomes a fiduciary, solicited comments on the information collections included therein. The Department also submitted an information collection request (ICR) to OMB in accordance with 44 U.S.C. 3507(d), contemporaneously with the publication of the proposed regulation, for OMB's review. The Department received two comments from one commenter that specifically addressed the paperwork burden analysis of the information collections. Additionally comments were submitted which contained information relevant to the information collection costs and administrative burdens attendant to the proposal. The Department took into account such public comments in connection with making changes to the final rule, analyzing the economic impact of the proposal, and developing the revised paperwork burden analysis summarized below.

In connection with publication of the Department's amendment to its 1975 rule that defines when a person who provides investment advice to an employee benefit plan or IRA becomes a fiduciary, the Department is submitting an ICR to OMB requesting approval of a new collection of information under OMB Control Number 1210–0155. The Department will notify the public when OMB approves the ICR.

A copy of the ICR may be obtained by contacting the PRA addressee shown below or at *http://www.RegInfo.gov.* PRA ADDRESSEE: G. Christopher Cosby, Office of Policy and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue NW., Room N–5718, Washington, DC 20210. Telephone: (202) 693–8410; Fax: (202) 219–4745. These are not toll-free numbers.

As discussed in detail above, paragraph (b)(2)(i) of the final rule provides that a person is not an investment advice fiduciary by reason of certain communications with plan fiduciaries of participant-directed individual account employee benefit plans described in section 3(3) of ERISA regarding platforms of investment vehicles from which plan participants or beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts. A condition of paragraph (b)(2)(i) is that the person discloses in writing to the plan fiduciary that the person is not undertaking to provide impartial investment advice or to give advice in a fiduciary capacity.

Paragraph (b)(2)(iv)(C) and (D) of the regulation make clear that furnishing and providing certain specified investment educational information and materials (including certain investment allocation models and interactive plan materials) to a plan, plan fiduciary, participant, beneficiary, or IRA owner would not constitute the rendering of investment advice within the meaning of the final rule if certain conditions are met. The investment education provision includes conditions that require asset allocation models or interactive materials to include certain explanations and that they be accompanied by a statement with certain specified information.

Paragraph (c)(1) of the final rule provides that a person shall not be deemed to be an investment advice fiduciary within the meaning of the final rule by reason of advice to certain independent fiduciaries of a plan or IRA in connection with an arm's length sale, purchase, loan, exchange, or other transaction involving the investment of securities or other property if, before entering into the transaction, the independent fiduciary represents to the person that the fiduciary is exercising independent judgment in evaluating any recommendation, and the person fairly informs the independent plan fiduciary that the person is not undertaking to provide impartial investment advice, or to give advice in a fiduciary capacity and fairly informs the independent plan fiduciary of the existence and nature of the person's financial interests in the transaction.

Paragraph (c)(2) of the final rule provides that, in the case of certain swap transactions required to be cleared under provisions of the Dodd-Frank Act, certain counterparties, clearing members and clearing organizations are not deemed to be investment advice fiduciaries within the meaning of the final rule. A condition in the provision is that the plan fiduciary involved in the swap transaction, before entering into the transaction, represents that the fiduciary understands that the counterparty, clearing member or clearing organization are not undertaking to provide impartial investment advice and that the plan fiduciary is exercising independent judgment in evaluating any recommendations.

The disclosures needed to satisfy the platform provider, investment education, independent plan fiduciary, and swap transaction provisions of the final rule are information collection requests (ICRs) subject to the Paperwork Reduction Act. The Department has made the following assumptions in order to establish a reasonable estimate of the paperwork burden associated with these ICRs:

- Approximately 2,000 service providers will produce the platform provider disclosures; [56]

[56] One commenter requested additional transparency regarding the source of this estimate. According to 2013 Form 5500 Schedule C filings, approximately 2,000 service providers provided recordkeeping services to plans. The Department believes that considerable overlap exists between the recordkeeping market and the platform provider market and between the large plan service provider market and the small plan service provider market. Therefore, the Department has chosen to use recordkeepers reported on the Schedule C as a proxy for platform providers due to data availability constraints.

• Approximately 23,500 financial institutions and service providers will add the investment education disclosure to their investment education materials; [57]

• Approximately 36,000 independent plan fiduciaries with financial expertise would receive the independent plan fiduciary with financial expertise disclosure; [58]

• Service providers producing the platform provider disclosure already maintain contracts with their customers as a regular and customary business practice and the materials costs arising from inserting the platform provider disclosure into the existing contracts would be negligible;

• Materials costs arising from inserting the required investment education disclosure into existing models and interactive materials would be negligible;

• In transactions with independent plan fiduciaries covered by the provision in the final rule, the independent fiduciary would receive substantially all of the disclosures electronically via means already used in their normal course of business and the costs arising from electronic distribution would be negligible;

• Persons relying on these provisions in the final rule would use existing in-house resources to prepare the disclosures; and

• The tasks associated with the ICRs would be performed by clerical personnel at an hourly rate of $55.21 and legal professionals at an hourly rate of $133.61.[59]

In response to a recommendation made during testimony at the Department's August 2015 public hearing on the proposed rule, the Department tasked several attorneys with drafting sample legal documents in an attempt to determine the hour burden associated with complying with the ICRs. Commenters did not provide time or cost estimates needed to draft these disclosures; the legal burden estimates in this analysis, therefore, use the data generated by the Department to estimate the time required to create sample disclosures.

The Department estimates that it would require ten minutes of legal professional time to draft the disclosure needed under the platform provider provision; a statement that the person is not providing impartial investment advice or acting in a fiduciary capacity. Therefore, the platform provider disclosure would result in approximately 300 hours of legal time at an equivalent cost of approximately $45,000.

The Department estimates that it would require one hour of legal professional time to draft the disclosure needed under the investment education provision. Therefore, this disclosure would result in approximately 23,500 hours of legal time at an equivalent cost of approximately $3.1 million.

The Department estimates that it would require 25 minutes of legal professional time and 30 minutes of clerical time to produce the disclosure needed under the provision regarding transactions with independent plan fiduciaries. Therefore, the Department estimates that this disclosure would result in approximately 15,000 hours of legal time at an equivalent cost of approximately $2.0 million. It would also result in approximately 18,000 hours of clerical time at an equivalent cost of approximately $994,000. In total, the burden associated with producing the disclosure is approximately 33,000 hours at an equivalent cost of $3.0 million.

Plan fiduciaries covered by the swap transactions provision must already make the required representation to the counterparty under the Dodd-Frank Act provisions governing cleared swap transactions. This rule adds a requirement that the representation be made to the clearing member and financial institution involved in the transaction. The Department believes that the incremental burden of this additional requirement would be de minimis. Plan fiduciaries would be required to add a few words to the representations required under the Dodd-Frank Act provisions reflecting the additional recipients of the representation. Due to the sophisticated nature of the entities engaging in swap transactions, the Department believes that all of these representations are transmitted electronically; therefore, the incremental burden of transmitting this representation to two additional parties is de minimis. Further, keeping records that the representation had been received is a usual and customary business practice. Accordingly, the

[57] One commenter questioned the basis for the Department's assumption regarding the number of financial institutions likely to provide investment education disclosures. According to the ''2015 Investment Management Compliance Testing Survey'', Investment Adviser Association, cited in the regulatory impact analysis for the accompanying rule, 63 percent of Registered Investment Advisers service ERISA-covered plans and IRAs. The Department conservatively interprets this to mean that all of the 113 large Registered Investment Advisers, 63 percent of the 3,021 medium Registered Investment Advisers (1,903), and 63 percent of the 24,475 small Registered Investment Advisers (RIAs) (15,419) work with ERISA-covered plans and IRAs. The Department assumes that all of the 42 large broker-dealers, and similar shares of the 233 medium broker-dealers (147) and the 3,682 small broker-dealers (2,320) work with ERISA-covered plans and IRAs. According to SEC and FINRA data, cited in the regulatory impact analysis, 18 percent of broker-dealers are also registered as RIAs. Removing these firms from the RIA counts produces counts of 105 large RIAs, 1,877 medium RIAs, and 15,001 small RIAs that work with ERISA-covered plans and IRAs and are not also registered as broker-dealers. SNL Financial data show that 398 life insurance companies reported receiving either individual or group annuity considerations in 2014. The Department has used these data as the count of insurance companies working in the ERISA-covered plan and IRA markets. Finally, 2013 Form 5500 data show 3,375 service providers to ERISA-covered plans that are not also broker-dealers, Registered Investment Advisers, or insurance companies. Therefore, the Department estimates that approximately 23,265 broker-dealers, RIAs, insurance companies, and service providers work with ERISA-covered plans and IRAs. The Department has rounded up to 23,500 to account for any other financial institutions that may provide covered investment education.

[58] According to the ''2015 Investment Management Compliance Testing Survey,'' Investment Adviser Association, cited in the regulatory impact analysis for the accompanying rule, 63 percent of Registered Investment Advisers (RIAs) service ERISA-covered plans and IRAs. The Department conservatively interprets this to mean that all of the 113 large RIAs, 63 percent of the 3,021 medium RIAs (1,903), and 63 percent of the 24,475 small RIAs (15,419) work with ERISA-covered plans and IRAs. The Department assumes that all of the 42 large broker-dealers, and similar shares of the 233 medium broker-dealers (147) and the 3,682 small broker-dealers (2,320) work with ERISA-covered plans and IRAs. According to SEC and FINRA data, cited in the regulatory impact analysis, 18 percent of broker-dealers are also registered as RIAs. Removing these firms from the RIA counts produces counts of 105 large RIAs, 1,877 medium RIAs, and 15,001 small RIAs that work with ERISA-covered plans and IRAs and are not also registered as broker-dealers. SNL Financial data show that 398 life insurance companies reported receiving either individual or group annuity considerations in 2014. The Department has used these data as the count of insurance companies working in the ERISA-covered plan and IRA markets. Finally, 2013 Form 5500 data show 3,375 service providers to ERISA-covered plans that are not also broker-dealers, Registered Investment Advisers, or insurance companies. Therefore, the Department estimates that approximately 23,265 broker-dealers, RIAs, insurance companies, and service providers work with ERISA-covered plans and IRAs. Additionally, the Department is using plans with assets of $50 million or more as a proxy for other persons who managed $50 million or more in plan assets. According to 2013 Form 5500 filings, 12,446 plans had assets of $50 million or more. These categories total 35,711. The Department rounded up to 36,000 to account for other entities that might produce the disclosure.

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

Department has not associated any cost or burden with this ICR.

In total, the hour burden for information collections in this rule is approximately 57,000 hours at an equivalent cost of $6.2 million.

Because the Department assumes that all disclosures would either be distributed electronically or incorporated into existing materials, the Department has not associated any cost burden with these ICRs.

These paperwork burden estimates are summarized as follows:

Type of Review: New collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Conflict of Interest Final Rule, Fiduciary Exception Disclosure Requirements.

OMB Control Number: 1210—0155.

Affected Public: Business or other for profit.

Estimated Number of Respondents: 38,000.

Estimated Number of Annual Responses: 61,500.

Frequency of Response: When engaging in excepted transaction.

Estimated Total Annual Burden Hours: 56,833 hours.

Estimated Total Annual Burden Cost: $0.

M. Congressional Review Act

The final rule is subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801, *et seq.*) and, will be transmitted to Congress and the Comptroller General for review. The final rule is a ''major rule'' as that term is defined in 5 U.S.C. 804, because it is likely to result in an annual effect on the economy of $100 million or more.

N. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4) requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final agency rule that may result in an expenditure of $100 million or more (adjusted annually for inflation with the base year 1995) in any one year by State, local, and tribal governments, in the aggregate, or by the private sector. Such a mandate is deemed to be a ''significant regulatory action.'' The final rule is expected to have such an impact on the private sector, and the Department hereby provides such an assessment.

The Department is issuing the final rule under ERISA section 3(21)(A)(ii) (29 U.S.C. 1002(21)(a)(ii)).[60] The Department is charged with interpreting the ERISA and Code provisions that attach fiduciary status to anyone who is paid to provide investment advice to plan or IRA investors. The final rule updates and supersedes the 1975 rule[61] that currently interprets these statutory provisions.

The Department assessed the anticipated benefits and costs of the final rule pursuant to Executive Order 12866 in the Regulatory Impact Analysis for the final rule and concluded that its benefits would justify its costs. The Department's complete Regulatory Impact Analysis is available at *www.dol.gov/ebsa.* To summarize, the final rule's material benefits and costs generally would be confined to the private sector, where plans and IRA investors would, in the Department's estimation, reap both social welfare gains and transfers from the financial industry. The Department itself would benefit from increased efficiency in its enforcement activity. The public and overall U.S. economy would benefit from increased compliance with ERISA and the Code and increased confidence in advisers, as well as from more efficient allocation of investment capital. Together these welfare gains and transfers justify the associated costs.

The final rule is not expected to have any material economic impacts on State, local or tribal governments, or on health, safety, or the natural environment. In fact, the North American Securities Administrators Association submitted a comment in support of the Department's 2015 Proposal that did not suggest a material economic impact on state securities regulators. The National Association of Insurance Commissioners also submitted a comment that recognized that oversight of the retirement plans marketplace is a shared regulatory responsibility, and indicated a shared commitment to protect, educate and empower consumers as they make important decisions to provide for their retirement security. They pointed out that it is important that the approaches regulators take within their respective regulatory frameworks are consistent and compatible as much as possible, but did not suggest the rule would require an expenditure of $100 million or more by state insurance regulators. Similarly, comments from the National Conference of Insurance Legislators and the National Association of Governors suggested further dialogue with the NAIC, insurance legislators, and other state officials to ensure the federal and state approaches to consumer protection in this area are consistent and compatible, but did not identify a monetary impact on state or local governments resulting from the rule. As noted elsewhere in this Notice, the Department's obligation and overriding objective in developing regulations implementing ERISA (and the relevant prohibited transaction provisions in the Code) is to achieve the consumer protection objectives of ERISA and the Code. The Department believes the final rule reflects that obligation and objective while also reflecting that care was taken to craft the rule so it does not require state banking, insurance, or securities regulators to take steps that would impose additional costs on them or conflict with applicable state statutory or regulatory requirements. In fact, the Department noted that ERISA section 514 expressly saves state regulation of insurance, banking, and securities from ERISA's express preemption provision and has added a new paragraph (i) to the final rule to acknowledge 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. The Department also, in response to state regulator suggestions, agreed that it would be appropriate for the final rule to include an express provision acknowledging the savings clause in ERISA section 514(b)(2)(A) for state insurance, banking, or securities laws to emphasize the fact that those state regulators all have important roles in the administration and enforcement of standards for retirement plans and products within their jurisdiction.

O. Federalism Statement

Executive Order 13132 (August 4, 1999) outlines fundamental principles of federalism, and requires the adherence to specific criteria by Federal agencies in the process of 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. As discussed elsewhere in this Notice, 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

[60] Under section 102 of the Reorganization Plan No. 4 of 1978, the authority of the Secretary of the Treasury to interpret section 4975 of the Code has been transferred, with exceptions not relevant here, to the Secretary of Labor.

[61] 29 CFR 2510.3–21(c).

various levels of government. Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA. As explained elsewhere in this Notice, the Department does not intend this regulation 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. The final rule now includes an express provision to that effect in a new paragraph (i). The requirements implemented in the final rule do not alter the fundamental reporting and disclosure requirements of the statute with respect to employee benefit plans, and as such have no implications for the States or the relationship or distribution of power between the national government and the States.

Statutory Authority

This regulation is issued pursuant to the authority in section 505 of ERISA (Pub. L. 93–406, 88 Stat. 894; 29 U.S.C. 1135) and section 102 of Reorganization Plan No. 4 of 1978, 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 Parts 2509 and 2510

Employee benefit plans, Employee Retirement Income Security Act, Pensions, Plan assets.

For the reasons set forth in the preamble, the Department is amending parts 2509 and 2510 of subchapters A and B of Chapter XXV of Title 29 of the Code of Federal Regulations as follows:

Subchapter A—General

PART 2509—INTERPRETIVE BULLETINS RELATING TO THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

■ 1. The authority citation for part 2509 continues to read as follows:

Authority: 29 U.S.C. 1135. Secretary of Labor's Order 1–2011, 77 FR 1088 (Jan. 9, 2012). Sections 2509.75–10 and 2509.75–2 issued under 29 U.S.C. 1052, 1053, 1054. Sec. 2509.75–5 also issued under 29 U.S.C. 1002. Sec. 2509.95–1 also issued under sec. 625, Pub. L. 109–280, 120 Stat. 780.

§ 2509.96–1 [Removed]

■ 2. Remove § 2509.96–1.

Subchapter B—Definitions and Coverage under the Employee Retirement Income Security Act of 1974

PART 2510—DEFINITIONS OF TERMS USED IN SUBCHAPTERS C, D, E, F, AND G OF THIS CHAPTER

■ 3. The authority citation for part 2510 is revised to read as follows:

Authority: 29 U.S.C. 1002(2), 1002(21), 1002(37), 1002(38), 1002(40), 1031, and 1135; Secretary of Labor's Order 1–2011, 77 FR 1088; Secs. 2510.3–21, 2510.3–101 and 2510.3–102 also issued under Sec. 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 237. Section 2510.3–38 also issued under Pub. L. 105–72, Sec. 1(b), 111 Stat. 1457 (1997).

■ 4. Revise § 2510.3–21 to read as follows:

§ 2510.3–21 Definition of ''Fiduciary.''

(a) *Investment advice.* For purposes of section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974 (Act) and section 4975(e)(3)(B) of the Internal Revenue Code (Code), except as provided in paragraph (c) of this section, a person shall be deemed to be rendering investment advice with respect to moneys or other property of a plan or IRA described in paragraph (g)(6) of this section if—

(1) Such person provides to a plan, plan fiduciary, plan participant or beneficiary, IRA, or IRA owner the following types of advice for a fee or other compensation, direct or indirect:

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

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

(2) With respect to the investment advice described in paragraph (a)(1) of this section, the recommendation is made either directly or indirectly (*e.g.,* through or together with any affiliate) by a person who:

(i) Represents or acknowledges that it is acting as a fiduciary within the meaning of the Act or the Code;

(ii) Renders the advice pursuant to a written or verbal agreement, arrangement, or understanding that the advice is based on the particular investment needs of the advice recipient; or

(iii) Directs the advice to a specific advice recipient or recipients regarding the advisability of a particular investment or management decision with respect to securities or other investment property of the plan or IRA.

(b)(1) For purposes of this section, ''recommendation'' means a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the advice recipient engage in or refrain from taking a particular course of action. The determination of whether a ''recommendation'' has been made is an objective rather than subjective inquiry. In addition, the more individually tailored the communication is to a specific advice recipient or recipients about, for example, a security, investment property, or investment strategy, the more likely the communication will be viewed as a recommendation. Providing a selective list of securities to a particular advice recipient as appropriate for that investor would be a recommendation as to the advisability of acquiring securities even if no recommendation is made with respect to any one security. Furthermore, a series of actions, directly or indirectly (*e.g.,* through or together with any affiliate), that may not constitute a recommendation when viewed individually may amount to a recommendation when considered in the aggregate. It also makes no difference whether the communication was initiated by a person or a computer software program.

(2) The provision of services or the furnishing or making available of information and materials in conformance with paragraphs (b)(2)(i) through (iv) of this section is not a ''recommendation'' for purposes of this section. Determinations as to whether any activity not described in this paragraph (b)(2) constitutes a recommendation must be made by reference to the criteria set forth in paragraph (b)(1) of this section.

(i) *Platform providers.* Marketing or making available to a plan fiduciary of a plan, without regard to the individualized needs of the plan, its participants, or beneficiaries a platform or similar mechanism from which a plan fiduciary may select or monitor investment alternatives, including qualified default investment alternatives, into which plan participants or beneficiaries may direct the investment of assets held in, or contributed to, their individual accounts, provided the plan fiduciary is independent of the person who markets or makes available the platform or similar mechanism, and the person discloses in writing to the plan fiduciary that the person is not undertaking to provide impartial investment advice or to give advice in a fiduciary capacity. A plan participant or beneficiary or relative of either shall not be considered a plan fiduciary for purposes of this paragraph.

(ii) *Selection and monitoring assistance.* In connection with the activities described in paragraph (b)(2)(i) of this section with respect to a plan,

(A) Identifying investment alternatives that meet objective criteria specified by the plan fiduciary (*e.g.,* stated parameters concerning expense ratios, size of fund, type of asset, or credit quality), provided that the person identifying the investment alternatives discloses in writing whether the person has a financial interest in any of the identified investment alternatives, and if so the precise nature of such interest;

(B) In response to a request for information, request for proposal, or similar solicitation by or on behalf of the plan, identifying a limited or sample set of investment alternatives based on only the size of the employer or plan, the current investment alternatives designated under the plan, or both, provided that the response is in writing and discloses whether the person identifying the limited or sample set of investment alternatives has a financial interest in any of the alternatives, and if so the precise nature of such interest; or

(C) Providing objective financial data and comparisons with independent benchmarks to the plan fiduciary.

(iii) *General Communications.* Furnishing or making available to a plan, plan fiduciary, plan participant or beneficiary, IRA, or IRA owner general communications that a reasonable person would not view as an investment recommendation, including general circulation newsletters, commentary in publicly broadcast talk shows, remarks and presentations in widely attended speeches and conferences, research or news reports prepared for general distribution, general marketing materials, general market data, including data on market performance, market indices, or trading volumes, price quotes, performance reports, or prospectuses.

(iv) *Investment Education.* Furnishing or making available any of the following categories of investment-related information and materials described in paragraphs (b)(2)(iv)(A) through (D) of this section to a plan, plan fiduciary, plan participant or beneficiary, IRA, or IRA owner irrespective of who provides or makes available the information and materials (*e.g.,* plan sponsor, fiduciary or service provider), the frequency with which the information and materials are provided, the form in which the information and materials are provided (*e.g.,* on an individual or group basis, in writing or orally, or via call center, video or computer software), or whether an identified category of information and materials is furnished or made available alone or in combination with other categories of information and materials, provided that the information and materials do not include (standing alone or in combination with other materials) recommendations with respect to specific investment products or specific plan or IRA alternatives, or recommendations with respect to investment or management of a particular security or securities or other investment property, except as noted in paragraphs (b)(2)(iv)(C)(*4*) and (b)(2)(iv)(D)(*6*) of this section.

(A) *Plan information.* Information and materials that, without reference to the appropriateness of any individual investment alternative or any individual benefit distribution option for the plan or IRA, or a particular plan participant or beneficiary or IRA owner, describe the terms or operation of the plan or IRA, inform a plan fiduciary, plan participant, beneficiary, or IRA owner about the benefits of plan or IRA participation, the benefits of increasing plan or IRA contributions, the impact of preretirement withdrawals on retirement income, retirement income needs, varying forms of distributions, including rollovers, annuitization and other forms of lifetime income payment options (*e.g.,* immediate annuity, deferred annuity, or incremental purchase of deferred annuity), advantages, disadvantages and risks of different forms of distributions, or describe product features, investor rights and obligations, fee and expense information, applicable trading restrictions, investment objectives and philosophies, risk and return characteristics, historical return information, or related prospectuses of investment alternatives available under the plan or IRA.

(B) *General financial, investment, and retirement information.* Information and materials on financial, investment, and retirement matters that do not address specific investment products, specific plan or IRA investment alternatives or distribution options available to the plan or IRA or to plan participants, beneficiaries, and IRA owners, or specific investment alternatives or services offered outside the plan or IRA, and inform the plan fiduciary, plan participant or beneficiary, or IRA owner about:

(*1*) General financial and investment concepts, such as risk and return, diversification, dollar cost averaging, compounded return, and tax deferred investment;

(*2*) Historic differences in rates of return between different asset classes (*e.g.,* equities, bonds, or cash) based on standard market indices;

(*3*) Effects of fees and expenses on rates of return;

(*4*) Effects of inflation;

(*5*) Estimating future retirement income needs;

(*6*) Determining investment time horizons;

(*7*) Assessing risk tolerance;

(*8*) Retirement-related risks (*e.g.,* longevity risks, market/interest rates, inflation, health care and other expenses); and

(*9*) General methods and strategies for managing assets in retirement (*e.g.,* systematic withdrawal payments, annuitization, guaranteed minimum withdrawal benefits), including those offered outside the plan or IRA.

(C) *Asset allocation models.* Information and materials (*e.g.,* pie charts, graphs, or case studies) that provide a plan fiduciary, plan participant or beneficiary, or IRA owner with models of asset allocation portfolios of hypothetical individuals with different time horizons (which may extend beyond an individual's retirement date) and risk profiles, where—

(*1*) Such models are based on generally accepted investment theories that take into account the historic returns of different asset classes (*e.g.,* equities, bonds, or cash) over defined periods of time;

(*2*) All material facts and assumptions on which such models are based (*e.g.,* retirement ages, life expectancies, income levels, financial resources, replacement income ratios, inflation rates, and rates of return) accompany the models;

(*3*) The asset allocation models are accompanied by a statement indicating that, in applying particular asset allocation models to their individual situations, plan participants, beneficiaries, or IRA owners should consider their other assets, income, and investments (*e.g.,* equity in a home, Social Security benefits, individual retirement plan investments, savings accounts, and interests in other qualified and non-qualified plans) in addition to their interests in the plan or IRA, to the extent those items are not taken into account in the model or estimate; and

(*4*) The models do not include or identify any specific investment product or investment alternative available under the plan or IRA, except that solely with respect to a plan, asset allocation models may identify a specific investment alternative available under the plan if it is a designated investment alternative within the meaning of 29 CFR 2550.404a–5(h)(4) under the plan subject to oversight by a plan fiduciary independent from the person who developed or markets the investment alternative and the model:

(*i*) Identifies all the other designated investment alternatives available under the plan that have similar risk and return characteristics, if any; and

(*ii*) is accompanied by a statement indicating that those other designated investment alternatives have similar risk and return characteristics and identifying where information on those investment alternatives may be obtained, including information described in paragraph (b)(2)(iv)(A) of this section and, if applicable, paragraph (d) of 29 CFR 2550.404a–5.

(D) *Interactive investment materials.* Questionnaires, worksheets, software, and similar materials that provide a plan fiduciary, plan participant or beneficiary, or IRA owner the means to: Estimate future retirement income needs and assess the impact of different asset allocations on retirement income; evaluate distribution options, products, or vehicles by providing information under paragraphs (b)(2)(iv)(A) and (B) of this section; or estimate a retirement income stream that could be generated by an actual or hypothetical account balance, where—

(*1*) Such materials are based on generally accepted investment theories that take into account the historic returns of different asset classes (*e.g.,* equities, bonds, or cash) over defined periods of time;

(*2*) There is an objective correlation between the asset allocations generated by the materials and the information and data supplied by the plan participant, beneficiary or IRA owner;

(*3*) There is an objective correlation between the income stream generated by the materials and the information and data supplied by the plan participant, beneficiary, or IRA owner;

(*4*) All material facts and assumptions (*e.g.,* retirement ages, life expectancies, income levels, financial resources, replacement income ratios, inflation rates, rates of return and other features, and rates specific to income annuities or systematic withdrawal plans) that may affect a plan participant's, beneficiary's, or IRA owner's assessment of the different asset allocations or different income streams accompany the materials or are specified by the plan participant, beneficiary, or IRA owner;

(*5*) The materials either take into account other assets, income and investments (*e.g.,* equity in a home, Social Security benefits, individual retirement plan investments, savings accounts, and interests in other qualified and non-qualified plans) or are accompanied by a statement indicating that, in applying particular asset allocations to their individual situations, or in assessing the adequacy of an estimated income stream, plan participants, beneficiaries, or IRA owners should consider their other assets, income, and investments in addition to their interests in the plan or IRA; and

(*6*) The materials do not include or identify any specific investment alternative or distribution option available under the plan or IRA, unless such alternative or option is specified by the plan participant, beneficiary, or IRA owner, or it is a designated investment alternative within the meaning of 29 CFR 2550.404a–5(h)(4) under a plan subject to oversight by a plan fiduciary independent from the person who developed or markets the investment alternative and the materials:

(*i*) Identify all the other designated investment alternatives available under the plan that have similar risk and return characteristics, if any; and

(*ii*) Are accompanied by a statement indicating that those other designated investment alternatives have similar risk and return characteristics and identifying where information on those investment alternatives may be obtained; including information described in paragraph (b)(2)(iv)(A) of this section and, if applicable, paragraph (d) of 29 CFR 2550.404a–5;

(c) Except for persons who represent or acknowledge that they are acting as a fiduciary within the meaning of the Act or the Code, a person shall not be deemed to be a fiduciary within the meaning of section 3(21)(A)(ii) of the Act or section 4975(e)(3)(B) of the Code solely because of the activities set forth in paragraphs (c)(1), (2), and (3) of this section.

(1) *Transactions with independent fiduciaries with financial expertise*—The provision of any advice by a person (including the provision of asset allocation models or other financial analysis tools) to a fiduciary of the plan or IRA (including a fiduciary to an investment contract, product, or entity that holds plan assets as determined pursuant to sections 3(42) and 401 of the Act and 29 CFR 2510.3–101) who is independent of the person providing the advice with respect to an arm's length sale, purchase, loan, exchange, or other transaction related to the investment of securities or other investment property, if, prior to entering into the transaction the person providing the advice satisfies the requirements of this paragraph (c)(1).

(i) The person knows or reasonably believes that the independent fiduciary of the plan or IRA is:

(A) 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;

(B) 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;

(C) An investment adviser registered under the Investment Advisers Act of 1940 or, if not registered an as 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;

(D) A broker-dealer registered under the Securities Exchange Act of 1934; or

(E) Any independent fiduciary that holds, or has under management or control, total assets of at least $50 million (the person may rely on written representations from the plan or independent fiduciary to satisfy this paragraph (c)(1)(i));

(ii) The person knows or reasonably believes that the independent fiduciary of the plan or IRA is capable of evaluating investment risks independently, both in general and with regard to particular transactions and investment strategies (the person may rely on written representations from the plan or independent fiduciary to satisfy this paragraph (c)(1)(ii));

(iii) The person fairly informs the independent fiduciary that the person is not undertaking to provide impartial investment advice, or to give advice in a fiduciary capacity, in connection with the transaction and fairly informs the independent fiduciary of the existence and nature of the person's financial interests in the transaction;

(iv) The person knows or reasonably believes that the independent fiduciary of the plan or IRA is a fiduciary under ERISA or the Code, or both, with respect to the transaction and is responsible for exercising independent judgment in evaluating the transaction (the person may rely on written representations from the plan or independent fiduciary to satisfy this paragraph (c)(1)(iv)); and

(v) The person does not receive a fee or other compensation directly from the plan, plan fiduciary, plan participant or beneficiary, IRA, or IRA owner for the provision of investment advice (as opposed to other services) in connection with the transaction.

(2) *Swap and security-based swap transactions.* The provision of any advice to an employee benefit plan (as described in section 3(3) of the Act) by a person who is a swap dealer, security-based swap dealer, major swap participant, major security-based swap participant, or a swap clearing firm in connection with a swap or security-based swap, as defined in section 1a of the Commodity Exchange Act (7 U.S.C. 1a) and section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)) if—

(i) The employee benefit plan is represented by a fiduciary under ERISA independent of the person;

(ii) In the case of a swap dealer or security-based swap dealer, the person is not acting as an advisor to the employee benefit plan (within the meaning of section 4s(h) of the Commodity Exchange Act or section 15F(h) of the Securities Exchange Act of 1934) in connection with the transaction;

(iii) The person does not receive a fee or other compensation directly from the plan or plan fiduciary for the provision of investment advice (as opposed to other services) in connection with the transaction; and

(iv) In advance of providing any recommendations with respect to the transaction, or series of transactions, the person obtains a written representation from the independent fiduciary that the independent fiduciary understands that the person is not undertaking to provide impartial investment advice, or to give advice in a fiduciary capacity, in connection with the transaction and that the independent fiduciary is exercising independent judgment in evaluating the recommendation.

(3) *Employees.* (i) In his or her capacity as an employee of the plan sponsor of a plan, as an employee of an affiliate of such plan sponsor, as an employee of an employee benefit plan, as an employee of an employee organization, or as an employee of a plan fiduciary, the person provides advice to a plan fiduciary, or to an employee (other than in his or her capacity as a participant or beneficiary of an employee benefit plan) or independent contractor of such plan sponsor, affiliate, or employee benefit plan, provided the person receives no fee or other compensation, direct or indirect, in connection with the advice beyond the employee's normal compensation for work performed for the employer; or

(ii) In his or her capacity as an employee of the plan sponsor of a plan, or as an employee of an affiliate of such plan sponsor, the person provides advice to another employee of the plan sponsor in his or her capacity as a participant or beneficiary of the plan, provided the person's job responsibilities do not involve the provision of investment advice or investment recommendations, the person is not registered or licensed under federal or state securities or insurance law, the advice he or she provides does not require the person to be registered or licensed under federal or state securities or insurance laws, and the person receives no fee or other compensation, direct or indirect, in connection with the advice beyond the employee's normal compensation for work performed for the employer.

(d) *Scope of fiduciary duty—investment advice.* A person who is a fiduciary with respect to an plan or IRA by reason of rendering investment advice (as defined in paragraph (a) of this section) for a fee or other compensation, direct or indirect, with respect to any securities or other investment 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 described in paragraph (a)(1) of this section) for a fee or other compensation, and does not have any authority or responsibility to render such investment advice, provided that nothing in this paragraph shall be deemed to:

(1) Exempt such person from the provisions of section 405(a) of the Act concerning liability for fiduciary breaches by other fiduciaries with respect to any assets of the plan; or

(2) Exclude such person from the definition of the term ''party in interest'' (as set forth in section 3(14)(B) of the Act) or ''disqualified person'' (as set forth in section 4975(e)(2) of the Code) with respect to any assets of the employee benefit plan or IRA.

(e) *Execution of securities transactions.* (1) A person who is a broker or dealer registered under the Securities Exchange Act of 1934, a reporting dealer who makes primary markets in securities of the United States Government or of an agency of the United States Government and reports daily to the Federal Reserve Bank of New York its positions with respect to such securities and borrowings thereon, or a bank supervised by the United States or a State, shall not be deemed to be a fiduciary, within the meaning of section 3(21)(A) of the Act or section 4975(e)(3)(B) of the Code, with respect to a plan or IRA solely because such person executes transactions for the purchase or sale of securities on behalf of such plan in the ordinary course of its business as a broker, dealer, or bank, pursuant to instructions of a fiduciary with respect to such plan or IRA, if:

(i) Neither the fiduciary nor any affiliate of such fiduciary is such broker, dealer, or bank; and

(ii) The instructions specify:

(A) The security to be purchased or sold;

(B) A price range within which such security is to be purchased or sold, or, if such security is issued by an open-end investment company registered under the Investment Company Act of 1940 (15 U.S.C. 80a–1, *et seq.*), a price which is determined in accordance with Rule 22c1 under the Investment Company Act of 1940 (17 CFR 270.22c1);

(C) A time span during which such security may be purchased or sold (not to exceed five business days); and

(D) The minimum or maximum quantity of such security which may be purchased or sold within such price range, or, in the case of a security issued by an open-end investment company registered under the Investment Company Act of 1940, the minimum or maximum quantity of such security which may be purchased or sold, or the value of such security in dollar amount which may be purchased or sold, at the price referred to in paragraph (e)(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 (e)(1) of this section, shall not be deemed to be a fiduciary regarding any assets of the plan or IRA with respect to which such broker-dealer, reporting dealer or bank does not have any discretionary authority, discretionary control or discretionary responsibility, does not exercise any authority or control, does not render investment advice (as defined in paragraph (a) of this section) for a fee or other compensation, and does not have any authority or responsibility to render such investment advice, provided that nothing in this paragraph shall be deemed to:

(i) Exempt such broker-dealer, reporting dealer, or bank from the provisions of section 405(a) of the Act concerning liability for fiduciary breaches by other fiduciaries with respect to any assets of the plan; or

(ii) Exclude such broker-dealer, reporting dealer, or bank from the definition of the term ''party in interest'' (as set forth in section 3(14)(B) of the Act) or ''disqualified person'' (as set forth in section 4975(e)(2) of the Code) with respect to any assets of the plan or IRA.

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

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

(1) The term ''affiliate'' 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, or relative (as defined in paragraph (g)(8) 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,'' for purposes of paragraph (g)(1) of this section, means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(3) The term ''fee or other compensation, direct or indirect'' means, for purposes of this section and section 3(21)(A)(ii) of the Act, any explicit fee or compensation for the advice received by the person (or by an affiliate) from any source, and any other fee or compensation received from any source in connection with or as a result of the purchase or sale of a security or the provision of investment advice services, including, though not limited to, commissions, loads, finder's fees, revenue sharing payments, shareholder servicing fees, marketing or distribution fees, 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, gifts and gratuities, and expense reimbursements. 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 transaction or service or if eligibility for or the amount of the fee or compensation is based in whole or in part on the transaction or service.

(4) The term ''investment property'' does not include health insurance policies, disability insurance policies, term life insurance policies, and other property to the extent the policies or property do not contain an investment component.

(5) 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.

(6)(i) The term ''plan'' means any employee benefit plan described in section 3(3) of the Act and any plan described in section 4975(e)(1)(A) of the Code, and

(ii) 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.

(7) The term ''plan fiduciary'' means a person described in section (3)(21)(A) of the Act and 4975(e)(3) of the Code. For purposes of this section, a participant or beneficiary of the plan or a relative of either is not a ''plan fiduciary'' with respect to the plan, and the IRA owner or a relative is not a ''plan fiduciary'' with respect to the IRA.

(8) The term ''relative'' means a person described in section 3(15) of the Act and section 4975(e)(6) of the Code or a brother, a sister, or a spouse of a brother or sister.

(9) The term ''plan participant'' or ''participant'' means, for a plan described in section 3(3) of the Act, a person described in section 3(7) of the Act.

(h) *Effective and applicability dates*—(1) *Effective date.* This section is effective on June 7, 2016.

(2) *Applicability date.* Paragraphs (a), (b), (c), (d), (f), and (g) of this section apply April 10, 2017.

(3) Until the applicability date under this paragraph (h), the prior regulation under the Act and the Code (as it appeared in the July 1, 2015 edition of 29 CFR part 2510 and the April 1, 2015 edition of 26 CFR part 54) applies.

(i) *Continued applicability of State law regulating insurance, banking, or securities.* Nothing in this part 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.

■ 5. Effective June 7, 2016 to April 10, 2017, § 2510.3–21 is further amended by adding paragraph (j) to read as follows:

§ 2510.3–21 Definition of ''Fiduciary.''

* * * * *

(j) *Temporarily applicable provisions.* (1) During the period between June 7, 2016 and April 10, 2017, this paragraph (j) shall apply.

(i) A person shall be deemed to be rendering ''investment advice'' to an employee benefit plan, within the meaning of section 3(21)(A)(ii) of the Act, section 4975(e)(3)(B) of the Code and this paragraph (j), only if:

(A) Such person renders advice to the plan as to the value of securities or other property, or makes recommendation as to the advisability of investing in, purchasing, or selling securities or other property; and

(B) Such person either directly or indirectly (*e.g.,* through or together with any affiliate)—

(*1*) 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; or

(*2*) Renders any advice described in paragraph (j)(1)(i) of this section on a regular basis to the plan pursuant to a mutual agreement, arrangement or understanding, written or otherwise, between such person and the plan or a fiduciary with respect to the plan, that such services will serve as a primary basis for investment decisions with respect to plan assets, and that such person will render individualized investment advice to the plan based on the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments.

(2) *Affiliate and control.* (i) For purposes of paragraph (j) of this section, an ''affiliate'' of a person shall include:

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

(B) Any officer, director, partner, employee or relative (as defined in section 3(15) of the Act) of such person; and

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

(ii) For purposes of this paragraph (j), the term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(3) *Expiration date.* This paragraph (j) expires on April 10, 2017.

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

Phyllis C. Borzi,

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

[FR Doc. 2016–07924 Filed 4–6–16; 11:15 am]

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

[Application No. D–11712]

ZRIN 1210–ZA25

Best Interest Contract Exemption

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

ACTION: Adoption of Class Exemption.

SUMMARY: This document contains an exemption from certain prohibited transactions provisions of the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (the Code). The provisions at issue generally prohibit fiduciaries with respect to employee benefit plans and individual retirement accounts (IRAs) from engaging in self-dealing and receiving compensation from third parties in connection with transactions involving the plans and IRAs. The exemption allows entities such as registered investment advisers, broker-dealers and insurance companies, and their agents and representatives, that are ERISA or Code fiduciaries by reason of the provision of investment advice, to receive compensation that may otherwise give rise to prohibited transactions as a result of their advice to plan participants and beneficiaries, IRA owners and certain plan fiduciaries (including small plan sponsors). The exemption is subject to protective conditions to safeguard the interests of the plans, participants and beneficiaries and IRA owners. The exemption affects participants and beneficiaries of plans, IRA owners and fiduciaries with respect to such plans and IRAs.

DATES: *Issuance date:* This exemption is issued June 7, 2016.

Applicability date: This exemption is applicable to transactions occurring on or after April 10, 2017. See Section K of this preamble, *Applicability Date and Transition Rules,* for further information.

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

SUPPLEMENTARY INFORMATION:

Executive Summary

Purpose of This Regulatory Action

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

This Best Interest Contract Exemption is designed to promote the provision of investment advice that is in the best interest of retail investors such as plan participants and beneficiaries, IRA owners, and certain plan fiduciaries, including small plan sponsors. ERISA and the Code generally prohibit fiduciaries from receiving payments from third parties and from acting on conflicts of interest, including using their authority to affect or increase their own compensation, in connection with transactions involving a plan or IRA. Certain types of fees and compensation common in the retail market, such as brokerage or insurance commissions, 12b–1 fees and revenue sharing payments, may fall within these prohibitions when received by fiduciaries as a result of transactions involving advice to the plan, plan participants and beneficiaries, and IRA owners. To facilitate continued provision of advice to such retail investors under conditions designed to safeguard the interests of these investors, the exemption allows investment advice fiduciaries, including investment advisers registered under the Investment Advisers Act of 1940 or state law, broker-dealers, and insurance companies, and their agents and representatives, to receive these various forms of compensation that, in the absence of an exemption, would not be permitted under ERISA and the Code.

Rather than create a set of highly prescriptive transaction-specific exemptions, which has been the Department's usual approach, the exemption flexibly accommodates a wide range of compensation practices, while minimizing the harmful impact of conflicts of interest on the quality of advice. As a condition of receiving compensation that would otherwise be prohibited, individual Advisers and the Financial Institutions that employ or otherwise retain them must adhere to conditions designed to mitigate the harmful impact of conflicts of interest. By taking a standards-based approach, the exemption permits firms to continue to rely on many common compensation