DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

[Application No. D–12011]

ZRIN 1210–ZA29

Improving Investment Advice for Workers & Retirees

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

ACTION: Notification of Proposed Class Exemption.

SUMMARY: This document gives notice of a proposed class exemption from certain prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974, as amended (ERISA), and the Internal Revenue Code of 1986, as amended (the Code). The prohibited transaction provisions of ERISA and the Code generally prohibit fiduciaries with respect to employee benefit plans (Plans) and individual retirement accounts and annuities (IRAs) from engaging in self-dealing and receiving compensation from third parties in connection with transactions involving the Plans and IRAs. The provisions also prohibit purchasing and selling investments with the Plans and IRAs when the fiduciaries are acting on behalf of their own accounts (principal transactions). This proposed exemption would allow investment advice fiduciaries under both ERISA and the Code to receive compensation, including as a result of advice to roll over assets from a Plan to an IRA, and to engage in principal transactions, that would otherwise violate the prohibited transaction provisions of ERISA and the Code. The exemption would apply to registered investment advisers, broker-dealers, banks, insurance companies, and their employees, agents, and representatives that are investment advice fiduciaries. The exemption would include protective conditions designed to safeguard the interests of Plans, participants and beneficiaries, and IRA owners. The new class exemption would affect participants and beneficiaries of Plans, IRA owners, and fiduciaries with respect to such Plans and IRAs.

DATES: Written comments and requests for a public hearing on the proposed class exemption must be submitted to the Department within August 6, 2020. The Department proposes that the exemption, if granted, will be available 60 days after the date of publication of the final exemption in the **Federal Register**.

ADDRESSES: All written comments and requests for a hearing concerning the proposed class exemption should be sent to the Office of Exemption Determinations through the Federal eRulemaking Portal and identified by Application No. D–12011:

Federal eRulemaking Portal: www.regulations.gov at Docket ID number: EBSA–2020–0003. Follow the instructions for submitting comments.

See **SUPPLEMENTARY INFORMATION** below for additional information regarding comments.

FOR FURTHER INFORMATION CONTACT: Susan Wilker, telephone (202) 693–8557, or Erin Hesse, telephone (202) 693–8546, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor (these are not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Comment Instructions

All comments and requests for a hearing must be received by the end of the comment period. Requests for a hearing must state the issues to be addressed and include a general description of the evidence to be presented at the hearing. In light of the current circumstances surrounding the COVID–19 pandemic caused by the novel coronavirus which may result in disruption to the receipt of comments by U.S. Mail or hand delivery/courier, persons are encouraged to submit all comments electronically and not to follow with paper copies. The comments and hearing requests will be available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N–1513, 200 Constitution Avenue NW, Washington, DC 20210; however, the Public Disclosure Room may be closed for all or a portion of the comment period due to circumstances surrounding the COVID–19 pandemic caused by the novel coronavirus. Comments and hearing requests will also be available online at *www.regulations.gov,* at Docket ID number: EBSA–2020–0003 and *www.dol.gov/ebsa,* at no charge.

Warning: All comments received will be included in the public record without change and will be made available online at *www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be confidential or other information whose disclosure is restricted by statute. If you submit a comment, EBSA recommends that you include your name and other contact information, but DO NOT submit information that you consider to be confidential, or otherwise protected (such as Social Security number or an unlisted phone number), or confidential business information that you do not want publicly disclosed. However, if EBSA cannot read your comment due to technical difficulties and cannot contact you for clarification, EBSA might not be able to consider your comment. Additionally, the *www.regulations.gov* website is an ''anonymous access'' system, which means EBSA will not know your identity or contact information unless you provide it. If you send an email directly to EBSA without going through *www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public record and made available on the internet.

Background

The Employee Retirement Income Security Act of 1974 (ERISA) section 3(21)(A)(ii) provides, in relevant part, that a person is a fiduciary with respect to a Plan to the extent he or she 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. Internal Revenue Code (Code) section 4975(e)(3)(B) includes a parallel provision that defines a fiduciary of a Plan and an IRA. In 1975, the Department issued a regulation establishing a five-part test for fiduciary status under this provision of ERISA.[1] The Department's 1975 regulation also applies to the definition of fiduciary in the Code, which is identical in its wording.[2]

Under the 1975 regulation, for advice to constitute ''investment advice,'' a financial institution or investment professional 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, Plan fiduciary or IRA owner that (4) the advice will serve as a primary basis for investment decisions with respect to Plan or IRA assets, and that (5) the

[1] 29 CFR 2510.3–21(c)(1), 40 FR 50842 (October 31, 1975).

[2] 26 CFR 54.4975–9(c), 40 FR 50840 (October 31, 1975).

advice will be individualized based on the particular needs of the Plan or IRA. A financial institution or investment professional that meets this five-part test, and receives a fee or other compensation, direct or indirect, is an investment advice fiduciary under ERISA and under the Code.

Investment advice fiduciaries, like other fiduciaries to Plans and IRAs, are subject to duties and liabilities established in Title I of ERISA (ERISA) and Title II of ERISA (the Internal Revenue Code or the Code). Under Title I of ERISA, plan fiduciaries must act prudently and with undivided loyalty to employee benefit plans and their participants and beneficiaries. Although these statutory fiduciary duties are not in the Code, both ERISA and the Code contain provisions forbidding fiduciaries from engaging in certain specified ''prohibited transactions,'' involving Plans and IRAs, including conflict of interest transactions.[3] Under these prohibited transaction provisions, a fiduciary may not deal with the income or assets of a Plan or IRA in his or her own interest or for his or her own account, and a fiduciary may not receive payments from any party dealing with the Plan or IRA in connection with a transaction involving assets of the Plan or IRA. The Department has authority to grant administrative exemptions from the prohibited transaction provisions in ERISA and the Code.[4]

In 2016, the Department finalized a new regulation that would have replaced the 1975 regulation and it granted new associated prohibited transaction exemptions. After that rulemaking was vacated by the U.S. Court of Appeals for the Fifth Circuit in 2018,[5] the Department issued Field Assistance Bulletin (FAB) 2018–02, a temporary enforcement policy providing prohibited transaction relief to investment advice fiduciaries.[6] In the FAB, the Department stated it would not pursue prohibited transactions claims against investment advice fiduciaries who worked diligently and in good faith to comply with ''Impartial Conduct Standards'' for transactions that would have been exempted in the new exemptions, or treat the fiduciaries as violating the applicable prohibited transaction rules. The Impartial Conduct Standards have three components: A best interest standard; a reasonable compensation standard; and a requirement to make no misleading statements about investment transactions and other relevant matters.

This proposal takes into consideration the public correspondence and comments received by the Department since February 2017 and responds to informal industry feedback seeking an administrative class exemption based on FAB 2018–02. As noted in the FAB, following the 2016 rulemaking many financial institutions created and implemented compliance structures designed to ensure satisfaction of the Impartial Conduct Standards. These parties were permitted to continue to rely on those structures pending further guidance. Under the exemption, financial institutions could continue relying on those compliance structures on a permanent basis, subject to the additional conditions of the exemption, rather than changing course to begin complying with the Department's other existing exemptions for investment advice fiduciaries. In addition, the exemption would provide a defense to private litigation as well as enforcement action by the Department, while the FAB is limited to the latter.

This new proposed exemption would provide relief that is broader and more flexible than the Department's existing prohibited transaction exemptions for investment advice fiduciaries. The Department's existing exemptions generally provide relief for discrete, specifically identified transactions, and they were not amended to clearly provide relief for the compensation arrangements that developed over time.[7] The exemption would provide additional certainty regarding covered compensation arrangements and would avoid the complexity associated with a financial institution relying on multiple exemptions when providing investment advice.

The proposed exemption's principles-based approach is rooted in the Impartial Conduct Standards for fiduciaries providing investment advice. The proposed exemption includes additional conditions designed to support the provision of investment advice that meets the Impartial Conduct Standards. This notice also sets forth the Department's interpretation of the five-part test of investment advice fiduciary status and provides the Department's views on when advice to roll over Plan assets to an IRA[8] could be considered fiduciary investment advice under ERISA and the Code.

Since 2018, other regulators have considered enhanced standards of conduct for investment professionals as a method of addressing conflicts of interest. At the federal level, on June 5, 2019, the Securities and Exchange Commission (SEC) finalized a regulatory package relating to conduct standards for broker-dealers and investment advisers. The package included Regulation Best Interest, which establishes a best interest standard applicable to broker-dealers when making a recommendation of any securities transaction or investment strategy involving securities to retail customers.[9] The SEC also issued an interpretation of the conduct standards applicable to registered investment advisers.[10] As part of the package, the SEC adopted new Form CRS, which requires broker-dealers and registered investment advisers to provide retail

[3] ERISA section 406 and Code section 4975.

[4] ERISA section 408(a) and Code section 4975(c)(2). Reorganization Plan No. 4 of 1978 (5 U.S.C. App. (2018)) generally transferred the authority of the Secretary of the Treasury to grant administrative exemptions under Code section 4975 to the Secretary of Labor. These provisions require the Secretary to make the following findings before granting an administrative exemption: (i) The exemption is administratively feasible; (ii) the exemption is in the interests of the Plans and IRAs and their participants and beneficiaries, and (iii) the exemption is protective of the rights of participants and beneficiaries of the Plans and IRAs. The Department is proposing this new class exemption on its own motion pursuant to ERISA section 408(a) and Code section 4975(c)(2), and in accordance with procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637 (October 27, 2011)).

[5] *Chamber of Commerce of the United States* v. *U.S. Department of Labor,* 885 F.3d 360 (5th Cir. 2018). Elsewhere in this issue of the **Federal Register**, the Department is publishing a technical amendment related to the decision.

[6] *Available at www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2018-02.* The Impartial Conduct Standards incorporated in the FAB were conditions of the new exemptions granted in 2016. *See* Best Interest Contract Exemption, 81 FR 21002 (Apr. 8, 2016), as corrected at 81 FR 44773 (July 11, 2016).

[7] *See e.g.,* PTE 86–128, Class Exemption for Securities Transactions involving Employee Benefit Plans and Broker-Dealers, 51 FR 41686 (Nov. 18, 1986), as amended, 67 FR 64137 (Oct. 17, 2002)(providing relief for a fiduciary's use of its authority to cause a Plan or IRA to pay a fee for effecting or executing securities transactions to the fiduciary, as agent for the Plan or IRA, and for a fiduciary to act as an agent in an agency cross transaction for a Plan or IRA and another party to the transaction and receive reasonable compensation for effecting or executing the transaction from the other party to the tranaction); PTE 84–24 Class Exemption for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, Investment Companies and Investment Company Principal Underwriters, 49 FR 13208 (Apr. 3, 1984) , as corrected, 49 FR 24819 (June 15, 1984), as amended, 71 FR 5887 (Feb. 3, 2006) (providing relief for the receipt of a sales commission by an insurance agent or broker from an insurance company in connection with the purchase, with plan assets, of an insurance or annuity contract).

[8] For purposes of any rollover of assets between a Plan and an IRA described in this preamble, the term ''IRA'' only includes an account or annuity described in Code section 4975(e)(1)(B) or (C).

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

[10] Commission Interpretation Regarding Standard of Conduct for Investment Advisers, 84 FR 33669 (July 12, 2019) (SEC Fiduciary Interpretation).

investors with a short relationship summary with specified information (SEC Form CRS).[11]

State regulators and standards-setting bodies also have focused on conduct standards. The New York State Department of Financial Services has amended its insurance regulations to establish a best interest standard in connection with life insurance and annuity transactions.[12] The Massachusetts Securities Division has amended its regulations for broker-dealers to apply a fiduciary conduct standard, under which broker-dealers and their agents must ''[m]ake recommendations and provide investment advice without regard to the financial or any other interest of any party other than the customer.'' [13] The National Association of Insurance Commissioners has revised its Suitability In Annuity Transactions Model Regulation to clarify that all recommendations by agents and insurers must be in the best interest of the consumer and that agents and carriers may not place their financial interest ahead of in the consumer's interest in making the recommendation.[14]

The approach in this proposal includes Impartial Conduct Standards that are, in the Department's view, aligned with those of the other regulators. In this way, the proposal is designed to promote regulatory efficiencies that might not otherwise exist under the Department's existing administrative exemptions for investment advice fiduciaries.

This proposed exemption is expected to be an Executive Order (E.O.) 13771 deregulatory action because it would allow investment advice fiduciaries with respect to Plans and IRAs to receive compensation and engage in certain principal transactions that would otherwise be prohibited under ERISA and the Code. The temporary enforcement policy stated in FAB 2018–02 remains in place. The Department is proposing this class exemption on its own motion, pursuant to ERISA section 408(a) and Code section 4975(c)(2), and in accordance with the procedures set forth in 29 CFR part 2570 (76 FR 66637 (October 27, 2011)).

Description of the Proposed Exemption

As discussed in greater detail below, the exemption proposed in this notice would be available to registered investment advisers, broker-dealers, banks, and insurance companies (Financial Institutions) and their individual employees, agents, and representatives (Investment Professionals) that provide fiduciary investment advice to Retirement Investors. The proposal defines Retirement Investors as Plan participants and beneficiaries, IRA owners, and Plan and IRA fiduciaries.[15] Under the exemption, Financial Institutions and Investment Professionals could receive a wide variety of payments that would otherwise violate the prohibited transaction rules, including, but not limited to, commissions, 12b–1 fees, trailing commissions, sales loads, mark-ups and mark-downs, and revenue sharing payments from investment providers or third parties. The exemption's relief would extend to prohibited transactions arising as a result of investment advice to roll over assets from a Plan to an IRA, as detailed later in this proposed exemption. The exemption also would allow Financial Institutions to engage in principal transactions with Plans and IRAs in which the Financial Institution purchases or sells certain investments from its own account.

As noted above, ERISA and the Code include broad prohibitions on self-dealing. Absent an exemption, a fiduciary may not deal with the income or assets of a Plan or IRA in his or her own interest or for his or her own account, and a fiduciary may not receive payments from any party dealing with the Plan or IRA in connection with a transaction involving assets of the Plan or IRA. As a result, fiduciaries who use their authority to cause themselves or their affiliates[16] or related entities[17] to receive additional compensation violate the prohibited transaction provisions unless an exemption applies.[18]

The proposed exemption would condition relief on the Investment Professional and Financial Institution providing advice in accordance with the Impartial Conduct Standards. In addition, the exemption would require Financial Institutions to acknowledge in writing their and their Investment Professionals' fiduciary status under ERISA and the Code, as applicable, when providing investment advice to the Retirement Investor, and to describe in writing the services to be provided and the Financial Institutions' and Investment Professionals' material conflicts of interest. Finally, Financial Institutions would be required to adopt policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards and conduct a retrospective review of compliance. The exemption would also provide, subject to additional safeguards, relief for Financial Institutions to enter into principal transactions with Retirement Investors, in which they purchase or sell certain investments from their own accounts.

The exemption requires Financial Institutions to provide reasonable oversight of Investment Professionals and to adopt a culture of compliance. The proposal further provides that Financial Institutions and Investment Professionals would be ineligible to rely on the exemption if, within the previous 10 years, they were convicted of certain crimes arising out of their provision of investment advice to Retirement Investors; they would also be ineligible if they engaged in systematic or

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

[12] New York State Department of Financial Services Insurance Regulation 187, 11 NYCRR 224, First Amendment, effective August 1, 2019.

[13] 950 Mass. Code Regs. 12.204 & 12.207 as amended effective March 6, 2020.

[14] NAIC Takes Action to Protect Annuity Consumers; *available at https://content.naic.org/article/news_release_naic_takes_action_protect_annuity_consumers.htm.*

[15] The term ''Plan'' is defined for purposes of the exemption as any employee benefit plan described in ERISA section 3(3) and any plan described in Code section 4975(e)(1)(A). The term ''Individual Retirement Account'' or ''IRA'' is defined as any account or annuity described in Code section 4975(e)(1)(B) through (F), including an Archer medical savings account, a health savings account, and a Coverdell education savings account.

[16] For purposes of the exemption, an affiliate would include: (1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the Investment Professional or Financial Institution. (For this purpose, ''control'' would mean the power to exercise a controlling influence over the management or policies of a person other than an individual) (2) Any officer, director, partner, employee, or relative (as defined in ERISA section 3(15)), of the Investment Professional or Financial Institution; and (3) Any corporation or partnership of which the Investment Professional or Financial Institution is an officer, director, or partner.

[17] For purposes of the exemption, related entities would include entities that are not affiliates, but in which the Investment Professional or Financial Institution has an interest that may affect the exercise of its best judgment as a fiduciary.

[18] As articulated in the Department's regulations, ''a fiduciary may not use the authority, control, or responsibility which makes such a person a fiduciary to cause a plan to pay an additional fee to such fiduciary (or to a person in which such fiduciary has an interest which may affect the exercise of such fiduciary's best judgment as a fiduciary) to provide a service.'' 29 CFR 2550.408b–2(e)(1).

intentional violation of the exemption's conditions or provided materially misleading information to the Department in relation to their conduct under the exemption. Ineligible parties could rely on an otherwise available statutory exemption or apply for an individual prohibited transaction exemption from the Department. This targeted approach of allowing the Department to give special attention to parties with certain criminal convictions or with a history of egregious conduct with respect to compliance with the exemption should provide significant protections for Retirement Investors while preserving wide availability of investment advice arrangements and products.

The proposed exemption would not expand Retirement Investors' ability to enforce their rights in court or create any new legal claims above and beyond those expressly authorized in ERISA, such as by requiring contracts and/or warranty provisions.[19]

Scope of Relief

Financial Institutions

The exemption would be available to entities that satisfy the exemption's definition of a ''Financial Institution.'' The proposal limits the types of entities that qualify as a Financial Institution to SEC- and state-registered investment advisers, broker-dealers, insurance companies and banks.[20] The proposed definition is based on the entities identified in the statutory exemption for investment advice under ERISA section 408(b)(14) and Code section 4975(d)(17), which are subject to well-established regulatory conditions and oversight.[21] Congress determined that this group of entities could prudently mitigate certain conflicts of interest in their investment advice through adherence to tailored principles under the statutory exemption. The Department takes a similar approach here, and therefore is proposing to include the same group of entities. To fit within the definition of *Financial Institution,* the firm must not have been disqualified or barred from making investment recommendations by any insurance, banking, or securities law or regulatory authority (including any self-regulatory organization).

The Department recognizes that different types of Financial Institutions have different business models, and the proposal is drafted to apply flexibly to these institutions.[22] Broker-dealers, for example, provide a range of services to Retirement Investors, ranging from executing one-time transactions to providing personalized investment recommendations, and they may be compensated on a transactional basis such as through commissions.[23] If broker-dealers that are investment advice fiduciaries with respect to Retirement Investors provide investment advice that affects the amount of their compensation, they must rely on an exemption.

Registered investment advisers, by contrast, generally provide ongoing investment advice and services and are commonly paid either an assets under management fee or a fixed fee.[24] If a registered investment adviser is an investment advice fiduciary that charges only a level fee that does not vary on the basis of the investment advice provided, the registered investment adviser may not violate the prohibited transaction rules.[25] However, if the registered investment adviser provides investment advice that causes itself to receive the level fee, such as through advice to roll over Plan assets to an IRA, the fee (including an ongoing management fee paid with respect to the IRA) is prohibited under ERISA and the Code.[26] Additionally, if a registered investment adviser that is an investment advice fiduciary is dually-registered as a broker-dealer, the registered investment adviser may engage in a prohibited transaction if it recommends a transaction that increases the broker-dealer's compensation, such as for execution of securities transactions. As noted above, it is a prohibited transaction for a fiduciary to use its authority to cause an affiliate or related entity to receive additional compensation.[27]

Insurance companies commonly compensate insurance agents on a commission basis, which generally creates prohibited transactions when insurance agents are investment advice fiduciaries that provide investment advice to Retirement Investors in connection with the sales. However, the Department is aware that insurance companies often sell insurance products and fixed (including indexed) annuities through different distribution channels than broker-dealers and registered investment advisers. While some insurance agents are employees of an insurance company, other insurance agents are independent, and work with multiple insurance companies. The proposed exemption would apply to either of these business models. Insurance companies can supervise independent insurance agents and they can also create oversight and compliance systems through contracts with intermediaries such as independent marketing organizations (IMOs), field marketing organizations (FMOs) or brokerage general agencies (BGAs).[28] Eligible parties can also continue to use relief under the existing exemption for insurance transactions, PTE 84–24, as an alternative.[29] The Department requests comment on these suggestions, and whether there are alternatives for oversight of investment advice fiduciaries who also serve as insurance agents.

Finally, banks and similar institutions would be permitted to act as Financial Institutions under the exemption if they or their employees are investment advice fiduciaries with respect to Retirement Investors. The Department seeks comment on whether banks and their employees provide investment advice to Retirement Investors, and if so, whether the proposal needs

[19] ERISA section 502(a) provides the Secretary of Labor and plan participants and beneficiaries with a cause of action for fiduciary breaches and prohibited transactions with respect to ERISA-covered Plans (but not IRAs). Code section 4975 imposes a tax on disqualified persons participating in a prohibited transaction involving Plans and IRAs (other than a fiduciary acting only as such).

[20] The proposal includes ''a bank or similar financial institution supervised by the United States or a state, or a savings association (as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1)).'' The Department would interpret this definition to extend to credit unions.

[21] ERISA section 408(g)(11)(A) and Code section 4975(f)(8)(J)(i).

[22] Some of the Department's existing prohibited transaction exemptions would also apply to the transactions described in the next few paragraphs.

[23] Regulation Best Interest Release, 84 FR at 33319.

[24] *Id.*

[25] As noted above, fiduciaries who use their authority to cause themselves or their affiliates or related entities to receive additional compensation violate the prohibited transaction provisions unless an exemption applies. 29 CFR 2550.408b–2(e)(1).

[26] The Department has long interpreted the requirement of a fee to broadly cover ''all fees or other compensation incident to the transaction in which the investment advice to the plan has been rendered or will be rendered.'' Preamble to the Department's 1975 Regulation, 40 FR 50842 (October 31, 1975). The Department's analysis of the five-part test's application to rollovers is discussed below.

[27] 29 CFR 2550.408b–2(e)(1).

[28] Although the proposal's definition of Financial Institution does not include insurance intermediaries, the Department seeks comments on whether the exemption should include insurance intermediaries as Financial Institutions for the recommendation of fixed (including indexed) annuity contracts. If so, the Department asks parties to provide a definition of the type of intermediary that should be permitted to operate as a Financial Institution and whether any additional protective conditions might be necessary with respect to the intermediary.

[29] Class Exemption for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, Investment Companies and Investment Company Principal Underwriters, 49 FR 13208 (Apr. 3, 1984), as corrected, 49 FR 24819 (June 15, 1984), as amended, 71 FR 5887 (Feb. 3, 2006).

adjustment to address any unique aspects of their business models. The Department seeks comment on other business models not listed here, and invites commenters to explain whether other business models would be appropriate to include in this framework.

The proposal also allows the definition of *Financial Institution* to expand after the exemption is finalized based upon subsequent grants of individual exemptions to additional entities that are investment advice fiduciaries that meet the five-part test seeking to be treated as covered Financial Institutions. Additional types of entities, such as IMOs, FMOs, or BGAs, that are investment advice fiduciaries may separately apply for relief for the receipt of compensation in connection with the provision of investment advice on the same conditions as apply to the Financial Institutions covered by the proposed exemption.[30] If the Department grants an individual exemption under ERISA section 408(a) and Code section 4975(c) after the date this exemption is granted, the expanded definition of Financial Institution in the individual exemption would be added to this class exemption so other entities that satisfy the definition could similarly use the class exemption. The Department requests comment on the procedural aspects, *e.g.,* ensuring sufficient notice to Retirement Investors, of this permitted expansion of the definition.

The Department seeks comment on the definition of *Financial Institution* in general and whether any other type of entity should be included. The Department also seeks comment as to whether the definition is overly broad, or whether Retirement Investors would benefit from a narrowed list of Financial Institutions. In addition, the Department requests comment on whether the definition of *Financial Institution* is sufficiently broad to cover firms that render advice with respect to investments in Health Savings Accounts (HSA), and about the extent to which Plan participants receive investment advice in connection with such accounts.

Investment Professionals

As defined in the proposal, an *Investment Professional* is an individual who is a fiduciary of a Plan or IRA by reason of the provision of investment advice, who is an employee, independent contractor, agent or representative of a Financial Institution, and who satisfies the federal and state regulatory and licensing requirements of insurance, banking, and securities laws (including self-regulatory organizations) with respect to the covered transaction, as applicable. Similar to the definition of *Financial Institution,* this definition also includes a requirement that the Investment Professional has not been disqualified from making investment recommendations by any insurance, banking, or securities law or regulatory authority (including any self-regulatory organization).

Covered Transactions

The proposal would permit Financial Institutions and Investment Professionals, and their affiliates and related entities, to receive reasonable compensation as a result of providing fiduciary investment advice. The exemption specifically covers compensation received as a result of investment advice to roll over assets from a Plan to an IRA. The exemption also would provide relief for a Financial Institution to engage in the purchase or sale of an asset in a riskless principal transaction or a Covered Principal Transaction, and receive a mark-up, mark-down, or other payment. The exemption would provide relief from ERISA section 406(a)(1)(A) and (D) and 406(b) and Code section 4975(c)(1)(A), (D), (E), and (F).[31]

Subsection (1) of the exemption would provide broad relief for Financial Institutions and Investment Professionals that are investment advice fiduciaries to receive all forms of reasonable compensation as a result of their investment advice to Retirement Investors. For example, it would cover compensation received as a result of investment advice to acquire, hold, dispose of, or exchange securities and other investments. It would also cover compensation received as a result of investment advice to take a distribution from a Plan or to roll over the assets to an IRA, or from investment advice regarding other similar transactions including (but not limited to) rollovers from one Plan to another Plan, one IRA to another IRA, or from one type of account to another account (*e.g.,* from a commission-based account to a fee-based account). The exemption would cover compensation received as a result of investment advice as to persons the Retirement Investor may hire to serve as an investment advice provider or asset manager.

Subsection (2) of the exemption would address the circumstance in which the Financial Institution may, in addition to providing investment advice, engage in a purchase or sale of an investment with a Retirement Investor and receive a mark-up or a mark-down or similar payment on the transaction. The exemption would extend to both riskless principal transactions and Covered Principal Transactions. A riskless principal transaction is a transaction in which a Financial Institution, after having received an order from a Retirement Investor to buy or sell an investment product, purchases or sells the same investment product for the Financial Institution's own account to offset the contemporaneous transaction with the Retirement Investor. Covered Principal Transactions are defined in the exemption as principal transactions involving certain specified types of investments, discussed in more detail below. Principal transactions that are not riskless and that do not fall within the definition of Covered Principal Transaction would not be covered by the exemption.

The following sections provide additional information on the proposal as it would apply to investment advice to roll over ERISA-covered Plan assets to an IRA, and as it would apply to Covered Principal Transactions.

Rollovers

Amounts accrued in an ERISA-covered Plan can represent a lifetime of savings, and often comprise the largest sum of money a worker has at retirement. Therefore, the decision to roll over ERISA-covered Plan assets to an IRA is potentially a very consequential financial decision for a Retirement Investor. For example, Retirement Investors may incur transaction costs associated with moving the assets into new investments and accounts, and, because of the loss of economies of scale, the cost of investing through an IRA may be higher than through a Plan.[32] Retirement

[30] Exemption relief for an insurance intermediary would only be required if the intermediary is an investment advice fiduciary under the applicable regulations. An exemption is not necessary for an insurance intermediary or its insurance agents who conduct sales transactions and are not fiduciaries under ERISA or the Code.

[31] The proposal does not include relief from ERISA section 406(a)(1)(C) and Code section 4975(c)(1)(C). The statutory exemptions, ERISA section 408(b)(2) and Code section 4975(d)(2) provide this necessary relief for Plan or IRA service providers, subject the applicable conditions.

[32] *See, e.g.,* ''IRA Investors Are Concentrated in Lower-Cost Mutual Funds'' (Aug. 8, 2018), available at *https://www.ici.org/viewpoints/view_18_ira_expenses_fees* (''The data show that 401(k) investors incur lower expense ratios in their mutual fund holdings than IRA mutual fund investors. One reason for this is economies of scale, as many employer plans aggregate the savings of hundreds or thousands of workers, and often carry large average account balances, which are more cost-effective to service. In addition, employers that

Investors who roll out of ERISA-covered Plans also lose important ERISA protections, including the benefit of a Plan fiduciary representing their interests in selecting a menu of investment options or structuring investment advice relationships, and the statutory causes of action to protect their interests. Retirement Investors who are retirees may not have the ability to earn additional amounts to offset any costs or losses.

Rollovers from ERISA-covered Plans to IRAs were expected to approach $2.4 trillion cumulatively from 2016 through 2020.[33] These large sums of money eligible for rollover represent a significant revenue source for investment advice providers. A firm that recommends a rollover to a Retirement Investor can generally expect to earn transaction-based compensation such as commissions, or an ongoing advisory fee, from the IRA, but may or may not earn compensation if the assets remain in the Plan.

In light of potential conflicts of interest related to rollovers from Plans to IRAs, ERISA and the Code prohibit an investment advice fiduciary from receiving fees resulting from investment advice to Plan participants to roll over assets from a Plan to an IRA, unless an exemption applies. The proposed exemption would provide relief, as needed, for this prohibited transaction, if the Financial Institution and Investment Professional provide investment advice that satisfies the Impartial Conduct Standards and they comply with the other applicable conditions discussed below.[34] In particular, the Financial Institution would be required to document the reasons that the advice to roll over was in the Retirement Investor's best interest. In addition, investment advice fiduciaries under Title I of ERISA would remain subject to the fiduciary duties imposed by section 404 of that statute.

In determining the fiduciary status of an investment advice provider in this context, the Department does not intend to apply the analysis in Advisory Opinion 2005–23A (the Deseret Letter), which suggested that advice to roll assets out of a Plan did not generally constitute investment advice. The Department believes that the analysis in the Deseret Letter was incorrect and that advice to take a distribution of assets from an ERISA-covered Plan is actually advice to sell, withdraw, or transfer investment assets currently held in the Plan. A recommendation to roll assets out of a Plan is necessarily a recommendation to liquidate or transfer the Plan's property interest in the affected assets, the participant's associated property interest in the Plan investments, and the fiduciary oversight structure that applies to the assets. Typically the assets, fees, asset management structure, investment options, and investment service options all change with the decision to roll money out of the Plan. Accordingly, the better view is that a recommendation to roll assets out of a Plan is advice with respect to moneys or other property of the Plan. Moreover, a distribution recommendation commonly involves either advice to change specific investments in the Plan or to change fees and services directly affecting the return on those investments.[35]

All prongs of the five-part test must be satisfied for the investment advice provider to be a fiduciary within the meaning of the regulatory definition, including the ''regular basis'' prong and the prongs requiring the advice to be provided pursuant to a ''mutual'' agreement, arrangement, or understanding that the advice will serve as ''a primary basis'' for investment decisions. As discussed below, these inquiries will be informed by all the surrounding facts and circumstances. The Department acknowledges that advice to take a distribution from a Plan and roll over the assets may be an isolated and independent transaction that would fail to meet the regular basis prong.[36] However, the Department believes that whether advice to roll over Plan assets to an IRA satisfies the regular-basis prong of the five-part test depends on the surrounding facts and circumstances. The Department has long interpreted advice to a Plan to include advice to participants and beneficiaries in participant-directed individual account pension plans.[37] The Department also recognizes that advice to roll over Plan assets can occur as part of an ongoing relationship or an anticipated ongoing relationship that an individual enjoys with his or her advice provider. For example, in circumstances in which the advice provider has been giving financial advice to the individual about investing in, purchasing, or selling securities or other financial instruments, the advice to roll assets out of a Plan is part of an ongoing advice relationship that satisfies the ''regular basis'' requirement. Similarly, advice to roll assets out of the Plan into an IRA where the advice provider will be regularly giving financial advice regarding the IRA in the course of a more lengthy financial relationship would be the start of an advice relationship that satisfies the ''regular basis'' requirement. In these scenarios, there is advice to the Plan—meaning the Plan participant or beneficiary—on a regular basis. The Department is disinclined to propose an exemption that would artificially exclude rollover advice from investment advice when that would be contrary to the parties' course of dealing and expectations. And it is more than reasonable, as discussed below, that the advice provider would anticipate that advice about rolling over Plan assets would be ''a primary basis for [those] investment decisions.''

This interpretation would both align the Department's approach with other regulators and protect Plan participants and beneficiaries under today's market practices, including the increasing prevalence of 401(k) plans and self-directed accounts. Numerous sources acknowledge that a common purpose of advice to roll over Plan assets is to establish an ongoing relationship in which advice is provided on a regular basis outside of the Plan, in return for a fee or other compensation. For example, in a 2013 notice reminding firms of their responsibilities regarding IRA rollovers, the Financial Industry Regulatory Authority (FINRA) stated that ''a financial adviser has an economic incentive to encourage an investor to roll Plan assets into an IRA that he will represent as either a broker-dealer or an investment adviser representative.'' [38] Similarly, in 2011, the U.S. Government Accountability Office (GAO) discussed the practice of cross-selling, in which 401(k) service providers sell Plan participants products and services outside of their Plans, including IRA rollovers. GAO reported that industry professionals said

sponsor 401(k) plans may defray some of the costs of running the plan, enabling the sponsor to select lower-cost funds (or fund share classes) for the plan.'')

[33] Cerulli Associates, ''U.S. Retirement Markets 2019.''

[34] The exemption would also provide relief for investment advice fiduciaries under either ERISA or the Code to receive compensation for advice to roll Plan assets to another Plan, to roll IRA assets to another IRA or to a Plan, and to transfer assets from one type of account to another, all limited to the extent such rollovers are permitted under law. The analysis set forth in this section will apply as relevant to those transactions as well.

[35] The SEC and FINRA have each recognized that recommendations to roll over Plan assets to an IRA will almost always involve a securities transaction. *See* Regulation Best Interest Release, 84 FR at 33339; FINRA Regulatory Notice 13–45 Rollovers to Individual Retirement Accounts (December 2013), *available at https://www.finra.org/sites/default/files/NoticeDocument/p418695.pdf.*

[36] Merely executing a sales transaction at the customer's request also does not confer fiduciary status.

[37] Interpretive Bulletin 96–1, 29 CFR 2509.96–1.

[38] FINRA Regulatory Notice 13–45.

''cross-selling IRA rollovers to participants, in particular, is an important source of income for service providers.'' [39]

Therefore, the regular basis prong of the five-part test would be satisfied when an entity with a pre-existing advice relationship with the Retirement Investor advises the Retirement Investor to roll over assets from a Plan to an IRA. Similarly, for an investment advice provider who establishes a new relationship with a Plan participant and advises a rollover of assets from the Plan to an IRA, the rollover recommendation may be seen as the first step in an ongoing advice relationship that could satisfy the regular basis prong of the five-part test depending on the facts and circumstances.[40]

Further, the determination of whether there is a mutual agreement, arrangement, or understanding that the investment advice will serve as a primary basis for investment decisions is appropriately based on the *reasonable* understanding of each of the parties, if no mutual agreement or arrangement is demonstrated. Written statements disclaiming a mutual understanding or forbidding reliance on the advice as a primary basis for investment decisions are not determinative, although such statements are appropriately considered in determining whether a mutual understanding exists.

More generally, the Department emphasizes that the five-part test does not look at whether the advice serves as ''the'' primary basis of investment decisions, but whether it serves as ''a'' primary basis. When financial service professionals make recommendations to a Retirement Investor, particularly pursuant to a best interest standard such as the one in the SEC's Regulation Best Interest, or another requirement to provide advice based on the individualized needs of the Retirement Investor, the parties typically should reasonably understand that the advice will serve as at least a primary basis for the investment decision. By contrast, a one-time sales transaction, such as the one-time sale of an insurance product, does not by itself confer fiduciary status under ERISA or the Code, even if accompanied by a recommendation that the product is well-suited to the investor and would be a valuable purchase.[41]

In addition to satisfying the five-part test, a person must receive a fee or other compensation to be an investment advice fiduciary. The Department has long interpreted this requirement broadly to cover ''all fees or other compensation incident to the transaction in which the investment advice to the plan has been rendered or will be rendered.'' [42] The Department previously noted that ''this may include, for example, brokerage commissions, mutual fund sales commissions, and insurance sales commissions.'' [43] In the rollover context, fees and compensation received from transactions involving rollover assets would be incident to the advice to take a distribution from the Plan and to roll over the assets to an IRA. If, under the above analysis, advice to roll over Plan assets to an IRA is fiduciary investment advice under ERISA, the fiduciary duties of prudence and loyalty would apply to the initial instance of advice to take the distribution and to roll over the assets. Fiduciary investment advice concerning investment of the rollover assets and ongoing management of the assets, once distributed from the Plan into the IRA, would be subject to obligations in the Code. For example, a broker-dealer who satisfies the five-part test with respect to a Retirement Investor, advises that Retirement Investor to move his or her assets from a Plan to an IRA, and receives any fees or compensation incident to distributing those assets, will be a fiduciary subject to ERISA, including section 404, with respect to the advice regarding the rollover.

The Department requests comment on all aspects of this part of its proposal. For instance: Are there other rollover scenarios that are not clear and which the Department should address? Does the discussion above reflect real-world experiences and concerns? Does it provide enough clarity to financial entities interested in the proposed exemption?

Principal Transactions

Principal transactions involve the purchase from, or sale to, a Plan or IRA, of an investment, on behalf of the Financial Institution's own account or the account of a person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the Financial Institution. Because an investment advice fiduciary engaging in a principal transaction is on both sides of the transaction, the firm has a clear conflict. In addition, the securities typically traded in principal transactions often lack pre-trade price transparency and Retirement Investors may, therefore, have difficulty evaluating the fairness of a particular principal transaction. These investments also can be associated with low liquidity, low transparency, and the possible incentive to sell unwanted investments held by the Financial Institution.

Consistent with the Department's historical approach to prohibited transaction exemptions for fiduciaries, this proposal includes relief for principal transactions that is limited in scope and subject to additional conditions, as set forth in the definition of Covered Principal Transactions, described below. Importantly, certain transactions would not be considered principal transactions for purposes of the exemption, and so could occur under the more general conditions. This includes the sale of an insurance or annuity contract, or a mutual fund transaction.

Principal transactions that are ''riskless principal transactions'' would be covered under the exemption as well, subject to the general conditions. A riskless principal transaction is a transaction in which a Financial Institution, after having received an order from a Retirement Investor to buy or sell an investment product, purchases or sells the same investment product in a contemporaneous transaction for the Financial Institution's own account to offset the transaction with the Retirement Investor. The Department requests comment on whether the exemption text should include a definition of the terms ''principal transaction'' and ''riskless principal transaction.''

The proposal uses the defined term ''Covered Principal Transaction'' to describe the types of non-riskless principal transactions that would be covered under the exemption. For purchases from a Plan or IRA, the term is broadly defined to include any securities or other investment property.

[39] U.S. General Accountability Office, 401(k) Plans: Improved Regulation Could Better Protect Participants from Conflicts of Interest, GAO 11–119 (Washington, DC 2011), *available at https://www.gao.gov/assets/320/315363.pdf.*

[40] The Department is aware that some Financial Institutions pay unrelated parties to solicit clients for them. *See* Rule 206(4)–3 under the Investment Advisers Act of 1940; *see also* Investment Advisers Advertisements; Compensation for Solicitations, Proposed Rule, 84 FR 67518 (December 10, 2019). The Department notes that advice by a paid solicitor to take a distribution from a Plan and to roll over assets to an IRA could be part of ongoing advice to a Retirement Investor, if the Financial Institution that pays the solicitor provides ongoing fiduciary advice to the IRA owner.

[41] Like other Investment Professionals, however, insurance agents may have or contemplate an ongoing advice relationship with a customer. For example, agents who receive trailing commissions on annuity transactions may continue to provide ongoing recommendations or service with respect to the annuity.

[42] Preamble to the Department's 1975 Regulation, 40 FR 50842 (October 31, 1975).

[43] *Id.*

This is to reflect the possibility that a principal transaction will be needed to provide liquidity to a Retirement Investor. However, for sales to a Plan or IRA, the proposed exemption would provide more limited relief. For those sales, the definition of Covered Principal Transaction would be limited to transactions involving: corporate debt securities offered pursuant to a registration statement under the Securities Act of 1933; U.S. Treasury securities; debt securities issued or guaranteed by a U.S. federal government agency other than the U.S. Department of Treasury; debt securities issued or guaranteed by a government-sponsored enterprise (GSE); municipal bonds; certificates of deposit; and interests in Unit Investment Trusts. The Department seeks comment on whether any of these investments should be further defined for clarity.

The Department intends for this exemption to accommodate new and additional investments, as appropriate. Accordingly, the definition of Covered Principal Transaction is designed to expand to include additional investments if the Department grants an individual exemption that provides relief for investment advice fiduciaries to sell the investment to a Retirement Investor in a principal transaction, under the same conditions as this class exemption.

For sales of a debt security to a Plan or IRA, the definition of Covered Principal Transaction would require the Financial Institution to adopt written policies and procedures related to credit quality and liquidity. Specifically, the policies and procedures must be reasonably designed to ensure that the debt security, at the time of the recommendation, has no greater than moderate credit risk and has sufficient liquidity that it could be sold at or near its carrying value within a reasonably short period of time. This standard is intended to identify investment grade securities, and is included to prevent the exemption from being available to Financial Institutions that recommend speculative debt securities from their own accounts.

The proposal is broader than the scope of FAB 2018–02, which did not include principal transactions involving municipal bonds. The Department cautions, however, that Financial Institutions and Investment Professionals should pay special care to the reasons for advising Retirement Investors to invest in municipal bonds. Tax-exempt municipal bonds are often a poor choice for investors in ERISA plans and IRAs because the plans and IRAs are already tax advantaged and, therefore, do not benefit from paying for the bond's tax-favored status.[44] Financial Institutions and Investment Professionals may wish to document the reasons for any recommendation of a tax-exempt municipal bond and why the recommendation, despite the tax consequences, was in the Retirement Investor's best interest.

The Department seeks public comment on all aspects of the proposal's treatment of principal transactions, including the proposal to provide relief in this exemption for principal transactions involving municipal bonds. Do commenters believe that the exemption should extend to principal transactions involving municipal bonds? Do commenters believe the definition of municipal bonds should be limited to taxable municipal bonds? Should the exemption include any additional safeguards for these transactions? Are there any other transactions that would benefit from special care before making a recommendation in addition to municipal bonds? The Department requests comments on whether its proposed mechanism for including new and additional investments through later, individual exemptions provides sufficient flexibility.

Exclusions

Section I(c) provides that certain specific transactions would be excluded from the exemption. Under Section I(c)(1), the exemption would not extend to transactions involving ERISA-covered Plans if the Investment Professional, Financial Institution, or an affiliate is either (1) the employer of employees covered by the Plan, or (2) is a named fiduciary or plan administrator, or an affiliate thereof, who was selected to provide advice to the Plan by a fiduciary who is not independent of the Financial Institution, Investment Professional, and their affiliates. The Department is of the view that, to protect employees from abuse, employers generally should not be in a position to use their employees' retirement benefits as potential revenue or profit sources, without additional safeguards. Employers can always render advice and recover their direct expenses in transactions involving their employees without need of an exemption.[45] Further, the Department does not intend for the exemption to be used by a Financial Institution or Investment Professional that is the named fiduciary or plan administrator of a Plan or an affiliate thereof, unless the Financial Institution or Investment Professional is selected as an advice provider by a party that is independent of them.[46] Named fiduciaries and plan administrators have significant authority over Plan operations and accordingly, the Department believes that any selection of these parties to also provide investment advice to the Plan or its participants and beneficiaries should be made by an independent party who will also monitor the performance of the investment advice services.

As reflected in Section I(c)(2), the exemption also would not extend to transactions that result from robo-advice arrangements that do not involve interaction with an Investment Professional. Congress previously granted statutory relief for investment advice programs using computer models in ERISA sections 408(b)(14) and 408(g) and Code sections 4975(d)(17) and 4975(f)(8) and the Department has promulgated applicable regulations thereunder.[47] Thus, while ''hybrid'' robo-advice arrangements[48] would be permitted under the exemption, arrangements in which the only investment advice provided is generated by a computer model would not be eligible for relief under the exemption. The Department requests comment on whether additional relief is needed for robo-advice arrangements which do not

[44] *See e.g.,* Seven Questions to Ask When Investing in Municipal Bonds, *available at http://www.msrb.org/~/media/pdfs/msrb1/pdfs/seven-questions-when-investing.ashx.* (''[T]ax-exempt bonds may not be an efficient investment for certain tax advantaged accounts, such as an IRA or 401k, as the tax-advantages of such accounts render the tax-exempt features of municipal bonds redundant. Furthermore, since withdrawals from most of those accounts are subject to tax, placing a tax exempt bond in such an account has the effect of converting tax-exempt income into taxable income. Finally, if an investor purchases bonds in the secondary market at a discount, part of the gain received upon sale may be subject to regular income tax rates rather than capital gains rates.'')

[45] ERISA section 408(b)(5) provides a statutory exemption for the purchase of life insurance, health insurance, or annuities, from an employer with respect to a Plan or a wholly-owned subsidiary of the employer.

[46] For purposes of this exemption, the Department would view a party as independent of the Financial Institution and Investment Professional if: (i) The person was not the Financial Institution, Investment Professional or an affiliate, (ii) the person did not have a relationship to or an interest in the Financial Institution, Investment Professional or any affiliate that might affect the exercise of the person's best judgment in connection with transactions covered by the exemption, and (iii) the party does not receive and is not projected to receive within the current federal income tax year, compensation or other consideration for his or her own account from the Financial Institution, Investment Professional or an affiliate, in excess of 2% of the person's annual revenues based upon its prior income tax year.

[47] 29 CFR 2550.408g–1.

[48] Hybrid robo-advice arrangements involve both computer software-based models and personal investment advice from an Investment Professional.

involve interaction with an Investment Professional.

Finally, under Section I(c)(3), the exemption would not extend to transactions in which the Investment Professional is acting in a fiduciary capacity other than as an investment advice fiduciary. This is consistent with FAB 2018–02, which applied to investment advice fiduciaries. For clarity, Section I(c)(3) cites to the Department's five-part test as the governing authority for status as an investment advice fiduciary.

Exemption Conditions

Section II of the proposal sets forth the general conditions that would be included in the exemption. Section III establishes the eligibility requirements. Section IV would require parties to maintain records to demonstrate compliance with the exemption. Section V includes the defined terms used in the exemption. These sections are discussed below. In order to avoid a prohibited transaction, the Financial Institution and Investment Professional would have to comply with all of the conditions of the exemption, and could not waive or disclaim compliance with any of the conditions. Similarly, a Retirement Investor could not agree to waive any of the conditions.

Investment Advice Arrangement (Section II)

Section II sets forth conditions that would govern the Financial Institution's and Investment Professionals' provision of investment advice. As discussed in greater detail below, Section II(a) would require Financial Institutions and Investment Professionals to comply with the Impartial Conduct Standards by providing advice that is in Retirement Investors' best interest, charging only reasonable compensation, and making no materially misleading statements about the investment transaction and other relevant matters. The Impartial Conduct Standards would further require the Financial Institution and Investment Professional to seek to obtain the best execution of the investment transaction reasonably available under the circumstances, as required by the federal securities laws.

Section II(b) would require Financial Institutions, prior to engaging in a transaction pursuant to the exemption, to provide a written disclosure to the Retirement Investor acknowledging that the Financial Institution and its Investment Professionals are fiduciaries under ERISA and the Code, as applicable.[49] The disclosure also would be required to provide a written description, accurate in all material respects regarding the services to be provided and the Financial Institution's and Investment Professional's material conflicts of interest. Under Section II(c), the Financial Institution would be required to establish, maintain and enforce written policies and procedures prudently designed to ensure that the Financial Institution and its Investment Professionals comply with the Impartial Conduct Standards. Section II(d) would require Financial Institutions to conduct an annual retrospective review.

Best Interest Standard

As defined in Section V(a), the proposed best interest standard would be satisfied if investment advice ''reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, and does not place the financial or other interest of the Investment Professional, Financial Institution or any affiliate, related entity or other party ahead of the interests of the Retirement Investor, or subordinate the Retirement Investor's interests to their own.''

This proposed best interest standard is based on longstanding concepts derived from ERISA and the high fiduciary standards developed under the common law of trusts, and is intended to comprise objective standards of care and undivided loyalty, consistent with the requirements of ERISA section 404.[50] These longstanding concepts of law and equity were developed in significant part to deal with the issues that arise when agents and persons in a position of trust have conflicting interests, and accordingly are well-suited to the problems posed by conflicted investment advice.

The proposal's standard of care is an objective standard that would require the Financial Institution and Investment Professional to investigate and evaluate investments, provide advice, and exercise sound judgment in the same way that knowledgeable and impartial professionals would.[51] Thus, an Investment Professional's and Financial Institution's advice would be measured against that of a prudent Investment Professional. As indicated in the text, the standard of care is measured at the time the advice is provided, and not in hindsight.[52] The standard would not measure compliance by reference to how investments subsequently performed or turn Financial Institutions and Investment Professionals into guarantors of investment performance; rather, the appropriate measure is whether the Investment Professional gave advice that was prudent and in the best interest of the Retirement Investor at the time the advice is provided.

The proposal articulates the best interest standard as the Financial Institutions' and Investment Professionals' duty to ''not place the financial or other interest of the Investment Professional, Financial Institution or any affiliate, related entity or other party ahead of the interests of the Retirement Investor, or subordinate the Retirement Investor's interests to their own.'' The standard is to be interpreted and applied consistent with the standard set forth in the SEC's Regulation Best Interest[53] and the SEC's

[49] As noted above, the Department does not intend the exemption to expand Retirement Investors' ability, such as by requiring contracts and/or warranty provisions, to enforce their rights in court or create any new legal claims above and beyond those expressly authorized in ERISA. Neither does the Department believe the exemption would create any such expansion.

[50] *Cf. also* Code section 4975(f)(5), which defines ''correction'' with respect to prohibited transactions as placing a Plan or IRA in a financial position not worse that it would have been in if the person had acted ''under the highest fiduciary standards.'' While the Code does not expressly impose a duty of loyalty on fiduciaries, the best interest standard proposed here is intended to ensure adherence to the ''highest fiduciary standards'' when a fiduciary advises a Plan or IRA owner under the Code.

[51] *See* Regulation Best Interest Care Obligation, 17 CFR 240.15l–1(a)(2)(ii); Regulation Best Interest Release, 84 FR at 33321 (Under the Care Obligation, ''[t]he broker-dealer must understand potential risks, rewards, and costs associated with the recommendation.''); *id.,* at 33326 (''We are adopting the Care Obligation largely as proposed; however, we are expressly requiring that a broker-dealer understand and consider the potential costs associated with its recommendation, and have a reasonable basis to believe that the recommendation does not place the financial or other interest of the broker-dealer ahead of the interest of the retail customer.''); *id.* at 33376 & n. 598 (discussing the Care Obligation in the context of complex or risky securities and investment strategies; citing FINRA Regulatory Notice 17–32 as explaining that ''[t]he level of reasonable diligence that is required will rise with the complexity and risks associated with the security or strategy. With regard to a complex product such as a volatility-linked [Exchange Traded Product], an associated person should be capable of explaining, at a minimum, the product's main features and associated risks.'').

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

[53] Regulation Best Interest's best interest obligation provides that a ''broker, dealer, or a natural person who is an associated person of a broker or dealer, when making a recommendation of any securities transaction or investment strategy involving securities (including account recommendations) to a retail customer, shall act in

interpretation regarding the conduct standard for registered investment advisers.[54] [55]

This best interest standard would allow Investment Professionals and Financial Institutions to provide investment advice despite having a financial or other interest in the transaction, so long as they do not place the interests ahead of the interests of the Retirement Investor, or subordinate the Retirement Investor's interests to their own. For example, in choosing between two investments equally available to the investor, it would not be permissible for the Investment Professional to advise investing in the one that is worse for the Retirement Investor because it is better for the Investment Professional's or the Financial Institution's bottom line. Because the standard does not forbid the Financial Institution or Investment Professional from having an interest in the transaction this standard would not foreclose the Investment Professional and Financial Institution from being paid, nor would it foreclose investment advice on proprietary products or investments that generate third party payments.

The best interest standard in this proposal would not impose an unattainable obligation on Investment Professionals and Financial Institutions to somehow identify the single ''best'' investment for the Retirement Investor out of all the investments in the national or international marketplace, assuming such advice were even possible at the time of the transaction. The obligation under the best interest standard would be to give advice that adheres to professional standards of prudence, and that does not place the interests of the Investment Professional, Financial Institution, or other party ahead of the Retirement Investor's financial interests, or subordinate the Retirement Investor's interests to those of the Investment Professional or Financial Institution.

Neither the best interest standard nor any other condition of the exemption would establish a monitoring requirement for Financial Institutions or Investment Professionals; the parties can, of course, establish a monitoring obligation by agreement, arrangement, or understanding. Under Section II(b), discussed below, Financial Institutions would, however, be required to disclose which services they will provide. Moreover, Financial Institutions should carefully consider whether certain investments can be prudently recommended to the individual Retirement Investor in the first place without ongoing monitoring of the investment. Investments that possess unusual complexity and risk, for example, may require ongoing monitoring to protect the investor's interests. An Investment Professional may be unable to satisfy the exemption's best interest standard with respect to such investments without a mechanism in place for monitoring. The added cost of monitoring such investments should also be considered by the Financial Institution and Investment Professional in determining whether the recommended investments are in the Retirement Investor's best interest. The Department requests comments on this best interest standard and whether additional examples would be useful.

Reasonable Compensation

General

Section II(a)(2) of the exemption would establish a reasonable compensation standard. Compensation received, directly or indirectly, by the Financial Institution, Investment Professional, and their affiliates and related entities for their services would not be permitted to exceed reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2).

The obligation to pay no more than reasonable compensation to service providers has been long recognized under ERISA and the Code. ERISA section 408(b)(2) and Code section 4975(d)(2) expressly require all types of services arrangements involving Plans and IRAs to result in no more than reasonable compensation to the service provider. Investment Professionals and Financial Institutions—as service providers—have long been subject to this requirement, regardless of their fiduciary status. The reasonable compensation standard requires that compensation not be excessive, as measured by the market value of the particular services, rights, and benefits the Investment Professional and Financial Institution are delivering to the Retirement Investor. Given the conflicts of interest associated with the commissions and other payments that would be covered by the exemption, and the potential for self-dealing, it is particularly important that Investment Professionals and Financial Institutions adhere to these statutory standards, which are rooted in common law principles.

In general, the reasonableness of fees will depend on the particular facts and circumstances at the time of the recommendation. Several factors inform whether compensation is reasonable, including the market price of service(s) provided and/or the underlying asset(s), the scope of monitoring, and the complexity of the product. No single factor is dispositive in determining whether compensation is reasonable; the essential question is whether the charges are reasonable in relation to what the investor receives. Under the exemption, the Financial Institution and Investment Professional would not have to recommend the transaction that is the lowest cost or that generates the lowest fees without regard to other relevant factors. Recommendations of the ''lowest cost'' security or investment strategy, without consideration of other factors, could in fact violate the exemption.

The reasonable compensation standard would apply to all transactions under the exemption, including investment products that bundle together services and investment guarantees or other benefits, such as annuities. In assessing the reasonableness of compensation in connection with these products, it is appropriate to consider the value of the guarantees and benefits as well as the value of the services. When assessing the reasonableness of a charge, one generally needs to consider the value of all the services and benefits provided for the charge, not just some. If parties need additional guidance in this respect, they should refer to the Department's interpretations under ERISA section 408(b)(2) and Code section 4975(d)(2). The Department will provide additional guidance if necessary.

Best Execution

Section II(a)(2)(B) of the exemption would require that, as required by the federal securities laws, the Financial

the best interest of the retail customer at the time the recommendation is made, without placing the financial or other interest of the broker, dealer, or natural person who is an associated person of a broker or dealer making the recommendation ahead of the interest of the retail customer.'' 17 CFR 240.15l-1(a)(1).

[54] ''An investment adviser's fiduciary duty under the Advisers Act comprises a duty of care and a duty of loyalty. This fiduciary duty requires an adviser 'to adopt the principal's goals, objectives, or ends.' This means the adviser must, at all times, serve the best interest of its client and not subordinate its client's interest to its own. In other words, the investment adviser cannot place its own interests ahead of the interests of its client.'' SEC Fiduciary Interpretation, 84 FR at 33671(citations omitted).

[55] The NAIC's updated Suitability in Annuity Transactions Model Regulation includes a safe harbor for recommendations made by financial professionals that are ERISA and Code fiduciaries in compliance with the duties, obligations, prohibitions and all other requirements attendant to such status under ERISA and the Code. NAIC Suitability in Annuity Transactions Model Regulation, Spring 2020, Section 6.E.(5)(c), available at *https://www.naic.org/store/free/MDL-275.pdf.*

Institution and Investment Professional seek to obtain the best execution of the investment transaction reasonably available under the circumstances. Financial Institutions and Investment Professionals subject to federal securities laws such as the Securities Act of 1933, the Securities Exchange Act of 1934, and the Investment Advisers Act of 1940, and rules adopted by FINRA and the Municipal Securities Rulemaking Board (MSRB), are obligated to a longstanding duty of best execution. As described recently by the SEC, ''[a] broker-dealer's duty of best execution requires a broker-dealer to seek to execute customers' trades at the most favorable terms reasonably available under the circumstances.'' [56] This condition complements the reasonable compensation standard set forth in ERISA and the Code.

The Department would apply the best execution requirement consistent with the federal securities laws. Financial Institutions that are FINRA members would satisfy this subsection if they comply with the standards in FINRA rules 2121 (Fair Prices and Commissions) and 5310 (Best Execution and Interpositioning), or any successor rules in effect at the time of the transaction, as interpreted by FINRA. Financial Institutions engaging in a purchase or sale of a municipal bond would satisfy this subsection if they comply with the standards in MSRB rules G–30 (Prices and Commissions) and G–18 (Best Execution), or any successor rules in effect at the time of the transaction, as interpreted by MSRB. Financial Institutions that are subject to and comply with the fiduciary duty under section 206 of the Investment Advisers Act, which as described by the SEC encompasses a duty to seek best execution, would satisfy this subsection.[57]

Misleading Statements

Section II(a)(3) would require that statements by the Financial Institution and its Investment Professionals to the Retirement Investor about the recommended transaction and other relevant matters are not materially misleading at the time they are made. Other relevant matters would include fees and compensation, material conflicts of interest, and any other fact that could reasonably be expected to affect the Retirement Investor's investment decisions. For example, the Department would consider it materially misleading for the Financial Institution or Investment Professional to include any exculpatory clauses or indemnification provisions in an arrangement with a Retirement Investor that are prohibited by applicable law.[58] Retirement Investors are clearly best served by statements and representations free from material misstatements and omissions. Financial Institutions and Investment Professionals best avoid liability—and best promote the interests of Retirement Investors—by ensuring that accurate communications are a consistent standard in all their interactions with their customers.

Disclosure—Section II(b)

Section II(b) of the exemption would require the Financial Institution to provide certain written disclosures to the Retirement Investor, prior to engaging in any transactions pursuant to the exemption. The Financial Institution must acknowledge, in writing, that the Financial Institution and its Investment Professionals are fiduciaries under ERISA and the Code, as applicable, with respect to any fiduciary investment advice provided by the Financial Institution or Investment Professional to the Retirement Investor. The Financial Institution must provide a written description of the services to be provided and material conflicts of interest arising out of the services and any recommended investment transaction. The description must be accurate in all material respects.

The disclosure obligations in this proposal are designed to protect Retirement Investors by enhancing the quality of information they receive in connection with fiduciary investment advice. The disclosures should be in plain English, taking into consideration Retirement Investors' level of financial experience. The requirement can be satisfied through any disclosure, or combination of disclosures, required to be provided by other regulators so long as the disclosure required by Section II(b) is included.

The proposed disclosures are designed to ensure that the fiduciary nature of the relationship is clear to the Financial Institution and Investment Professional, as well as the Retirement Investor, at the time of the investment transaction. The Department does not intend the fiduciary acknowledgment or any of the disclosure obligations to create a private right of action as between a Financial Institution or Investment Professional and a Retirement Investor and it does not believe the exemption would do so.[59] As noted above, ERISA section 502(a) provides a cause of action for fiduciary breaches and prohibited transactions with respect to ERISA-covered Plans (but not IRAs). Code section 4975 imposes a tax on disqualified persons participating in a prohibited transaction involving Plans and IRAs (other than a fiduciary acting only as such). These are the sole remedies for engaging in non-exempt prohibited transactions.

The description of the services to be provided and material conflicts of interest is necessary to ensure Retirement Investors receive information to assess the conflicts and compensation structures. The approach taken in the proposal is principles-based and meant to provide the flexibility necessary to apply to a wide variety of business models and practices. The proposal does not require specific disclosures to be tailored for each Retirement Investor or each transaction as long as a compliant disclosure is provided before engaging in the particular transaction for which the exemption is sought. The Department requests comments on the disclosure requirements. In particular, the Department seeks comment on whether the written acknowledgment of fiduciary status should be accompanied by a disclosure of the fiduciary's obligations under the exemption to provide advice in accordance with the Impartial Conduct Standard. The Department also requests comment on whether the Department should instead require this disclosure of Financial Institutions' and Investment Professionals' obligations under the Impartial Conduct Standards as an alternative to requiring written disclosure of their fiduciary status.

Policies and Procedures—Section II(c)

General

Section II(c)(1) of the proposal would establish an overarching requirement

[56] Regulation Best Interest Release, 84 FR at 33373, note 565.

[57] SEC Fiduciary Interpretation, 84 FR at 33674–75 (Section II.B.2 ''Duty to Seek Best Execution'').

[58] *See, e.g.,* ERISA section 410 and *see also* ERISA Interpretive Bulletin 75–4—Indemnification of fiduciaries under ERISA § 410(a). (''The Department of Labor interprets section 410(a) as rendering void any arrangement for indemnification of a fiduciary of an employee benefit plan by the plan. Such an arrangement would have the same result as an exculpatory clause, in that it would, in effect, relieve the fiduciary of responsibility and liability to the plan by abrogating the plan's right to recovery from the fiduciary for breaches of fiduciary obligations.'')

[59] In *Chamber of Commerce of the United States* v. *U.S. Department of Labor,* supra note 5, the U.S. Court of Appeals for the 5th Circuit found that the Department did not have authority to include certain contract requirements in the new exemptions granted as part of the 2016 fiduciary rulemaking. The Department is mindful of this holding and has not included any contract requirement in this proposal.

that Financial Institutions establish, maintain and enforce written policies and procedures prudently designed to ensure that the Financial Institution and its Investment Professionals comply with the Impartial Conduct Standards. Under Section II(c)(2), Financial Institutions' policies and procedures would be required to mitigate conflicts of interest to the extent that the policies and procedures, and the Financial Institution's incentive practices, when viewed as a whole, are prudently designed to avoid misalignment of the interests of the Financial Institution and Investment Professionals and the interests of Retirement Investors. In accordance with this standard, a reasonable person reviewing the Financial Institution's incentive practices, policies, and procedures would conclude that the policies do not give Investment Professionals an incentive to violate the Impartial Conduct Standards, but rather are reasonably designed to promote compliance with the standards.

As defined in the proposal, a conflict of interest is ''an interest that might incline a Financial Institution or Investment Professional—consciously or unconsciously—to make a recommendation that is not in the Best Interest of the Retirement Investor'' [60] Conflict mitigation is a critical condition of the exemption, and is an important factor for the Department to make the findings under ERISA section 408(a) and Code section 4975(d)(2), that the exemption is in the interests of, and protective of, Retirement Investors. The requirement to avoid misalignment means, for example, that Financial Institutions' policies and procedures would be required to be prudently designed to protect Retirement Investors from recommendations to make excessive trades, or to buy investment products, annuities, or riders that are not in the investor's best interest or that allocate excessive amounts to illiquid or risky investments.

Section II(c)(3) of the exemption would establish specific documentation requirements for recommendations to roll over Plan or IRA assets to another Plan or IRA and to change from one type of account to another (*e.g.,* from a commission-based account to a fee-based account). Financial Institutions making these recommendations would be required to document the specific reason or reasons why the recommendation was considered to be in the best interest of the Retirement Investor. The Department requests comments on whether additional specific documentation requirements would be appropriate.

To comply with the conditions in Section II(c), Financial Institutions would identify and carefully focus on the particular aspects of their business model that may create incentives that are misaligned with the interests of Retirement Investors. If, for example, a Financial Institution anticipates that conflicts of interest in its business model will center on advice to roll over Plan assets, and after the rollover, the Financial Institution and Investment Professional will be compensated on a level-fee basis, the Financial Institution's policies and procedures should focus on the rollover or distribution recommendation. The proposed requirement in Section II(c)(3) to document the reason for rollover and account recommendations supports compliance with the Impartial Conduct Standards in this context.[61]

On the other hand, if a Financial Institution intends to receive transaction-based third party compensation, and compensate Investment Professionals based on transactions that occur in a Retirement Investor's accounts, such as through commissions, the Financial Institution's policies and procedures would also address the incentives created by these compensation arrangements. Financial Institutions that provide advice regarding proprietary products or from limited menus of products would consider the conflicts of interest these arrangements create. Approaches to these conflicts of interest are discussed in more detail below.

Advice To Roll Over Plan or IRA Assets

Rollover recommendations are a primary concern of the Department, as Financial Institutions and Investment Professionals may have a strong economic incentive to recommend that investors roll over assets into one of their Institution's IRAs, whether from a Plan or from an IRA account at another Financial Institution, or even between different account types. The decision to roll over assets from an ERISA-covered Plan to an IRA may be one of the most important financial decisions that Retirement Investors make, as it may have a long-term impact on their retirement security.

The Department believes the requirement in Section II(c)(3) to document the reasons that advice to take a distribution or to roll over Plan or IRA assets were in the Retirement Investor's best interest will serve an important role in protecting Retirement Investors during this significant decision. The requirement is designed to ensure that Investment Professionals take the time to form a prudent recommendation, and that a record is available for later review.

For purposes of compliance with the exemption, a prudent recommendation to roll over from an ERISA-covered Plan to an IRA would necessarily include consideration and documentation of the following: The Retirement Investor's alternatives to a rollover, including leaving the money in his or her current employer's Plan, if permitted, and selecting different investment options; the fees and expenses associated with both the Plan and the IRA; whether the employer pays for some or all of the Plan's administrative expenses; and the different levels of services and investments available under the Plan and the IRA. For rollovers from another IRA or changes from a commission-based account to a fee-based arrangement, a prudent recommendation would include consideration and documentation of the services that would be provided under the new arrangement.

In evaluating a potential rollover from an ERISA-covered Plan, the Investment Professional and Financial Institution should make diligent and prudent efforts to obtain information about the existing Plan and the participant's interests in it. If the Retirement Investor is unwilling to provide the information, even after a full explanation of its significance, and the information is not otherwise readily available, the Investment Professional should make a reasonable estimation of expenses, asset values, risk, and returns based on publicly available information and explain the assumptions used and their limitations to the Retirement Investor. The Department requests comment on whether there are any other actions the Department should or could take with respect to disclosure or reporting that would promote prudent rollover advice without overlapping existing regulatory requirements.

[60] This definition is consistent with the concept of a conflict of interest in the SEC's rulemaking. Regulation Best Interest definition of Conflict of Interest, 17 CFR 240.15l–1(b)(3); SEC Fiduciary Interpretation, 84 FR at 33671.

[61] In general, after the rollover, the ongoing receipt of compensation based on a fixed percentage of the value of assets under management does not require a prohibited transaction exemption. However, the Department cautions that certain practices such as ''reverse churning'' (*i.e.* recommending a fee-based account to an investor with low trading activity and no need for ongoing monitoring or advice) or recommending holding an asset solely to generate more fees may be prohibited transactions that would not satisfy the Impartial Conduct Standards.

Commission-Based Compensation Arrangements

Financial Institutions that compensate Investment Professionals through transaction-based payments and incentives would need to consider how to minimize the impact of these compensation incentives on fiduciary investment advice to Retirement Investors, so that the Financial Institution would be able to meet the exemption's standard of conflict mitigation set forth in proposed Section II(c)(2). As noted above, this standard would require the policies and procedures, and the Financial Institution's incentive practices, when viewed as a whole, to be prudently designed to avoid misalignment of the interests of the Financial Institution and Investment Professionals and the interests of Retirement Investors.

For commission-based compensation arrangements, Financial Institutions would be encouraged to focus on both financial incentives to Investment Professionals and supervisory oversight of investment advice. These two aspects of the Financial Institution's policies and procedures would complement each other, and Financial Institutions would retain the flexibility, based on the characteristics of their businesses, to adjust the stringency of each component provided that the exemption's overall standards would be satisfied. Financial Institutions that significantly mitigate commission-based compensation incentives would have less need to rigorously oversee Investment Professionals. Conversely, Financial Institutions that have significant variation in compensation across different investment products would need to implement more stringent supervisory oversight.

In developing compliance structures, the Department envisions that Financial Institutions would implement conflict mitigation strategies identified by the Financial Institutions' other regulators. The following non-exhaustive examples of practices identified as options by the SEC could be implemented by Financial Institutions in compensating Investment Professionals: (i) Avoiding compensation thresholds that disproportionately increase compensation through incremental increases in sales; (ii) Minimizing compensation incentives for employees to favor one type of account over another; or to favor one type of product over another, proprietary or preferred provider products, or comparable products sold on a principal basis, for example, by establishing differential compensation based on neutral factors; (iii) Eliminating compensation incentives within comparable product lines by, for example, capping the credit that an associated person may receive across mutual funds or other comparable products across providers; (iv) Implementing supervisory procedures to monitor recommendations that are: near compensation thresholds; near thresholds for firm recognition; involve higher compensating products, proprietary products or transactions in a principal capacity; or, involve the rollover or transfer of assets from one type of account to another (such as recommendations to roll over or transfer assets in an ERISA account to an IRA) or from one product class to another; (v) Adjusting compensation for associated persons who fail to adequately manage conflicts of interest; and (vi) Limiting the types of retail customer to whom a product, transaction or strategy may be recommended.[62]

Financial Institutions also should consider minimizing incentives at the Financial Institution level. Firms could establish or enhance the review process for investment products that may be recommended to Retirement Investors. This process could include procedures for identifying and mitigating conflicts of interest associated with the product and declining to recommend a product if the Financial Institution cannot effectively mitigate associated conflicts of interest.

Insurance companies and insurance agents that are investment advice fiduciaries relying on the exemption would be encouraged to adopt strategies similar to those identified above to address conflicts of interest. Insurance companies could also supervise independent insurance agents who provide investment advice on their products through the mechanisms noted above. To comply with the exemption, the insurer could adopt and implement supervisory and review mechanisms and avoid improper incentives that preferentially push the products, riders, and annuity features that might incentivize Investment Professionals to provide investment advice to Retirement Investors that does not meet the Impartial Conduct Standards. Insurance companies could implement procedures to review annuity sales to Retirement Investors to ensure that they were made in satisfaction of the Impartial Conduct Standards, much as they may already be required to review annuity sales to ensure compliance with state-law suitability requirements.[63]

In this regard, insurance company Financial Institutions would be responsible only for an Investment Professional's recommendation and sale of products offered to Retirement Investors by the insurance company in conjunction with fiduciary investment advice, and not unrelated and unaffiliated insurers.[64] Insurance companies could implement the policies and procedures by monitoring market prices and benchmarks for their products and services, and remaining attentive to any financial inducements they offer to independent agents that could result in a misalignment of the interests of the agent and his or her Retirement Investor customer. Insurers could also create a system of oversight and compliance by contracting with an IMO to implement policies and procedures designed to ensure that all of the agents associated with the intermediary adhere to the conditions of this exemption. Thus, for example, as one possible approach, the intermediary could eliminate compensation incentives across all the insurance

[62] Regulation Best Interest Release, 84 FR at 33392.

[63] *Cf.* NAIC Suitability in Annuity Transactions Model Regulation, Spring 2020, Section 6.C.(2)(d) (''The insurer shall establish and maintain procedures for the review of each recommendation prior to issuance of an annuity that are designed to ensure that there is a reasonable basis to determine that the recommended annuity would effectively address the particular consumer's financial situation, insurance needs and financial objectives. Such review procedures may apply a screening system for the purpose of identifying selected transactions for additional review and may be accomplished electronically or through other means including, but not limited to, physical review. Such an electronic or other system may be designed to require additional review only of those transactions identified for additional review by the selection criteria''); and (e) (''The insurer shall establish and maintain reasonable procedures to detect recommendations that are not in compliance with subsections A, B, D and E. This may include, but is not limited to, confirmation of the consumer's consumer profile information, systematic customer surveys, producer and consumer interviews, confirmation letters, producer statements or attestations and programs of internal monitoring. Nothing in this subparagraph prevents an insurer from complying with this subparagraph by applying sampling procedures, or by confirming the consumer profile information or other required information under this section after issuance or delivery of the annuity''), available at *https://www.naic.org/store/free/MDL-275.pdf.* The prior version of the model regulation, which was adopted in some form by a number of states, also included similar provisions requiring systems to supervise recommendations. *See* Annuity Suitability (A) Working Group Exposure Draft, Adopted by the Committee Dec. 30, 2019, *available at https://www.naic.org/documents/committees_mo275.pdf.* (comparing 2020 version with prior version).

[64] *Cf. Id.,* Section 6.C.(4) (''An insurer is not required to include in its system of supervision: (a) A producer's recommendations to consumers of products other than the annuities offered by the insurer''), available at *https://www.naic.org/store/free/MDL-275.pdf.*

companies that work with the intermediary, assisting each of the insurance companies with their independent obligations under the exemption. This might involve the intermediary's review of documentation prepared by insurance agents to comply with the exemption, as may be required by the insurance company, or the use of third-party industry comparisons available in the marketplace to help independent insurance agents recommend products that are prudent for the Retirement Investors they advise.[65]

The Department notes that regulators in the securities and insurance industry have adopted provisions requiring elimination of sales contests and similar incentives such as sales quotas, bonuses, and non-cash compensation that are based on sales of certain investments within a limited period of time.[66] The Department agrees that these practices create incentives to recommend products that are not in a Retirement Investor's best interest that cannot be effectively mitigated. Therefore, Financial Institutions' policies and procedures would not be prudently designed to avoid a misalignment of interests between Investment Professionals and Retirement Investors if they establish or permit these practices. To satisfy the exemption's standard of mitigation, Financial Institutions would be required to carefully consider performance and personnel actions and practices that could encourage violation of the Impartial Conduct Standards.

The Department notes Financial Institutions complying with the exemption would need to review their policies and procedures periodically and reasonably revise them as necessary to ensure that the policies and procedures continue to satisfy the conditions of this exemption. In particular, the exemption would require ongoing vigilance as to the impact of conflicts of interest on the provision of fiduciary investment advice to Retirement Investors. As a matter of prudence, Financial Institutions should address any deficiencies in their policies and procedures if, in fact, the policies and procedures are not achieving their intended goal of ensuring compliance with the exemption and the provision of advice that satisfies the Impartial Conduct Standards. The Department seeks comment on the proposed policy and procedure requirements, including whether this principle-based method is sufficiently protective of participants and beneficiaries.

Proprietary Products and Limited Menus of Investment Products

It is important to note that the Department believes that the best interest standard can be satisfied by Financial Institutions and Investment Professionals that provide investment advice on proprietary products or on a limited menu, including limitations to proprietary products[67] and products that generate third party payments.[68] Product limitations can serve a beneficial purpose by allowing broker-dealers and associated persons to develop increased familiarity with the products they recommend. At the same time, limited menus, particularly if they focus on proprietary products and products that generate third party payments, can result in heightened conflicts of interest. Financial Institutions and their affiliates may receive more compensation than they would for recommending other products, and, as a result, Investment Professionals' and Financial Institutions' interests may be misaligned with the interests of Retirement Investors.

Financial Institutions and Investment Professionals providing investment advice on proprietary products or on a limited menu would satisfy the standard provided they give complete and accurate disclosure of their material conflicts of interest in connection with such products or limitations and adopt policies and procedures that are prudently designed to prevent any conflicts of interest from causing a misalignment of the interests of the Financial Institution and Investment Professional with the interests of the Retirement Investor. This would include policies applicable to circumstances where the Financial Institution or Investment Professional prudently determines that its proprietary products or limited menu do not offer Retirement Investors an investment option in their best interest when compared with other investment alternatives available in the marketplace. The Department envisions that Financial Institutions complying with the Impartial Conduct Standards would carefully consider their product offerings and form a reasonable conclusion about whether the menu of investment options would permit Investment Professionals to provide fiduciary investment advice to Retirement Investors in accordance with the Impartial Conduct Standards. The exemption would be available if the Financial Institution prudently concludes that its offering of proprietary products, or its limitations on investment product offerings, in conjunction with the policies and procedures, would not cause a misalignment of interests. Financial Institutions and Investment Professionals cannot use a limited menu to justify making a recommendation that does not meet the Impartial Conduct Standards.

The Department seeks comment on this analysis. Is this preamble guidance sufficient or do commenters believe that it is important for the exemption text to specifically address proprietary products and limited menus of investment products? Should the Department more specifically incorporate provisions of Regulation Best Interest in this respect?[69] Should this exemption specify documentation requirements reflecting the Financial Institution's analysis or conclusions with respect to its adoption of a limited menu or its recommendation of proprietary products, and its ability to comply with the conditions of this exemption with respect to such products or menus?

Retrospective Review—Section II(d)

Section II(d) of the proposal relates to the Financial Institution's oversight of its compliance, and its Investment Professionals' compliance, with the Impartial Conduct Standards and the policies and procedures. While mitigation of Financial Institutions' and Investment Professionals' conflicts of interest is critical, Financial Institutions must also monitor Investment Professionals' conduct to detect advice that does not adhere to the Impartial

[65] None of the conditions of this proposal are intended to categorically bar the provision of employee benefits to insurance company statutory employees, despite the practice of basing eligibility for such benefits on sales of proprietary products of the insurance company. *See* Internal Revenue Code section 3121.

[66] Regulation Best Interest Release, 84 FR at 33394–97; NAIC Suitability in Annuity Transactions Model Regulation, Spring 2020, Section 6.C.(2)(h), available at *https://www.naic.org/store/free/MDL-275.pdf.*

[67] Proprietary products include products that are managed, issued or sponsored by the Financial Institution or any of its affiliates.

[68] Third party payments include sales charges when not paid directly by the Plan or IRA; gross dealer concessions; revenue sharing payments; 12b–1 fees; distribution, solicitation or referral fees; volume-based fees; fees for seminars and educational programs; and any other compensation, consideration or financial benefit provided to the Financial Institution or an affiliate or related entity by a third party as a result of a transaction involving a Plan or IRA.

[69] *See* 17 CFR 240.15l–1(a)(2)(iii)(C) describing policies and procedures addressing material limitations placed on securities or investment strategies.

Conduct Standards or the Financial Institution's policies and procedures.

Under the proposal, Financial Institutions would be required to conduct a retrospective review, at least annually, that is reasonably designed to assist the Financial Institution in detecting and preventing violations of, and achieving compliance with, the Impartial Conduct Standards and the policies and procedures governing compliance with the exemption. The Department envisions that the review would involve testing a sample of transactions to determine compliance.

The methodology and results of the retrospective review would be reduced to a written report that is provided to the Financial Institution's chief executive officer (or equivalent officer). That officer would be required to certify annually that:

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

(B) The Financial Institution has in place policies and procedures prudently designed to achieve compliance with the conditions of this exemption; and

(C) The Financial Institution has in place a prudent process to modify such policies and procedures as business, regulatory and legislative changes and events dictate, and to test the effectiveness of such policies and procedures on a periodic basis, the timing and extent of which is reasonably designed to ensure continuing compliance with the conditions of this exemption.

This retrospective review, report and certification would be required to be completed no later than six months following the end of the period covered by the review. The Financial Institution would be required to retain the report and supporting data for a period of six years. If the Department, any other federal or state regulator of the Financial Institution, or any applicable self-regulatory organization, requests the written report and supporting data within those six years, the Financial Institution would make the requested documents available within 10 business days of the request. The Department believes that the requirement to provide the written report within 10 business days will ensure that Financial Institutions diligently prepare their reports each year, resulting in meaningful protection of Retirement Investors. The Department requests comments about this process, including regarding the timing and certified information.

Financial Institutions can use the results of the review to find more effective ways to ensure that Investment Professionals are providing investment advice in accordance with the Impartial Conduct Standards, and to correct any deficiencies in existing policies and procedures. Requiring the chief executive officer (or equivalent, *i.e.,* the most senior officer or executive in charge of managing the Financial Institution) to certify review of the report is a means of creating accountability for the review. This would serve the purpose of ensuring that more than one person determines whether the Financial Institution is complying with the conditions of the exemption and avoiding non-exempt prohibited transactions. If the chief executive officer does not have the experience or expertise to determine whether to make the certification, he or she would be expected to consult with a knowledgeable compliance professional to be able to do so. The proposed retrospective review is based on FINRA rules governing how broker-dealers supervise associated persons,[70] adapted to focus on the conditions of the exemption. The Department is aware that other Financial Institutions are subject to regulatory requirements to review their policies and procedures;[71] however, for the reasons stated above, the Department believes that the specific certification requirement in the proposal will serve to protect Retirement Investors in the context of conflicted investment advice transactions.

Eligibility (Section III)

Section III of the proposal identifies circumstances under which an Investment Professional or Financial Institution would not be eligible to rely on the exemption. The grounds for ineligibility would involve certain criminal convictions or certain egregious conduct with respect to compliance with the exemption. The proposed period of ineligibility would be 10 years.

Criminal Convictions

An Investment Professional or Financial Institution would become ineligible upon the conviction of any crime described in ERISA section 411 arising out of provision of advice to Retirement Investors, except as described below. The Department includes crimes described in ERISA section 411 for the proposal because they are likely to directly contravene the Investment Professional's or Financial Institution's ability to maintain the high standard of integrity, care, and undivided loyalty demanded by a fiduciary's position of trust and confidence.

Ineligibility after a criminal conviction described in the exemption would be automatic for an Investment Professional. However, Financial Institutions with a criminal conviction described in the exemption would be permitted to submit a petition to the Department and seek a determination that continued reliance on the exemption would not be contrary to the purposes of the exemption. Petitions would be required to be submitted within 10 business days of the conviction to the Director of the Office of Exemption Determinations by email at *e-OED@dol.gov,* or by certified mail at Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Suite 400, Washington, DC 20210.

Following receipt of the petition, the Department would provide the Financial Institution with the opportunity to be heard, in person or in writing or both. Because of the 10-business day timeframe for submitting a petition, the Department would not expect the Financial Institution to set forth its entire position or argument in its initial petition. The opportunity to be heard in person would be limited to one in-person conference unless the Department determines in its sole discretion to allow additional conferences.

The Department's determination as to whether to grant the petition would be based solely on its discretion. In determining whether to grant the petition, the Department will consider the gravity of the offense; the relationship between the conduct underlying the conviction and the Financial Institution's system and practices in its retirement investment business as a whole; the degree to which the underlying conduct concerned individual misconduct, or, alternately, corporate managers or policy; how recent was the underlying lawsuit; remedial measures taken by the Financial Institution upon learning of the underlying conduct; and such other factors as the Department determines in its discretion are reasonable in light of the nature and purposes of the exemption. The Department would consider whether any extenuating circumstances would indicate that the Financial Institution should be able to continue to rely on the exemption despite the conviction. The standard for the determination, as stated above, would be that continued reliance on the exemption would not be contrary to the

[70] *See* FINRA rules 3110, 3120, and 3130.

[71] *See e.g.,* Rule 206(4)–7 under the Investment Advisers Act of 1940.

purposes of the exemption. Accordingly, the Department will focus on the Financial Institution's ability to fulfil its obligations under the exemption prudently and loyally, for the protection of Retirement Investors. The Department will provide a written determination to the Financial Institution that articulates the basis for the determination. The Department notes that the denial of a Financial Institution's petition will not necessarily indicate that the Department will not entertain a separate individual exemption request submitted by the same Financial Institution subject to additional protective conditions.

Conduct With Respect to Compliance With the Exemption

An Investment Professional or Financial Institution would become ineligible upon the date of a written ineligibility notice from the Director of the Office of Exemption Determinations that they (i) engaged in a systematic pattern or practice of violating the conditions of the exemption; (ii) intentionally violated the conditions of this exemption; or (iii) provided materially misleading information to the Department in connection with the Investment Professional's or Financial Institution's conduct under the exemption. This type of conduct in connection with exemption compliance would indicate that the entity should not be permitted to continue to rely on the broad prohibited transaction relief in the class exemption.

The proposal sets forth a process governing the issuance of the written ineligibility notice, as follows. Prior to issuing a written ineligibility notice, the Director of the Office of Exemption Determinations would be required to issue a written warning to the Investment Professional or Financial Institution, as applicable, identifying specific conduct that could lead to ineligibility, and providing a six-month opportunity to cure. At the end of the six-month period, if the Department determined that the conduct persisted, it would provide the Investment Professional or Financial Institution with the opportunity to be heard, in person or in writing, before the Director of the Office of Exemption Determinations issued the written ineligibility notice. The written ineligibility notice would articulate the basis for the determination that the Investment Professional or Financial Institution engaged in conduct warranting ineligibility.

Period and Scope of Ineligibility

The proposed period of ineligibility would be 10 years; however, the ineligibility provisions would apply differently to Investment Professionals and Financial Institutions. An Investment Professional convicted of a crime would become ineligible immediately upon the date the Investment Professional is convicted by a trial court, regardless of whether that judgment remains under appeal, or upon the date of the written ineligibility notice from the Office of Exemption Determinations.

A Financial Institution's ineligibility would be triggered by its own conviction or receipt of a written ineligibility notice, or that of another Financial Institution in the same Control Group. A Financial Institution is in a Control Group with another Financial Institution if, directly or indirectly, the Financial Institution owns at least 80 percent of, is at least 80 percent owned by, or shares an 80 percent or more owner with, the other Financial Institution. For purposes of this provision, if the Financial Institutions are not corporations, ownership is defined to include interests in the Financial Institution such as profits interest or capital interests.

The Department is including Control Group Financial Institutions to ensure that a Financial Institution facing ineligibility for its actions affecting Retirement Investors cannot simply transfer its fiduciary investment advice business to another Financial Institution that is closely related and also provides fiduciary investment advice to Retirement Investors, thus avoiding the ineligibility provisions entirely. The proposed definition is narrowly tailored to cover only other investment advice fiduciaries that share significant ownership. A Financial Institution could not become ineligible based on the actions of an entity engaged in unrelated services that happened to share a small amount of common ownership. The 80 percent threshold is consistent with the Code's rules for determining when employees of multiple corporations should be treated as employed by the same employer.[72] The Department requests comments on this definition. Is 80 percent an appropriate threshold? Are there alternative ways of defining ownership that would be easily applicable to all types of Financial Institutions?

Unlike Investment Professionals, Financial Institutions would have a one-year winding down period before becoming ineligible to rely on the exemption, as long as they complied with the exemption's other conditions during that year. The winding down period begins on the date of the trial court's judgment, regardless of whether that judgment remains under appeal. Financial Institutions that timely submit a petition regarding the conviction would become ineligible as of the date of a written notice of denial from the Office of Exemption Determinations. Financial Institutions that become ineligible due to conduct with respect to exemption compliance would become ineligible as of the date of the written ineligibility notice from the Office of Exemption Determinations.

Financial Institutions or Investment Professionals that become ineligible to rely on this exemption may rely on a statutory prohibited transaction exemption if one is available or may seek an individual prohibited transaction exemption from the Department. The Department encourages any Financial Institution or Investment Professional facing allegations that could result in ineligibility to begin the application process. If the applicant becomes ineligible and the Department has not granted a final individual exemption, the Department will consider granting retroactive relief, consistent with its policy as set forth in 29 CFR 2570.35(d). Retroactive exemptions may require additional prospective compliance.

The Department seeks comment on the proposal's eligibility provisions. Are the crimes included in the proposal properly tailored to identify Investment Professionals and Financial Institutions that should no longer be eligible to rely on the broad relief in the class exemption? Is additional guidance needed with respect to any aspect of the ineligibility section to provide clarity to Investment Professionals and Financial Institutions?

Recordkeeping (Section IV)

Section IV would condition relief on the Financial Institution maintaining the records demonstrating compliance with this exemption for six years. The Department generally imposes a recordkeeping requirement on exemptions so that parties relying on an exemption can demonstrate, and the Department can verify, compliance with the conditions of the exemption.

To demonstrate compliance with the exemption, Financial Institutions would be required to provide, among other things, documentation of rollover recommendations and their written policies and procedures adopted

[72] See Code section 414(b).

pursuant to Section II(c). The Department does not expect Financial Institutions to document the reason for every investment recommendation made pursuant to the exemption. However, documentation may be especially important for recommendations of particularly complex products or recommendations that might, on their face, appear inconsistent with the best interest of a Retirement Investor.

Section IV would require that the records be made available, to the extent permitted by law, to any authorized employee of the Department; any fiduciary of a Plan that engaged in an investment transaction pursuant to this exemption; any contributing employer and any employee organization whose members are covered by a Plan that engaged in an investment transaction pursuant to this exemption; or any participant or beneficiary of a Plan, or IRA owner that engaged in an investment transaction pursuant to this exemption.

The records should be made reasonably available for examination at their customary location during normal business hours. Participants, beneficiaries and IRA owners; Plan fiduciaries; and contributing employers/employee organizations should be able to request only information applicable to their own transactions, and not privileged trade secrets or privileged commercial or financial information of the Financial Institution, or information identifying other individuals. Should the Financial Institution refuse to disclose information on the basis that the information is exempt from disclosure, the Department expects that the Financial Institution would provide a written notice, within 30 days, advising the requestor of the reasons for the refusal and that the Department may request such information.

Regulatory Impact Analysis

Executive Orders 12866 and 13563 Statement

Executive Orders 12866 [73] and 13563 [74] direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health, and safety effects; distributive impacts; and equity). Executive Order 13563 emphasizes the importance of quantifying costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

Under Executive Order 12866, ''significant'' regulatory actions are subject to review by the Office of Management and Budget (OMB). Section 3(f) of the Executive Order defines a ''significant regulatory action'' as any regulatory action that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely and materially affect a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities (also referred to as ''economically significant'');

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

The Department anticipates that this proposed exemption would be economically significant within the meaning of section 3(f)(1) of Executive Order 12866. Therefore, the Department provides the following assessment of the potential benefits and costs associated with this proposed exemption. In accordance with Executive Order 12866, this proposed exemption was reviewed by OMB.

If the exemption is granted, it will be transmitted to Congress and the Comptroller General for review in accordance with the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 *et seq.*).

Need for Regulatory Action

Following the United States Court of Appeals for the Fifth Circuit decision to vacate the Department's 2016 fiduciary rule and exemptions, the Department issued the temporary enforcement policy under FAB 2018–02 and announced its intent to provide additional guidance in the future. Since then, as discussed earlier in this preamble, the regulatory landscape has changed as other regulators, including the SEC, have adopted enhanced conduct standards for financial services professionals. These changes are accordingly reflected in the baseline that the Department applies when it evaluates the benefits and costs associated with this proposed exemption below.

At the same time, the share of total Plan participation attributable to participant-directed defined contribution (DC) Plans continued to grow. In 2017, 83 percent of DC Plan participation was attributable to 401(k) Plans, and 98 percent of 401(k) Plan participants were responsible directing some or all of their account investments.[75] Individual DC Plan participants and IRA investors are responsible for investing their retirement savings and they are in need of high quality, impartial advice from financial service professionals in making these investment decisions.

Given this backdrop, the Department believes that it is appropriate to propose an exemption to formalize the relief provided in the FAB. The exemption would provide Financial Institutions and Investment Professionals broader, more flexible prohibited transaction relief than is currently available, while safeguarding the interests of Retirement Investors. Offering a permanent exemption based on the FAB would provide certainty to Financial Institutions and Investment Professionals that may currently be relying on the temporary enforcement policy.

Benefits

This proposed exemption would generate several benefits. It would provide Financial Institutions and Investment Professionals with flexibility to choose between the new exemption or existing exemptions, depending on their needs and business models. In this regard, the proposed exemption would help preserve different business models, transaction arrangements, and products that meet different needs in the market place. This can, in turn, help preserve wide availability of investment advice arrangements and products for Retirement Investors. Furthermore, the exemption would provide certainty for Financial Institutions and Investment Professionals that opted to comply with the enforcement policy announced in the FAB to continue with that compliance approach, and the exemption would ensure advice that satisfies the Impartial Conduct Standards is widely available to Retirement Investors without any interruption.

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[73] Regulatory Planning and Review, 58 FR 51735 (Oct. 4, 1993).

[74] Improving Regulation and Regulatory Review, 76 FR 3821 (Jan. 21, 2011).

[75] *Private Pension Plan Bulletin Historic Tables and Graphs 1975–2017,* Employee Benefits Security Administration (Sep. 2018), *https://www.dol.gov/sites/dolgov/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletin-historical-tables-and-graphs.pdf.*

As described above, the FAB announced a temporary enforcement policy that would apply until the issuance of further guidance. Its designation as ''temporary'' communicated its nature as a transitional measure following the vacatur of the Department's 2016 rulemaking. Although the FAB remains in place following this proposal, the Department does not envision that the FAB represents a permanent compliance approach. This is due in part to the fact that the FAB allows Financial Institutions to avoid enforcement action by the Department but it does not (and cannot) provide relief from private litigation.

In connection with the more permanent relief it would provide, the exemption would have more specific conditions than the FAB, which required only good faith compliance with the Impartial Conduct Standards. The conditions in the proposal are designed to support the provision of investment advice that meets the Impartial Conduct Standards. For example, the required policies and procedures and retrospective review inform Financial Institutions as to how they should implement compliance with the standards.

Some Financial Institutions may consider whether to rely on the Department's existing exemptions rather than adopt the specific conditions in the new proposed exemption. The existing exemptions generally rely on disclosures as conditions. However, the existing exemptions are also very narrowly tailored in terms of the transactions and types of compensation arrangements that are covered as well as the parties that may rely on the exemption. For example, the existing exemptions were never amended to clearly cover the third party compensation arrangements, such as revenue sharing, that developed over time. Investment advice fiduciaries relying on some of the existing exemptions would be limited to the types of compensation that tend to be more transparent to Retirement Investors, such as commission payments.

For a number of reasons, Financial Institutions may decide to rely on the new exemption, if it is finalized, instead of the Department's existing exemptions. The proposed exemption does not identify specific transactions or limit the types of payments that are covered, so Financial Institutions may prefer this flexibility. Additionally, Financial Institutions may determine that there is a marketing advantage to acknowledging their fiduciary status with respect to Retirement Investors, as would be required by the new exemption.

As the proposed exemption would apply to multiple types of investment advice transactions, it would potentially allow Financial Institutions to rely on one exemption for investment advice transactions under a single set of conditions. This approach may allow Financial Institutions to streamline compliance, as compared to relying on multiple exemptions with multiple sets of conditions, resulting in a lower overall compliance burden for some Financial Institutions. Retirement Investors may benefit, in turn, if those Financial Institutions pass their savings on to them.

This proposed exemption's alignment with other regulatory conduct standards could result in a reduction in overall regulatory burden as well. As discussed earlier in this preamble, the proposed exemption was developed in consideration of other regulatory conduct standards. The Department envisions that Financial Institutions and Investment Professionals that have already developed, or are in the process of developing, compliance structures for other regulators' standards will be able to experience regulatory efficiencies through reliance on the new exemption.

As discussed above, the Department believes that the proposed exemption would provide significant protections for Retirement Investors. The proposed exemption would not expand Retirement Investors' ability, such as through required contracts and warranty provisions, to enforce their rights in court or create any new legal claims above and beyond those expressly authorized in ERISA. Rather, the proposed exemption relies in large measure on Financial Institutions' reasonable oversight of Investment Professionals and their adoption of a culture of compliance. Accordingly, in addition to the Impartial Conduct Standards, the exemption includes conditions designed to support investment advice that meets those standards, such as the provisions requiring written policies and procedures, documentation of rollover recommendations, and retrospective review.

Finally, the proposal provides that Financial Institutions and Investment Professionals with certain criminal convictions or that engage in egregious conduct with respect to compliance with the exemption would become ineligible to rely on the exemption. These factors would indicate that the Financial Institution or Investment Professional does not have the ability to maintain the high standard of integrity, care, and undivided loyalty demanded by a fiduciary's position of trust and confidence. This targeted approach of allowing the Department to give special attention to parties with certain criminal convictions or with a history of egregious conduct with respect to compliance with the exemption should provide significant protections for Retirement Investors while preserving wide availability of investment advice arrangements and products.

Although the Department expects this proposed exemption to generate significant benefits, it has not quantified the benefits due to a lack of available data. However, the Department expects the benefits to outweigh the compliance costs associated with this proposal because it creates an additional pathway for compliance with ERISA's prohibited transaction provisions. This new pathway is broader than existing exemptions, and thus applies to a wider range of transaction arrangements and products than the relief that is already available. The Department anticipates that entities will generally take advantage of the exemptive relief available in this proposal only if it is less costly than other alternatives already available, including avoiding prohibited transactions or complying with a different exemption. The Department requests comments about the specific benefits that may flow from the exemption and invites commenters to submit quantifiable data that would support or disprove the Department's expectations.

Costs

To estimate compliance costs associated with the proposed exemption, the Department takes into account the changed regulatory baseline. For example, the Department assumes affected entities will likely incur incremental costs if they are already subject to another regulator's similar rules or requirements. Because this proposed exemption is intended to align significantly with other regulators' rules and standards of conduct, the Department expects the compliance costs associated with this proposal to be modest. The Department estimates that the proposed exemption would impose costs of more than $44 million in the first year and $42 million in each subsequent year.[76] Over 10 years, the

[76] These estimates rely on the Employee Benefits Security Administration's 2018 labor rate estimates. See *Labor Cost Inputs Used in the Employee Benefits Security Administration, Office of Policy and Research's Regulatory Impact Analyses and Paperwork Reduction Act Burden Calculation,* Continued

costs associated with the proposal would be approximately $294 million, annualized to $42 million per year (using a 7 percent discount rate).[77] Using a perpetual time horizon (to allow the comparisons required under E.O. 13771), the annualized costs in 2016 dollars are $30 million at a 7 percent discount rate. These costs are broken down and explained below. More details are provided in the Paperwork Reduction Act section as well. The Department requests comments on this overall estimate and is especially interested in how different entities will incur costs associated with this proposed exemption as well as any quantifiable data that would support or contradict any aspect of its analysis below.

Affected Entities

As a first step, the Department examines the entities likely to be affected by the proposed exemption. The proposal would potentially impact SEC- and state-registered investment advisers (IAs), broker-dealers (BDs), banks, and insurance companies, as well as their employees, agents, and representatives. The Department acknowledges that not all these entities will serve as investment advice fiduciaries to Plans and IRAs within the meaning of ERISA and the Code. Additionally, because other exemptions are also currently available to these entities, it is unclear how widely Financial Institutions will rely upon the exemption and which firms are most likely to choose to rely on it. To err on the side of overestimation, the Department includes all entities eligible for this proposed relief in its cost estimation. The Department solicits comments about which, and how many, entities would likely utilize this proposed exemption.

Broker-Dealers (BDs)

As of December 2018, there were 3,764 registered BDs. Of those, 2,766, or approximately 73.5 percent, reported retail customer activities,[78] while 998 were estimated to have no retail customers. The Department does not have information about how many BDs advise Retirement Investors, which, as defined in the proposed exemption include Plan fiduciaries, Plan participants and beneficiaries, and IRA owners. However, according to one compliance survey, about 52 percent of IAs provide advice directly to retirement plans.[79] Assuming the same percentage of BDs service retirement plans, nearly 2,000 BDs would be affected by the proposed exemption.[80] The proposal may also impact BDs that advise Retirement Investors that are Plan participants or beneficiaries, or IRA owners, but the Department does not have a basis to estimate the number of these BDs. The Department assumes that such BDs would be considered as providing recommendations to retail customers under the SEC's Regulation Best Interest.

To continue servicing retirement plans with respect to transactions that otherwise would be prohibited under ERISA and the Code, this group of BDs would be able to rely on the proposed exemption.[81] Because BDs with retail businesses are subject to the SEC's Regulation Best Interest, they already comply with, or are preparing to comply with, standards functionally identical to those set forth in the proposed exemption.

SEC-Registered Investment Advisers (IAs)

As of December 2018, there were approximately 13,299 SEC-registered IAs [82] and 17,268 state-registered IAs.[83] An IA must register with the appropriate regulatory authorities, with the SEC or with state securities authorities. IAs registered with the SEC are generally larger than state-registered IAs, both in staff and in regulatory assets under management (RAUM).[84] SEC-registered IAs that advise retirement plans and other Retirement Investors would be directly affected by the proposed exemption.

Some IAs are dual-registered as BDs. To avoid double counting when estimating compliance costs, the Department counted dual-registered entities as BDs and excluded them from the burden estimates of IAs.[85] The Department estimates there to be 12,940 SEC-registered IAs, a figure produced by subtracting the 359 dually-registered IAs from the 13,299 SEC-registered IAs.

Similar to BDs, the Department assumes that about 52 percent of SEC-registered IAs provide recommendations or services to retirement plans.[86] Applying this assumption, the Department estimates that approximately 6,729 SEC-registered IAs currently service retirement plans. An inestimable number of IAs may provide advice only to Retirement Investors that are Plan participants or beneficiaries or IRA owners, rather than retirement plans. These IAs are fiduciaries, and they already operate under conditions functionally identical to those required by the proposed exemption.[87] Accordingly, the proposed exemption would pose no more than a nominal burden for these entities.

State-Registered Investment Advisers

As of December 2018, there were 16,939 state-registered IAs.[88] Of these state-registered IAs, 13,793 provide advice to retail investors, while 3,146 do not.[89] State-registered IAs tend to be smaller than SEC-registered IAs, both in RAUM and staff. For example, according to one survey of both SEC- and state-registered IAs, about 47 percent of respondent IAs reported 11 to

Employee Benefits Security Administration (June 2019), *https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf.*

[77] The costs would be $357 million over 10-year period, annualized to $42 million per year, if a 3 percent discount rate is applied.

[78] Regulation Best Interest Release, 84 FR at 33407.

[79] *2019 Investment Management Compliance Testing Survey,* Investment Adviser Association (Jun. 18, 2019), *https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/about/190618_IMCTS_slides_after_webcast_edits.pdf.*

[80] If this assumption is relaxed to include all BDs, the costs would increase by $1 million for the first year and by $0.02 million for subsequent years.

[81] The Department's estimate of compliance costs does not include any state-registered BDs because the exception from SEC registration for BDs is very narrow. *See Guide to Broker-Dealer Registration,* Securities and Exchange Commission (Apr. 2008), *www.sec.gov/reportspubs/investor-publications/divisionsmarketregbdguidehtm.html.*

[82] Form CRS Relationship Summary Release at 33564.

[83] *Id.* at 33565. (Of these 17,268 state-registered IAs, 125 are also registered with SEC and 204 are also dual registered BDs.)

[84] After the Dodd-Frank Wall Street Reform and Consumer Protection Act, an IA with $100 million or more in regulatory assets under management generally registers with the SEC, while an IA with less than $100 million registers with the state in which it has its principle office, subject to certain exceptions. For more details about the registration of IAs, see *General Information on the Regulation of Investment Advisers,* Securities and Exchange Commission (Mar. 11, 2011), *www.sec.gov/divisions/investment/iaregulation/memoia.htm;* see also *A Brief Overview: The Investment Adviser Industry,* North American Securities Administrators Association (2019), *www.nasaa.org/industry-resources/investment-advisers/investment-adviser-guide/.*

[85] The Department applied this exclusion rule across all types of IAs, regardless of registration (SEC registered versus state only) and retail status (retail versus nonretail).

[86] 2019 Investment Management Compliance Testing Survey, *supra* note 79.

[87] *SEC Standards of Conduct Rulemaking: What It Means for RIAs,* Investment Adviser Association (July 2019), *https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/resources/IAA-Staff-Analysis-Standards-of-Conduct-Rulemaking2.pdf.*

[88] This excludes state-registered IAs that are also registered with the SEC or dual registered BDs.

[89] Form CRS Relationship Summary Release.

50 employees.[90] In contrast, an examination of state-registered IAs reveals about 80 percent reported only 0 to 2 employees.[91] According to one report, 64 percent of state-registered IAs manage assets under $30 million.[92] According to a study by the North American Securities Administrators Association, about 16 percent of state-registered IAs provide advice or services to retirement plans.[93] Based on this study, the Department assumes that 16 percent of state-registered IAs advise retirement plans. Thus, the Department estimates that approximately 2,710 state-registered, nonretail IAs provide advice to retirement plans and other Retirement Investors.

Insurers

The proposed exemption would affect insurers. Insurers are primarily regulated by states, and no single regulator records a national-level count of insurers. Although state regulators track insurers, the sum of all insurers cannot be calculated by aggregating individual state totals because individual insurers often operate in multiple states. However, the NAIC estimates there were approximately 386 insurers directly writing annuities in 2018. Some of these insurers may not sell any annuity contracts in the IRA or retirement plan markets. Furthermore, insurers can rely on other existing exemptions instead of the proposed exemption. Due to lack of data, the Department includes all 386 insurers in its cost estimation, although this likely overestimates costs. The Department invites any comments about how many insurers would utilize this proposed exemption.

Banks

There are 5,362 federally insured depository institutions in the United States.[94] The Department understands that banks most commonly use ''networking arrangements'' to sell retail non-deposit investment products (RNDIPs), including, among other products, equities, fixed-income securities, exchange-traded funds, and variable annuities.[95] Under such arrangements, bank employees are limited to performing only clerical or ministerial functions in connection with brokerage transactions. However, bank employees may forward customer funds or securities and may describe, in general terms, the types of investment vehicles available from the bank and BD under the arrangement. Similar restrictions exist with respect to bank employees' referrals of insurance products and IAs. Because of the limitations, the Department believes that in most cases such referrals will not constitute fiduciary investment advice within the meaning of the proposed exemption. Due to the prevalence of banks using networking arrangements for transactions related to RNDIPs, the Department believes that most banks will not be affected with respect to such transactions.

The Department does not have sufficient data to estimate the costs to banks of any other investment advice services because it does not know how frequently banks use their own employees to perform activities that would be otherwise prohibited. The Department invites comments on the magnitude of such costs and welcomes submission of data that would facilitate their quantification.

Costs Associated With Disclosures

The Department estimates the compliance costs associated with the disclosure requirement would be approximately $1 million in the first year and $0.3 million per year in each subsequent year.[96]

Section II(b) of the proposed exemption would require Financial Institutions to acknowledge, in writing, their status as fiduciaries under ERISA and the Code. In addition, the institutions must furnish a written description of the services they provide and any material conflicts of interest. For many entities, including IAs, this condition would impose only modest additional costs, if any at all. Most IAs already disclose their status as a fiduciary and describe the types of services they offer in Form ADV. BDs with retail investors are also required, as of June 30, 2020, to provide disclosures about services provided and conflicts of interest on Form CRS and pursuant to the disclosure obligation in Regulation Best Interest. Even among entities that currently do not provide such disclosures, such as insurers and some BDs, the Department believes that developing disclosures required in this proposed exemption would not substantially increase costs because the required disclosures are clearly specified and limited in scope.

Not all entities will decide to use the proposed exemption. Some may instead rely on other existing exemptions that better align with their business models. However, for the cost estimation, the Department assumes that all eligible entities would use the proposed exemption and incur, on average, modest costs.

The Department estimates that developing disclosures that acknowledge fiduciary status and describe the services offered and any material conflicts of interest would incur costs of approximately $0.7 million in the first year.[97]

The Department estimates that it would cost Financial Institutions about $0.3 million to print and mail required disclosures to Retirement Investors,[98]

[90] 2019 Investment Management Compliance Testing Survey, *supra* note 79.

[91] *2019 Investment Adviser Section Annual Report,* North American Securities Administrators Association (May 2019), *www.nasaa.org/wp-content/uploads/2019/06/2019–IA-Section-Report.pdf.*

[92] *2018 Investment Adviser Section Annual Report,* North American Securities Administrators Association (May 2018), *www.nasaa.org/wp-content/uploads/2018/05/2018–NASAA–IA-Report-Online.pdf.*

[93] 2019 Investment Adviser Section Annual Report, *supra* note 91.

[94] The FDIC reports there are 4,681 Commercial banks and 681 Savings Institutions (thrifts) for 5,362 FDIC- Insured Institutions as of March 31, 2019. For more details, see *Statistics at a Glance,* Federal Deposit Insurance Corporation (Mar. 31, 2019), *www.fdic.gov/bank/statistical/stats/2019mar/industry.pdf.*

[95] For more details about ''networking arrangements,'' see *Conflict of Interest Final Rule, Regulatory Impact Analysis for Final Rule and Exemptions,* U.S. Department of Labor (Apr. 2016), *www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.*

[96] Except where specifically noted, all cost estimates are expressed in 2019 dollars throughout this document.

[97] A written acknowledgment of fiduciary status would cost approximately $0.2 million, while a written description of the services offered and any material conflicts of interest would cost another $0.5 million. The Department assumes that 11,782 Financial Institutions, comprising 1,957 BDs, 6,729 SEC-registered IAs, 2,710 state-registered IAs, and 386 insurers, are likely to engage in transactions covered under this PTE. For a detailed description of how the number of entities is estimated, see the Paperwork Reduction Act section, below. The $0.2 million costs associated with a written acknowledgment of fiduciary status are calculated as follows. The Department assumes that it will take each retail BD firm 15 minutes, each nonretail BD or insurance firm 30 minutes, and each registered IA 5 minutes to prepare a disclosure conveying fiduciary status at an hourly labor rate of $138.41, resulting in cost burden of $221,276. Accordingly, the estimated per-entity cost ranges from $11.53 for IAs to $69.21 for non-retail BDs and insurers. The $0.5 million costs associated with a written description of the services offered and any material conflicts of interest are calculated as follows. The Department assumes that it will take each retail BD or IA firm 5 minutes, each small nonretail BD or small insurer 60 minutes, and each large nonretail BDs or larger insurer 5 hours to prepare a disclosure conveying services provided and any conflicts of interest at an hourly labor rate of $138.41, resulting in cost burden of $510,877. Accordingly, the estimated per-entity cost ranges from $11.53 for retail broker-dealers and IAs to $692.07 for large non-retail BDs and insurers.

[98] The Department estimates that approximately 1.8 million Retirement Investors are likely to engage in transactions covered under this PTE, of which 8.1 percent are estimated to receive paper disclosures. Distributing paper disclosures is estimated to take a clerical professional 1 minute per disclosure, at an hourly labor rate of $64.11,

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but it assumes most required disclosures would be electronically delivered to plan fiduciaries. The Department assumes that approximately 92 percent of participants who roll over their plan assets to IRAs would receive required disclosures electronically.[99] According to one study, approximately 3.6 million accounts in retirement plans were rolled over to IRAs in 2018.[100] Of those, about half, 1.8 million, were rolled over by financial services professionals.[101] Therefore, prior to transactions necessitated by rollovers, participants are likely to receive required disclosures from their Investment Professionals. In some cases, Financial Institutions and Investment Professionals may send required disclosures to participants, particularly those with participant-directed defined contribution accounts, before providing investment advice. The Department welcomes comments that speak to the costs associated with required disclosures.

Costs Associated With Written Policies and Procedures

The Department estimates that developing policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards would cost approximately $1.7 million in the first year.[102]

The estimated compliance costs reflect the different regulatory baselines under which different entities are currently operating. For example, IAs already operate under a standard functionally identical to that required under the proposed exemption,[103] and report how they address conflicts of interests in Form ADV.[104] Similarly, BDs subject to the SEC's Regulation Best Interest also operate, or are preparing to operate, under a standard that is functionally identical to the proposed exemption. To comply fully with the proposed exemption, however, these entities may need to review their policies and procedures and amend their existing policies and procedures. These additional steps would impose additional, but not substantial, costs at the Financial Institution level.

The insurers and non-retail BDs currently operating under a suitability standard in most states and largely relying on transaction-based forms of compensation, such as commissions, would be required to establish written policies and procedures that comply with the Impartial Conduct Standards, if they choose to use this proposed exemption. These activities would likely involve higher cost increases than those experienced by IAs and retail BDs. To a large extent, however, the entities facing potentially higher costs would likely elect to rely on other existing exemptions. In this regard, the burden estimates on these entities are likely overestimated to the extent that many of these entities would not use this proposed exemption.

Because smaller entities generally have less complex business practices and arrangements than their larger counterparts, it would likely cost less for them to comply with the proposed exemption. This is reflected in the compliance cost estimates presented in this economic analysis.

Costs Associated With Annual Report of Retrospective Review

Section II(d) would require Financial Institutions to conduct an annual retrospective review reasonably designed to assist the Financial Institution in detecting and preventing violations of, and achieving compliance with the Impartial Conduct Standards and their own policies and procedures, and to produce a written report that is certified by the institution's chief executive officer. The Department estimates that this requirement will impose $1.7 million in costs each year.[105] FINRA requires BDs to establish and maintain a supervisory system reasonably designed to facilitate compliance with applicable securities laws and regulations,[106] to test the supervisory system, and to amend the system based on the testing.[107] Furthermore, the BD's chief executive officer (or equivalent officer) must annually certify that it has processes in place to establish, maintain, test, and modify written compliance policies and written supervisory procedures reasonably designed to achieve compliance with FINRA rules.[108]

resulting in a cost burden of $156,094. Assuming the disclosures will require two sheets of paper at a cost $0.05 each, the estimated material cost for the paper disclosures is $14,608. Postage for each paper disclosure is expected to cost $0.55, resulting in a printing and mailing cost of $94,954.

[99] The Department estimates approximately 56.4 percent of participants receive disclosures electronically based on data from various data sources including the National Telecommunications and Information Agency (NTIA). In light of the 2019 Electronic Disclosure Regulation, the Department estimates that additional 35.5 percent of participants receive them electronically. In total, 91.9 percent of participants are expected to receive disclosures electronically.

[100] *U.S. Retirement-End Investor 2019: Driving Participant Outcomes with Financial Wellness Programs,* The Cerulli Report (2019).

[101] *Id.*

[102] The Department assumes that 11,782 Financial Institutions, comprising 1,957 BDs, 6,729 SEC-registered IAs, 2,710 state-registered IAs, and 386 insurers, are likely to engage in transactions covered under this PTE. For a detailed description of how the number of entities is estimated, see the Paperwork Reduction Act section, below. The Department assumes that it will take a legal professional, at an hourly labor rage of $138.41, 22.5 minutes at each small retail BD, 45 minutes at each large retail BD, 5 hours at each small nonretail BD, 10 hours at each large nonretail BD, 15 minutes at each small IA, 30 minutes at each large IA, 5 hours at each small insurer, and 10 hours at each large insurer to meet the requirement. This results in a cost burden estimate of $1,664,127. Accordingly, the estimated per-entity cost ranges from $34.60 for small IAs to $1,384.14 for large non-retail BDs and insurers. These compliance cost estimates are not discounted.

[103] *See* SEC Fiduciary Standard of Conduct Interpretation (Release No. IA–5248); *see also A Brief Overview: The Investment Adviser Industry,* North American Securities Administrators Association (2019), *www.nasaa.org/industry-resources/investment-advisers/investment-adviser-guide/.* (According to the NASAA, the anti-fraud provisions of the Investment Advisers Act of 1940, the NASAA Model Rule 102(a)(4)–1, and most state laws require IAs to act as fiduciaries. NASAA further states, ''Fiduciary duty requires the adviser to hold the client's interest above its own in all matters. Conflicts of interest should be avoided at all costs. However, there are some conflicts that will inevitably occur . . . In these instances, the adviser must take great pains to clearly and accurately describe those conflicts and how the adviser will maintain impartiality in its recommendations to clients.'')

[104] *See* Form ADV [17 CFR 279.1] (Part 2A of Form ADV requires IAs to prepare narrative brochures that contain information such as the types of advisory services offered, fee schedule, disciplinary information and conflicts of interest. For example, item 10.C of part 2A asks IAs to identify if certain relationships or arrangements create a material conflict of interest, and to describe the nature of the conflict and how to address it. If an IA recommends other IAs for its clients and the IA receives compensation directly or indirectly from those advisers that creates a material conflict of interest or the IA has other business relationships with those advisers that create a material conflict of interest, Item 10.D of Part 2A requires the IA to discuss the material conflicts of interest that these practices create and how to address them.)

[105] The Department assumes that 794 Financial Institutions, comprising 20 BDs, 538 SEC-registered IAs, 217 state-registered IAs, and 20 insurers, would be likely to incur costs associated with producing a retrospective review report. The Department estimates it will take a legal professional, at an hourly labor rate of $138.41, 5 hours for small firms and 10 hours for large firms to produce a retrospective review report, resulting in an estimated cost burden of $973,297. The estimate per-entity cost ranges from $692.07 for small entities to $1,384.14 for large entities. Additionally, the Department assumes that 9,845 Financial Institutions, comprising 20 BDs, 6,729 SEC-registered IAs, 2,710 state-registered IAs, and 386 insurers, would be likely to incur costs associated with reviewing and certifying the report. The Department estimates it will take a legal professional 15 minutes for small firms and 30 minutes for large firms to review the report and certify the exemption, resulting in an estimated cost burden of $718,806. The estimated per-entity cost ranges from $41.41 for small entities to $82.82 for large entities. For a detailed description of how the number of entities for each cost burden is estimated, see the Paperwork Reduction Act section.

[106] Rule 3110. Supervision, FINRA Manual, *www.finra.org/rules-guidance/rulebooks/finra-rules/3110.*

[107] Rule 3120. Supervisory Control System, FINRA Manual, *www.finra.org/rules-guidance/rulebooks/finra-rules/3120.*

[108] Rule 3130. Annual Certification of Compliance and Supervisory Processes, FINRA Manual,

Many insurers are already subject to similar standards.[109] For instance, the NAIC's Model Regulation contemplates that insurers establish a supervision system that is reasonably designed to comply with the Model Regulation and annually provide senior management with a written report that details findings and recommendations on the effectiveness of the supervision system.[110] States that have adopted the Model Regulation also require insurers to conduct annual audits and obtain certifications from senior managers. Based on these regulatory baselines, the Department believes the compliance costs attributable to this requirement would be modest.

SEC-registered IAs are already subject to Rule 206(4)–7, which requires them to adopt and implement written policies and procedures reasonably designed to ensure compliance with the Advisers Act and rules adopted thereunder and review them annually for adequacy and the effectiveness of their implementation. Under the same rule, SEC-registered IAs must designate a chief compliance officer to administer the policies and procedures. However, they are not required to conduct an internal audit nor produce a report detailing findings from its audit. Nonetheless, many seem to voluntarily produce reports after conducting internal audits. One compliance testing survey reveals that about 92 percent of SEC-registered IAs voluntarily provide an annual compliance program review report to senior management.[111] Relying on this information, the Department estimates that only 8 percent of SEC-registered IAs advising retirement plans would incur costs associated with producing a retrospective review report. The rest would incur minimal costs to satisfy the conditions related to this requirement.

Due to lack of data, the Department based the cost estimates associated with state-registered IAs on the assumption that 8 percent of state-registered IAs advising retirement plans currently do not produce compliance review reports, and thus would incur costs associated with the oversight conditions in the proposed exemption. As discussed above, compared with SEC-registered IAs, state-registered IAs tend to be smaller in terms of RAUM and staffing, and thus may not have formal procedures in place to conduct retrospective reviews to ensure regulatory compliance. If that were often the case, the Department's assumption would likely underestimate costs. However, because state-registered IAs tend to be smaller than their SEC-registered counterparts, they tend to handle fewer transactions, limit the range of transactions they handle, and have fewer employees to supervise. Therefore, the costs associated with establishing procedures to conduct internal retrospective reviews and produce compliance reports would likely be low. In sum, the Department estimates that the costs associated with the retrospective review requirement of the proposed exemption would be approximately $1.7 million each year.

Costs Associated With Rollover Documentation

In 2018, slightly more than 3.6 million retirement plan accounts rolled over to an IRA, while slightly less than 0.5 million accounts were rolled over to other retirement plans.[112] Not all rollovers were managed by financial services professionals. As discussed above, about half of all rollovers from plans to IRAs were handled by financial services professionals, while the rest were self-directed.[113] Based on this information, the Department estimates approximately 1.8 million participants obtained advice from financial services professionals.[114] Some of these rollovers likely involved financial services professionals who were not fiduciaries under the five-part test, thus the actual number of rollovers affected by this proposed exemption is likely lower than 1.8 million. The proposed exemption would require the Financial Institution to document why a recommended rollover is in the best interest of the Retirement Investor. As a best practice, the SEC already encourages firms to record the basis for significant investment decisions such as rollovers, although doing so is not required under Regulation Best Interest.[115] In addition, some firms may voluntarily document significant investment decisions to demonstrate compliance with applicable law, even if not required.[116] Therefore, the Department expects that many Financial Institutions already document significant decisions like rollovers.

In estimating costs associated with rollover documentations, the Department faces uncertainty with regards to the number of rollovers that would be affected by the proposed exemption. Given this uncertainty, below the Department discusses a range of cost estimates. For the lower-end cost estimate, the Department estimates that the costs for documenting the basis for investment decisions would come to $15 million per year.[117] This low-end estimate is based on the assumption that most financial services professionals already incorporate documenting rollover justifications in their regular business practices and another assumption that not all rollovers are handled by financial services professionals who act in a fiduciary

www.finra.org/rules-guidance/rulebooks/finra-rules/3130.

[109] The previous NAIC Suitability in Annuity Transactions Model Regulation (2010) had been adopted by many states before the newer NAIC Model Regulation was approved in 2020. Both previous and updated Model Regulations contain similar standards as written report of retrospective review conditions of the proposed exemption.

[110] NAIC Suitability in Annuity Transactions Model Regulation, Spring 2020, Section 6.C.(2)(i), available at *https://www.naic.org/store/free/MDL-275.pdf.* (The same requirement is found in the previous NAIC Suitability in Annuity Transactions Model Regulation (2010), section 6.F.(1)(f).)

[111] *2018 Investment Management Compliance Testing Survey,* Investment Adviser Association (Jun. 14, 2018), *https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/publications/2018-Investment-Management_Compliance-Testing-Survey-Results-Webcast_pptx.pdf.*

[112] U.S. Retirement-End Investor 2019, *supra* note 100. (To estimate costs associated with documenting rollovers, the Department did not include rollovers from plans to plans because plan-to-plan rollovers are unlikely to be mediated by Investment Professionals. Also plan-to-plan rollovers occur far less frequently than plan-to-IRA rollovers. Thus, even if plan-to-plan rollovers were included in the cost estimation, the impact would likely be small.)

[113] *Id.*

[114] Another report suggested a higher share, 70 percent of households owning IRAs held their IRAs through Investment Professionals. Note that this is household level data based on an IRA owners' survey, which was not particularly focused on rollovers. (*See* Sarah Holden & Daniel Schrass, ''The Role of IRAs in US Households' Saving for Retirement, 2018,'' *ICI Research Perspective,* vol. 24, no. 10 (Dec. 2018).)

[115] Regulation Best Interest Release, 84 FR at 33360.

[116] According to a comment letter about the proposed Regulation Best Interest, BDs have a strong financial incentive to retain records necessary to document that they have acted in the best interest of clients, even if it is not required. Another comment letter about the proposed Regulation Best Interest suggests that BDs generally maintain documentation for suitability purposes.

[117] For those rollovers affected by this proposed exemption it would take, on average, 10 minutes per rollover to document justifications. Thus, the Department estimates almost 75,500 burden hours in aggregate and slightly less than $15 million assuming $194.77 hourly rate for personal financial advisor. The Department assumes that financial services professionals would spend on average 10 minutes to document the basis for rollover recommendations. The Department understands that financial services professionals seek and gather information regarding to investor profiles in accordance with other regulators' rules. Further, financial professionals often discuss the basis for their recommendations and associated risks with their clients as a best practice. After collecting relevant information and discussing the basis for certain recommendations with clients, the Department believes that it would take relatively short time to document justifications for rollover recommendations.

capacity.[118] For the upper-end cost estimate, the Department assumes that all rollovers involving financial services professionals would be affected by the proposed exemption. Then the estimated costs would come to $59 million per year.[119] For the primary cost estimate, the Department assumes that 67.4 percent of rollovers involving financial services professionals would be affected by the proposed exemption.[120] Under this assumption, the estimated costs would be $40 million per year.[121] The Department acknowledges that uncertainty still remains as some financial services professionals who do *not* generally serve as fiduciaries of their Plan clients may act in a fiduciary capacity in certain rollover recommendations, and thus would be affected by the proposed exemption. Alternatively, the opposite can be true: Financial services professionals who usually serve as fiduciaries of their Plan clients may act in a *non*-fiduciary capacity in certain rollover recommendations, and thus would *not* be affected by the proposed exemption. The Department welcomes any comments and data that can help more precisely estimating the number of rollovers affected by the exemption. In addition, the Department invites comments about financial services professionals' practices about documenting rollover recommendations, particularly whether financial services professionals often utilize a form with a list of common reasons for rollovers and how long on average it would take for a financial services professional to document a rollover recommendation.[122]

Costs Associated With Recordkeeping

Section IV of the proposed exemption would require Financial Institutions to maintain records demonstrating compliance with the exemption for 6 years. The Financial Institutions would also be required to make records available to regulators, Plans, and participants. Recordkeeping requirements in Section IV are generally consistent with requirements made by the SEC and FINRA.[123] In addition, the recordkeeping requirements correspond to the 6-year period in section 413 of ERISA. The Department understands that many firms already maintain records, as required in Section IV, as part of their regular business practices. Therefore, the Department expects that the recordkeeping requirement in Section IV would impose a negligible burden.[124] The Department welcomes comments regarding the burden associated with the recordkeeping requirement.

Regulatory Alternatives

The Department considered various alternative approaches in developing this proposed exemption. Those alternatives are discussed below.

No New Exemption

The Department considered merely leaving in place the existing exemptions that provide prohibited transaction relief for investment advice transactions. However, the existing exemptions generally apply to more limited categories of transactions and investment products, and they include conditions that are tailored to the particular transactions or products covered under each exemption. Therefore, under the existing exemptions, Financial Institutions may find it inefficient to implement advice programs for all of the different products and services they offer. By providing a single set of conditions for all investment advice transactions, this proposal aims to promote the use and availability of investment advice for all types of transactions in a manner that aligns with the conduct standards of other regulators, such as the SEC.

Including an Independent Audit Requirement in the Proposed Exemption

The proposal would require Financial Institutions to conduct a retrospective review, at least annually, designed to detect and prevent violations of the Impartial Conduct Standards, and to ensure compliance with the policies and procedures governing the exemption. The exemption does not require that the review be conducted by an independent party, allowing Financial Institutions to self-review.

As an alternative to this approach, the Department considered requiring independent audits to ensure compliance under the exemption. The Department decided against this

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[118] To estimate costs, the Department further assumes that approximately 50 percent of 1.8 million rollovers involve financial professionals who already document rollover recommendations as a best practice. Additionally, the Department assumes half of the remaining half of rollovers, thus an additional quarter of the total 1.8 million rollovers, are handled by financial professionals who act in a non-fiduciary capacity. Thus the Department assumes that approximately three-quarters of 1.8 million rollovers would not be affected by the proposed exemption, while one-quarter of 1.8 million rollovers would be affected.

[119] Assuming that it would take, on average, 10 minutes per rollover to document justifications, the Department estimates about 301,850 burden hours in aggregate and slightly less than $59 million assuming $194.77 hourly rate for personal financial advisor.

[120] In 2019, a survey was conducted to financial services professionals who hold more than 50 percent of their practice's assets under management in employer-sponsored retirement plans. These financial services professionals include both BDs and IAs. In addition, 45 percent of those professionals indicated that they make a proactive effort to pursue IRA rollovers from their DC plan clients. According to this survey, approximately 32.6 percent responded that they function in a non-fiduciary capacity. Therefore, the Department assumes that approximately 67.4 percent of financial service professionals serve their Plan clients as fiduciaries. See *U.S. Defined Contribution 2019: Opportunities for Differentiation in a Competitive Landscape,* The Cerulli Report (2019).

[121] Assuming that it would take, on average, 10 minutes per rollover to document justifications, the Department estimates over 203,000 burden hours in aggregate and slightly less than $40 million assuming $194.77 hourly rate for personal financial advisor.

[122] The Department assumes that financial services professionals would spend on average 10 minutes to document the basis for rollover recommendations. The Department understands that financial services professionals seek and gather information regarding to investor profiles in accordance with other regulators' rules. Further, financial professionals often discuss the basis for their recommendations and associated risks with their clients as a best practice. After collecting relevant information and discussing the basis for certain recommendations with clients, the Department believes that it would take relatively short time to document justifications for rollover recommendations. However, the Department welcomes comments about the burden hours associated with documenting rollover recommendations.

[123] The SEC's Regulation Best Interest amended Rule 17a–4(e)(5) to require that BDs retain all records of the information collected from or provided to each retail customer pursuant to Regulation Best Interest for at least 6 years after the earlier of the date the account was closed or the date on which the information was last replaced or updated. FINRA Rule 4511 also requires its members preserve for a period of at least 6 years those FINRA books and records for which there is no specified period under the FINRA rules or applicable Exchange Act rules.

[124] The Department notes that insurers that are expected to use the proposed exemption are generally not subject to the SEC's Regulation Best Interest and FINRA rules. The Department understands, however, that some states' insurance regulations require insurers to retain similar records for less than six years. For example, some states require insurers to maintain records for five years after the insurance transaction is completed. Thus, the recordkeeping requirement of the proposed exemption would likely impose additional burden on the 386 insurers that the Department estimates would rely on this proposed exemption. However, the Department expects most insurers to maintain records electronically. Electronic storage prices have decreased substantially as cloud services become more widely available. For example, cloud storage space costs on average $0.018 to $0.021 per GB per month. Some estimate that approximately 250,000 PDF files or other typical office documents can be stored on 100GB. Accordingly, the Department believes that maintaining records in electronic storage for an additional year or two would not impose a significant cost burden on the affected 386 insurers. (For more detailed pricing information of three large cloud service providers, *see https://cloud.google.com/products/calculator;* or *https://azure.microsoft.com/en-us/pricing/calculator/;* or *https://calculator.s3.amazonaws.com/index.html.*) The Department welcomes comments on this assessment and the effect of the recordkeeping requirement on insurers.

approach to avoid the significant cost burden that this requirement would impose. The proposal instead requires that Financial Institutions provide a written report documenting the retrospective review, and supporting information, to the Department and other regulators within 10 business days of a request. The Department believes this proposed requirement compels Financial Institutions to take the review obligation seriously, regardless of whether they choose to hire an independent auditor to conduct the review.

Paperwork Reduction Act

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

Currently, the Department is soliciting comments concerning the proposed information collection request (ICR) included in the proposed Improving Investment Advice for Workers & Retirees (''Proposed PTE''). A copy of the ICR may be obtained by contacting the PRA addressee shown below or at *www.RegInfo.gov.*

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

• Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

• Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

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

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

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

PRA Addressee: Address requests for copies of the ICR to G. Christopher Cosby, Office of Policy and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue NW, Room N–5718, Washington, DC, 20210. Telephone (202) 693–8425; Fax: (202) 219–5333. These are not toll-free numbers. ICRs submitted to OMB also are available at *www.RegInfo.gov.*

As discussed in detail below, the Proposed PTE would require Financial Institutions and/or their Investment Professionals to (1) make certain disclosures to Retirement Investors, (2) adopt written policies and procedures, (3) document the basis for rollover recommendations, (4) prepare a written report of the retrospective review, and (5) maintain records showing that the conditions have been met to receive relief under the proposed exemption. These requirements are ICRs subject to the Paperwork Reduction Act.

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

• Disclosures distributed electronically will be distributed via means already used by respondents in the normal course of business, and the costs arising from electronic distribution will be negligible;

• Financial Institutions will use existing in-house resources to prepare the disclosures, policies and procedures, rollover documentations, and retrospective reviews, and to maintain the recordkeeping systems necessary to meet the requirements of the Proposed PTE;

• A combination of personnel will perform the tasks associated with the ICRs at an hourly wage rate of $194.77 for a personal financial advisor, $64.11 for mailing clerical personnel, and $138.41 for a legal professional;[125]

• Approximately 11,782 Financial Institutions will take advantage of the Proposed PTE and they will use the Proposed PTE in conjunction with transactions involving nearly all of their clients that are defined benefit plans, defined contribution plans, and IRA holders.[126]

Disclosures, Documentation, Retrospective Review, and Recordkeeping

Section II(b) of the Proposed PTE would require Financial Institutions to furnish Retirement Investors with a disclosure prior to engaging in a covered transaction. Section II(b)(1) would require Financial Institutions to acknowledge in writing that the Financial Institution and its Investment Professionals are fiduciaries under ERISA and the Code, as applicable, with respect to any investment advice provided to the Retirement Investors. Section II(b)(2) would require Financial Institutions to provide a written description of the services they provide and any material conflicts of interest. The written description must be accurate in all material respects. Financial Institutions will generally be required to provide the disclosure to each Retirement Investor once, but Financial Institutions may need to provide updated disclosures to ensure accuracy.

Section II(c)(1) of the Proposed PTE would require Financial Institutions to establish, maintain, and enforce written policies and procedures prudently designed to ensure that they and their Investment Professionals comply with the Impartial Conduct Standards. Section II(c)(2) would further require that the Financial Institutions design the policies and procedures to mitigate conflicts of interest.

[125] The Department's 2018 hourly wage rate estimates include wages, benefits, and overhead, and are calculated as follows: mean wage data from the 2018 National Occupational Employment Survey (May 2018, *www.bls.gov/news.release/archives/ocwage_03292019.pdf*), wages as a percent of total compensation from the Employer Cost for Employee Compensation (December 2018, *www.bls.gov/news.release/archives/ecec_03192019.pdf*), and overhead cost corresponding to each 2-digit NAICS code from the Annual Survey of Manufacturers (December 2017, *www.census.gov/data/Tables/2016/econ/asm/2016-asm.html*) multiplied by the percent of each occupation within that NAICS industry code based on a matrix of detailed occupation employment for each NAICS industry from the BLS Office of Employment projections (2016, *www.bls.gov/emp/data/occupational-data.htm*).

[126] For this analysis, ''IRA holders'' include rollovers from ERISA plans. The Department welcomes comments on this estimate.

Section II(c)(3) of the Proposed PTE would require Financial Institutions to document the specific reasons for any rollover recommendation and show that the rollover is in the best interest of the Retirement Investor.

Under Section II(d) of the Proposed PTE, Financial Institutions would be required to conduct an annual retrospective review that is reasonably designed to prevent violations of the Proposed PTE's Impartial Conduct Standards and the institution's own policies and procedures. The methodology and results of the retrospective review would be reduced to a written report that is provided to the Financial Institution's chief executive officer and chief compliance officer (or equivalent officers). The chief executive officer would be required to certify that (1) the officer has reviewed the report of the retrospective review, and (2) the Financial Institution has in place policies and procedures prudently designed to achieve compliance with the conditions of the Proposed PTE, and (3) the Financial Institution has a prudent process for modifying such policies and procedures. The process for modifying policies and procedures would need to be responsive to business, regulatory, and legislative changes and events, and the chief executive officer would be required to periodically test their effectiveness. The review, report, and certification would be completed no later than 6 months following the end of the period covered by the review. The Financial Institution would be required to retain the report, certification, and supporting data for at least 6 years, and to make these items available to the Department, any other federal or state regulator of the Financial Institution, or any applicable self-regulatory organization within 10 business days.

Section IV sets forth the recordkeeping requirements in the Proposed PTE.

Production and Distribution of Required Disclosures

The Department assumes that 11,782 Financial Institutions, comprising 1,957 BDs,[127] 6,729 SEC-registered IAs,[128] 2,710 state-registered IAs,[129] and 386 insurers,[130] are likely to engage in transactions covered under this PTE. Each would need to provide disclosures that (1) acknowledge its fiduciary status and (2) identify the services it provides and any material conflicts of interest. The Department estimates that preparing a disclosure indicating fiduciary status would take a legal professional between 5 and 30 minutes, depending on the nature of the business,[131] resulting in an hour burden of 1,599 [132] and a cost burden of $221,276.[133] Preparing a disclosure identifying services provided and conflicts of interest would take a legal professional an estimated 5 minutes to 5 hours, depending on the nature of the business,[134] resulting in an hour burden of 3,691 [135] and an equivalent cost burden of $510,877.[136]

The Department estimates that approximately 1.8 million Retirement Investors [137] have relationships with Financial Institutions and are likely to engage in transactions covered under this PTE. Of these 1.8 million Retirement Investors, it is assumed that 8.1 percent [138] or 146,083 Retirement Investors, would receive paper disclosures. Distributing paper disclosures is estimated to take a clerical professional 1 minute per disclosure, resulting in an hourly burden of 2,435 [139] and an equivalent cost burden of $156,094.[140] Assuming the disclosures will require two sheets of paper at a cost $0.05 each, the estimated material cost for the paper disclosures is $14,608. Postage for each paper disclosure is expected to cost $0.55, resulting in a printing and mailing cost of $94,954.

Written Policies and Procedures Requirement

The Department assumes that 11,782 Financial Institutions, comprising 1,957 BDs,[141] 6,729 SEC-registered IAs,[142]

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[127] The SEC estimated that there were 3,764 BDs as of December 2018 (*see* Form CRS Relationship Summary Release). The IAA Compliance 2019 Survey estimates that 52 percent of IAs have a pension consulting business. The estimated number of BDs affected by this exemption is the product of the SEC's estimate of total BDs in 2018 and IAA's estimate of the percent of IAs with a pension consulting business.

[128] The SEC estimated that there were 12,940 SEC-registered IAs that were not dually registered as BDs as of December 2018 (*see* Form CRS Relationship Summary Release). The IAA Compliance 2019 Survey estimates that 52 percent of IAs have a pension consulting business. The estimated number of IAs affected by this exemption is the product of the SEC's estimate of SEC-registered IAs in 2018 and the IAA's estimate of the percent of IAs with a pension consulting business.

[129] The SEC estimated that there were 16,939 state-registered IAs that were not dually registered as BDs as of December 2018 (*see* Form CRS Relationship Summary Release). The NASAA 2019 estimates that 16 percent of state-registered IAs have a pension consulting business. The estimated number of state-registered IAs affected by this exemption is the product of the SEC's estimate of state-registered IAs in 2018 and NASAA's estimate of the percent of state-registered IAs with a pension consulting business.

[130] NAIC estimates that the number of insurers directly writing annuities as of 2018 is 386.

[131] The Department assumes that it will take each retail BD firm 15 minutes, each nonretail BD or insurance firm 30 minutes, and each registered IA 5 minutes to prepare a disclosure conveying fiduciary status.

[132] Burden hours are calculated by multiplying the estimated number of each firm type by the estimated time it will take each firm to prepare the disclosure.

[133] The hourly cost burden is calculated by multiplying the burden hour of each firm associated with preparation of the disclosure by the hourly wage of a legal professional.

[134] The Department assumes that it will take each retail BD or IA firm 5 minutes, each small nonretail BD or small insurer 60 minutes, and each large nonretail BDs or larger insurer 5 hours to prepare a disclosure conveying services provided and any conflicts of interest.

[135] Burden hours are calculated by multiplying the estimated number of each firm type by the estimated time it will take each firm to prepare the disclosure.

[136] The hourly cost burden is calculated by multiplying the burden hour of each firm associated with preparation of the disclosure by the hourly wage of a legal professional.

[137] The Department estimates the number of affected plans and IRAs be equal to 50 percent of rollovers from plans to IRAs. Cerulli has estimated the number of plans rolled into IRAs to be 3,622,198 (*see* U.S. Retirement-End Investor 2019, *supra* note 100).

[138] According to data from the National Telecommunications and Information Agency (NTIA), 37.7 percent of individuals age 25 and over have access to the internet at work. According to a Greenwald & Associates survey, 84 percent of plan participants find it acceptable to make electronic delivery the default option, which is used as the proxy for the number of participants who will not opt-out of electronic disclosure if automatically enrolled (for a total of 31.7 percent receiving electronic disclosure at work). Additionally, the NTIA reports that 40.5 percent of individuals age 25 and over have access to the internet outside of work. According to a Pew Research Center survey, 61 percent of internet users use online banking, which is used as the proxy for the number of internet users who will affirmatively consent to receiving electronic disclosures (for a total of 24.7 percent receiving electronic disclosure outside of work). Combining the 31.7 percent who receive electronic disclosure at work with the 24.7 percent who receive electronic disclosure outside of work produces a total of 56.4 percent who will receive electronic disclosure overall. In light of the 2019 Electronic Disclosure Regulation, the Department estimates that 81.5 percent of the remaining 43.6 percent of individuals will receive the disclosures electronically. In total, 91.9 percent of participants are expected to receive disclosures electronically.

[139] Burden hours are calculated by multiplying the estimated number of plans receiving the disclosures non-electronically by the estimated time it will take to prepare the physical disclosure.

[140] The hourly cost burden is calculated as the burden hours associated with the physical preparation of each non-electronic disclosure by the hourly wage of a clerical professional.

[141] The SEC estimated that there were 3,764 BDs as of December 2018 (*see* Form CRS Relationship Summary Release). The IAA Compliance 2019 Survey estimates that 52 percent of IAs have a pension consulting business. The estimated number of BDs affected by this exemption is the product of the SEC's estimate of total BDs in 2018 and IAA's estimate of the percent of IAs with a pension consulting business.

[142] The SEC estimated that there were 12,940 SEC-registered IAs, who were not dually registered as BDs, as of December 2018 (*see* Form CRS Relationship Summary Release). The IAA Compliance 2019 Survey estimates that 52 percent of IAs have a pension consulting business. The

2,710 state registered IAs,[143] and 386 insurers,[144] are likely to engage in transactions covered under this PTE. The Department estimates that establishing, maintaining, and enforcing written policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards will take a legal professional between 15 minutes and 10 hours, depending on the nature of the business.[145] This results in an hour burden of 12,023 [146] and an equivalent cost burden of $1,664,127.[147]

Rollover Documentation Requirement

To meet the requirement of the rollover documentation requirement, Financial Institutions must document the specific reasons that any recommendation to roll over assets is in the best interest of the Retirement Investor. The Department estimates that 1.8 million retirement plan accounts [148] were rolled into IRAs in accordance with advice from a financial services professional. Due to uncertainty, the Department discusses a range of cost estimates. For the lower-end cost estimate, the Department estimates that the costs for documenting the basis for investment decisions would come to $15 million per year.[149] This is based on the assumption that most financial services professionals already incorporate documenting the basis for rollover recommendations in their regular business practices and another assumption that not all rollovers are handled by financial services professionals who act in a fiduciary capacity.[150] For the upper-end cost estimate, the Department assumes that all rollovers involving financial services professionals would be affected by the proposed exemption. Then the costs would be $59 million per year.[151] For the primary cost estimate, the Department assumes that 67.4 percent of rollovers would be affected by the proposed exemption.[152] Under this assumption, the costs would be $40 million per year.[153] The Department invites comments and data regarding the number of rollovers affected by the proposed exemption and the burden hours associated with documenting the basis for rollover recommendations. The Department estimates that documenting each rollover recommendation will take a personal financial advisor 10 minutes,[154] resulting in 203,447 [155] burden hours and an equivalent cost burden of $39,626,306.[156]

Annual Retrospective Review Requirement

Under the internal retrospective review requirement, a Financial Institution is required to (1) conduct an annual retrospective review reasonably designed to assist the Financial Institution in detecting and preventing violations of, and achieving compliance with the Impartial Conduct Standards and their policies and procedures and (2) produce a written report that is certified by the Financial Institution's chief executive officer.

The Department understands that, as per FINRA Rule 3110,[157] FINRA Rule 3120,[158] and FINRA Rule 3130,[159] broker dealers are already held to a standard functionally identical to that of the retrospective review requirements of this proposed exemption. Accordingly, in this analysis, the Department assumes that broker dealers will incur minimal costs to meet this requirement. In 2018, the Investment Adviser Association estimated that 92 percent of SEC-registered IAs voluntarily provide an annual compliance program review report to senior management.[160] The Department estimates that only 8 percent, or 538,[161] of SEC-registered IAs advising retirement plans would incur costs associated with producing a retrospective review report. Due to lack of data, the Department assumes that state-registered IAs exhibit similar retrospective review patterns and estimates that 8 percent, or 217,[162] of state-registered IAs would also incur costs associated with producing a retrospective review report.

As SEC-registered IAs are already subject to SEC Rule 206(4)–7 the Department assumes these IAs would incur minimal costs to satisfy the conditions related to this requirement. Insurers in many states are already subject state insurance law based on the

estimated number of IAs affected by this exemption is the product of the SEC's estimate of SEC-registered IAs in 2018 and IAA's estimate of the percent of IAs with a pension consulting business.

[143] The SEC estimated that there were 16,939 state-registered IAs who were not dually registered as BDs as of December 2018 (*see* Form CRS Relationship Summary Release). The NASAA 2019 estimates that 16 percent of state-registered IAs have a pension consulting business. The estimated number of state-registered IAs affected by this exemption is the product of the SEC's estimate of state-registered IAs in 2018 and NASAA's estimate of the percent of state-registered IAs with a pension consulting business.

[144] NAIC estimates that 386 insurers were directly writing annuities as of 2018.

[145] The Department assumes that it will take each small retail BD 22.5 minutes, each large retail BD 45 minutes, each small nonretail BD 5 hours, each large nonretail BD 10 hours, each small IA 15 minutes, each large IA 30 minutes, each small insurer 5 hours, and each large insurer 10 hours to meet the requirement.

[146] Burden hours are calculated by multiplying the estimated number of each firm type by the estimated time it will take each firm to establish, maintain, and enforce written policies and procedures.

[147] The hourly cost burden is calculated as the burden hour of each firm associated with meeting the written policies and procedures requirement multiplied by the hourly wage of a legal professional.

[148] Cerulli has estimated the number of plans rolled into IRAs to be 3,622,198 (*see* U.S. Retirement-End Investor 2019, *supra* note 100). The Department estimates that 50 percent of these rollovers will be handled by a financial professional.

[149] *See supra* note 117.

[150] *See supra* note 118.

[151] *See supra* note 119.

[152] *See supra* note 120.

[153] *See supra* note 121.

[154] *See supra* note 122.

[155] Burden hours are calculated by multiplying the estimated number of rollovers affected by this proposed exemption by the estimated hours needed to document each recommendation.

[156] The hourly cost burden is calculated as the burden hour of each firm associated with meeting the rollover documentation requirement multiplied by the hourly wage of a personal financial advisor.

[157] Rule 3110. Supervision, FINRA Manual, *www.finra.org/rules-guidance/rulebooks/finra-rules/3110.*

[158] Rule 3120. Supervisory Control System, FINRA Manual, *www.finra.org/rules-guidance/rulebooks/finra-rules/3120.*

[159] Rule 3130. Annual Certification of Compliance and Supervisory Processes, FINRA Manual, *www.finra.org/rules-guidance/rulebooks/finra-rules/3130.*

[160] *2018 Investment Management Compliance Testing Survey,* Investment Adviser Association (Jun. 14, 2018), *https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/publications/2018-Investment-Management_Compliance-Testing-Survey-Results-Webcast_pptx.pdf.*

[161] The SEC estimated that there were 12,940 SEC-registered IAs that were not dually registered as BDs as of December 2018 (*see* Form CRS Relationship Summary Release). The IAA Compliance 2019 Survey estimates that 52 percent of IAs have a pension consulting business. The IAA Investment Management Compliance Testing Survey estimates that 92 percent of SEC-registered IAs provide an annual compliance program review report to senior management. The estimated number of IAs affected by this exemption who do not meet the retrospective review requirement is the product of the SEC's estimate of SEC-registered IAs in 2018, the IAA's estimate of the percent of IAs with a pension consulting business, and IAA's estimate of the percent of IA's who do not provide an annual compliance program review report.

[162] The SEC estimated that there were 16,939 state-registered IAs that were not dually registered as BDs as of December 2018 (*see* Form CRS Relationship Summary Release). The NASAA 2019 estimates that 16 percent of state-registered IAs have a pension consulting business. The IAA Investment Management Compliance Testing Survey estimates that 92 percent of SEC-registered IAs provide an annual compliance program review report to senior management. The Department assumes state-registered IAs exhibit similar retrospective review patterns as SEC-registered IAs. The estimated number of state-registered IAs affected by this exemption is the product of the SEC's estimate of state-registered IAs in 2018, NASAA's estimate of the percent of state-registered IAs with a pension consulting business, and IAA's estimate of the percent of IA's who do not provide an annual compliance program review report.

NAIC's Model Regulation, [163] Thus, the Department assumes that insurers would incur negligible costs associated with producing a retrospective review report. This is estimated to take a legal professional 5 hours for small firms and 10 hours for large firms, depending on the nature of the business. This results in an hour burden of 7,032 [164] and an equivalent cost burden of $973,297.[165]

In addition to conducting the audit and producing a report, Financial Institutions will need to review the report and certify the exemption. This is estimated to take a financial professional 15 minutes for small firms and 30 minutes for large firms, depending on the nature of the business. This results in an hour burden of 4,340 [166] and an equivalent cost burden of $718,806.[167] The Department welcomes any comments about burden hours associated with producing an annual review report and certifying it.

Overall Summary

Overall, the Department estimates that in order to meet the conditions of this PTE, 11,782 Financial Institutions will produce 1.8 million disclosures and notices annually. These disclosures and notices will result in 234,565 burden hours during the first year and 217,253 burden hours in subsequent years, at an equivalent cost of $43.9 million and $41.5 million respectively. The disclosures and notices in this exemption will also result in a total cost burden for materials and postage of $94,954 annually.

These paperwork burden estimates are summarized as follows:

- *Type of Review:* New collection (Request for new OMB Control Number).
- *Agency:* Employee Benefits Security Administration, Department of Labor.
- *Title:* Improving Investment Advice for Workers & Retirees.
- *OMB Control Number:* 1210–NEW.
- *Affected Public:* Business or other for-profit institution.
- *Estimated Number of Respondents:* 11,782.
- *Estimated Number of Annual Responses:* 1,811,099.
- *Frequency of Response:* Initially, Annually, and when engaging in exempted transaction.
- *Estimated Total Annual Burden Hours:* 234,565 during the first year and 217,253 in subsequent years.
- *Estimated Total Annual Burden Cost:* $94,954 during the first year and $94,954 in subsequent years.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) [168] imposes certain requirements on rules subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act or any other law.[169] Under section 603 of the RFA, agencies must submit an initial regulatory flexibility analysis (IRFA) of a proposal that is likely to have a significant economic impact on a substantial number of small entities, such as small businesses, organizations, and governmental jurisdictions. The Department determines that this proposed exemption will likely have a significant economic impact on a substantial number of small entities. Therefore, the Department provides its IRFA of the proposed exemption, below. The Department welcomes comments regarding this assessment.

Need for and Objectives of the Rule

As discussed earlier in this preamble, the proposed class exemption would allow investment advice fiduciaries to receive compensation and engage in transactions that would otherwise violate the prohibited transaction provisions of ERISA and the Code. As such, the proposed exemption would grant Financial Institutions and Investment Professionals the flexibility to address different business models, and would lessen their overall regulatory burden by coordinating potentially overlapping regulatory requirements. The exemption conditions, including the Impartial Conduct Standards and other conditions supporting the standards, are expected to provide protections to Retirement Investors. Therefore, the Department expects the proposed exemption to benefit Retirement Investors that are small entities and to provide efficiencies to small Financial Institutions.

Affected Small Entities

The Small Business Administration (SBA),[170] pursuant to the Small Business Act,[171] defines small businesses and issues size standards by industry. The SBA defines a small business in the Financial Investments and Related Activities Sector as a business with up to $41.5 million in annual receipts. Due to a lack of data and shared jurisdictions, for purpose of performing Regulatory Flexibility Analyses pursuant to section 601(3) of the Regulatory Flexibility Act, the Department, after consultation with SBA's Office of Advocacy, defines small entities included in this analysis differently from the SBA definitions.[172] For instance, in this analysis, the small-business definitions for BDs and SEC-registered IAs are consistent with the SEC's definitions, as these entities are subject to the SEC's rules as well as the ERISA.[173] As with SEC-registered IAs, the size of state-registered IAs is determined based on total value of the assets they manage.[174] The size of insurance companies is based on annual sales of annuities. The Department requests comments on the appropriateness of the size standard used to evaluate the impact of the proposed exemption on small entities.

In December 2018, there were 985 small-business BDs and 528 SEC-registered, small-business IAs.[175] The Department estimates that approximately 52 percent of these small-businesses will be affected by the proposed exemption.[176] In December 2018, the Department estimates there were approximately 10,840 small state-registered IAs,[177] of which about 1,700

[163] NAIC Suitability in Annuity Transactions Model Regulation, Spring 2020, Section 6.C.(2)(i), available at *https://www.naic.org/store/free/MDL-275.pdf.* (The same requirement is found in the previous NAIC Suitability in Annuity Transactions Model Regulation (2010), section 6.F.(1)(f).)

[164] Burden hours are calculated by multiplying the estimated number of each firm type by the estimated time it will take each firm to review the report and certify the exemption.

[165] The hourly cost burden is calculated by multiplying the burden hours for reviewing the report and certifying the exemption requirement by the hourly wage of a legal professional.

[166] Burden hours are calculated by multiplying the estimated number of each firm type by the estimated time it will take each firm to review the report and certify the exemption.

[167] The hourly cost burden is calculated by multiplying the burden hours for reviewing the report and certifying the exemption requirement by the hourly wage of a financial professional.

[168] 5 U.S.C. 601 *et seq.*

[169] 5 U.S.C. 601(2), 603(a); *see also* 5 U.S.C. 551.

[170] 13 CFR 121.201.

[171] 15 U.S.C. 631 *et seq.*

[172] The Department consulted with the Small Business Administration Office of Advocacy in making this determination as required by 5 U.S.C. 603(c).

[173] 17 CFR parts 230, 240, 270, and 275, *https://www.sec.gov/rules/final/33-7548.txt.*

[174] Due to lack of available data, the Department includes state-registered IAs managing assets less than $30 million as small entities in this analysis.

[175] *See Form CRS Relationship Summary; Amendments to Form ADV,* 84 FR 33492 (Jul. 12, 2019).

[176] *2019 Investment Management Compliance Testing Survey,* Investment Adviser Association (Jun. 18, 2019), *https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/about/190618_IMCTS_slides_after_webcast_edits.pdf.*

[177] The SEC estimates there were approximately 17,000 state-registered IAs (*see Form CRS Relationship Summary; Amendments to Form ADV,* 84 FR 33492 (Jul. 12, 2019)). The Department estimates that about 64 percent of state-registered IAs manage assets less than $30 million, and it considers such entities small businesses. (*See 2018 Investment Adviser Section Annual Report,* North

are estimated to be affected by the proposed exemption.[178] There were approximately 386 insurers directly writing annuities in 2018,[179] 316 of which the Department estimates are small entities.[180] Table 1 summarizes the distribution of affected entities by size.

TABLE 1—DISTRIBUTION OF AFFECTED ENTITIES BY SIZE

	BDs		SEC-registered IAs		State-registered IAs		Insurers	
Small	985	26%	528	4%	10,840	64%	316	82%
Large	2,779	74%	12,412	96%	6,099	36%	70	18%
Total	3,764	100%	12,940	100%	16,939	100%	386	100%

Projected Reporting, Recordkeeping, and Other Compliance Requirements

As discussed above, the proposed exemption would provide Financial Institutions and Investment Professionals with the flexibility to choose between the new proposed exemption or existing exemptions, depending on their individual needs and business models. Furthermore, the proposed exemption would provide Financial Institutions and Investment Professionals broader, more flexible prohibited transaction relief than is currently available, while safeguarding the interests of Retirement Investors. In this regard, this proposed exemption could present a less burdensome compliance alternative for some Financial Institutions because it would allow them to streamline compliance rather than rely on multiple exemptions with multiple sets of conditions.

This proposed exemption simply provides an additional alternative pathway for Financial Institutions and Investment Professionals to receive compensation and engage in certain transactions that would otherwise be prohibited under ERISA and the Code. Financial Institutions would incur costs to comply with conditions set forth in the proposed exemption. However, the Department believes the costs associated with those conditions would be modest because the proposed exemption was developed in consideration of other regulatory conduct standards. The Department believes that many Financial Institutions and Investment Professionals have already developed, or are in the process of developing, compliance structures for similar regulatory standards. Therefore, the Department does not believe the proposed exemption will impose a significant compliance burden on small entities. For example, the Department estimates that a small entity would incur, on average, an additional $1,000 in compliance costs to meet the conditions of the proposed exemption. These additional costs would represent 0.4 percent of the net capital of BD with $250,000. A BD with less than $500,000 in net capital is generally considered small, according to the SEC.

Duplicate, Overlapping, or Relevant Federal Rules

ERISA and the Code rules governing advice on the investment of retirement assets overlap with SEC rules that govern the conduct of IAs and BDs who advise retail investors. The Department considered conduct standards set by other regulators, such as SEC, state insurance regulators, and FINRA, in developing the proposed exemption, with the goal of avoiding overlapping or duplicative requirements. To the extent the requirements overlap, compliance with the other disclosure or recordkeeping requirements can be used to satisfy the exemption, provided the conditions are satisfied. This would lead to overall regulatory efficiency.

Significant Alternatives Considered

The RFA directs the Department to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities.

External Audit

Under section II(d) of the proposed exemption, Financial Institutions would be required to conduct an annual retrospective review that is reasonably designed to detect and prevent violations of, and achieve compliance with, the Impartial Conduct Standards and the institution's own policies and procedures. The Department considered the alternative of requiring a Financial Institution to engage an independent party to provide an external audit. The Department elected not to propose this requirement to avoid the increased costs this approach would impose. Smaller Financial Institutions may have been disproportionately impacted by such costs, which would have been contrary to the Department's goals of promoting access to investment advice for Retirement Investors. Further, the Department is not convinced that an independent, external audit would yield useful information commensurate with the cost, particularly to small entities. Instead, the proposal requires that Financial Institutions to document their retrospective review, and provide it, and supporting information, to the Department and other regulators within 10 business days of such request.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 [181] requires each federal agency to prepare a written statement assessing the effects of any federal mandate in a proposed or final rule that may result in an expenditure of $100 million or more (adjusted annually for inflation with the base year 1995) in any 1 year by state, local, and tribal governments, in the aggregate, or by the private sector. For purposes of the Unfunded Mandates Reform Act, as well as Executive Order 12875, this proposed exemption does not include any Federal mandate that will result in such expenditures.

Federalism Statement

Executive Order 13132 outlines fundamental principles of federalism. It also requires federal agencies to adhere to specific criteria in formulating and implementing policies that have ''substantial direct effects'' on the states,

American Securities Administrators Association (May 2018), *www.nasaa.org/wp-content/uploads/2018/05/2018-NASAA-IA-Report-Online.pdf.*) Therefore, the Department estimates there were about 10,840 small, state-registered IAs.

[178] Of the small, state-registered IAs, the Department estimates that 16 percent provide advice or services to retirement plans (*see 2019 Investment Adviser Section Annual Report,* North American Securities Administrators Association, (May 2019)).

[179] NAIC estimates that the number of insurers directly writing annuities as of 2018 is 386.

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

[181] Public Law 104–4, 109 Stat. 48 (1995).

the relationship between the national government and states, or on the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that have these federalism implications must consult with state and local officials, and describe the extent of their consultation and the nature of the concerns of state and local officials in the preamble to the final regulation. The Department does not believe this proposed class exemption has federalism implications because it has no substantial direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

General Information

The attention of interested persons is directed to the following:

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

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

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

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

Improving Investment Advice for Workers & Retirees

Section I—Transactions

(a) *In general.* ERISA and the Internal Revenue Code prohibit fiduciaries, as defined, that provide investment advice to Plans and individual retirement accounts (IRAs) from receiving compensation that varies based on their investment advice and compensation that is paid from third parties. ERISA and the Code also prohibit fiduciaries from engaging in purchases and sales with Plans or IRAs on behalf of their own accounts (principal transactions). This exemption permits Financial Institutions and Investment Professionals who provide fiduciary investment advice to Retirement Investors to receive otherwise prohibited compensation and engage in riskless principal transactions and certain other principal transactions (Covered Principal Transactions) as described below. The exemption provides relief from the prohibitions of ERISA section 406(a)(1)(A), (D), and 406(b), and the sanctions imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(A), (D), (E), and (F), if the Financial Institutions and Investment Professionals provide fiduciary investment advice in accordance with the conditions set forth in Section II and are eligible pursuant to Section III, subject to the definitional terms and recordkeeping requirements in Sections IV and V.

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

(1) The receipt of reasonable compensation; and

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

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

(1) The Plan is covered by Title I of ERISA and the Investment Professional, Financial Institution or any affiliate is (A) the employer of employees covered by the Plan, or (B) a named fiduciary or plan administrator with respect to the Plan that was selected to provide advice to the Plan by a fiduciary who is not independent of the Financial Institution, Investment Professional, and their affiliates; or

(2) The transaction is a result of investment advice generated solely by an interactive website in which computer software-based models or applications provide investment advice based on personal information each investor supplies through the website, without any personal interaction or advice with an Investment Professional (*i.e.,* robo-advice);

(3) The transaction involves the Investment Professional acting in a fiduciary capacity other than as an investment advice fiduciary within the meaning of the regulations at 29 CFR 2510.3–21(c)(1)(i) and (ii)(B) or 26 CFR 54.4975–9(c)(1)(i) and (ii)(B) setting forth the test for fiduciary investment advice.

Section II—Investment Advice Arrangement

Section II requires Investment Professionals and Financial Institutions to comply with Impartial Conduct Standards, including a best interest standard, when providing fiduciary investment advice to Retirement Investors. In addition, the exemption requires Financial Institutions to acknowledge fiduciary status under ERISA and/or the Code, and describe in writing the services they will provide and their material Conflicts of Interest. Finally, Financial Institutions must adopt policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards when providing fiduciary investment advice to Retirement Investors and conduct a retrospective review of compliance.

(a) *Impartial Conduct Standards.* The Financial Institution and Investment Professional comply with the following ''Impartial Conduct Standards'':

(1) Investment advice is, at the time it is provided, in the Best Interest of the Retirement Investor. As defined in Section V(a), such advice reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, and does not place

the financial or other interests of the Investment Professional, Financial Institution or any affiliate, related entity, or other party ahead of the interests of the Retirement Investor, or subordinate the Retirement Investor's interests to their own;

(2)(A) The compensation received, directly or indirectly, by the Financial Institution, Investment Professional, their affiliates and related entities for their services does not exceed reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2); and (B) as required by the federal securities laws, the Financial Institution and Investment Professional seek to obtain the best execution of the investment transaction reasonably available under the circumstances; and

(3) The Financial Institutions' and its Investment Professionals' statements to the Retirement Investor about the recommended transaction and other relevant matters are not, at the time statements are made, materially misleading.

(b) *Disclosure.* Prior to engaging in a transaction pursuant to this exemption, the Financial Institution provides the following disclosure to the Retirement Investor:

(1) A written acknowledgment that the Financial Institution and its Investment Professionals are fiduciaries under ERISA and the Code, as applicable, with respect to any fiduciary investment advice provided by the Financial Institution or Investment Professional to the Retirement Investor; and

(2) A written description of the services to be provided and the Financial Institution's and Investment Professional's material Conflicts of Interest that is accurate and not misleading in all material respects.

(c) *Policies and Procedures.*

(1) The Financial Institution establishes, maintains and enforces written policies and procedures prudently designed to ensure that the Financial Institution and its Investment Professionals comply with the Impartial Conduct Standards in connection with covered fiduciary advice and transactions.

(2) Financial Institutions' policies and procedures mitigate Conflicts of Interest to the extent that the policies and procedures, and the Financial Institution's incentive practices, when viewed as a whole, are prudently designed to avoid misalignment of the interests of the Financial Institution and Investment Professionals and the interests of Retirement Investors in connection with covered fiduciary advice and transactions.

(3) The Financial Institution documents the specific reasons that any recommendation to roll over assets from a Plan to another Plan or IRA as defined in Code section 4975(e)(1)(B) or (C), from an IRA as defined in Code section 4975(e)(1)(B) or (C) to a Plan, from an IRA to another IRA, or from one type of account to another (*e.g.,* from a commission-based account to a fee-based account) is in the Best Interest of the Retirement Investor.

(d) *Retrospective Review.*

(1) The Financial Institution conducts a retrospective review, at least annually, that is reasonably designed to assist the Financial Institution in detecting and preventing violations of, and achieving compliance with, the Impartial Conduct Standards and the policies and procedures governing compliance with the exemption.

(2) The methodology and results of the retrospective review are reduced to a written report that is provided to the Financial Institution's chief executive officer (or equivalent officer) and chief compliance officer (or equivalent officer).

(3) The Financial Institution's chief executive officer (or equivalent officer) certifies, annually, that:

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

(B) The Financial Institution has in place policies and procedures prudently designed to achieve compliance with the conditions of this exemption; and

(C) The Financial Institution has in place a prudent process to modify such policies and procedures as business, regulatory and legislative changes and events dictate, and to test the effectiveness of such policies and procedures on a periodic basis, the timing and extent of which is reasonably designed to ensure continuing compliance with the conditions of this exemption.

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

(5) The Financial Institution retains the report, certification, and supporting data for a period of six years and makes the report, certification, and supporting data available to the Department, within 10 business days of request.

Section III—Eligibility

(a) *General.* Subject to the timing and scope provisions set forth in subsection (b), an Investment Professional or Financial Institution will be ineligible to rely on the exemption for 10 years following:

(1) A conviction of any crime described in ERISA section 411 arising out of such person's provision of investment advice to Retirement Investors, unless, in the case of a Financial Institution, the Department grants a petition pursuant to subsection (c)(1) below that the Financial Institution's continued reliance on the exemption would not be contrary to the purposes of the exemption; or

(2) Receipt of a written ineligibility notice issued by the Office of Exemption Determinations for (A) engaging in a systematic pattern or practice of violating the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; (B) intentionally violating the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; or (C) providing materially misleading information to the Department in connection with the Financial Institution's conduct under the exemption; in each case, as determined by the Director of the Office of Exemption Determinations pursuant to the process described in subsection (c).

(b) *Timing and Scope of Ineligibility.*

(1) An Investment Professional shall become ineligible immediately upon (A) the date of the trial court's conviction of the Investment Professional of a crime described in subsection (a)(1), regardless of whether that judgment remains under appeal, or (B) the date of the Office of Exemption Determinations' written ineligibility notice described in subsection (a)(2), issued to the Investment Professional.

(2) A Financial Institution shall become ineligible following (A) the 10th business day after the conviction of the Financial Institution or another Financial Institution in the same Control Group of a crime described in subsection (a)(1) regardless of whether that judgment remains under appeal, or, if the Financial Institution timely submits a petition described in subsection (c)(1) during that period, upon the date of the Office of Exemption Determination's written denial of the petition, or (B) the Office of Exemption Determinations' written ineligibility notice, described in subsection (a)(2), issued to the Financial Institution or another Financial Institution in the same Control Group.

(3) Control Group. A Financial Institution is in a Control Group with another Financial Institution if, directly or indirectly, the Financial Institution owns at least 80 percent of, is at least 80 percent owned by, or shares an 80 percent or more owner with, the other Financial Institution. For purposes of

this provision, if the Financial Institutions are not corporations, ownership is defined to include interests in the Financial Institution such as profits interest or capital interests.

(4) Winding Down Period. Any Financial Institution that is ineligible will have a one-year winding down period during which relief is available under the exemption subject to the conditions of the exemption other than eligibility. After the one-year period expires, the Financial Institution may not rely on the relief provided in this exemption for any additional transactions.

(c) *Opportunity to be heard.*

(1) Petitions under subsection (a)(1).

(A) A Financial Institution that has been convicted of a crime may submit a petition to the Department informing the Department of the conviction and seeking a determination that the Financial Institution's continued reliance on the exemption would not be contrary to the purposes of the exemption. Petitions must be submitted, within 10 business days after the date of the conviction, to the Director of the Office of Exemption Determinations by email at *e-OED@dol.gov,* or by certified mail at Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Suite 400, Washington, DC 20210.

(B) Following receipt of the petition, the Department will provide the Financial Institution with the opportunity to be heard, in person or in writing or both. The opportunity to be heard in person will be limited to one in-person conference unless the Department determines in its sole discretion to allow additional conferences.

(C) The Department's determination as to whether to grant the petition will be based solely on its discretion. In determining whether to grant the petition, the Department will consider the gravity of the offense; the relationship between the conduct underlying the conviction and the Financial Institution's system and practices in its retirement investment business as a whole; the degree to which the underlying conduct concerned individual misconduct, or, alternately, corporate managers or policy; how recent was the underlying lawsuit; remedial measures taken by the Financial Institution upon learning of the underlying conduct; and such other factors as the Department determines in its discretion are reasonable in light of the nature and purposes of the exemption. The Department will provide a written determination to the Financial Institution that articulates the basis for the determination.

(2) Written ineligibility notice under subsection (a)(2). Prior to issuing a written ineligibility notice, the Director of the Office of Exemption Determinations will issue a written warning to the Investment Professional or Financial Institution, as applicable, identifying specific conduct implicating subsection (a)(2), and providing a six-month opportunity to cure. At the end of the six-month period, if the Department determines that the conduct persists, it will provide the Investment Professional or Financial Institution with the opportunity to be heard, in person or in writing or both, before the Director of the Office of Exemption Determinations issues the written ineligibility notice. The opportunity to be heard in person will be limited to one in-person conference unless the Department determines in its sole discretion to allow additional conferences. The written ineligibility notice will articulate the basis for the determination that the Investment Professional or Financial Institution engaged in conduct described in subsection (a)(2).

(d) A Financial Institution or Investment Professional that is ineligible to rely on this exemption may rely on a statutory prohibited transaction exemption if one is available or seek an individual prohibited transaction exemption from the Department. To the extent an applicant seeks retroactive relief in connection with an exemption application, the Department will consider the application in accordance with its retroactive exemption policy as set forth in 29 CFR 2570.35(d). The Department may require additional prospective compliance conditions as a condition of retroactive relief.

Section IV—Recordkeeping

(a) The Financial Institution maintains for a period of six years records demonstrating compliance with this exemption and makes such records available, to the extent permitted by law including 12 U.S.C. 484, to the following persons or their authorized representatives:

(1) Any authorized employee of the Department;

(2) Any fiduciary of a Plan that engaged in an investment transaction pursuant to this exemption;

(3) Any contributing employer and any employee organization whose members are covered by a Plan that engaged in an investment transaction pursuant to this exemption; or

(4) Any participant or beneficiary of a Plan, or IRA owner that engaged in an investment transaction pursuant to this exemption.

(b)(1) None of the persons described in subsection (a)(2)–(4) above are authorized to examine records regarding a recommended transaction involving another Retirement Investor, privileged trade secrets or privileged commercial or financial information of the Financial Institution, or information identifying other individuals.

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

Section V—Definitions

(a) Advice is in a Retirement Investor's ''Best Interest'' if such advice reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, and does not place the financial or other interests of the Investment Professional, Financial Institution or any affiliate, related entity, or other party ahead of the interests of the Retirement Investor, or subordinate the Retirement Investor's interests to their own.

(b) A ''Conflict of Interest'' is an interest that might incline a Financial Institution or Investment Professional—consciously or unconsciously—to make a recommendation that is not in the Best Interest of the Retirement Investor.

(c) A ''Covered Principal Transaction'' is a principal transaction that:

(1) For sales to a Plan or IRA:

(A) Involves a U.S. dollar denominated debt security issued by a U.S. corporation and offered pursuant to a registration statement under the Securities Act of 1933; a U.S. Treasury Security; a debt security issued or guaranteed by a U.S. federal government agency other than the U.S. Department of Treasury; a debt security issued or guaranteed by a government-sponsored enterprise; a municipal security; a certificate of deposit; an interest in a Unit Investment Trust; or any investment permitted to be sold by an investment advice fiduciary to a Retirement Investor under an individual exemption granted by the Department after the effective date of this exemption that includes the same conditions as this exemption, and

(B) If the recommended investment is a debt security, the security is recommended pursuant to written policies and procedures adopted by the Financial Institution that are reasonably designed to ensure that the security, at the time of the recommendation, has no greater than moderate credit risk and sufficient liquidity that it could be sold at or near carrying value within a reasonably short period of time; and

(2) For purchases from a Plan or IRA, involves any securities or investment property.

(d) ''Financial Institution'' means an entity that is not disqualified or barred from making investment recommendations by any insurance, banking, or securities law or regulatory authority (including any self-regulatory organization), that employs the Investment Professional or otherwise retains such individual as an independent contractor, agent or registered representative, and that is:

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

(2) A bank or similar financial institution supervised by the United States or a state, or a savings association (as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1));

(3) An insurance company qualified to do business under the laws of a state, that: (A) Has obtained a Certificate of Authority from the insurance commissioner of its domiciliary state which has neither been revoked nor suspended; (B) has undergone and shall continue to undergo an examination by an independent certified public accountant for its last completed taxable year or has undergone a financial examination (within the meaning of the law of its domiciliary state) by the state's insurance commissioner within the preceding 5 years, and (C) is domiciled in a state whose law requires that an actuarial review of reserves be conducted annually and reported to the appropriate regulatory authority;

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

(5) An entity that is described in the definition of Financial Institution in an individual exemption granted by the Department after the date of this exemption that provides relief for the receipt of compensation in connection with investment advice provided by an investment advice fiduciary under the same conditions as this class exemption.

(e) ''*Individual Retirement Account*'' or ''*IRA*'' means any account or annuity described in Code section 4975(e)(1)(B) through (F).

(f) ''*Investment Professional*'' means an individual who:

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

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

(3) Satisfies the federal and state regulatory and licensing requirements of insurance, banking, and securities laws (including self-regulatory organizations) with respect to the covered transaction, as applicable, and is not disqualified or barred from making investment recommendations by any insurance, banking, or securities law or regulatory authority (including any self-regulatory organization).

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

(h) ''*Retirement Investor*'' means—

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

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

(3) A fiduciary of a Plan or IRA.

Jeanne Klinefelter Wilson,

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

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