DEPARTMENT OF LABOR
Employee Benefits Security Administration
29 CFR Part 2510
RIN 1210–AC02
Retirement Security Rule: Definition of an Investment Advice Fiduciary

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Proposed rule.

SUMMARY: This document contains a proposed amendment to the regulation defining when a person renders “investment advice for a fee or other compensation, direct or indirect” with respect to any moneys or other property of an employee benefit plan, for purposes of the definition of a “fiduciary” in the Employee Retirement Income Security Act of 1974 (Title I of ERISA or the Act). The proposal also would amend the parallel regulation defining for purposes of Title II of ERISA, a “fiduciary” of a plan defined in Internal Revenue Code (Code) section 4975, including an individual retirement account. The Department also is publishing elsewhere in today’s Federal Register proposed amendments to Prohibited Transaction Exemption 2020–02 (Improving Investment Advice for Workers & Retirees) and to several other existing administrative exemptions from the prohibited transaction rules applicable to fiduciaries under Title I and Title II of ERISA.

DATES:

Public Comments. Comments are due on or before January 2, 2024.

Public Hearing. The Department anticipates holding a public hearing approximately 45 days following the date of publication in the Federal Register. Specific information regarding the date, location, and submission of requests to testify will be published in the Federal Register.

ADDRESSES: You may submit written comments, identified by RIN 1210–AC02, by any of the following methods:


Instructions: All submissions must include the agency name and Regulatory Identifier Number (RIN) for this rulemaking. If you submit comments electronically, do not submit paper copies.

Warning: Do not include any personally identifiable information or confidential business information that you do not want publicly disclosed. Comments are public records posted on the internet as received and can be retrieved by most internet search engines.

Docket: For access to the docket to read background documents, including the plain-language summary of the proposed rule of not more than 100 words in length required by the Providing Accountability Through Transparency Act of 2023, or comments, go to the Federal eRulemaking Portal at https://www.regulations.gov. Comments will be available to the public, without charge, online at http://www.regulations.gov and http://www.dol.gov/agencies/ebsa and at the Public Disclosure Room, Employee Benefits Security Administration, Room N–1513, 200 Constitution Ave, NW, Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT:

• For questions regarding the proposed rule: contact Luisa Grillo-Chope, Office of Regulations and Interpretations, Employee Benefits Security Administration (EBSA), 202–693–8510. (Not a toll-free number).

• For questions regarding the prohibited transaction exemptions: contact Susan Wilker, Office of Exemption Determinations, EBSA, 202–693–8540. (Not a toll-free number).

• For questions regarding the Regulatory Impact Analysis: contact James Butikofer, Office of Research and Analysis, EBSA, 202–693–8434. (Not a toll-free number).

• For questions regarding the

Customer Service Information:

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

SUPPLEMENTARY INFORMATION:

A. Executive Summary

The Department of Labor is proposing a new regulatory definition of an investment advice fiduciary for purposes of Title I and Title II of the Employee Retirement Income Security Act (ERISA). As compared to the existing regulatory definition, which dates to 1975, the proposal better reflects the text and the purposes of the statute and better protects the interests of retirement investors, consistent with the mission of the Department’s Employee Benefits Security Administration to ensure the security of the retirement, health, and other workplace-related benefits of America’s workers and their families.

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

• The person either directly or indirectly (e.g., through or together with any affiliate) has discretionary authority or control, whether or not pursuant to an agreement, arrangement, or understanding, with respect to purchasing or selling securities or other investment property for the retirement investor;

• The person either directly or indirectly (e.g., through or together with any affiliate) makes investment recommendations to investors on a regular basis as part of their business and the recommendation is provided under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor’s best interest; or

• The person making the recommendation represents or acknowledges that they are acting as a fiduciary when making investment recommendations.

The proposal is designed to ensure that ERISA’s fiduciary standards uniformly apply to all advice that retirement investors receive concerning investment of their retirement assets in a way that ensures that retirement investors’ reasonable expectations are honored when receiving advice from financial professionals who hold themselves out as trusted advice providers. The Department’s proposal fills an important gap in those advice relationships where advice is not currently required to be provided in the retirement investor’s best interest, and the investor may not be aware of that fact.

Together with proposed amendments to administrative exemptions from the prohibited transaction rules applicable to fiduciaries under Title I and Title II of ERISA published elsewhere in this issue of the Federal Register, the
Proposal is intended to protect the interests of retirement investors by requiring investment advice providers to adhere to stringent conduct standards and mitigate their conflicts of interest. The proposals’ compliance obligations are generally consistent with the best interest obligations set forth in the Securities and Exchange Commission’s (SEC’s) Regulation Best Interest and its Commission Interpretation Regarding Standard of Conduct for Investment Advisers (SEC Investment Adviser Interpretation), each released in 2019. The Department anticipates that the most significant benefits of the proposals will stem from the uniform application of the ERISA fiduciary standard and exemption conditions to investment advice to retirement investors. Under the proposals, advice providers would be subject to a common fiduciary standard that would reduce retirement investor exposure to conflicted advice that erodes investment returns and would be obligated to adhere to protective conflict-mitigation requirements.1 Requiring advice providers to compete under a common fiduciary standard will be especially beneficial with respect to those transactions that currently are not uniformly covered by fiduciary protection provisions consistent with ERISA’s high standards, including recommendations to roll over assets from a workplace retirement plan to an IRA (e.g., in those cases in which the advice provider is not subject to Federal securities law standards and, as is often the case, does not have an ongoing and preexisting relationship with the customer); investment recommendations with respect to many commonly purchased retirement annuities, such as fixed index annuities; and investment recommendations to plan fiduciaries.

B. Background

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

ERISA2 is a “comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans.”3 Under the statutory framework, Title I of ERISA imposes duties and restrictions on individuals who are “fiduciaries” with respect to employee benefit plans. In particular, fiduciaries to Title I plans must adhere to duties of prudence and loyalty. ERISA section 404 provides that Title I plan fiduciaries must act with the “care, skill, prudence, and diligence under the circumstances then prevailing that a prudent [person] acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims,” and they also must discharge their duties with respect to a plan “solely in the interest of the participants and beneficiaries.”4

These fiduciary duties, which are rooted in the common law of trusts, are reinforced by prohibitions against transactions involving conflicts of interest because of the danger such transactions pose to plans and their participants. The prohibited transaction provisions of ERISA, including Title II of ERISA which is codified in the Internal Revenue Code (Code), “categorically bar[]” plan fiduciaries from engaging in transactions deemed “likely to injure the pension plan.”5 These prohibitions broadly forbid a fiduciary from “deal[ing] with the assets of the plan in his own interest or for his own account,” and “receive[ing] any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.”6 Congress also gave the Department authority to grant conditional administrative exemptions from the prohibited transaction provisions, but only if the Department finds that the exemption is (1) administratively feasible for the Department, (2) in the interests of the plan and of its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries of such plan.

Title II of ERISA, codified in the Code,7 governs the conduct of fiduciaries to plans defined in Code section 4975(e)(1), which includes IRAs.8 Some plans defined in Code section 4975(e)(1) are also covered by Title I of ERISA, but the definitions of such plans are not identical. Although Title II, as codified in the Code, does not directly impose specific duties of prudence and loyalty on fiduciaries as in ERISA, it prohibits fiduciaries from engaging in conflicted transactions on many of the same terms as Title I.9 Under the Reorganization Plan No. 4 of 1978, which Congress subsequently ratified in 1984,10 the Department was generally granted authority to interpret the fiduciary definition and issue administrative exemptions from the prohibited transaction provisions in Code section 4975.11

Many of the protections, duties, and liabilities in both Title I and Title II of ERISA hinge on fiduciary status; therefore, the determination of who is a “fiduciary” is of central importance. ERISA includes a statutory definition of a fiduciary at section 3(21)(A), which provides that a person is a fiduciary with respect to a plan to the extent the person (i) exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) has any discretionary authority or discretionary responsibility in the administration of such plan.12 The same

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1 The references in this document to a “fiduciary” are intended to mean an ERISA fiduciary unless otherwise stated.
7 ERISA section 406(a), 29 U.S.C. 1106(a).
8 This proposal includes one reference to the Code in the context of discussions of Title II of ERISA involving specific provisions codified in the Code. The Department understands that references to the Code are useful but emphasizes that both Title I and Title II are covered by the same definition of fiduciary and the same general framework of prohibited transactions, and that, under both Title I and Title II, fiduciaries must comply with the conditions of an available prohibited transaction exemption in order to engage in an otherwise prohibited transaction.
9 26 U.S.C. 4975(c)(1); cf. id. at 4975(f)(5), which defines “correction” with respect to prohibited transactions as placing a plan or an IRA in a financial position not worse than it would have been if the person had acted “under the highest fiduciary standards.”
definition of a fiduciary is in Code section 4975(e)(3).

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

In 1975, shortly after ERISA was enacted, the Department issued a regulation at 29 CFR 2510.3–21(c)(1) that defined the circumstances under which a person renders “investment advice” to an employee benefit plan within the meaning of section 3(21)(A)(ii) of ERISA, such that said person would be a fiduciary under ERISA. The regulation narrowed the plain and expansive language of section 3(21)(A)(ii), creating a five-part test that must be satisfied in order for a person to be considered as a fiduciary by reason of rendering investment advice. Under the five-part test, a person is a fiduciary only if they: (1) render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing, or selling securities or other property (2) on a regular basis (3) pursuant to a mutual agreement, arrangement, or understanding with the plan or a plan fiduciary that (4) the advice will serve as a primary basis for investment decisions with respect to plan assets, and that (5) the advice will be individualized based on the particular needs of the plan. The Department of the Treasury issued a virtually identical regulation under Code section 4975(e)(3), at 26 CFR 54.4975–9(c)(1), which applies to plans defined in Code section 4975.

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

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

Recently, other regulators have recognized the need for change in the regulation of investment recommendations and have imposed enhanced conduct standards on financial professionals that make investment recommendations, including broker-dealers and insurance agents. As a result, the regulatory landscape today is very different than it was even five years ago. In 2010, the SEC adopted Regulation Best Interest, which established an enhanced best interest standard of conduct applicable to broker-dealers when making a recommendation of any securities transaction or investment strategy involving securities to retail customers. The SEC also issued its SEC Investment Adviser Interpretation, which addressed the conduct standards applicable to investment advisers under the Investment Advisers Act of 1940 (Advisers Act). As the SEC has repeatedly stated, “key elements of the standard of conduct that applies to broker-dealers under Regulation Best Interest will be substantially similar to key elements of the standard of conduct that applies to investment advisers pursuant to their fiduciary duty under the Advisers Act.” In this connection, the SEC has also stressed that Regulation Best Interest “aligns the standard of conduct with retail customers’ reasonable expectations.”

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

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16 40 FR 50840 (Oct. 31, 1975). The issuance of this regulation pre-dated The Reorganization Plan
The Department began the process of reexamining the regulatory definition of an investment advice fiduciary under Title I and Title II of ERISA in 2010. After issuing two notices of proposed rules, conducting multiple days of public hearings, and over six years of deliberations, the Department replaced the 1975 regulation with a new regulatory definition (the “2016 Final Rule”), which applied under Title I and Title II of ERISA. In the preamble to the 2016 Final Rule, the Department noted that the 1975 five-part test had been created in a very different context and investment advice marketplace. The Department expressed concern that specific elements of the five-part test— which are not found in the text of Title I or Title II of ERISA—worked to defeat retirement investors’ legitimate expectations when they received investment advice from trusted advice providers in the modern marketplace for financial advice.

The Department identified the “regular basis” element in the five-part test as a particularly important example of the 1975 regulation’s shortcomings. The Department stated that the requirement that advice be provided on a “regular basis” had failed to draw a sensible line between fiduciary and non-fiduciary conduct and had undermined the Act’s protective purpose. The Department pointed to examples of transactions in which a discrete instance of advice can be of critical importance to the plan, such as a one-time purchase of a group annuity to cover all of the benefits promised to substantially all of a plan’s participants for the rest of their lives when a defined benefit plan terminates, or a plan’s expenditure of hundreds of millions of dollars on a single real estate transaction based on the recommendation of a financial adviser hired for purposes of that one transaction.

The Department likewise expressed concern that the requirements in the 1975 regulation of a “mutual agreement, arrangement, or understanding” that advice would serve as “a primary basis for the investment” should give rise to ERISA fiduciary status, even as investors marketed themselves as providing investment advice as a primary basis for the investment to ensure that it properly and uniformly protects the financial interests of retirement investors as Congress intended. As reflected in this regulatory package, after evaluation of the types of investment advisory relationships that should give rise to ERISA fiduciary status, the Department has concluded that it is appropriate to revise the regulatory definition of an investment advice fiduciary under Title I and Title II of ERISA in the manner set forth herein.

Prior Rulemakings

The Department began the process of reexamining the regulatory definition of an investment advice fiduciary under Title I and Title II of ERISA in 2010. After issuing two notices of proposed rules, conducting multiple days of public hearings, and over six years of deliberations, the Department replaced the 1975 regulation with a new regulatory definition (the “2016 Final Rule”), which applied under Title I and Title II of ERISA. In the preamble to the 2016 Final Rule, the Department noted that the 1975 five-part test had been created in a very different context and

22 This refers to the requirement in the 1975 regulation that, in order for fiduciary status to attach, investment advice must be provided by the person “on a regular basis.” 29 CFR 2510.1-21(c)(1)(ii)(B).

23 This defines “cash compensation” as “any discount, concession, fee, service fee, commission, loan, override, or cash benefit received by a producer in connection with the recommendation or sale of an annuity from an insurer, intermediary, or directly from the consumer.” (Emphasis added)
analysis demonstrating that investment advice providers are compensated in ways that create conflicts of interest, which can bias investment advice and erode plan and IRA investment results. The Department noted that many of the consultants and advisers who provide investment-related advice and recommendations received compensation from the financial institutions whose investment products they recommend, and that this can give the consultants and advisers a strong bias, conscious or unconscious, to favor investments that provide them greater compensation rather than those that may be most appropriate for the retirement investors. The Department also found that consolidation of the financial services industry and developments in compensation arrangements multiplied the opportunities for self-dealing and reduced the transparency of fees. Most significantly, the Department explained in its analysis that, in the absence of the 2016 Final Rule, the underperformance associated with conflicts of interest in the mutual funds segment alone could have cost IRA investors between $95 billion and $189 billion over the following 10 years and between $202 billion and $404 billion over the following 20 years. While these projected losses were substantial, they represented only a portion of what IRA investors stood to lose as a result of conflicted investment advice.

The Department expected that compliance with the 2016 Final Rule would deliver large gains for retirement investors by reducing these losses. The Department cited evidence that holding broker-dealer representatives to fiduciary standards at the State level does not impair access to their services. Additionally, the Department noted that financial services firms already were moving toward more fee-based advice models, considering flatter compensation models, and integrating technology. The Department anticipated that the rule would accelerate these types of innovations for the benefit of plan and IRA investors.

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

One main issue highlighted in the 2016 Final Rule involved the protection of retirement investors in the context of recommendations to roll over assets from workplace retirement plans to IRAs. As the Department noted, decisions to take a benefit distribution or engage in rollover transactions are among the most, if not the most, important financial decisions that plan participants and beneficiaries and IRA owners and beneficiaries are called upon to make. The Department explained that when an individual is a participant in a workplace retirement plan, their employer or other plan sponsor has both the incentive and the fiduciary duty to facilitate sound investment choices, while in an IRA, both good and bad investment choices are more numerous, and investment advice providers often operate under conflicts of interest. The Department illustrated the consequence of these rollovers to both individuals and investment advice providers, by pointing out that rollovers from employee benefit plans to IRAs were expected to approach $2.4 trillion cumulatively from 2016 through 2020. Investment advice providers have a strong economic incentive to recommend that investors roll over assets into one of their institutions’ IRAs, whether from a plan or from an IRA account at another financial institution, or even between different account types. The 2016 Final Rule also specifically superseded a 2005 Advisory Opinion, 2005–23A (commonly known as the Deseret Letter) which had opined that it is not fiduciary investment advice under Title I of ERISA to make a recommendation as to distribution options from an employee benefit plan, even if accompanied by a recommendation as to where the distribution would be invested.

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

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

3. Litigation Over the 2016 Rulemaking

The 2016 Final Rule and related new and amended exemptions (collectively, the 2016 Rulemaking) was challenged in multiple lawsuits. In National Association for Fixed Annuities v. Perez, a district court in the District of

33 See 81 FR 20946, 20964 (Apr. 8, 2016).
34 Id. at 20949 fn. 7 (citing Cerulli Associates, “U.S. Retirement Markets 2015”).
35 Id.
36 81 FR 21002 (Apr. 8, 2016).
37 81 FR 21009 (Apr. 8, 2016).
38 81 FR 21139 (Apr. 8, 2016); 81 FR 21147 (Apr. 8, 2016); 81 FR 21181 (Apr. 8, 2016); 81 FR 21208 (Apr. 8, 2016).
Columbia upheld the 2016 Rulemaking in the context of a broad challenge on multiple grounds. Among other things, the court found that the 2016 Final Rule comports with both the text and the purpose of ERISA, and it noted “if anything, it is the five-part test—and not the current rule—that is difficult to reconcile with the statutory text. Nothing in the phrase ‘renders investment advice’ suggests that the statute applies only to advice provided ‘on a regular basis.’” Relatedly, in Market Synergy v. United States Department of Labor, the U.S. Court of Appeals for the Tenth Circuit affirmed a district court’s decision similarly upholding the 2016 Rulemaking as it applied to fixed indexed annuities.

On March 15, 2018, however, the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) overturned a district court’s decision upholding the validity of the 2016 Final Rule and vacated the 2016 Rulemaking in toto, in Chamber of Commerce v. United States Department of Labor (Chamber). The Fifth Circuit held that the 2016 Final Rule conflicted with ERISA section 3(21)(A)(ii) and Code section 4975[e][3][B]. Specifically, the Fifth Circuit found that the 2016 Final Rule swept too broadly and extended to relationships that lacked “trust and confidence,” which the court stated were hallmarks of the common law fiduciary relationship that Congress intended to incorporate into the statutory definitions. The court concluded that “all relevant sources indicate that Congress codified the touchstone of common law fiduciary status—the parties’ underlying relationship of trust and confidence—and nothing in the statute ‘requires’ departing from the touchstone.”

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

4. Field Assistance Bulletin No. 2018–02

In response to the Fifth Circuit’s vacature of the 2016 Rulemaking, on May 7, 2018, the Department issued Field Assistance Bulletin 2018–02, Temporary Enforcement Policy on Prohibited Transactions Rules Applicable to Investment Advice Fiduciaries (FAB 2018–02). The Department noted that, pending further guidance, the Department would not pursue prohibited transaction claims against fiduciaries who were working diligently and in good faith to comply with the Impartial Conduct Standards for transactions that would have been exempted in the BIC Exemption and Principal Transactions Exemption, or treat such fiduciaries as violating the applicable prohibited transaction rules. In adopting the temporary enforcement policy, the Department cited uncertainty about fiduciary obligations and the scope of exemptive relief following the court’s opinion that could disrupt existing investment advice arrangements to the detriment of retirement plans, retirement investors, and financial institutions, as well as the significant resources some financial institutions had devoted towards compliance with the BIC Exemption and the Principal Transactions Exemption.

5. Subsequent Actions by the Department

On July 7, 2020, the Department proposed a new prohibited transaction class exemption under Title I and Title II of ERISA for investment advice fiduciaries with respect to employee benefit plans and IRAs, called “Improving Investment Advice for Workers & Retirees.” The proposal stated it was in response to informal industry feedback seeking a permanent administrative class exemption based on FAB 2018–02. On the same day, the Department issued a technical amendment to the Code of Federal Regulations (CFR) reinserting the 1975 regulation, reflecting the Fifth Circuit’s vacature of the 2016 Final Rule. The technical amendment also reinserted into the CFR Interpretive Bulletin 96–1 (IB 96–1) relating to participant investment education, which had been removed and largely incorporated into the text of the 2016 Final Rule.

Additionally, on December 18, 2020, the Department updated its website to reflect the fact that the pre-existing prohibited transaction exemptions that had been amended in the 2016 Rulemaking had been restored to their pre-amendment form, and also to reflect that the Department had withdrawn the Deseret Letter.

46 85 FR 40834 (July 7, 2020).
47 85 FR 40835.
48 85 FR 40839 (July 7, 2020).
Investment Advice for Workers & Retirees exemption as PTE 2020–02. The exemption provides relief that is similar in scope to the BIC Exemption and the Principal Transactions Exemption, but it does not include contract or warranty provisions. The exemption expressly covers prohibited transactions resulting from both rollover advice and advice on how to invest assets within a plan or IRA, and imposes new conditions on investment advice fiduciaries providing such advice. In particular, PTE 2020–02 mirrors the core of the BIC and Principal Transaction exemptions’ requirements of best interest standards of conduct and policies and procedures to ensure the advice is provided consistent with those standards.

The preamble to PTE 2020–02 also included the Department’s interpretation of when advice to roll over assets from an employee benefit plan to an IRA would constitute fiduciary investment advice under the 1975 regulation’s five-part test. As in the 2016 Rulemaking, the Department again made clear in 2020 that rollover recommendations were a central concern in the regulation of fiduciary investment advice. Accordingly, the Department emphasized the importance to a retirement investor of the rollover decision, as well as the fact that investment advice providers may have a strong economic incentive to recommend that investors roll over assets into one of their institutions’ IRAs.

The preamble interpretation confirmed the Department’s continued view that the Deseret Letter was incorrect, and that a recommendation to roll assets out of a Title I Plan is advice with respect to moneys or other property of the plan and, if provided by a person who satisfies all of the requirements of the regulatory test, constitutes fiduciary investment advice. The preamble interpretation also discussed when a recommendation to roll over assets from an employee benefit plan to an IRA would satisfy the “regular basis” requirement. Additionally, the preamble set forth the Department’s interpretation of the 1975 regulation’s requirement of “a mutual agreement, arrangement, or understanding” that the investment advice will serve as “a primary basis for investment decisions.” In April 2021, the Department issued Frequently Asked Questions (FAQs) that, among other things, summarized aspects of the preamble interpretation.

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

6. Other Regulatory Developments

Since the vacatur of the Department’s 2016 Rulemaking, other regulators have considered and adopted enhanced standards of conduct for investment professionals as a method of addressing, among other things, conflicts of interest. At the Federal level, on June 5, 2019, the SEC finalized a regulatory package relating to conduct standards for broker-dealers and investment advisers. The package included Regulation Best Interest, which established a best interest standard applicable to broker-dealers when making a recommendation of any securities transaction or investment strategy involving securities to retail customers. The SEC also issued its SEC Investment Adviser Interpretation regarding the conduct standards applicable to investment advisers under the Advisers Act. As part of the package, the SEC adopted new Form CRS, which requires registered investment advisers under the Advisers Act and registered broker-dealers to provide retail investors with a short relationship summary with specified information (SEC Form CRS).

According to the SEC, these actions were designed to enhance and clarify the standards of conduct applicable to broker-dealers and investment advisers, help retail investors better understand and compare the services offered and make an informed choice of the relationship best suited to their needs and circumstances, and foster greater consistency in the level of protections provided by each regime, particularly at the point in time that a recommendation is made.

The SEC’s Regulation Best Interest enhanced the broker-dealer standard of conduct “beyond existing suitability obligations.” According to the SEC, this [Align[ed] the standard of conduct with retail customers’ reasonable expectations by requiring broker-dealers, among other things, to: Act in the best interest of the retail customer at the time the recommendation is made, without placing the financial or other interest of the broker-dealer ahead of the interests of the retail customer; and address conflicts of interest by establishing, maintaining, and enforcing policies and procedures reasonably designed to identify and fully and fairly disclose material facts about conflicts of interest, and in instances where [the SEC has] determined that disclosure is insufficient to reasonably address the conflict, to mitigate or, in certain instances, eliminate the conflict.

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

- Understand the potential risks, rewards, and costs associated with the recommendation, and have a reasonable basis to believe that the recommendation could be in the best interest of at least some retail customers;
- Have a reasonable basis to believe that the recommendation is in the best interest of a particular retail customer based on that

58 FR 33939 (July 12, 2019). 59 Form CRS Relationship Summary: Amendments to Form ADV, 84 FR 33492 (July 12, 2019).
57 Regulation Best Interest request, 84 FR 33318, 33321 (July 12, 2019).
56 Ed. at 33318.
54 84 FR 33318 (July 12, 2019).
53 84 FR 33669 (July 12, 2019).
52 84 FR 33318 (July 12, 2019).
50 The SEC’s Regulation Best Interest’s “best interest obligation” includes a Disclosure Obligation, a Care Obligation, a Conflict of Interest Obligation, and a Compliance Obligation. The Care Obligation requires broker-dealers, in making recommendations, to exercise reasonable diligence, care, and skill to: Understand the potential risks, rewards, and costs associated with the recommendation, and have a reasonable basis to believe that the recommendation could be in the best interest of at least some retail customers; Have a reasonable basis to believe that the recommendation is in the best interest of a particular retail customer based on that

emphasized that, “[i]mportantly, regardless of whether a retail investor chooses a broker-dealer or an investment adviser (or both), the retail investor will be entitled to a recommendation (from a broker-dealer) or advice (from an investment adviser) that is in the best interest of the retail investor and that does not place the interests of the firm or the financial professional ahead of the interests of the retail investor.” 64 The SEC also noted that the standard of conduct cannot be satisfied through disclosure alone.65

The best interest standard in the SEC’s Regulation Best Interest applies to broker-dealers and their associated persons when they make a recommendation to a retail customer of any “securities transaction or an investment strategy involving securities (including account recommendations).” According to the SEC, this language encompasses recommendations to roll over or transfer assets in a workplace retirement plan account to an IRA, and recommendations to take a plan distribution.66 However, the SEC also stated that while Regulation Best Interest applies to advice regarding a person’s own retirement account such as a 401(k) account or IRA, it does not cover advice to workplace retirement plans themselves or to their legal representatives when they are receiving advice on the plan’s behalf.67

The SEC Investment Adviser Interpretation, published simultaneously with Regulation Best Interest, reaffirmed and in some cases clarified aspects of the fiduciary duty of an investment adviser under the Investment Advisers Act.68 The SEC stated that “an investment adviser’s fiduciary duty under the Investment Advisers Act comprises both a duty of care and a duty of loyalty.”69 According to the SEC, “[t]his fiduciary duty is based on equitable common law principles and is fundamental to advisers’ relationships with their clients under the Advisers Act.” 70 The fiduciary duty under the Federal securities laws requires an adviser “to adopt the principal’s goals, objectives, or ends.” 71 The SEC stated:

This means the adviser must, at all times, serve the best interest of its client and not subordinate its client’s interest to its own. In other words, the investment adviser cannot place its own interests ahead of the interests of its client. This combination of care and loyalty obligations has been characterized as requiring the investment adviser to act in the “best interest” of its client at all times.72

The SEC further stated, “[t]he investment adviser’s fiduciary duty is broad and applies to the entire adviser-client relationship.”73

The SEC also adopted a new required disclosure of a “Form CRS Relationship Summary,” under which registered investment advisers under the Advisers Act and broker-dealers must provide retail investors with certain information about the nature of their relationship with their financial professional. One of the purposes of the Form CRS is to help retail investors better understand and compare the services and relationships that investment advisers and broker-dealers offer in a way that is distinct from other required disclosures under the Federal securities laws.74 Form CRS also includes a link to a dedicated page on the SEC’s investor education website, Investor.gov, which offers educational information about broker-dealers and investment advisers, and other materials.75

State Legislative and Regulatory Developments

Also, since the vacatur of the Department’s 2016 Rulemaking, there have been legislative and regulatory developments at the State level concerning conduct standards. The Massachusetts Securities Division amended its regulations to apply a fiduciary conduct standard under which broker-dealers and their agents must “[m]ake recommendations and provide investment advice without regard to the financial or any other interest of any party other than the customer.” 76

60 Id. at 33372.
61 Id. at 33476.
63 Regulation Best Interest release, 84 FR 33318, 33320 (July 12, 2019).
64 Id. at 33332.
65 Id. at 33390.
66 Id. at 33337.
67 Id. at 33343–44.
68 84 FR 33669 (July 12, 2019).
69 Id. at 33671 (footnote omitted).
70 Id. at 33670.
71 Id. at 33671.
72 Id. (footnote omitted).
73 Id at 33670. See also id. n 17 citing authorities where the Commission previously recognized the broad scope of section 206 of the Advisers Act in a variety of contexts.
74 84 FR 33492, 33493 (July 12, 2019).
75 Id. SEC staff has since issued guidance on Regulation Best Interest, Form CRS, and related interpretations, including staff bulletins on care obligations, conflicts of interest, and account recommendations for retail investors, which are available at https://www.sec.gov/regulation-best-interest.
The NAIC Model Regulation, updated in 2020, provides that insurance agents must act in the consumer’s “best interest,” as defined by the Model Regulation, when making a recommendation of an annuity, and insurers must establish and maintain a system to supervise recommendations so that the insurance needs and financial objectives of consumers at the time of the transaction are effectively addressed.77 According to the NAIC, as of August 23, 2023, 43 jurisdictions have implemented the revisions to the model regulation.78

The NAIC Model Regulation includes a best interest obligation comprised of a care obligation, a disclosure obligation, a conflict of interest obligation, and a documentation obligation, applicable to an insurance producer.79 If these specific obligations are met, the producer is treated as satisfying the overarching best interest standard as expressed in the NAIC Model Regulation. The care obligation states that the producer, in making a recommendation, must exercise reasonable diligence, care and skill to:

- Know the consumer’s financial situation, insurance needs and financial objectives;
- Understand the available recommendation options after making a reasonable inquiry into options available to the producer;
- Have a reasonable basis to believe the recommended option effectively addresses the consumer’s financial situation, insurance needs and financial objectives . . . .80

Additionally, the obligation to comply with the “best interest” standard is limited to the individual producer, as opposed to the insurer responsible for supervising the producer.

These regulatory changes cover many, but not all, of the assets held by retirement plans. Further, the SEC’s Regulation Best Interest and the NAIC Model Regulation are each limited in important ways in terms of application to advice provided to ERISA plan fiduciaries although this is not the case with the Advisers Act fiduciary obligations. For example, Regulation Best Interest does not cover advice to workplace retirement plans or their representatives (such as an employee of a small business who is a fiduciary of the business’s 401(k) plan).86 The NAIC Model Regulation does not apply to transactions involving contracts used to fund an employee pension or welfare plan covered by ERISA.87 The Department believes that retirement investors and the regulated community are best served by an ERISA fiduciary standard that applies uniformly to all investments that retirement investors may make with respect to their retirement accounts. Amendments to the ERISA regulation are necessary to achieve that result.

7. Coordination With Other Agencies

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

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

As the SEC has adopted regulatory standards for broker-dealers that are

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79 A producer is defined in section 5.L. of the Model Regulation as “a person or entity required to be licensed under the laws of this state to sell, solicit or negotiate insurance, including annuities.” Section 5.L. further provides that the term producer includes an insurer where no producer is involved.
80 NAIC Model Regulation, at section 6(A)(1)(a).
81 Id. at section 6(A)(4).
82 Id. at section 6(A)(1)(a).
83 Id. at section 4(B)(1).
84 Section 6(d) of the Model Regulation provides, “[i]f the requirements under this subsection do not create a fiduciary obligation or relationship and only create a regulatory obligation as established in this regulation, insurers, investment advisers and other fiduciaries, including ERISA fiduciaries, must establish and maintain a system to supervise recommendations for their own retirement accounts. Amendments to the ERISA regulation are necessary to achieve that result.
85 Regulation Best Interest release, 84 FR 33318, 33343–44 (July 12, 2019). Regulation Best Interest would apply, however, to retail customers receiving recommendations for their own retirement accounts.
86 Id.
87 NAIC Model Regulation, at section 4(B)(1).
C. Purpose of the Proposed Rule and Summary of the Major Provisions

1. Purpose of the Proposed Rule

Since the 1975 rule was adopted, developments in retirement savings vehicles and in the investment advice marketplace have altered the way retirement investors interact with investment advice providers. In 1975, retirement plans were primarily defined benefit plans, which were typically managed by sophisticated investment professionals. IRAs were not major market participants and 401(k) plans were not yet in existence. Today, however, plan participants, IRA owners, and their beneficiaries exercise direct authority over their investments, and depend upon a wide range of investment professionals, including broker-dealers, advisers subject to the Advisers Act, insurance agents, and others on how to make complex decisions about the management of retirement assets. These individual investors have far greater responsibility for decisions about their retirement savings than was true in 1975, when investment professionals directly managed plan investments. Individual investors routinely depend on the quality of the advice they receive from financial professionals who commonly hold themselves out as trusted advice providers. Because these professionals have inherent conflicts of interest, however, there is an ever-present danger that the investment advice the retirement investor receives will be driven, not by the best interest of the investor, but by the financial interests of the investment professional or firm whom they depend upon for advice that is in their interest.

Certainly, when an investment professional satisfies all five conditions of the 1975 regulation with respect to a given instance of advice, the investment professional is properly treated as a fiduciary in accordance with the parties’ reasonable expectations of the nature of their relationship. However, the 1975 test, as applied to the current marketplace is underinclusive because it fails to capture many circumstances in which an investor would reasonably believe they were receiving advice from an investment professional who was rendering services to the investor based upon the investor’s best interest. The Department’s experience in the current marketplace is that the five-part test—in particular, the “regular basis” requirement and the requirement of “a mutual agreement, arrangement, or understanding” that the investment advice will serve as “a primary basis for investment decisions”—too often work to defeat legitimate retirement investor expectations of impartial advice and allow some advice relationships to occur where there is no best interest standard.

These components of the five-part test are not found in the statute’s text, and in today’s marketplace, undermine legitimate investor understandings of a professional relationship centered around the investor’s best interest. In other words, there are currently many situations where the retirement investor reasonably expects that their relationship with the advice provider is one in which the investor can (and should) place trust and confidence in the recommendation, yet which are not covered by the current regulation. This proposal attempts to reconcile the regulatory text with the both the reasonable expectations of the retirement investor along with the statutory text and purpose.

The proposed revised definition of an investment advice fiduciary under ERISA, as discussed in detail below, is consistent with the express text of the statutory definition and better protects the interests of retirement investors. The proposal comports with the broad language and protective purposes of the statute, while at the same time limiting the treatment of recommendations as ERISA fiduciary advice to those objective circumstances in which a retirement investor would reasonably believe that they can rely upon the advice as rendered by an investment professional who is acting in the investor’s best interest, rather than merely promoting their own competing financial interests at the investor’s expense.

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

While Congress enacted ERISA to give special protections to retirement investors based on the central importance of retirement assets to individuals' financial security and the broader marketplace, ERISA's regulation of advice has failed to keep up with changes in the marketplace, in marked contrast to other regulatory regimes. As noted above, the Department's proposal follows the acts of other regulators who have similarly recognized the need to change the standards applicable to investment professionals to reflect current realities. It is appropriate that the Department, too, update its regulation to reflect the current marketplace, and to ensure that ERISA and the Code serve their protective purposes. When Congress enacted ERISA, it chose to impose a uniquely protective regime on the management and oversight of plan assets. The law's aim was to protect the interests of plan participants and beneficiaries by imposing especially high standards on those who exercise functional authority over plan investments, including rendering investment advice for a fee. As many Courts have noted, ERISA's obligations are the 'highest known to the law.' 88 The 1975 rule as applied to current market conditions, however, undermines ERISA's protective goals and defeats legitimate investor expectations of professional advice based upon their best interest. As discussed in more detail in the RIA, some retirement investors remain vulnerable to harm from conflicts of interest in the investment advice they receive because of the outdated 1975 regulation. The Department, as opposed to other regulators, remains uniquely positioned to create a regulatory definition of an investment advice fiduciary under ERISA that is uniformly applicable to all the types of investments that retirement investors make.

For example, the Department's proposal fills an important gap regarding advice to plans and plan fiduciaries. Advice from broker-dealers to plans and plan fiduciaries is not protected by the SEC's Regulation Best Interest. And the NAIC Model Regulation does not apply to transactions involving contracts used to fund retirement plans covered by ERISA. The fiduciary advice definition in Title I and Title II of ERISA, however, extends more broadly to cover advice to plan and IRA fiduciaries as well as plan participants, beneficiaries, and IRA owners and beneficiaries. This provides important protections to the retirement investors saving through these plans. The proposed rule would apply uniformly to advice to retirement investors within the ambit of Title I and Title II of ERISA, as is consistent with the text of the statutory definition which draws no distinctions between these different categories of retirement investors.

The proposal also takes on special importance in creating uniform standards for investment transactions that are not covered by the Federal securities laws. Some types of plan and IRA investments, such as real estate, fixed indexed annuities, certificates of deposit, and other bank products, may not be subject to the SEC's Regulation Best Interest, and there are a number of persons who provide investment advice services that are not subject to the SEC’s Regulation Best Interest. When investment professionals hold themselves out to retirement investors as making recommendations based on the retirement investors' best interests, their recommendations should be driven by a uniform fiduciary obligation, and not by perceptions that one category of investment product is subject to lower regulatory standards than another.

Since ERISA's enactment, the Department has been expressly given the authority under Title I of ERISA to issue regulations defining terms in Title I and to grant administrative exemptions from the prohibited transactions provisions. Pursuant to the President's Reorganization Plan No. 4 of 1978,93 which Congress ratified in 1984,94 the Department's authority was expanded to include authority to issue regulations, rulings, and opinions on the definition of a fiduciary with respect to Title II plans under the Code (including IRAs) and to grant administrative prohibited transaction exemptions applicable to them.95 Thus, the Department has clear authority to promulgate the regulatory definition of a fiduciary under both Title I and Title II of ERISA, and the Department has taken care in this proposal to honor the text and purposes of Title I and Title II of ERISA.

2. Summary of the Major Provisions of the Proposed Rule

The Department proposes that a person would be an investment advice fiduciary if they provide investment advice or make an investment recommendation to a retirement investor (i.e., a plan, plan fiduciary, plan participant or beneficiary, IRA, IRA owner or beneficiary, or IRA fiduciary); the advice or recommendation is provided “for a fee or other compensation, direct or indirect,” as defined in the proposed rule; and the person provides the advice or makes the recommendation in one of the following contexts:

• The person either directly or indirectly (e.g., through or together with any affiliate) has discretionary authority or control, whether or not pursuant to an agreement, arrangement, or understanding, with respect to purchasing or selling securities or other investment property for the retirement investor;

• The person either directly or indirectly (e.g., through or together with any affiliate) makes investment recommendations to investors on a regular basis as part of their business and the recommendation is provided under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor’s best interest; or

• The person making the recommendation represents or acknowledges that they are acting as a fiduciary when making investment recommendations.92

92 This proposed rule is accompanied by proposals (published elsewhere in the Federal Register) related to prohibited transaction exception relief. The proposals would amend existing PTEs, including PTE 2020–02, that allow, subject to protective conditions, investment advice fiduciaries to receive compensation and engage in transactions that otherwise would be prohibited. Unlike the PTEs that were a part of the 2016 Rulemaking, these PTEs do not, and the amendments would not, impose required contracts or warranties that the Fifth Circuit objected to. These prohibited transaction exemptions also do not exempt a party from status as a fiduciary, and therefore, the proposals do not affect the scope of the regulatory definition of an investment advice fiduciary. Rather, the exemption proposals involve an exercise of the statutory authority afforded to the Department by Congress to give administrative relief from the strict prohibited transaction provisions in Title I and Title II of ERISA for beneficial transactions involving plans and IRAs. See section 408(a) of ERISA (requiring the Department to make findings before granting an exemption that the exemption is administratively feasible, in the interests of the plan or IRA and of its participants and beneficiaries, and protective of

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91 Sec. 102, 5 U.S.C. App. 1.
It is important to note that each required component of the new proposed regulatory definition would have to be satisfied with respect to any particular recommendation for the recommendation to constitute fiduciary investment advice. In accordance with the statute, fiduciary status is determined on a transactional basis. Under the statutory text, a person is a fiduciary with respect to advice “to the extent . . . [they] render[] investment advice for a fee or other compensation, direct or indirect.” The proposed rule, like the 1975 rule, contemplates a fiduciary status on a transaction-by-transaction basis. One is only a fiduciary “to the extent” the person making the recommendation meets the rule’s requirements with respect to the particular advice transaction at issue.

The Department believes the test that it is proposing here better honors the statute and retirement investors’ legitimate expectations of impartial investment advice from trusted advice providers than the 1975 rule, while avoiding the danger of sweeping too broadly and covering recommendations that Congress might not have intended to cover.

The Department’s proposal is also intended to be responsive to the Fifth Circuit’s emphasis on relationships of trust and confidence. The current proposal is much more narrowly tailored than the 2016 Final Rule, which treated as fiduciary advice, any compensated investment recommendation as long as it was directed to a specific retirement investor regarding the advisability of a particular investment or management decision with respect to securities or other investment property of the plan or IRA. In contrast, the proposal provides that fiduciary status would attach only if compensated recommendations are made in certain specified contexts, each of which describes circumstances in which the retirement investor can reasonably place their trust and confidence in the advice provider. The Department believes the approach in this proposal is consistent with the statutory definition that applies fiduciary status on a functional (and therefore, transactional) basis.

The proposed regulatory definition of an investment advice fiduciary includes the following paragraphs, which are discussed in greater detail below. Paragraph (c) of the proposed regulation defines the term “investment advice.” Paragraph (d) retains the provision in the existing regulation regarding “execution of securities transactions.” Paragraph (e) defines the phrase “for fee or other compensation, direct or indirect.” Paragraph (f) sets forth definitions used in the regulation. Paragraph (g) addresses applicability of the regulation. Paragraph (h) confirms the continued applicability of State law regulating insurance, banking, and securities.

3. Covered Advice and Recommendations

Paragraph (c)(1) of the proposed regulation provides that a person renders “investment advice” with respect to moneys or other property of a plan or IRA if the person makes a recommendation of any securities or other investment transaction or any investment strategy involving securities or other investment property to the plan, plan fiduciary, plan participant or beneficiary, IRA, IRA owner or beneficiary, or IRA fiduciary, subject to certain specified criteria. Paragraphs (c)(1)(i), (ii), and (iii) set forth three alternative contexts under which covered recommendations would constitute investment advice for purposes of the statutory definitions of an investment advice fiduciary in Title I and Title II of ERISA. As discussed herein, under each of these three contexts, the Department believes that retirement investors could reasonably place their trust and confidence in the advice provider. The proposal also makes clear that fiduciary status under Title I and/or Title II of ERISA may result from recommendations to any of the relevant plan actors, including not only the plan fiduciary, but also plan participants, IRA owners, and their beneficiaries. This is consistent with the Department’s longstanding position that advice to a plan participant or beneficiary is advice to the plan.

Paragraph (c)(1)(i)

In the first context, which is set forth in proposed paragraph (c)(1)(i), a person renders fiduciary “investment advice” within the meaning of ERISA section 3(21) (if the person rendering advice

account following a recommendation.” 84 FR 33318, 33331 (July 12, 2019).

95 See 29 CFR 2530.10–2(c)(1)(ii)(A) and 26 CFR 54.4975–9(c)(1)(ii)(A) (emphasis added). See also paragraph (d) of the proposal, which provides that a person is not a fiduciary merely because they have certain specific discretion in connection with the execution of securities transactions.

96 As discussed below, the proposed rule would not impose on a fiduciary an automatic fiduciary obligation to continue to monitor an investment or a retirement investor’s activities to ensure the recommendations remain prudent and appropriate for the plan or IRA. The extent of a monitoring obligation would depend on whether the facts and circumstances indicate that the fiduciary has undertaken that responsibility. A fiduciary that assumes discretion over plan or IRA assets, however, would generally be viewed as assuming a monitoring obligation.
regular basis as part of their business and the recommendation is provided under circumstances indicating the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor’s best interest.

The proposed provision applies only to advice rendered by a person who makes investment recommendations to investors “on a regular basis as part of their business.” As compared to the “regular basis” prong of the 1975 regulation, which the Department believes can work to undermine the current reasonable expectations of retirement investors, this proposed provision is properly focused on whether the advice provider is in the business of providing investment recommendations. The proposal’s updated regular basis requirement avoids concerns that the rule could sweep so broadly as to cover, for example, the lawyer who suggests that a consumer finance a purchase by tapping into retirement funds.

Retirement investors would not typically view such persons as making investment recommendations based on the retirement investors’ individual financial interests, and the rule would not treat them as fiduciaries. Similarly, the human resources employees of a plan sponsor would not be considered investment advice fiduciaries under the proposed regulatory definition, because they do not regularly make investment recommendations to investors as part of their business.97

However, the proposal’s regular basis requirement would not defeat legitimate investor expectations by automatically excluding one-time advice from treatment as fiduciary investment advice.98 For example, the proposed rule would treat an insurance agent’s recommendation to invest a retiree’s retirement savings in an annuity as fiduciary advice if the agent regularly makes investment recommendations to investors, and the circumstances indicate that the recommendation is based on the retiree’s particular needs and circumstances and may be relied upon for making an investment decision that is in the investor’s best interest.

Similarly, if the agent told the retiree that they were rendering fiduciary advice, the proposal would treat the recommendation as fiduciary advice even if it was one-time advice. Over time, the Department has become concerned that 1975 regulation’s regular basis test served to defeat objective understandings of the nature of the professional relationship and the reliability of the advice as based on the investor’s best interest.

By limiting the scope of those who may be an investment advice fiduciary to those who make investment recommendations as a regular part of their business, the Department believes that the proposed definition is appropriately tailored to those advice providers in whom retirement investors may reasonably place their trust and confidence. The proposed provision excludes investment recommendations on a regular basis as part of their business is an objective test based on the totality of facts and circumstances.99 The Department invites comment on this approach, including the extent to which the Department should consider the investor’s understandings as to whether the adviser regularly makes investment recommendations as part of their business. The Department seeks comment regarding examples of financial professionals who may be reasonably viewed by investors as giving investment advice but would not in fact meet the requirements laid out in this provision.

Proposed paragraph (c)(1)(ii) further provides that, to count as fiduciary advice, the recommendation must be provided “under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor’s best interest.”

This provision of the proposal is similar to, but improves upon, the parts of the 1975 regulation that require a “mutual agreement, arrangement or understanding” that the advice will serve as “a primary basis” for the retirement investor’s investment decisions. Instead of the “mutual agreement, arrangement, or understanding” requirement—which over time has encouraged investment professionals to hold themselves out as trusted advisers while disclaiming fiduciary status in the fine print—the proposal would focus on the objective “circumstances” surrounding the recommendation, including how the investment professional held themselves out to the retirement investor and described the services offered. The Department believes that the proposed language will better avoid loopholes and fine print disclaimers, while properly focusing on a reasonable understanding of the nature of their relationship.

Further, the proposal does not include the 1975 regulation’s “primary basis” requirement, which has proved difficult to interpret and untested from the extent to which the recommendation was presented as advice upon which the investor could rely in making a decision.100 Instead, the proposal has a requirement that the circumstances indicate that the recommendation “may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor’s best interest.”

Recommendations that meet this test can be outcome-determinative for the investor and are appropriately treated as fiduciary advice when the elements of the proposed rule are satisfied.

In determining whether proposed paragraph (c)(1)(i) is satisfied, the Department intends to examine the

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97 The Department also would not consider salaries of human resources employees of the plan sponsor to be a fee or other compensation in connection with or as a result of the educational services and materials that they provide to plan participants and beneficiaries. Further, the proposed rule does not alter the principles articulated in ERISA Interpretive Bulletin 75–8, D–2 (29 CFR 2509.75–8) (IB 75–8). IB 75–8 provides that persons who perform purely administrative functions for an employee benefit plan, within a framework of policies, interpretations, rules, practices and procedures made by other persons, but who make decisions as to plan policy, interpretations, practices or procedures, are not fiduciaries with respect to the plan by virtue of those purely ministerial functions.

98 As noted by the magistrate judge in Federation of Americans for Consumer Choice v. United States Dept. of Labor, the Fifth Circuit’s opinion “did not foreclose that Title I duties may reach those fiduciaries who, as aligned with Title I’s text, render advice, even for the first time, ‘for a fee or

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100 See Preamble to Prohibited Transaction Exemption 2020–02, Improving Investment Advice for Workers & Retirees, 85 FR 82798, 82808 (Dec. 18, 2020) (discussing comments on whether the test focuses on “a” primary basis or “the” primary basis).
ways investment advice providers market themselves and describe their services. For example, some stakeholders have previously expressed concern that investment advice providers that adopt titles such as financial consultant, financial planner, and wealth manager, are holding themselves out as acting in positions of trust and confidence while simultaneously disclaiming status as an ERISA fiduciary. In the Department’s view, an investment advice provider’s use of such titles routinely involves holding themselves out as making investment recommendations that will be based on the particular needs or individual circumstances of the retirement investor and may be relied upon as a basis for investment decisions that are in the retirement investor’s best interest.

Of course, whether a recommendation is provided under circumstances indicating that it is based on the particular needs or individual circumstances of the retirement investor and that it may be relied upon as a basis for investment decisions that are in the retirement investor’s best interest is only part of the consideration. Even if a recommendation satisfies a portion of the definition, it is not fiduciary investment advice unless each aspect is satisfied (e.g., to satisfy paragraph (c)(1)(iii), the person must also (directly or indirectly) make investment recommendations on a regular basis as part of their business).

The Department invites comments on the extent to which particular titles are commonly perceived to convey that the investment professional is providing individualized recommendations that may be relied upon as a basis for investment decisions in a retirement investor’s best interest (and if not, why such titles are used). The Department also requests comment on whether types of conduct, communication, representation, and terms of engagement of investment advice providers should merit similar treatment.

Paragraph (c)(1)(iii)

The third context identified in the proposal, in proposed paragraph (c)(1)(iii), is if the person making recommendations represents or acknowledges that they are acting as a fiduciary when making investment recommendations. An investment advice provider that acknowledges fiduciary status has expressly agreed that the customer may place trust and confidence in them. Furthermore, as discussed in the Fifth Circuit’s opinion, honesty is a general premise of a common law fiduciary relationship.

This provision of the proposal would ensure that parties making a fiduciary representation or acknowledgment cannot subsequently deny their fiduciary status if a dispute arises, but rather must honor their words.

For purposes of the proposal, paragraph (c)(1)(iii) is not limited to the circumstances in which the person specifically represents that they are a fiduciary for purposes of Title I or Title II of ERISA, or specifically cites any particular statutory provisions. It is enough that the investment advice provider told the retirement investor that the investment advice or investment recommendations were or will be made in a fiduciary capacity. As with the other contexts identified in proposed paragraph (c)(1), this is intended to align fiduciary status with the retirement investor’s reasonable expectations. A retirement investor who is told by a person that the person will be acting as a fiduciary reasonably and appropriately places their trust and confidence in such a person.

In the retirement context, the Department has stressed the importance of clarity regarding the nature of an advice relationship and has encouraged retirement investors to ask advice providers about their status as an ERISA fiduciary with respect to retirement accounts and seek a written statement of the advice provider’s fiduciary status. The Department’s FAQs entitled Choosing the Right Person to Give You Investment Advice, Choosing the Right Person to Give You Investment Plans and Individual Retirement Accounts state “A written statement helps ensure that the fiduciary nature of the relationship is clear to both you and the investment advice provider at the time of the transaction, and limits the possibility of miscommunication.”

Many retirement investors may receive a written fiduciary acknowledgment due to compliance obligations of an investment advice provider. For example, retirement investors that are plan fiduciaries entering into an investment advice services arrangement on behalf of the plan are likely to receive an acknowledgment of fiduciary status from the provider as part of the disclosure obligations under ERISA section 408(b)(2) and the regulations thereunder.

Further, an upfront written acknowledgment of fiduciary status is a requirement of several prohibited transaction exemptions available to investment advice fiduciaries, including the statutory exemption added by Congress at ERISA section 408(b)(14) and the Department’s broad administrative exemption, PTE 2020–02.

As discussed in the preamble to PTE 2020–02, the Department believes that parties seeking to provide investment advice to retirement investors and relying on the exemption should, at a minimum, make a conscious up-front determination of whether they are acting as fiduciaries; tell their retirement investor customers that they are rendering advice as fiduciaries; and, based on their conscious decision to act as fiduciaries, implement and follow the exemption’s conditions.

Disclaimers

Paragraph (c)(1)(v) of the proposal addresses the impact of disclaimers on parties’ status as investment advice fiduciaries. The proposed paragraph provides that written statements by a person disclaiming status as a fiduciary under the Act, the Code, or this regulation, or disclaiming any of the conditions set forth in paragraph (c)(1)(iii), will not control to the extent they are inconsistent with the person’s oral communications, marketing materials, applicable State or Federal law, or other interactions with the retirement investor. The Department’s intent in including this paragraph in the proposal is to permit parties to define the nature of their relationship, but also to ensure that any disclaimer be consistent with oral communications or actions, marketing material, State and Federal law, and other interactions based on all relevant facts and circumstances. When the disclaimer is at odds with the investment advice provider’s oral communications, marketing material, State or Federal law, or other interactions, the disclaimer is insufficient to defeat the retirement investor’s legitimate expectations.

101 See id. at 82803.

102 Chamber, 885 F.3d 360, 370 (5th Cir. 2018) (citing George M. Turner, Revocable Trusts § 3:2 (Sept. 2016 Update))


105 See ERISA section 408(g)(6)(A)(iv), 29 U.S.C. 1108(g)(6)(A)(iv) (“The fiduciary adviser [must] provide[d] to a participant or a beneficiary before the initial provision of the investment advice with regard to any security or other property offered as an investment option, a written notification (which may consist of notification by means of electronic communication) . . . that the adviser is acting as a fiduciary of the plan in connection with the provision of the advice . . .”).

106 Section III(b)(1).


108 This discussion of disclaimers applies to the regulation proposed herein, defining an investment advice provider’s fiduciary status. Continued
4. Recommendations Regarding Securities Transactions or Other Investment Transactions or Investment Strategies

The definition of “investment advice” in proposed paragraph (c)(1) requires that there be “a recommendation regarding securities transactions or other investment transactions or investment strategies.”

Recommendation

Whether a person has made a “recommendation” is a threshold element in establishing the existence of fiduciary investment advice. For purposes of the proposed rule, the Department views a recommendation as a communication that, based on its content, context, and presentation, would reasonably be viewed as a suggestion that the retirement investor engage in or refrain from taking a particular course of action. The analysis would apply equally to a communication that is made orally or in writing and would include electronic communications. The determination of whether a recommendation has been made would be an objective rather than a subjective inquiry.

In this regard, the more individually tailored the communication is to a specific retirement investor or investors about, for example, a security, investment property, or investment strategy, the more likely the communication will be viewed as a recommendation; however, the Department cautions that the fact that a communication is made to a group rather than an individual would not be dispositive of whether a recommendation exists. Additionally, providing a selective list of securities to a particular retirement investor as appropriate for the investor would be a recommendation as to the advisability of acquiring securities even if no recommendation is made with respect to any one security. Furthermore, a series of actions, taken directly or indirectly (e.g., through or together with any affiliate), that may not constitute a recommendation when each action is viewed individually may amount to a recommendation when considered in the aggregate. Even if an action rises to the level of a recommendation, the advice is only fiduciary investment advice if the rest of the regulatory test is met.

In evaluating whether a recommendation has been made under advice fiduciary, and would not extend to a circumstance in which a financial professional has investment discretion over a retirement investor’s assets.

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

The SEC did not include a formal definition of a recommendation in Regulation Best Interest, based on its view that the concept of a recommendation is fact-specific and not conducive to an express definition. In drafting this proposal, the Department has worked to ensure alignment with the regulatory regimes of the SEC and other regulatory agencies, and is proposing a similar approach.

In the Department’s view, the framework established by the SEC for broker-dealers is consistent with ordinary understandings of “advice” and familiar to the broker-dealers that are regulated by the SEC. Accordingly, the Department would consider a recommendation for purposes of the SEC’s Regulation Best Interest as a recommendation for purposes of this proposed regulation. The Department seeks comment on whether the approach taken in the proposal is sufficiently clear, or whether an express definition would be preferable.

Definition of the phrase “recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property.”

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

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

- As to the advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property, as to investment strategy, or as to how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred, or distributed from the plan or IRA;
- As to the management of securities or other investment property, including, among other things, recommendations on investment policies or strategies, portfolio composition, selection of other persons to provide investment advice or investment management services, selection of investment account arrangements (e.g., account types such as brokerage versus advisory) or voting of proxies appurtenant to securities; and
- As to rolling over, transferring, or distributing assets from an employee benefit plan or IRA, including recommendations as to whether to engage in the transaction, and the amount, the form, and the destination of such a rollover, transfer, or distribution.

Components of these proposed covered recommendations are discussed below.

Recommendations Involving Securities, Other Investment Property, and Investment Strategy

Paragraph (f)(10)(i) of the proposal describes, as covered recommendations, recommendations as to “the advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property, as to investment strategy, or as to how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred, or
distributed from the plan or IRA.” Similar to the SEC and FINRA, the Department intends to interpret “investment strategy” broadly, to include “among others, recommendations generally to use a bond ladder, day trading . . . or margin strategy involving securities, irrespective of whether the recommendations mention particular securities.” 113

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

The Department proposes that the term investment property, however, not include health insurance policies, disability insurance policies, term life insurance policies, and other property to the extent the policies or property do not contain an investment component. This is confirmed in a proposed definition of “investment property” in paragraph (f)(11). Although there can be situations in which a person recommending group health or disability insurance, for example, effectively exercises such control over the decision that the person is functionally exercising discretionary control over the management or administration of the plan as described in ERISA section 3(21)(A)(i) or section 3(21)(A)(ii), the Department does not believe that the definition of investment advice in ERISA’s statutory text is properly interpreted or understood to cover a recommendation to purchase group health, disability, term life insurance, or similar insurance policies that do not have an investment component.

Recommendations as to How Securities or Other Investment Property Should Be Invested After Rollover, Transfer, or Distribution

Proposed paragraph (f)(10)(i) also references recommendations “as to how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred, or distributed from the plan or IRA.” This proposed provision addresses an important concern of the Department that investment advice providers should not be able to avoid fiduciary responsibility for a rollover recommendation by focusing solely on the investment of assets after they are rolled over from the plan. In many or most cases, a recommendation to a plan participant or beneficiary regarding the investment of securities or other investment property after a rollover, transfer, or distribution involves an implicit recommendation to the participant or beneficiary to engage in the rollover, transfer, or distribution. Certainly, a prudent and loyal fiduciary generally could not make a recommendation on how to invest assets currently held in a plan after a rollover, without even considering the logical alternative of leaving the assets in the plan or evaluating how that option compares with the retirement investor’s likely investment experience post-rollover. A fiduciary would violate ERISA’s 404 obligations if it recommended that a retirement investor roll the money out of the plan without proper consideration of how the money might be invested after the rollover.

Moreover, even in those relatively rare circumstances in which there is no implicit rollover recommendation, advice to a plan participant on how to invest assets currently held in an ERISA-covered plan is “advice with respect to moneys or other property of such plan” within the meaning of section 3(21)(A)(ii) of ERISA, inasmuch as the assets at issue are still held by the plan. The Department requests comments on the proposed language, and on whether this approach will appropriately protect the interests of plan participants and beneficiaries, or whether another approach would be more protective.

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

Paragraph (f)(10)(i) of the proposed rule describes, as covered recommendations, recommendations as to the management of securities or other investment property, including, among other things, recommendations on investment policies or strategies, portfolio composition, selection of other persons to provide investment advice or investment management services, selection of investment account arrangements (e.g., account types such as brokerage (as a sub-advisory), or the voting of proxies appurtenant to securities. The statutory text broadly refers to “investment advice . . . with respect to any moneys or other property of such plan.” Recommendations as to investment management or strategy fall within the most straightforward reading of the statutory text. Accordingly, the proposed regulation makes clear that covered investment advice is not artificially limited solely to recommendations to buy, sell, or hold particular securities or investment property to the exclusion of all the other important categories of investment advice that Investment professionals routinely provide.

This provision of the proposed regulation also makes clear that recommendations as to the selection of investment account arrangements would be covered. Accordingly, a recommendation to move from a commission-based account to an advisory fee-based account (or vice versa) would be a covered recommendation. The provision is consistent with the SEC’s Regulation Best Interest and the Advisers Act’s fiduciary obligations. 114

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

Proposed paragraph (f)(10)(ii) extends to recommendations as to “selection of other persons to provide investment advice or investment management services.” Consistent with the Department’s longstanding position, the proposed regulation would cover the recommendation of another person to be entrusted with investment advice or investment management authority over retirement assets. Selection of recommendations are often critical to the proper management and investment of those assets and are fiduciary in nature if the other conditions of the proposed definition are satisfied. Recommendations of investment advisers or managers are no different than recommendations of investments that the plan or IRA may acquire and are often, by virtue of the track record or


114 17 CFR 240.15l–1(a)(1) (“A broker, dealer, or a natural person who is an associated person of a broker or dealer, when making a recommendation of any securities transaction or investment strategy involving securities (including account recommendations) to a retail customer, shall act in the best interest of the retail customer at the time the recommendation is made, without placing the financial or other interest of the broker, dealer, or natural person who is an associated person of a broker or dealer making the recommendation ahead of the interest of the retail customer.”) (emphasis added); SEC Investment Adviser Interpretation, 84 FR at 33674 (“An adviser’s fiduciary duty applies to all investment advice the investment adviser provides to clients, including advice about investment strategy, engaging a sub-adviser, and account type.”).
information surrounding the capabilities and strategies that are employed by the recommended fiduciary, inseparable from recommendations as to the types of investments that the plan or IRA will acquire. For example, the assessment of an investment fund manager or management is often a critical part of the analysis of which fund to pick for investing plan or IRA assets.

Under this proposal, the Department does not intend to suggest, however, that a person could become a fiduciary merely by engaging in the normal activity of marketing themselves as a potential fiduciary to be selected by a plan fiduciary or IRA owner, without making a recommendation of a securities transaction or other investment transaction or any investment strategy involving securities or other investment property. Touting the quality of one’s own advisory or investment management services would not trigger fiduciary obligations. This view is made clear by the language in proposed paragraph (f)(10)(ii) that extends to recommendations of “other persons” to provide investment advice or investment management services.

However, this discussion should not be read to exempt a person from being a fiduciary with respect to any of the investment recommendations covered by proposed paragraphs (c)(1) and defined in proposed paragraph (f)(10). There is a line between an investment advice provider making claims as to the value of its own advisory or investment management services in marketing materials, on the one hand, and making recommendations to retirement investors on how to invest or manage their savings, on the other. An investment advice provider can recommend that a retirement investor enter into an advisory relationship with the provider without acting as a fiduciary. But when the investment advice provider recommends, for example, that the investor pull money out of a plan or invest in a particular fund, that advice may be given in a fiduciary capacity even if part of a presentation in which the provider is also recommending that the person enter into an advisory relationship. As proposed, the complete facts and circumstances surrounding each piece of advice would be considered. The Department believes that this is consistent with the functional fiduciary test laid out in the statute in which an entity is an investment advice fiduciary to the extent that they satisfy the definition. Just because one piece of advisory investment advice (here, the “hire me” recommendation) does not mean that

the rest of the advice is necessarily excluded from the definition (here, the advice to pull money out of the plan and invest in a particular fund). The investment advice fiduciary could not prudently recommend that a plan participant roll money out of a plan into investments that generate a fee for the fiduciary but leave the participant in a worse position than if the participant had left the money in the plan. Thus, when a recommendation to “hire me” effectively includes a recommendation on how to invest or manage plan or IRA assets (e.g., whether to roll assets into an IRA or plan or how to invest assets if rolled over), advice or recommendation would need to be evaluated separately under the provisions in the proposed regulation.\footnote{The Department believes this approach is consistent with the SEC’s approach in Regulation Best Interest. In FAQs, the SEC described a scenario involving broker-dealer communications with a prospective retail customer that would not rise to the level of a recommendation. However, the SEC cautioned that a recommendation made in the context of a “hire me” conversation or otherwise would be subject to Regulation Best Interest. See Questions on Regulation Best Interest, available at https://www.sec.gov/tmfaq-regulation-best-interest.}

Proxy Voting Appurtenant to Ownership of Shares of Corporate Stock

Proposed paragraph (f)(10)(ii) also extends to recommendations as to the “voting of proxies appurtenant to securities.” The Department has long viewed the exercise of ownership rights as a fiduciary responsibility; consequently, recommendations on the exercise of proxy or other ownership rights are appropriately treated as fiduciary in nature if the other conditions of the regulation are satisfied.\footnote{See Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, 85 FR 81658 (Dec. 16, 2020) (“In connection with proxy voting, the Department’s longstanding position is that the fiduciary act of managing plan assets includes the management of voting rights (as well as other shareholder rights) appurtenant to shares of stock.”).}

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

Recommendations on Rollovers, Benefit Distributions, or Transfers From Plan or IRA

Proposed paragraph (f)(10)(iii) describes, as a category of covered recommendations, recommendations “as to rolling over, transferring, or distributing assets from an employee benefit plan or IRA, including recommendations as to whether to engage in the transaction, and the amount, the form, and the destination of such a rollover, transfer, or distribution.” This aspect of the proposal is consistent with the Department’s longstanding interest in protecting retirement investors in the context of a recommendation to roll over employee benefit plan assets to an IRA, as well as other recommendations to roll over, transfer, or distribute assets from a plan or IRA.

The Department continues to believe that decisions to take a benefit distribution or engage in rollover transactions are among the most, if not the most, important financial decisions that plan participants and beneficiaries, and IRA owners and beneficiaries are called upon to make. The Department continues to believe that advice provided in connection with a rollover decision, even if not accompanied by a specific recommendation on how to invest assets, should be treated as fiduciary investment advice. A distribution recommendation involves either advice to change specific investments in the plan or to change fees and services directly affecting the return on those investments. Even if the assets would not be covered by Title I or Title II of ERISA when they are moved outside the plan or IRA, the recommendation to change the plan or IRA investments is investment advice under Title I or Title II of ERISA.

Thus, recommendations on distributions (including rollovers or transfers into another plan or IRA) or recommendations to entrust plan assets to a particular IRA provider would fall within the scope of investment advice in this proposed regulation, and would be covered by Title I of ERISA, including the enforcement provisions of section 502(a). Further, in the Department’s view, the evaluation of whether a recommendation constitutes
fiduciary investment advice should be the same regardless of whether it is a recommendation to take a distribution or make a rollover to an IRA or a recommendation not to take a distribution or to keep assets in a plan. The proposal’s approach also aligns with the SEC’s Regulation Best Interest and Advisers Act fiduciary obligations, which extend to account recommendations generally as well as recommendations to roll over or transfer assets from one type of account to another.\textsuperscript{117}

5. Application of Paragraph (c)(1)

The proposal provides a general rule under which investment advice providers could determine their status through application of the facts and circumstances surrounding their interactions with their customers. To aid parties in conducting the analysis, the Department provides the following discussion of the application of the general rule in certain common circumstances and requests comment on the discussion. The Department also seeks comment on whether any adjustment should be made to the regulatory text to address issues discussed herein.

Sophisticated Retirement Investors

The proposed regulation does not include any special provision for recommendations to sophisticated advice recipients. Rather, under the proposal, fiduciary status would turn on the application of proposed paragraph (c)(1). In the absence of investment discretion, proposed paragraph (c)(1)(i) or a fiduciary acknowledgment (see proposed paragraph (c)(1)(iii)), the investment advice provider’s fiduciary or non-fiduciary status would depend on the parties’ understandings under the particular facts and circumstances (see proposed paragraph (c)(1)(ii)).

The Department acknowledges that some commenters in previous rulemakings have asserted that a specific “counterparty” provision is necessary to avoid limiting plan and IRA owners and beneficiaries, the Department believes that communications to financial intermediaries would typically fall outside the scope of proposed paragraph (c)(1)(ii) because they would not involve recommendations based on the particular needs or individual circumstances of the plan or IRA serviced by the intermediary. There may also be other circumstances in which application of proposed paragraph (c)(1)(ii) would not result in a covered recommendation being treated as fiduciary investment advice. In general, however, the Department envisions that proposed paragraph (c)(1)(ii) would apply broadly to recommendations to plan and IRA fiduciaries acting on behalf of plans and IRAs.

More fundamentally, the Department rejects the purported dichotomy between a mere “sales” recommendation to a counterparty, on the one hand, and advice, on the other, in the context of the retail market for investment products. As reflected in recent regulatory developments from both the SEC and NAIC, financial service industry marketing materials, and the industry’s comment letters reciting the guidance they provide to investors, sales and advice typically go hand in hand in the retail market.

In the Department’s view, the updated conduct standards adopted by the SEC and the NAIC also reflect an acknowledgment of the fact that broker-dealers and insurance agents commonly provide paid investment and annuity recommendations to their customers. The SEC stated in the Regulation Best Interest release that “there is broad acknowledgment of the benefits of, and support for, the continuing existence of the broker-dealer business model, including a commission or other transaction-based compensation structure, as an option for retail customers seeking investment recommendations.”\textsuperscript{120} The NAIC Model Regulation, section 6.5.M defines a recommendation as “advice provided by a producer to an individual consumer that was intended to result in or does result in a purchase, an exchange or a replacement of an annuity in accordance with that advice.” Further, “cash compensation” is defined as “any discount, concession, fee, service fee, commission, sales charge, loan, override, or cash benefit received by a producer in connection with the recommendation or sale of an annuity from an insurer, intermediary, or directly from the consumer.”\textsuperscript{121} When retirement investors talk to investment advice providers about the investments they should make, they commonly pay for, and receive, advice within the meaning of the statutory definition.

Platform Providers and Pooled Employer Plans

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

In the case of a platform provider, application of the proposed regulation may often focus on whether the communications fall within the threshold definition of a “recommendation.” As discussed in section 4, whether a recommendation exists under the proposal will turn on the degree to which a communication is

\textsuperscript{117} Regulation Best Interest release, 84 FR 33318, 33339 (July 12, 2019); SEC Investment Adviser Interpretation, 84 FR 33669, 33674 (July 12, 2019).

\textsuperscript{118} The 2016 Final Rule provided that, subject to specified conditions, certain transactions with independent fiduciaries with financial expertise would not constitute fiduciary investment advice. 81 FR 20446, 20860 (Apr. 8, 2016).

\textsuperscript{119} High net worth investors and sophisticated investors are not carved out of protections under the SEC’s Regulation Best Interest or the Advisers Act fiduciary duty.

\textsuperscript{120} 84 FR 33318, 33319 (July 12, 2019).

\textsuperscript{121} NAIC Model Rule section 5.B. (emphasis added).
"individually tailored" to the retirement investor or investors, and providing a selective list of securities to a particular retirement investor as appropriate for the investor would be a recommendation as to the advisability of acquiring securities even if no recommendation is made with respect to any one security. Therefore, the inquiry may turn on whether the provider presents the investments on the platform as having been selected for and appropriate for the investor (i.e., the plan and its participants and beneficiaries). In this regard, platform providers who merely identify investment alternatives using objective third-party criteria (e.g., expense ratios, fund size, or asset type specified by the plan fiduciary) to assist in selecting and monitoring investment alternatives, without additional screening or recommendations based on the interests of plan or IRA investors, would not be considered under the proposal to be making a recommendation.

In the Department’s view, this same analysis is likely to apply in the context of pooled employer plans (PEPs), which are individual account plans established of pooled employer plans (PEPs), which are considered under the proposal to be of plan or IRA investors, would not be recommendations based on the interests of plan and its participants and beneficiaries). In this regard, platform providers who merely identify investment alternatives using objective third-party criteria (e.g., expense ratios, fund size, or asset type specified by the plan fiduciary) to assist in selecting and monitoring investment alternatives, without additional screening or recommendations based on the interests of plan or IRA investors, would not be considered under the proposal to be making a recommendation.

In the Department’s view, this same analysis is likely to apply in the context of pooled employer plans (PEPs), which are individual account plans established or maintained for the purpose of providing benefits to the employees of two or more employers, authorized in the Setting Every Community Up for Retirement Enhancement (SECURE) Act.122 PEPs are required to designate a pooled plan provider (PPP) who is a named fiduciary of the PEP.123 PPPs are in a unique statutory position in that they are granted full discretion and authority to establish the plan and all of its features, administer the plan, act as a fiduciary, hire service providers, and select investments and investment managers. When a PPP or another service provider interacts with an employer about investment options under the plan, whether they have made a recommendation under the proposal will turn, in part, on whether they present the investments as selected for, and appropriate for, the plan, its participants, or beneficiaries.

Swaps and Security-Based Swaps

Swaps and security-based swaps are a broad class of financial transactions defined and regulated under amendments to the Commodity Exchange Act and the Securities Exchange Act of 1934 (Securities Exchange Act) by the Dodd-Frank Act. Section 4s(h) of the Commodity Exchange Act124 and section 15F of the Securities Exchange Act125 establish similar business conduct standards for dealers and major participants in swaps or security-based swaps. Special rules apply for swap and security-based swap transactions involving “special entities,” a term that includes employee benefit plans covered under ERISA. Under the business conduct standards in the Commodity Exchange Act as added by the Dodd-Frank Act, swap dealers or major swap participants that act as counterparties to ERISA plans must, among other conditions, have a reasonable basis to believe that the plans have independent representatives who are fiduciaries under ERISA.126 Similar requirements apply for security-based swap transactions.127 The CFTC and the SEC have issued final rules to implement these requirements.128

In the Department’s view, when Congress enacted the swap and security-based swap provisions in the Dodd-Frank Act, including those expressly applicable to ERISA-covered plans, it did not intend to broadly impose ERISA fiduciary status on the plan’s counterparty as it engaged in regulated conduct as part of the swap or security-based swap transaction with the employee benefit plan. The Department conferred with both the CFTC and the SEC at the time of those agencies’ rulemakings, and assured harmonization of any change in the ERISA fiduciary advice regulation so as to avoid unintended consequences. The Department makes the same assurance with respect to this proposed regulation. The disclosures required of plans’ counterparties under the business conduct standards would not generally constitute a “recommendation” as defined in the proposal, or otherwise compel the dealers or major participants to act as fiduciaries in swap and security-based swap transactions conducted pursuant to section 4s of the Commodity Exchange Act and section 15F of the Securities Exchange Act. This includes disclosures regarding material risks, characteristics, incentives and conflicts of interest; disclosures regarding the daily mark of a swap or security-based swap and a counterparty’s clearing rights; disclosures necessary to ensure fair and balanced communications; and disclosures regarding the capacity in which a swap or security-based swap dealer or major swap participant is acting when a counterparty to a special entity, as required by the business conduct standards.

This is not to say that a dealer or major participant would necessarily fall outside the scope of the proposed regulation if, in addition to providing the disclosures mandated above, it also chose to make specific investment recommendations to plan clients. In that circumstance, a swap dealer could become a fiduciary by virtue of their voluntary decision to make individualized investment recommendations to an ERISA-covered plan if the subparagraph’s conditions were met.129 To the extent dealers wish to avoid fiduciary status under the proposal, however, they can structure their relationships to avoid making such investment recommendations to plans. Additionally, clearing firms would not be investment advice fiduciaries under the proposed rule merely as a result of providing such services as valuations, pricing, and liquidity information. As discussed in greater detail in the next section, the proposed rule does not include valuation and similar services as a category of covered recommendations.

Valuation of Securities and Other Investment Property

This proposed rule does not include valuation services, appraisal services, or fairness opinions as categories of covered recommendations. In this regard, the Department notes that the definition of “recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property” in proposed paragraph (l)(10) does not include reference to any of these functions. Accordingly, the provision of valuation services, appraisal services, or fairness opinions would not, in and of themselves, lead to fiduciary status under the proposed rule. The Department continues to believe issues related to valuation are best addressed through a separate rulemaking.

122 ERISA section 3(43), 29 U.S.C. 1002(43).
124 7 U.S.C. 6a(h).
126 7 U.S.C. 6a(h)(5); 17 CFR 23.450.
129 The business conduct standards do not preclude a swap dealer from giving advice if it chooses to do so. See, e.g., 17 CFR 23.434 (imposing requirements on swap dealers that recommend a swap or trading strategy involving a swap to a counterparty); see also 17 CFR 240.15Fh–3(f) (similar provision applicable to security-based swap dealers).
6. For a Fee or Other Compensation, Direct or Indirect

Paragraph (e) of the proposal includes a definition of “for a fee or other compensation, direct or indirect,” for purposes of section 3(21)(A)(ii) of ERISA and section 4975(e)(3)(B) of the Code. The proposal provides:

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

This proposed definition is consistent with the preamble of the 1975 regulation, which states that “a fee or other compensation, direct or indirect” includes all other compensation “incident to the transaction in which the investment advice to the plan has been rendered or will be rendered,” including, for example, brokerage commissions, mutual fund sales commissions, and insurance sales commissions. As the Department explained in the preamble when it proposed the exemption now at PTE 77–9:131

The Department has expressed the view that, for purposes of section 3(21)(A)(ii) of the Act and section 4975(e)(3)(B) of the Code, should be deemed to include all fees or other compensation incident to the transaction in which the investment advice to the plan has been rendered or will be rendered, and may therefore include insurance and mutual fund sales commissions. The Department and the IRS have not modified or revised this position, notwithstanding the contrary views expressed in several of the applications for class exemption.

This proposed definition is also consistent with, for example, guidance the Department provided just eight years after the 1975 regulation was finalized. Specifically, an association that represented broker-dealers asked the Department to render the status of broker-dealers under ERISA. The association posited that fiduciary status under ERISA section 3(21)(A)(ii) (the “fee or other compensation, direct or indirect” provision) would not attach to broker-dealers “unless the broker-dealer provides investment advice for distinct, non-transactional compensation.” The Department rejected this interpretation of ERISA section 3(21)(A)(ii). The Department stated that, based on the facts and circumstances presented by each case, if the services provided by the broker-dealer include the provision of “investment advice”, as defined in regulation 2510.3–21(c), it may be reasonably expected that, even in the absence of a distinct and identifiable fee for such advice, a portion of the commissions paid to the broker-dealer would represent compensation for the provision of such investment advice.

As the proposed regulation makes clear, however, there must be a link between the transaction-based compensation and the investment professional’s recommendation. Under the terms of the proposal, the compensation is treated as paid “in connection with or as a result of” the provision of advice only if it would not have been paid but for the recommended transaction or the provision of advice, or if the investment advice provider’s eligibility for the compensation (or its amount) is based in whole or part on the recommended transaction or the provision of advice.

Under the proposed definition, any fee that is paid explicitly for the provision of investment advice would fall within the proposed definition of “for a fee or other compensation, direct or indirect.” This would include, for example, a fee paid to an investment adviser under the Advisers Act based on the retirement investor’s assets under management.

A fee or other compensation received in connection with an investment transaction also would fall within the proposed definition of “for a fee or other compensation, direct or indirect.” This treatment of investment compensation is in accord with the actions of other State and Federal regulators, and with the modern marketplace for investment advice in which brokers and insurance agents can do far more than merely execute transactions or close sales. Investment professionals are commonly compensated for their advice through the payment of transaction-based fees, such as commissions, which are contingent on the investor’s decision to engage in the recommended transaction. The SEC acknowledged this in the Regulation Best Interest release, noting that “there is broad acknowledgment of the benefits of, and support for, the continuing existence of the broker-dealer business model, including a commission or other transaction-based compensation structure, as an option for retail customers seeking investment recommendations.” The SEC discussion further contemplated that commissions compensate broker-dealers for their recommendations, and may be the preferred method of investment advice compensation with respect to certain transactions. As an example, the SEC stated that retail customers seeking a long-term investment may determine that “paying a one-time commission to a broker-dealer recommending such an investment is more cost effective than paying an ongoing advisory fee to an investment adviser merely to hold the same investment.” The Department agrees that there are benefits to ensuring a wide range of compensation structures remain available to retirement investors. Likewise, the NAIC Model Regulation acknowledged that insurance agents make recommendations and might be compensated for their recommendations through commissions. The NAIC Model Regulation defines a recommendation as “advice provided by a producer to an individual consumer that was intended to result or does result in a purchase, an exchange or a replacement of an annuity in accordance with that advice.” The definition of “cash compensation” in the model regulation is: “any discount, concession, fee, service fee,
commission, sales charge, loan, override, or cash benefit received by a producer in connection with the recommendation or sale of an annuity from an insurer, intermediary, or directly from the consumer.138

When an investment professional meets the five-part test set out in the 1975 rule, or the fiduciary definition set forth in this proposal, the services rendered by the professional include individualized advice, and the compensation, including commission payments, is not merely for execution of a sale, but for the professional advice provided to the investor, as uniformly recognized by the Department’s previous guidance and by other State and Federal regulators.139

The statutory exemption for investment advice to participants and beneficiaries of individual account plans set forth in ERISA section 408(b)(14) similarly recognizes that compensation for advice often comes in the form of commissions and transaction-based compensation.140 Accordingly, the exemption applies to transactions “in connection with the provision of investment advice described in section 3(21)(A)(ii)” including “the direct or indirect receipt of fees or other compensation by the fiduciary adviser or an affiliate thereof . . . in connection with the provision of the advice or in connection with an acquisition, holding, or sale of a security or other property available as an investment under the plan pursuant to the investment advice.”141

As has been true since the Department first proposed regulations under this section in 1975 and as discussed above, the Department understands the phrase “for a fee or other compensation, direct or indirect” to encompass a broad array of compensation incident to the transaction.142 The Department requests comments on this portion of the proposal, including whether additional examples would be helpful.

7. Other Definitions in the Proposed Rule

In addition to the definitions discussed above, proposed paragraph (f) would define a variety of other pertinent terms for purposes of the proposed rule. The definitions generally track other definitions within Title I and Title II of ERISA and the Federal securities laws. The definitions in proposed paragraph (f), not otherwise discussed above, are: “affiliate” (similar to that of paragraph (e)(1) of the 1975 rule); and “control” (similar to that of paragraph (e)(2) of the 1975 rule). “Plan” refers to any plan described under section 3(3) of ERISA and any plan described in section 4975(e)(1)(A) of the Code. For purposes of the proposal “IRA” refers to any account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code.143 “Plan fiduciary” would use the same definition as described in section (3)(21)(A) of the Act and section 4975(e)(3) of the Code; for these purposes, a participant or beneficiary of the plan who is receiving advice is not a ‘plan fiduciary’ with respect to the plan. Under the proposed rule “relative” refers to a person described in section 3(15) of the Act and section 4975(e)(6) of the Code and also includes a sibling, or a spouse of a sibling. “Plan participant” or “participant” (for a plan described in section 3(3) of ERISA), would be a person described in section 3(7) ERISA.

8. Scope of Investment Advice Fiduciary Duty

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

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

Also, as has been made clear by the Department, there are a number of ways to provide fiduciary investment advice without engaging in transactions prohibited by Title I or Title II of ERISA because of the conflicts of interest they pose. For example, an investment advice provider can structure the fee arrangement to avoid a prohibited transaction (and the related conflicts of interest) by offsetting third party payments against direct fees agreed to by the retirement investor, as explained in advisory opinions issued by the Department.144 If there is not a prohibited transaction, then there is no need to comply with the terms of an exemption, though an investment advice fiduciary with respect to a Title I plan would still be required to comply with the statutory duties including prudence and loyalty.

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

138 Id. at Section S. B.
142 143 The definition of an IRA would also include an individual retirement annuity described in Code section 408(b), an Archer MSA described in Code section 223(d), and a Coverdell education savings account described in Code section 530. However, for purposes of any rollover of assets between a Title I Plan and an IRA described in this preamble, the term “IRA” includes only an account or annuity described in Code section 407(e)(1)(B) or (C).
The proposed regulation does not include a specific provision addressing investment education. Investment education is addressed in the Department’s IB 96–1, which was reinstated in 2020.\(^{145}\) IB 96–1 provides examples of four categories of information and materials regarding participant-directed individual account plans—plan information, general financial and investment information, asset allocation models, and interactive investment materials—that do not constitute investment advice. This is the case irrespective of who provides the information (e.g., plan sponsor, fiduciary, or service provider), the frequency with which the information is shared, the form in which the information and materials are provided (e.g., on an individual or group basis, in writing or orally, or via video or computer software), or whether an identified category of information and materials is furnished alone or in combination with other identified categories of information and materials. The IB states that there may be many other examples of information, materials, and educational services, which, if furnished to participants and beneficiaries, would not constitute “investment advice.”

Although the Department issued IB 96–1 when the 1975 rule was in effect, the Department believes that the IB would continue to provide accurate guidance under the proposed regulation. If the proposed rule is finalized, the IB would continue to correctly describe the types of educational information and materials that should not be treated as “recommendations” subject to the fiduciary advice definition. Although the IB specifically applies in the context of participants and beneficiaries in participant-directed individual account plans, the Department believes that the analysis it presents is valid regardless of whether the retirement investor is a plan participant, beneficiary, IRA owner, IRA beneficiary, or fiduciary.

One important example of investment education is the provision of information about the benefits of increasing contributions to an employee benefit plan. Under IB 96–1, the provision of information on “the benefits of plan participation” and the “benefits of increasing plan contributions” are both examples of “plan information.” The Department confirms that, for purposes of the proposal, the provision of such information would not trigger fiduciary status.

In the 2016 Final Rule, the Department incorporated the provisions of IB 96–1 into the regulatory text; as a result, certain provisions were specifically applicable to transactions involving IRAs. In addition, the Department made a few changes to the provisions. The Department clarified and expanded the category in IB 96–1 from “General Financial and Investment Information” to “General financial, investment, and retirement information.” The revised category included information on “[g]eneral methods and strategies for managing assets in retirement (e.g., systemic withdrawal payments, annuitization, guaranteed minimum withdrawal benefits).” This change was intended to improve retirement security by facilitating the provision of information and education relating to retirement needs that extend beyond a participant’s or beneficiary’s date of retirement. Such information would be considered non-fiduciary education as long as the provider did not recommend a specific investment or investment strategy.\(^{146}\)

The Department cautions, however, that to the extent a provider goes beyond providing education and gives investment advice on a specific investment or investment strategy, it is not appropriate to broadly exempt those communications from fiduciary liability. The Department believes that such an approach would be especially inappropriate in cases in which a service provider offers “educational” services that systematically exceed the boundaries of education. In such cases, when firms or individuals make specific investment recommendations to plan participants, they should adhere to basic fiduciary norms of prudence and loyalty and take appropriate measures to protect plan participants and beneficiaries from the potential harm caused by conflicts of interest.

An employer or other plan sponsor would not, however, become an investment advice fiduciary under the proposal merely because the employer or plan sponsor engaged a service provider to provide investment advice or because a service provider engaged to provide investment education crossed the line and provided investment advice in a particular case. On the other hand, whether the service provider renders fiduciary advice or non-fiduciary education, the proposed rule does not change the well-established fiduciary obligations that arise in connection with the selection and monitoring of plan service providers.\(^{147}\) Even if the service provider crosses the line and makes investment recommendations that go beyond mere “education,” the service provider will only be treated as an investment advice fiduciary to the extent that the full proposed regulatory definition is satisfied. Depending on the facts and circumstances, whether a service provider is an investment advice fiduciary under the proposal may require an inquiry into whether that service provider has held itself out as a fiduciary, whether that service provider regularly provides investment advice as part of the provider’s business, whether such advice is individualized, and whether the service provider received a fee or compensation (directly or indirectly) in connection with the advice.

The Department seeks comment on this discussion of investment education. Do commenters agree that the examples of investment education information and materials identified in IB 96–1 and in the provisions of the 2016 Final Rule regarding investment education do not constitute a “recommendation” as described under the proposed rule? Further, do commenters believe that IB 96–1 provides sufficient and appropriate guidance in conjunction with the provisions in this proposal, or do commenters support amending IB 96–1 or incorporating any of its provisions into the final regulation?

10. Application to Code Section 4975

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

\(^{145}\) 85 FR 40589 (July 7, 2020).

\(^{146}\) 81 FR 20946, 20977 (Apr. 8, 2016).

\(^{147}\) See IB 96–1, Section (e) “Selection and Monitoring of Educators and Advisors.”
defining the term “fiduciary” under the Code.

To rationalize the administration and interpretation of the parallel provisions in Title I and Title II of ERISA, Reorganization Plan No. 4 of 1978 divided the interpretive and rulemaking authority for these provisions between the Secretaries of Labor and of the Treasury. Under the Reorganization Plan, which was prepared by the President and transmitted to Congress pursuant to the provisions of Chapter 9 of Title 5 of the United States Code, the Department of Labor has authority to interpret the prohibited transaction provisions and the definition of a fiduciary in the Code. ERISA’s prohibited transaction rules, sections 406 to 408, apply to Title I plans, and the Code’s corresponding prohibited transaction rules, 26 U.S.C. 4975(c), apply to tax-qualified pension plans, as well as other tax-advantaged arrangements, such as IRAs, that are not subject to the fiduciary responsibility and prohibited transaction rules in Title I of ERISA.148 In accordance with the above discussion, paragraph (g) of the proposal, entitled “Applicability” provides a “fiduciary” both for purposes of ERISA section 3(21)(A)(ii) and for the parallel provision in Code section 4975(e)(3)(B).

Proposed paragraph (g) explains the applicability of Title I of ERISA and the Code in the specific context of rollovers. As that paragraph explains, “a person who satisfies paragraphs (c)(1) and (e) of this section in connection with a recommendation to a retirement investor that an employee benefit plan as defined in section 3(3) of the Act, a fiduciary of such a plan, or a participant or beneficiary of such a plan, including a recommendation concerning the rollover of assets currently held in a plan to an IRA, is a fiduciary subject to the provisions of Title I of the Act.” With this example, the Department intends to clarify the application of Title I to recommendations made regarding rollovers from a Title I plan under the proposal. As discussed above, the Department had earlier taken a contrary position in the Deseret Letter, which was withdrawn.

11. State Law

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

D. Severability

The Department is considering whether this proposal could continue to work even if certain aspects of the proposal were struck down by a court. In determining whether any aspects of this proposal could be severable the Department is focused on the text and purpose of ERISA. The Department requests comments regarding whether this proposal would be workable and appropriate if certain aspects were severed, or why it would not be workable or appropriate. Specifically, the Department is interested in hearing which aspects of the rule the public believes could or could not be severed, and the rationale behind those views. The Department expects to consider severability as it reviews comments and drafts a final rule.

The Department generally intends discrete aspects of this regulatory package to be in the event that this regulatory package is finalized with both an updated regulatory definition of a fiduciary and amendments to the PTEs, the Department intends that the updated regulatory definition of a fiduciary would survive even if a court vacated any of the amendments to the PTEs leaving in place the previously granted versions of those PTEs.

E. Effective Date

The Department proposes to make the rule effective 60 days after publication of a final rule in the Federal Register. The Department requests comment on this proposed timeframe and whether parties believe that additional time is needed before the rule becomes applicable.

F. Regulatory Impact Analysis

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

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

Title I of ERISA imposes duties and restrictions on fiduciaries with respect to employee benefit plans. ERISA section 404 requires Title I plan fiduciaries to act with the “care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.” Further, fiduciaries must carry out their duties “solely in the interest of the participants and beneficiaries” of the plan. Title I of ERISA also includes prohibited transaction provisions that forbid fiduciaries from, among other things, self-dealing.151 The aim of the prohibited transaction provisions is to protect plans, their participants, and beneficiaries from dangerous conflicts of interest that threaten the safety and security of plan benefits.152 Title II of ERISA, codified in the Internal Revenue Code, governs the conduct of fiduciaries to tax-qualified

150 Reorganization Plan No. 4 of 1978 also transferred to the Secretary of Labor the authority to grant administrative exemptions from the prohibited transaction provisions in section 4975 of the Code. See section 4975(c)(2) of the Code.
plans and IRAs. Although Title II does not directly impose specific duties of prudence and loyalty on fiduciaries as ERISA section 404(a) does, it prohibits fiduciaries from engaging in conflicted transactions on many of the same terms as Title I.\footnote{Cf. 26 U.S.C. 4975(c)(1), Code section 4975(f)(5) defining “correction” with respect to prohibited transactions as placing a plan or an IRA in a financial position not worse than it would have been in if the person had acted “under the highest fiduciary standards.”}

The proposal focuses on the provision of fiduciary investment advice to ERISA retirement plans, participants, and IRA owners and seeks to reduce or eliminate the impacts of conflicts of interest on advice they receive. The proposal amends the definition of a fiduciary such that an investment advice provider is a fiduciary if the person provides advice or makes a recommendation on any securities transaction or other investment transaction or any investment strategy involving securities or other investment property to the plan, plan fiduciary, plan participant or beneficiary, IRA, IRA owner or IRA fiduciary (retirement investor), the advice or recommendation is provided “for a fee or other compensation, direct or indirect,” as defined by the proposed rule, and (i), (ii) or (iii) is satisfied:

(i) The person either directly or indirectly (e.g., through or together with any affiliate) has discretionary authority or control, whether or not pursuant to an agreement, arrangement or understanding, with respect to purchasing or selling securities or other investment property for the retirement investor;

(ii) The person either directly or indirectly (e.g., through or together with any affiliate) makes investment recommendations to investors on a regular basis as part of its business and the recommendation is provided under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor’s best interest; or

(iii) The person making the recommendation represents or acknowledges that they are acting as a fiduciary when making the investment recommendation.

The proposed amendments to PTE 2020–02 expand the scope of the exemption to cover certain transactions involving PEPs and transactions involving “pure” robo-advice providers. The amendments would provide greater specificity as to what information must be disclosed to retirement investors under the exemption and clarify that fiduciary acknowledgements must clearly indicate whether the entity is a fiduciary with respect to investment recommendations and advice.

Additionally, the amendments would require financial institutions to notify retirement investors of their right to obtain additional information upon request, free of charge. The proposed amendments would also provide more guidance for financial institutions and investment professionals complying with PTE 2020–02’s requirements related to financial institutions’ policies and procedures. The amendments would also expand on which parties can request and receive records under the exemption’s recordkeeping provisions.

PTE 84–24 would be amended to limit relief for investment advice to independent insurance producers (i.e., independent insurance agencies) that recommend annuities from an unaffiliated financial institution to retirement investors on a commission or fee basis. Additionally, PTEs 75–1 Parts III and IV, 77–4, 80–83, 83–1, and 86–128 would be amended to eliminate relief for transactions resulting from fiduciary investment advice, as defined under ERISA.

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

The most significant benefits of the proposal are expected to result from (1) changing the definition of a fiduciary by amending the five-part test, (2) requiring advice given to a broader range of advice recipients, including plan fiduciaries and non-retail investors, to meet fiduciary standards under ERISA, (3) extending the application of the fiduciary best interest standard in the market for non-security annuities, creating a uniform standard across different retirement products, and (4) requiring that more rollover recommendations be in the retirement investor’s best interest.

These proposed amendments generally align with the Investment Advisers Act of 1940 and the SEC’s Regulation Best Interest. In crafting this proposal, the Department has worked to align its proposed definition with Regulation Best Interest and the Advisers Act where it can. ERISA has a functional fiduciary test and imposes fiduciary status only to the extent the functional test is satisfied. The Department intends for the compliance obligations under this proposal to broadly align with the standards set by the SEC where practicable and has tried to accomplish such alignment in this proposal. The Department believes that by harmonizing the application of fiduciary duty for retirement investment advisers across regulatory regimes, retirement investors will benefit from more uniform protections from conflicted advice. While extending fiduciary duty to more entities will generate costs, the Department believes any new compliance costs will not be unduly burdensome as the proposal broadly aligns with those compliance obligations imposed under the Investment Advisers Act and the SEC’s Regulation Best Interest on investment advisers and broker-dealers, respectively, and simply expands them to larger portions of the retirement market.


1. Executive Orders

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives. If regulation is necessary, agencies must choose a regulatory approach that maximizes net benefits, including potential economic, environmental, public health and safety effects; distributive impacts; and equity. Executive Order 13563 emphasizes the importance of quantifying costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

Under Executive Order 12866, “significant” regulatory actions are subject to review by the Office of Management and Budget (OMB). As amended by Executive Order 14094,\footnote{88 FR 21879 (Apr. 6, 2023).} entitled “Modernizing Regulatory Review”, section 3(f) of Executive Order 12866 defines a “significant regulatory
action” as any regulatory action that is likely to result in a rule that may:

1) have an annual effect on the economy of $200 million or more (adjusted every three years by the Administrator of the Office of Information and Regulatory Affairs (OIRA) for changes in gross domestic product); or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial, or tribal governments or communities;

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

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

4) raise legal or policy issues for which centralized review would meaningfully further the President’s priorities or the principles set forth in the Executive order, as specifically authorized in a timely manner by the Administrator of OIRA in each case.

It has been determined that this proposal is significant within the meaning of section 3(f)(1) of the Executive Order. Therefore, the Department has provided an assessment of the proposal’s potential costs, benefits, and transfers, and OMB has reviewed the proposal.

2. Need for Regulatory Action

In preparing this analysis, the Department has reviewed recent regulatory and legislative actions concerning investment advice, market developments in industries providing investment advice, and research literature weighing in on investment advice. From this review, the Department believes there is compelling evidence that retirement investors remain vulnerable to harm from conflicts of interest in the investment advice they receive. Given this evidence, and the Department’s mission to ensure the security of retirement benefits of America’s workers and their families, the Department is proposing to amend the definition of fiduciary and certain exemption relief.

Why Being a Fiduciary Matters

As described above, fiduciaries under ERISA are subject to specific requirements. ERISA section 404 requires Title I plan fiduciaries to act with the “care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.” Further, fiduciaries must carry out their duties “solely in the interest of the participants and beneficiaries” of the plan. Title II of ERISA, codified in the Internal Revenue Code, governs the conduct of fiduciaries to tax-qualified plans and IRAs. Under both Title I and Title II, fiduciaries are subject to prohibited transactions that forbid them from, among other things, self-dealing. The aim of the prohibited transaction provisions is to protect plans, their participants, and beneficiaries from dangerous conflicts of interest that threaten the safety and security of plan benefits.

This combination of a high standard of conduct and personal liability for violations of the standard of conduct for Title I fiduciaries, and restrictions on behavior for Title I and Title II fiduciaries functions to protect plans, participants, and beneficiaries from fiduciary misdeeds. Previously, the Department conducted an economic analysis (2016 Regulatory Impact Analysis (RIA)) of then-current market conditions and the likely effects of expanding the definition of fiduciary to include more individuals. It reviewed evidence that included:

• statistical comparisons finding poorer risk-adjusted investment performance in more confined settings;

• experimental and audit studies revealing questionable investment advice provider conduct, including recommendations to withdraw from low-cost, well diversified portfolios and invest in high-cost alternatives likely to deliver inferior results;

• studies detailing gaps in consumers’ financial literacy, errors in their financial decision-making, and the inadequacy of disclosure as a consumer protection;

• federal agency reports documenting abuse and investors’ vulnerability;

• a study by the President’s Council of Economic Advisers that attributed $17 billion in annual IRA investor losses to advisory conflicts;

• economic theory, which predicts that when expert investment advice providers have conflicts of interest, non-expert investors will be harmed; and

• international experience with harmful advisory conflicts and responsive reforms.

The Department’s analysis found that conflicted advice was widespread, caused serious harm to retirement investors, and that disclosing conflicts alone would fail to adequately mitigate the conflicts or remedy the harm. The analysis concluded that extending fiduciary protections to more advice would reduce advisory conflicts and deliver substantial net gains for retirement investors.

Changes in Retirement Savings Since the 1975 Regulation

While the 1975 regulation that established the five-part test has remained fixed, the private retirement savings landscape has changed dramatically. In the late 1970s, private retirement savings were mainly held in large employer-sponsored defined benefit plans. Under the terms of these plans and the governing legal structure, the plans and plan sponsors promised fixed payments to retirees, generally based on a percentage of their compensation and years of employment with the sponsoring employer. Plan sponsors hired professional asset managers, who were subject to ERISA’s fiduciary obligations, to invest the funds, and the employers or other plan sponsors shouldered the risk that investment returns were insufficient to pay promised benefits. Individual plan participants did not take direct responsibility for management of the assets held by the plan and did not depend on expert advice for the sound management of funds, which were directly controlled by investment professionals.

Since then, much of the responsibility for investment decisions in employment-based plans has shifted from these large private pension fund managers to individual retirement account participants, many with low levels of financial literacy. Over time, the share of participants covered by defined contribution plans, in which benefits are based on contributions and earnings within an individual account, grew substantially, from just 26 percent in 1975 to 78 percent in 2020. By 2020, 94 percent of active participants in defined contribution plans had responsibility for directing the investment of some or all of their...
account balances.164 The Department could not have foreseen such a dramatic shift when it issued the existing fiduciary investment advice regulation in 1975. The passage of ERISA authorized IRAs in 1974, and IRAs remained in their infancy when the 1975 rule was issued. The vast majority of consumers were not managing their own retirement savings, nor retaining investment advisers to do so, because 401(k) plans did not even exist in 1975. Though workers have assumed more of the responsibility for their investment decisions, they have at least still receive some fiduciary oversight and protections provided by ERISA while participating in employer-sponsored plans. However, often workers who change jobs or retire roll over their retirement savings to an IRA, where they assume full responsibility for investing the assets in the larger marketplace without those protections. Not only is it very common for defined contribution plan participants to roll over their retirement savings to an IRA, but it is also increasing among defined benefit plan participants. Defined benefit plan participants have the option to perform a rollover if their plan allows them to take a lump-sum payment when they separate from service. About 36 percent of private industry workers in traditional defined benefit plans have a lump-sum payment available at normal retirement, as do virtually all private industry workers in non-traditional defined benefit plans, such as cash balance plans.165 In 1993, private defined benefit plans held more than twice the assets in private defined contribution plans, and roughly 10 times more than IRA assets. By the first quarter of 2022, the order had reversed: IRAs held $13.2 trillion in assets, private defined contribution plans held $9.2 trillion, and private defined benefit plans held $3.7 trillion in assets.166 This trend is expected to continue as retirement investors are projected to move $4.5 trillion from defined contribution plans to IRAs from 2022 through 2027.167

Moreover, workers have become more reliant on their retirement savings as Social Security benefits have eroded in recent decades. The age to receive full retirement benefits is gradually increasing from 65 to 67 between 2003 and 2027. Those who claim Social Security before reaching full retirement age—which in 2021 was approximately 60 percent of new retired-worker beneficiaries—receive reduced benefits.168 For a hypothetical medium wage earner who first claims benefits at age 65, their Social Security benefit, as a share of average career earnings, was more than 40 percent in 2005 but is projected to be only about 35 percent in 2025.169

Investment Advice and the 1975 Regulation

As the nature of retirement savings has changed since 1975, investment advice has also evolved. Commercial relationships between corporate pension plan sponsors and fund managers and their consulting advisers have been supplanted by retail relationships between consumers and the trusted experts they turn to for help managing their 401(k) plan and IRA savings.

Instead of ensuring that trusted advisers give prudent and unbiased advice in accordance with fiduciary norms, the 1975 regulation erected a multi-part series of technical impediments to fiduciary responsibility. The five-part test of the 1975 rule diverges from the express language of the statute and from its protective purposes by stating that advice must be on a “regular basis” and be “a primary basis for investment decisions” to confer fiduciary status. Without fiduciary status, the advice provider is free to disregard ERISA’s duties of prudence and loyalty and to engage in self-dealing transactions that would otherwise be flatly prohibited by ERISA and the Code because of the dangers they pose to plans and plan participants.

While consumers often use financial advisers for investment advice related to their retirement savings, if an investment recommendation does not meet all five parts of the 1975 test, the adviser is not treated as a fiduciary under ERISA, no matter how complete the investor’s reliance on recommendations purported to be based on their best interest in light of their individual circumstances.

For example, under the 1975 rule, if the advice is not given on a “regular basis,” it makes no difference if the person making the recommendation claims to make the recommendation based on the investor’s best interest and knows that the investor is relying on that recommendation. Thus, if a plan participant seeks advice on whether to roll over all their retirement savings, representing a lifetime of work, out of an ERISA-covered plan overseen by professional ERISA fiduciaries, to purchase an annuity, the person making the recommendation with respect to the purchase of the annuity has no obligation to adhere to a best interest standard unless they meet all prongs of the 1975 rule, including regularly giving advice to the plan participant. This is true even if the person giving the advice holds themselves out as an investment expert whose recommendation is based solely on a careful and individualized assessment of the investor’s needs, the plan participant has no investment expertise whatsoever, and both parties understand that the participant is relying upon the advice for the most important financial decision of their life. Because the advice was not rendered on a “regular basis,” the adviser has no obligation under ERISA to adhere to fiduciary standards, and thus would not be subject to ERISA’s prohibitions on disregarding the participants’ financial interests, recommending an annuity that is imprudent and ill-suited to the participant’s circumstances, and favoring the adviser’s own financial interests at the expense of the participant.170 An adviser who regularly

170 Investors have suffered significant losses when an investment professional does not act in the investor’s best interest. For example, in 2021, the SEC settled with Teachers Insurance and Annuity Association of America (TIAA) for $57 million, citing disclosure violations and failure to implement policies and procedures. See https://www.sec.gov/litigation/admin/2021/33-10954.pdf. While the SEC was able to settle, the Southern District of New York recently dismissed a complaint by plaintiffs in this same TIAA plan who argued that TIAA acted as an ERISA fiduciary when advising plan participants to roll over assets from their employer-sponsored plan to a TIAA managed account product. Although TIAA represented in market materials that it “met a fiduciary standard” when providing investment recommendations, the court found that it did not provide this advice on a regular basis and therefore did not satisfy the five-part test to be considered an ERISA fiduciary. See Continued
had rendered trivial advice about small plan investments, and met the other prongs of the multi-part test, would appropriately be treated as a fiduciary if they met the other requirements of the 1975 rule, but not the person who on one occasion purported to give individualized advice to roll a lifetime savings out of an ERISA-covered plan and place it in a fixed indexed annuity. This is not a sensible way to draw distinctions in fiduciary status, and finds no support in the text of ERISA, which makes no mention of a “regular basis” requirement. When the Department issued PTE 2020–02, it sought to ameliorate some of the effects of the regular basis requirement by suggesting that rollover advice could be treated as falling within the 1975 rule, if it was rendered at the beginning of an ongoing advisory relationship. Accordingly, in an April 2021 FAQ, in the context of advice to roll over assets from an employee benefit plan to an IRA, the Department acknowledged that a single instance of advice could not satisfy the regular basis prong of the 1975 test, but explained that “advice to roll over plan assets can also occur as part of an ongoing relationship or as the beginning of an intended future ongoing relationship that an individual has with an investment advice provider.” In other words, “when the investment advice provider has not previously provided advice but expects to regularly make investment recommendations regarding the IRA as part of an ongoing relationship to advise to roll assets out of an employee benefit plan into an IRA would be the start of an advice relationship that satisfies the regular basis requirement.”

Ultimately, however, that policy interpretation was struck down as inconsistent with the text of the 1975 rule. In American Securities Association v. United States Department of Labor, the court found that “the scope of the regular basis inquiry is limited to the provision of advice pertaining to a particular plan.” Further, the court held that “[b]efore a rollover occurs, a professional who gives rollover advice does so with respect to an IRA—governed plan. However, after the rollover, any future advice will be with respect to a new non-ERISA plan, such as an IRA that contains new assets from the rollover. The professional’s one-time rollover advice is thus the last advice that he or she makes to the specific plan.” Based on the court’s ruling, the only way for the Department to remedy the shortcomings of the “regular basis” test is through new rulemaking. Inexpert Customers

Researchers have consistently found that many Americans demonstrate low levels of financial knowledge and lack basic understanding of investment strategies. In particular, households age 50 and older and nearing retirement, “fail to grasp essential aspects of risk diversification, asset valuation, portfolio choice, and investment fees.” Such customers appear to be particularly vulnerable to receiving harmful advice. Egan et al. (2019) found that misconduct among investment advice professionals was higher in counties with populations that were less financially sophisticated, including those who are less educated and older. Retirement investors are in a poor position to assess the quality of the advice they receive, and the advisers’ incentives are often misaligned with the investors’ interests. The dependence of inexpert clients on advisers with significant conflicts of interest creates a large risk of investment advice and investment decisions that are not in the best interest of retirement investors. The Department’s 2016 RIA demonstrated that the balance of research and evidence indicates that the aggregate harm from cases in which consumers received bad advice due to investment advice providers’ conflicts of interest is significant. The complex nature of financial markets alone, particularly for insurance products, creates information asymmetry that makes it difficult for inexpert investors to navigate savings for retirement. Multiple studies cited found that retirement investors often lack a basic understanding of investment fundamentals. A subsequent 2018 FINRA study of non-retired individuals age 25–65 found that nearly one in five investors that only had retirement accounts through their employers routinely scored lower on financial literacy questions than active investors and that these workplace-only investors scored only two percentage points higher than the general population (32 percent versus 30 percent) on a composite question regarding interest, inflation and risk diversification. In addition to lacking rudimentary financial knowledge, many retirement investors often do not understand the roles of different players in the investment industry and what those players are obligated to do.

The SEC has commissioned several studies on whether investors can differentiate between different types of

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**174** Id. at *16 (emphasis added).

**175** Id. at *17. “Because assets cease to be assets of an ERISA plan after the rollover is complete, any future provision of advice is, by nature, no longer to that ERISA plan.”

**176** Id. at *16. “ ‘Fiduciary’ is defined as ‘in the nature, no longer to that ERISA plan.’ ”


investment service providers. A 2005 study considered four focus groups in different geographic locations and found that investors were generally unclear about distinctions between broker-dealers, financial advisers, investment advisers, and financial planners and often used the terms indistinguishably. A 2008 household survey found that while most of the survey respondents had a "general sense of the difference in services offered by brokers and by investment advisers but that they are not clear about their specific legal duties." A 2018 study also evaluated four focus groups and found that participant understanding of the distinction between broker-dealers and investment advisers was low, even among those who were provided information describing the classifications of the two categories. If investors are unable to distinguish between types of advisers, they cannot be expected to understand legal distinctions of the standard to which that advice is held.

Confusion regarding the different types of advice providers and the different standards of conduct to which they must adhere is often made worse by industry marketing and other practices. To attempt to address this, the SEC adopted as part of its 2019 Rulemaking a new required disclosure of a "Form CRS Relationship Summary," under which registered investment advisers and broker-dealers must provide retail investors with certain information about the nature of their relationship with the firm and its financial professionals in plain English. One of the purposes of the Form CRS is to help retail investors better understand and compare the services and relationships that

investment advisers and broker-dealers offer in a way that is distinct from other required disclosures under the securities laws.

In order for disclosures to be effective, however, investors must both review and understand them. Many disclosures, however, suffer from complexity, so investors overlook or misunderstand them and gloss over the information presented to them. A 2017 survey of private-sector workers with retirement plans found only one-third had read any investment fee disclosure in the past year and only 25 percent of all respondents had both read and understood the information. Many investors also cannot effectively assess the quality of investment advice they receive. Research suggests that, in general, consumers often fail to fully comprehend the quality of professional services they receive, including services from doctors, lawyers, and banks in addition to investment advice providers. The 2016 RIA cited evidence that advice from providers often encouraged investors’ cognitive biases, such as return chasing, rather than correcting such biases. It cited research showing that payments made to broker-dealers influenced the advice provided to clients and that funds distributed through more conflicted broker channels tend to perform worse. Research also suggests that investors’ opinions of adviser quality can be manipulated. For instance, Agnew et al. (2014) found that if an adviser first provides good advice on a financial decision that is easy to understand, the client will subsequently trust bad advice on a more difficult or complicated topic. Investors who are unable to discern when they are receiving bad advice are at risk of being persuaded to make investment decisions that are not in their best interest.

Overall, evidence demonstrates that the combination of inexpert customers and conflicted advisers results in investment underperformance and negative outcomes for investors. According to a 2015 report by the Council of Economic Advisers, approximately $1.7 trillion of IRA assets were invested in products with a payment structure that generates conflicts of interests. A substantial body of research has shown that IRA holders receiving conflicted investment advice can expect their investments to underperform by approximately 50 to 100 basis points per year.

As discussed in the 2016 RIA, the Department estimated that a 50 to 100 basis point performance gap of broker-sold funds would result in retirees losing $9 to $17 billion each year (or between 0.5 and 1 percentage point of return each year for $1.7 trillion in assets), $95 to $189 billion over 10 years, and $202 and $404 billion over 20 years. That means a retiree spending their savings down over 30 years would have 6 to 12 percent less to spend. If a retiree encounters conflicts of interest and experiences a 100-basis point reduction in performance, but still spends as though they were not encountering conflicts of interest, they would run out of retirement savings more than five years early.
Pervasiveness of Conflicts of Interest in Investment Advice

In recent years, consolidation of the financial industry and innovations in products and compensation practices have created opportunities for self-dealing and made fee arrangements less transparent to clients and regulators. The existence of safeguards in only certain markets, such as the recent adoption of Regulation Best Interest by the SEC regarding recommendations of securities transactions or investment strategies involving securities, creates incentives for agents to recommend conflicted products in less regulated markets. While the relative newness of Regulation Best Interest makes it challenging to quantify instances of these effects, there is research demonstrating similar impacts from other policies addressing financial conflicts of interest or misconduct that varied across markets. Bhattacharya et al. (2020) found that higher fiduciary standards are associated with the sale of higher quality annuity products.196 Honigsberg et al. (2022) showed that variation in regulatory oversight regimes leads to a situation where the worst financial advisers are operating in the most lightly regulated regimes.197 Charit and Brown (2019) found that under lighter regulation, advisers were more likely to receive complaints, particularly advisers with past complaints or with conflicts of interest.198 This proposal would extend protections associated with fiduciary status under ERISA, regardless of advice model, and reduce the gap in protections with respect to ERISA-covered investments.

Conflicts of Interest After the SEC’s Regulation Best Interest

Regulation Best Interest under the Securities Exchange Act of 1934 created a “best interest” standard of conduct for broker-dealers and associated persons when they make a recommendation to a retail customer of any securities transaction or investment strategy involving securities, including recommendation of types of accounts. While Regulation Best Interest does overlap with ERISA’s fiduciary standard, and reduces conflicts, the two standards do not align perfectly: Regulation Best Interest does not apply fiduciary accountability to all parties that provide investment advice to Retirement Investors and does not cover advice to non-retail investors. Moreover, Regulation Best Interest generally does not apply to recommendations of investment products that are not regulated as securities, such as many annuity products. Similarly, while there is a large overlap in the substance of the different regulatory regimes, in enacting ERISA, Congress provided special protections for tax-advantaged retirement savings that don’t apply more broadly. For example, Congress prohibited transactions (absent an exemption) that were determined to raise significant risk to retirement plan participants and beneficiaries.

The SEC began conducting limited scope broker-dealer examinations and risk-based inspections in June 2020 to assess whether firms established written policies and procedures to comply with Regulation Best Interest and had made reasonable progress in implementing those policies and procedures. In their reviews, staff identified instances of deficient disclosure obligations, care obligations, periodic review and testing, and conflict of interest obligations.199 FINRA has identified similar deficiencies in its Report on Examination and Risk Monitoring Program.200 The SEC’s Division of Examination notes that in response to deficiency letters identifying these issues, many broker-dealers modified their practices, policies and procedures.201 In addition, the SEC released additional guidance in April 2023 focused on the Care Obligation to continue to improve compliance with Regulation Best Interest.202 In the first year after the SEC’s compliance deadline for Regulation Best Interest, the North American Securities Administrators Association (NASAA) conducted a survey of 443 FINRA firms.203 The survey found that many broker-dealer firms were still utilizing the compliance programs they had in place prior to Regulation Best Interest, when the standard for retail advice was to recommend investments that were “suitable” for the client.204 In addition, the percentage of broker-dealer firms surveyed that were offering complex, costly, and risky products increased by 11 percent after Regulation Best Interest took effect. About 65 percent of broker-dealer firms did not discuss lower-cost or lower-risk products with their customers when they recommended complex, costly, and risky products. The survey also found that 24 to 30 percent of broker-dealer firms were still using conflicted forms of compensation, including sales contests, differential or variable compensation, and other extra forms of compensation.205 In the first year after Regulation Best Interest took effect, only 35 percent of those broker-dealer firms recommending complex, costly, and risky products had “reduced the financial reward associated with these products by capping agent sales credits.”206 In other words, the majority of broker-dealer firms that offered complex, costly and risky products had not restructured their financial reward structure in response to conflict mitigation requirements in SEC’s Regulation Best Interest.

NASDAQ’s Broker-Dealer Section Committee concluded a subsequent review of over 200 examinations evaluating broker-dealers’ compliance of Regulation Best Interest by state examiners in 25 states, under its second and third year of implementation.207 This review revealed steady implementation progress, including that firms had been updating investor profile forms and policies and procedures; that firms recommending complex, costly or risky products were imposing restrictions based on age, income/net worth and risk profiles; and that firms were utilizing cost-comparison tools to better consider reasonable investment

204 Kenneth Corbin, Reg BI Isn’t Working So Far. Exams Are Coming, Says NASAA, Barron’s (Nov. 5, 2021).

alternatives. The report noted, however, that firms still struggle with considering reasonably available alternatives and conflict mitigation: ignoring lower cost and risk products when recommending complex, costly risk products and relying on financial incentives to sell them; and that firms have not enhanced point of sale disclosures.

The SEC and FINRA have subsequently released additional guidance designed to clarify and strengthen compliance with Regulation Best Interest’s Consumer Protective conditions. The SEC announced in January 2023 that it intends to incorporate compliance with Regulation Best Interest into retail-focused examinations of broker-dealers and both the SEC and FINRA have begun enforcement actions related to Regulation Best Interest. In June 2022, the SEC charged a firm and five brokers for violating Regulation Best Interest and selling high-risk bonds to retirees and other retail investors. Meanwhile, FINRA levied its first Regulation Best Interest-related fine in October 2022 and suspended two New York-based brokers in February 2023.

Conflicts of Interest in Advice Given to Plan Fiduciaries

Concerns regarding investment advice extend to that received by ERISA plan fiduciaries. Pool et al. (2016) found that while mutual funds involved in plan management for 401(k) plans included both funds from their own family as well as unaffiliated funds in the menu of investment options, poor performing funds were less likely to be removed and more likely to be added to the menu if they were affiliated with the plan trustee. In 2005, the SEC found evidence that some pension consultants do not adequately disclose their conflicts and may steer plan fiduciaries to hire money managers based partly on the consultants’ own financial interests. The U.S. Government Accountability Office (GAO) found these inadequately disclosed conflicts were associated with substantial financial losses. GAO’s study found that between 2000 and 2004, plans associated with pension consultants without adequate disclosure of their conflicts of interest saw annual rates of return 1.2 to 1.3 percentage points lower than plans associated with pension consultants with adequate disclosure of conflicts of interest. In another study, GAO found that ERISA plan sponsors often are confused as to whether the advice they receive is fiduciary advice, and small plans in particular may suffer as a result. This confusion leaves plan participants vulnerable to lower returns due to conflicted advice.

Conflicts of Interest in Rollover Recommendations or Advice

The treatment of rollover recommendations or advice under the 1975 rule has been a central concern in the Department’s regulation of fiduciary investment advice. The decision to roll over assets from a plan to an IRA is often the single most important financial decision a plan participant makes, involving a lifetime of retirement savings. Most IRA assets are attributable to rollover contributions, and the amount of assets rolled over to IRAs is large and expected to increase substantially. In 2021, IRA rollovers from defined contribution plans increased by 4.9 percent. Cerulli Associates estimates that aggregate rollover contributions to IRAs from 2022 to 2027 will surpass $4.5 trillion.

The decision to roll over one’s retirement savings from an ERISA-covered employer-based plan into an IRA or other plan has significant consequences, and for many investors is the single most consequential advice they will receive and affects a lifetime of savings. About 57 percent of traditional IRA-owning households indicated that their IRAs contained rollovers from employer-sponsored retirement plans and of those households, 85 percent indicated they had rolled over their entire account balance in their most recent rollover. In 2020 more than 95 percent of the dollars flowing into IRAs came from rollovers, while the rest came from regular contributions.

Retiring workers must decide how best to invest a career’s worth of 401(k) savings, and many look to an investment advice provider for guidance. Financial institutions face an innate conflict of interest, in that a financial institution that provides a recommendation or advice concerning a rollover to a retirement investor may expect to earn transaction-based compensation such as commissions and/or receive an ongoing advisory fee that it likely would not receive if the assets were to remain in an ERISA-covered plan. Further, under the 1975 rule, if an investment advice provider makes a one-time recommendation that the worker move the entire balance of their retirement plan into an IRA and invest it in a particular annuity, then the advice provider has no fiduciary obligation under ERISA to honor the worker’s best interest unless this recommendation is part of an “ongoing” advice relationship. The resulting compensation represents a significant revenue source for investment advice providers.
In the preamble to PTE 2020–02, the Department provided an interpretation of when advice or a recommendation to roll over assets from an employee benefit plan to an IRA would constitute fiduciary investment advice under the 1975 regulation’s five-part test. The preamble interpretation confirmed the Department’s view that advice or a recommendation to roll over assets out of a Title I Plan is advice with respect to moneys or other property of the plan and, if provided by a person who satisfies all of the requirements of the five-part test, constitutes fiduciary investment advice. The preamble interpretation also discussed when a recommendation to roll over employee benefit plans to an IRA would satisfy the “regular basis” requirement and the Department’s interpretation of the requirement of “a mutual agreement, arrangement, or understanding” that the investment advice will serve as “a primary basis for investment decisions.”

Regarding the regular basis prong, the Department explained that “advice to roll assets out of a Title I Plan into an IRA where the investment advice provider has not previously provided advice but will be regularly giving advice regarding the IRA in the course of a lengthier financial relationship would be the start of an advice relationship that satisfies the regular basis prong.” 220 As discussed above, however, this interpretation of the 1975 rule was rejected by the court in American Securities Association v. United States Department of Labor,221 and in the case of Federation of Americans for Consumer Choice v. United States Department of Labor,222 the magistrate judge has recommended that the district court also reject this interpretation. In their view, the 1975 rule does not permit the Department to treat one-time rollover recommendations as “regular basis” advice based on the expectation of future advice on the management of the assets rolled out of the ERISA plan and into the IRA. Any change to the “regular basis” requirement requires a new rule. 223

While PTE 2020–02 mitigates some of these concerns by requiring investment advice fiduciaries to render advice in their customer’s best interest in order to receive certain types of compensation from otherwise prohibited transactions resulting from rollover advice, the limitations of the existing five-part test for fiduciary status still result in significant portions of the retirement investment market operating outside of the PTE’s protections.

Uniformity Across Markets and Product Types

The current regulatory approach to investment advice results in standards that vary by advice market and investment product. 224 As a result, retirement investors cannot rely on a single protective standard, and their exposure to risk is not only based on the types of products they invest in but also by who gives that advice or makes that recommendation and in what capacity they are acting. This creates investor confusion and makes room for regulatory arbitrage, where investment advice providers can use more favorable rules in one market to circumvent less favorable regulations elsewhere. The Department identifies the following nuances of the regulatory landscape as sources of investor confusion:

• Regulation Best Interest only applies to recommendations made by broker-dealers to retail customers. As a result of this limitation, broker-dealers’ recommendations of securities transactions, investment strategies, plan design, and plan investment options to plan fiduciaries, fall outside its scope. This may be particularly confusing for small plan fiduciaries.

• Securities laws (i.e., the Investment Advisers Act and Regulation Best Interest) may not apply to advice on investments such as real estate, fixed indexed annuities, commodities, certificates of deposit, and other bank products.

• Variable annuities and some indexed annuities are considered securities and are subject to securities laws, while fixed annuities, including fixed indexed annuities, are subject to state law. As discussed in the Regulatory Baseline section, these laws vary significantly from state to state.

This list is not exhaustive but provides a sense of how many seemingly similar investments are subject to widely different regulators and protective standards.

Honigsberg et al. (2022) identified associated persons of broker-dealers who had been registered with FINRA between 2010 and 2020 but were no longer registered with the regulatory authority. Of those that exited, roughly a third continued providing financial advice under a different regulatory regime, of which eight percent had a history of serious misconduct while registered with FINRA. This share increased to 12 percent when you looked at those that were still providing financial advice as an insurance producer registered with the NAIC and 13 percent when you looked at the National Futures Association members. The authors argued that the existing framework for regulating adviser misconduct creates incentives for the worst advisers to migrate to more poorly regulated state regimes. 225

The risk posed by non-uniform regulatory environments is exemplified by the annuity market. A recent survey of insurers reported that 58 percent of insurers thought the SEC’s Regulation Best Interest had improved protections for consumers. 226 However, as discussed above, generally only annuities considered securities are under the jurisdiction of the SEC. The remaining annuities are covered by state regulations that potentially hold those selling such insurance products to a lower standard. In crafting this proposal, the Department strove to craft a definition that hews to both the text and purpose of ERISA.

An investor’s retirement account may hold a wide range of investment products, those products may touch multiple regulatory regimes, and the retirement investor may not be aware of the different standards. Once the investment products are held in a tax-advantaged retirement account, however, ERISA requires a uniform standard, applicable regardless of the type of investment product. This range of investment products held in retirement plans means that the regulatory definition of an investment advice fiduciary for purposes of Title I of ERISA and the Code takes on special importance in creating uniform standards for investment advice, particularly when a retirement investor may not realize the investment product is not covered by another regulatory regime such as federal securities laws.

Need for Uniformity Concerning Rollovers

The difference between types of products, such as securities subject to regulation by the SEC and non-

223 224 For more information on the different regulatory regimes, Refer to the Regulatory Baseline section in this analysis.
securities annuities subject to regulation by state insurance departments, creates problematic incentives for professional financial products to recommend certain products.

Under the Investment Advisers Act and Regulation Best Interest, investment advisers and broker-dealers must have a reasonable basis to believe both the rollover itself and the account being recommended are in the retail investor’s best interest.227 SEC staff guidance recognizes that it would be difficult to have such a reasonable basis if, “you do not consider the alternative of leaving the retail investor’s investments in their employer’s plan, where that is an option.”228 Moreover, broker-dealers and investment advisers are instructed generally to consider certain factors when making rollover recommendations to retail investors, specifically and without limitation, “costs; level of services available; features of the existing account, including costs; available investment options; ability to take penalty-free withdrawals; application of required minimum distributions; protection from creditors and legal judgments; and holdings of employer stock.”229 As such, the SEC’s regulatory framework is likely to mitigate some of the aforementioned harms to retirement investors, but only in markets where it applies.

In contrast, the NAIC Model Regulation #275, which is the basis for much of the state regulation on insurers,230 makes no direct reference to rollovers, and imposes a less stringent obligation on annuity recommendations than the best interest standard imposed on securities recommendations and investment advice by the SEC. Given the average rollover contribution to a traditional IRA in 2019 was $112,000, the variation in regulatory standards regarding rollover advice can result in widely disparate outcomes among similarly situated retirement investors based solely on who they sought for advice and whether that adviser was required to put the investor’s interests above their own.

An update to the regulatory definition of an investment advice fiduciary, for purposes of Title I of ERISA and the Code, is necessary to enhance protections of retirement investors. This approach both reflects ERISA’s and the Code’s statutory text, which adopts a uniform approach, as well as sound public policy. Investment recommendations should be consistently governed solely by the best interest of retirement investors, rather than adviser perceptions that advice on one category of investment product is subject to different regulatory standards than another.

How the Proposed Rule Addresses the Need for Regulatory Action

The proposed amendments to the 1975 rule would better reflect the text and purposes of the statute and would address inadequacies that the Department has observed during its decades of experience in implementing the 1975 rule. This proposal would honor the broad statutory definition of fiduciary by amending the five-part test to create a uniformly protective fiduciary standard for retirement investors, subject to firm-level oversight, designed to mitigate and eliminate the harmful effects of biased advice. The amendments to the 1975 rule and related exemptions would also eliminate the risk of regulatory arbitrage, in which an investment advice provider may operate in a particular market to evade more stringent regulation. For instance, under the current regulation, an independent producer selling an indexed annuity, a financial professional giving a retirement investor one-time advice to roll investments into an IRA, or a financial professional giving advice on one transaction, could portray themselves as serving the best interest of the investor while being held to lower care standard than financial professionals subject to the Investment Advisers Act of 1940 or the SEC’s Regulation Best Interest or the Department’s fiduciary standard. In contrast, the amended rule would broadly align the standard of care required of all financial professionals giving retirement investment advice with retirement investors’ reasonable expectations that those recommendations are trustworthy. This would in turn create a retirement market where all advisers compete under a uniform fiduciary standard, reducing investor exposure to harms from conflicted advice.

The fiduciary standard, as buttressed by the protective conditions of PTE 2020–02 and PTE 84–24, protects investors from getting investment recommendations that are improperly biased because of the advisers’ competing financial interests. It requires firms and advisers to put the interests of Retirement Investors first and to take appropriate action to mitigate and control conflicts of interest. These conditions should go a long way to redressing the dangers posed by biased advice.

In addition, the proposed exemptions also give inept investors important information on the scope, severity, and magnitude of conflicts of interest. Moreover, by imposing a uniform fiduciary standard on conflicted advisers in the retirement marketplace, the proposed rule and exemptions reduce investor confusion about the standards governing advice. Retail investors who rely on conflicted advice are unlikely to have a sound understanding of differences in standards across various categories of investments and investment professionals.231 The SEC Investor Advisory Committee, when considering a uniform adoption of a standard of duty for investment advisers and broker-dealers in 2013, found that “investors do not distinguish between broker-dealers and investment advisers, do not know that broker-dealers and investment advisers are subject to different legal standards, do not understand the difference between a suitability standard and a fiduciary duty, and expect broker-dealers and investment advisers alike to act in their best interest when giving advice and making recommendation.”232

While these issues have been mitigated to a considerable degree by the imposition of a common “best interest” standard for broker-dealers governed by Regulation Best Interest and investment advisers subject to the Investment Advisers Act or state law, significant differences remain with respect to the standards governing investments that are not securities, such as fixed indexed annuities. Investor confusion is exacerbated by different

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227 In addition to staff guidance, the Commission recognized in Regulation Best Interest that, “as part of determining whether a broker-dealer has a reasonable basis to believe that a recommendation is in the best interests of the retail customer, a broker-dealer generally should consider reasonably available alternatives offered by the broker-dealer,” which the Commission viewed as “an inherent aspect of making a ‘best interest’ recommendation.” See Reg BI Adopting Release at 33381.


229 Ibid.

230 For more information, refer to the discussion in the Regulatory Baseline section on state legislation and regulation.


regulatory regimes referencing a “best interest standard” while defining what that means and the protections that entails differently.

Although the proposal will enhance disclosures of conflicts of interest, the Department stresses that disclosure alone is limited in its effectiveness at protecting investors from the dangers posed by conflicts of interest, as detailed in the RIA for the fiduciary rule the Department promulgated in 2016. As that document explained, there are myriad reasons to doubt that disclosure alone could effectively mitigate conflicts of interest, and available data support a finding that disclosure is not a reliable corrective for conflicts of interest:

- Even with relatively clear disclosures, investors routinely ignore them and are hard pressed to understand them. Investors often lack the requisite financial expertise, disregard the materials they receive, and have trouble following the disclosures or parsing their significance. These problems can be compounded for older and more vulnerable retirement-age investors.
  - Merely disclosing a conflict of interest does not give the investor a working model on how to determine the impact of the conflict of interest on the advice they are receiving or of how to use the disclosure to make a better investment decision. While now on notice of the conflict, the expert customer remains dependent on the expert’s advice.
  - Disclosure can even exacerbate the harmful impacts of conflicts of interest, as when an adviser feels morally licensed to indulge the conflict of interest because they can now treat the customer as duly warned or as when they press harder to make the sale to offset possible concerns about disclosed conflicts.
  - Without a working model on how to take account of conflicts of interest, investors may overweight the advice based on the adviser’s perceived honesty for having disclosed the conflict, or unduly discount the advice and take a contrarian approach because of discomfort about the advice’s reliability. Investors may also feel pressure not to question the adviser’s integrity or deprive them of their livelihood.

While disclosure of conflicts could, in some cases, change the adviser’s behavior for the better, mitigating or removing conflicts and requiring the adviser to adhere to a strong conduct standard with a mechanism for overseeing and enforcing compliance, when necessary, provides stronger incentives for advisers to provide investment advice that is in the best interest of the investor. These are the key components of the Department’s proposals, and the primary ways the Department expects the rule to address the problems posed by conflicted advice.

While the SEC has addressed many of the Department’s concerns about conflicted advice, the impact is limited to advice in the SEC’s regulatory jurisdiction. This situation would be alleviated by the introduction of a uniform fiduciary standard for the broad range of retirement investment transactions in all regulatory spheres. Additional regulatory action is warranted due to the pervasiveness of conflicts of interest in this marketplace and the complexity of investing assets for retirement. The growing body of evidence underscores that best interest fiduciary standards play an important role in protecting retirement investors. One of the Department’s objectives in issuing this proposal is to abate these and similar harms in areas outside of SEC jurisdiction, to ensure that retirement investors’ assets outside the securities space are also protected from conflicted advice. This proposal would extend the fiduciary best interest standard to additional markets and investment product, including annuities and other non-securities. This proposal would apply to advice given to plan fiduciaries as well as plan participants.

In addition, for retirement investors who already receive the protections in the Investment Advisers Act of 1940, Regulation Best Interest, and PTE 2020–02 under the regulatory baseline, this proposal would provide even stronger protections. Standards for mitigating conflicts under this proposal would be more rigorous and well-defined.

3. Baseline

Since the Department first took on the issues of fiduciary advice and conflicts of interest, there have been numerous developments in the regulatory environment and the financial markets in which they operate.

Regulatory Baseline

The problems of conflicted advice and supervisory structures for advice have received increased regulatory attention, resulting in action from the Department, the SEC, individual states, and the National Association of Insurance Commissioners (NAIC). The major actions are summarized below.

Regulatory Baseline, the Department of Labor

Many financial institutions undertook efforts to adapt to the Department’s 2016 Final Rule. As such, the intended improvements in retirement investor outcomes appear to have been on track prior to the Fifth Circuit’s vacatur of the 2016 Final Rule. Research suggests that the Department’s prior efforts produced positive changes in advice markets, even without fully taking effect, which were reinforced by the SEC’s actions. For instance, several studies found that the Department’s 2016 Final Rule had a positive effect on conflicts of interest and that some categories of conflicts, such as bundled share classes of mutual funds and high-expense variable annuities, were reduced even after the DOL rule was struck down. The nature of the conflicts associated with bundled share classes and high-expense variable annuities are discussed later in this document. In 2020, the Department issued a technical amendment to the CFR to reinsert the 1975 rule and published PTE 2020–02. The exemption is available to registered investment advisers, broker dealers, banks, and insurance companies and their individual employees, agents, and


236 For more information on the relationship of best interest fiduciary standards and the protection of retirement investors, refer to the Benefits section of the RIA.

representatives that provide fiduciary investment advice to retirement investors. However, the exemption explicitly excluded investment advice solely generated by an interactive website, referred to as "pure robo-advice." 239 Under the exemption, financial institutions and investment professionals can receive a wide variety of payments that would otherwise violate the prohibited transaction rules. The exemption’s relief extends to prohibited transactions arising as a result of investment advice to roll over assets from a plan to an IRA, under certain conditions.

This exemption conditions relief on the investment professional and financial institution investment advice fiduciaries providing advice in accordance with the Impartial Conduct Standards. The Impartial Conduct Standards include a best interest standard, a reasonable compensation standard, and a requirement to make no misleading statements about investment transactions and other relevant matters. The best interest standard in the exemption is broadly aligned with the federal securities laws. In addition, the exemption requires financial institutions to acknowledge in writing the institution’s and their investment professionals’ fiduciary status under Title I and the Code, as applicable, when providing investment advice to the retirement investor, and to describe in writing the services to be provided and the financial institutions’ and investment professionals’ material conflicts of interest. Financial institutions must document the reasons that a rollover recommendation is in the best interest of the retirement investor and provide that documentation to the retirement investor. 240 Financial institutions are required to adopt policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards and conduct a retrospective review of compliance.

In order to ensure that financial institutions provide reasonable oversight of investment professionals and adopt a culture of compliance, the exemption provides that financial institutions and investment professionals will be ineligible to rely on the exemption if, within the previous 10 years, they were convicted of certain crimes arising out of their provision of investment advice to retirement investors. They can also become ineligible if they engage in systematic or intentional violation of the exemption’s conditions or provided materially misleading information to the Department in relation to their conduct under the exemption.

At the time PTE 2020–02 was finalized, the Department left in place other administrative exemptions that could be used to provide investment advice in place of PTE 2020–02, including the other PTEs being amended in this proposal. Leaving the other PTEs in place allowed for a varied landscape of conditions that could be used by different types of financial institutions to provide investment advice for different types of assets and financial products. The varied landscape of conditions allows for regulatory arbitrage where investment advice providers can use more favorable rules in one market to circumvent less favorable regulations elsewhere.

Regulatory Baseline, the Securities and Exchange Commission

The Investment Advisers Act of 1940, “establishes a fiduciary duty for [investment advisers] roughly analogous to the fiduciary duties of care and loyalty established by ERISA for investment advisers to plans and plan participants.” 241 In an interpretation of the conduct standards applicable to investment advisers, the SEC wrote: 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. 242

In June 2019, the SEC adopted a package of rulemakings and interpretations designed to enhance the quality and transparency of retail investors’ relationships with investment advisers and broker-dealers. 243 The package included Regulation Best Interest, the Form CRS, and publication of two separate interpretations under the Investment Advisers Act.

Regulation Best Interest establishes a standard of conduct for broker-dealers and associated persons (unless otherwise indicated, together referred to as “broker-dealers”) when they make a recommendation to a retail customer of any securities transaction or investment strategy involving securities. 244 In adopting Regulation Best Interest, the SEC made findings consistent with the overarching premise of DOL’s recent rulemakings; that financial services firms’ conflicts of interest are harmful to investors. Specifically, in the Regulation Best Interest preamble, the SEC stated that: [[like many principal-agent relationships—including the investment adviser-client relationship—the relationship between a broker-dealer and a customer has inherent conflicts of interest, including those resulting from a transaction-based (e.g., commission) compensation structure and other broker-dealer compensation. 245 These and other conflicts of interest may provide an incentive to a broker-dealer to seek to increase its own compensation or other financial interests at the expense of the customer to whom it is making investment recommendations. 246

* * * * *

Notwithstanding these inherent conflicts of interest in the broker-dealer-customer relationship, there is broad acknowledgment of the benefits of, and support for, the continuing existence of the broker-dealer business model, including a commission or other transaction-based compensation structure, as an option for retail customers.

239 Hybrid robo-advice,” or advice that combines features of robo-advice and traditional investment advice, is included under the existing PTE 2020–02. 85 FR 82798, 82830 (Dec. 18, 2020).

240 The PTE 2020–02 preamble says: This requirement extends to recommended rollovers from a Plan to another Plan or IRA as defined in Code section 4975(e)(1)(B) or (C), from an IRA as defined in Code section 4975(e)(1)(B) or (C) to a Plan, from an IRA to another IRA, or from one type of asset to another (e.g., from a commission-based account to a fee-based account). The requirement to document the specific reasons for these recommendations is part of the required policies and procedures, in Section II(c)(3).”


242 Commission Interpretation Regarding Standard of Conduct for Investment Advisers, 84 FR 33669 (July 12, 2019).

243 SEC Regulation Best Interest defines retail customer to include ERISA plan participants and beneficiaries, including IRAs, but not ERISA fiduciaries. See 84 FR 33343–44 (July 12, 2019). This subject is further addressed in the affected entities section below.

244 The SEC’s Regulation Best Interest was adopted pursuant to the express and broad grant of rulemaking in Section 913(h) of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The SEC also required disclosure of a Customer Relationship Summary, adopted an interpretation of the fiduciary duty that investment advisers owe to their clients under the Investment Advisers Act, and published an interpretation of the “solely incidental” prong of the broker-dealer exclusion under the Investment Advisers Act. Under Regulation Best Interest, broker-dealers are required to act in the best interest of a retail customer when making a recommendation of any securities transaction or investment strategy involving securities to a retail customer and cannot place its own interests ahead of the customer’s interests.

245 The SEC also stated that “[t]he investment adviser-client relationship also has inherent conflicts of interest, including those resulting from an asset-based compensation structure that may provide an incentive for a broker-dealer to encourage its client to invest more money through an adviser in order increase its AUM at the expense of the client.” 246 84 FR 33319 (July 12, 2019).
seeking investment recommendations . . . Nevertheless, concerns exist regarding (1) the potential harm to retail customers resulting from broker-dealer recommendations provided where conflicts of interest exist and (2) the insufficiency of existing broker-dealer regulatory programs reasonably designed to address these conflicts when broker-dealers make recommendations to retail customers. More specifically, there are concerns that existing requirements do not require a broker-dealer’s recommendations to be in the retail customer’s best interest.247

Accordingly, the SEC stated that Regulation Best Interest enhances the broker-dealer standard of conduct beyond existing “suitability” obligations248 and aligns the standard of conduct with customers’ reasonable expectations by requiring broker-dealers to act in the best interest of the retail customer at the time the recommendation is made, without placing the financial or other interest of the broker-dealer ahead of the retail customer’s interest; and, among other things, address conflicts of interest by disclosing and mitigating, or even eliminating, conflicts of interest.249

In particular, the best interest obligation for Regulation Best Interest is only satisfied if the broker-dealer complies with four component obligations: a Disclosure Obligation, which requires a broker-dealer to provide all material facts related to the scope and terms of the relationship with the retail customer and the conflicts of interests associated with the recommendation prior to or at the time of the recommendation; a Care, and Skill When Making Recommendations to a Retail Customer, and a Compliance Obligation, which requires compliance programs tailored to the needs of the retail customer.250

Significantly, Regulation Best Interest applies to recommendations by broker-dealers to roll over or transfer assets in a workplace retirement plan accounts to an IRA and recommendations to take a plan distribution. The SEC has also issued staff guidance that under Regulation Best Interest and the Advisers Act’s fiduciary duty, when making a rollover recommendation, broker-dealers and investment advisers must consider costs, the level of services available, and features of existing accounts. The guidance notes that, “it would be difficult to form a reasonable basis to believe that a rollover recommendation is in the retail investor’s interest, if you do not consider the alternative of leaving the retail investor’s investments in their employer’s plan, where that is an option.”251

The standard of conduct in SEC’s Regulation Best Interest draws from key principles of fiduciary obligations, including those that apply to investment advisers under the Investment Advisers Act. As reiterated in Staff Bulletins252 and speeches,253 Regulation Best Interest, as adopted, incorporates Care and Conflict of Interest Obligations substantially similar to the fiduciary duties under the Advisers Act of loyalty (to not subordinate their client’s interest to their own) and care (to ensure that advice is suitable and in the best interest of the client), to recommendations made by broker-dealers to their retail clients. Importantly, regardless of whether a retail investor chooses a broker-dealer or an investment adviser (or both), the retail investor will be entitled to a recommendation (from a broker-dealer) or advice (from an investment adviser) that is in the best interest of the retail investor and does not place your or your firm’s interests ahead of the retail investor’s interest, if you do not consider the alternative of leaving the retail investor’s investments in their employer’s plan, where that is an option.”254

The SEC’s Regulation Best Interest aims to strengthen fiduciary obligations to retail investors, and the SEC has released practical guidance for rollovers in the best interest of the retail investor.255

For brokers-dealers subject to Regulation Best Interest and investment advisers subject to the Investment Advisers Act, there is substantial overlap between SEC requirements and the obligations imposed by ERISA, the Code, and this regulatory project. Outside this area of overlap, however, current standards generally are lower, so the potential costs—and benefits—of this proposal may be more significant. For example, this proposal would apply to state-licensed insurance agents and state-registered brokers, who are not uniformly regulated by the SEC, when they provide investment advice to IRA or ERISA plan investors. It would also apply to brokers-dealers who give fiduciary advice to ERISA plan fiduciaries, who are not included within Regulation Best Interest’s definition of a retail customer. Recommendations regarding plan and IRA investments in real estate, certificates of deposit, other bank products and fixed indexed annuities that are not considered

247 Id. at 33319 (internal citation omitted).
248 FINRA Rule 2111(a).
250 Id. at 33319 (internal citation omitted).
251 Ibid.
254 Id.
The Department is especially concerned about the proper regulation of fixed index annuities, as they comprised 67 percent of the retail annuity market in 2022, an increase of 42 percent from 2021, as investors hedged against rising interest rates. This growth in fixed annuity investments has increased the share of retirement savings residing in a less secure environment with fewer protections against conflicted advice compared to direct investors in mutual funds and securities. The Department anticipates the benefits to investors of extending fiduciary law principles to entities providing investment advice in currently less stringent regulatory regimes to be substantial. Regulatory Baseline, State Legislative and Regulatory Developments

The appropriate baseline for this analysis is also informed by certain recent legislative and regulatory developments involving conduct standards at the state level. Summary of State Legislative and Regulatory Developments

In a list compiled in July 2023, the Department identified 43 states that have enacted legislation, finalized regulation, or both that impose conduct standards and disclosure requirements on various financial institutions. The table below summarizes the enacted legislation and finalized regulation in each state, as well as the type of financial institution each regulation pertains to. This list includes states that have adopted the NAIC Model Regulation #275 in addition to states that have adopted conduct standards and disclosure requirements outside of NAIC Model Regulation #275.

<table>
<thead>
<tr>
<th>State</th>
<th>Legislation or regulation</th>
<th>Title of legislation or regulation</th>
<th>Affected entities</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Regulation</td>
<td>Suitability in Annuity Transactions</td>
<td>Insurers, Broker-Dealers, and Independent Producers.</td>
</tr>
<tr>
<td>Alaska</td>
<td>Regulation</td>
<td>Suitability in Annuity Transactions</td>
<td>Insurers and Independent Producers.</td>
</tr>
<tr>
<td>Arizona</td>
<td>Legislation</td>
<td>An Act Relating to Annuity Transactions</td>
<td>Insurers and Independent Producers.</td>
</tr>
<tr>
<td>Arkansas</td>
<td>Regulation</td>
<td>Stability in Annuity Transactions</td>
<td>Insurers and Independent Producers.</td>
</tr>
<tr>
<td>Delaware</td>
<td>Regulation</td>
<td>Stability in Annuity Transactions</td>
<td>Insurers and Independent Producers.</td>
</tr>
<tr>
<td>Florida</td>
<td>Legislation</td>
<td>Consumer Protection</td>
<td>Insurers and Insurance Agents.</td>
</tr>
<tr>
<td>Georgia</td>
<td>Regulation</td>
<td>Suitability in Annuity Transactions</td>
<td>Insurers and Independent Producers.</td>
</tr>
<tr>
<td>Hawaii</td>
<td>Legislation</td>
<td>An Act Relating to Insurance</td>
<td>Insurers and Independent Producers.</td>
</tr>
<tr>
<td>Idaho</td>
<td>Regulation</td>
<td>Annuity Consumer Protections Act</td>
<td>Insurers and Independent Producers.</td>
</tr>
<tr>
<td>Illinois</td>
<td>Regulation</td>
<td>Suitability in Annuity Transactions</td>
<td>Insurers and Independent Producers.</td>
</tr>
<tr>
<td>Iowa</td>
<td>Regulation</td>
<td>Rulermaking Related to Best Interest Standard for Insurance Professionals.</td>
<td>Insurers and Independent Producers.</td>
</tr>
<tr>
<td>Kansas</td>
<td>Regulation</td>
<td>Stability in Annuity Transactions</td>
<td>Insurers and Independent Producers.</td>
</tr>
<tr>
<td>Kentucky</td>
<td>Regulation</td>
<td>Stability in Annuity Transactions</td>
<td>Insurers and Independent Producers.</td>
</tr>
<tr>
<td>Louisiana</td>
<td>Legislation</td>
<td>Provides Relative to Venue for Direct Actions by Third Parties Against Insurers.</td>
<td>Insurance Commissioner.</td>
</tr>
<tr>
<td>Maine</td>
<td>Regulation</td>
<td>Suitability in Annuity Transactions</td>
<td>Insurers and Independent Producers.</td>
</tr>
<tr>
<td>Maryland</td>
<td>Regulation</td>
<td>Suitability in Annuity Transaction</td>
<td>Insurers and Independent Producers.</td>
</tr>
<tr>
<td>Massachusetts</td>
<td>Regulation</td>
<td>Amendments to Fiduciary Conduct Standards Amendments to Investment Adviser Disclosure Regulations.</td>
<td>Broker-Dealers and Agents.</td>
</tr>
</tbody>
</table>


258 For more information on the NAIC’s Suitability in Annuity Transactions Model Regulation, or Model Regulation #275, refer to the section entitled “NAIC Annuity Transactions Model Regulation #275” in this RIA.

259 The Massachusetts Supreme Judicial Court recently upheld the validity of the state’s fiduciary duty rule, holding that the Secretary of the Commonwealth had authority to promulgate it, that the Secretary’s authority was not an impermissible delegation of legislative power, that the rule did not override the common-law protections available to investors, and that the rule was not preempted by the SEC’s imposition of the Regulation Best Interest. Robinhood Fin. LLC v. Sec’y of Commonwealth, No. SJC–13381, 2023 WL 5490571, at *1, *6–15 (Mass. Aug. 25, 2023).
In addition, three states, that have not yet enacted legislation or finalized regulations have introduced legislation or proposed regulations that would impose conduct standards and disclosure requirements on various financial institutions.

### Table 1—States That Have Enacted Legislation or Finalized Regulation—Continued

<table>
<thead>
<tr>
<th>State</th>
<th>Legislation or regulation</th>
<th>Title of legislation or regulation</th>
<th>Affected entities</th>
</tr>
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<tbody>
<tr>
<td>Minnesota</td>
<td>Legislation</td>
<td>Annuity Suitability Regulation Modification</td>
<td>Insurers and Independent Producers.</td>
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<tr>
<td>Mississippi</td>
<td>Regulation</td>
<td>Annuity Transactions Model</td>
<td>Insurers and Independent Producers.</td>
</tr>
<tr>
<td>Nebraska</td>
<td>Legislation</td>
<td>An Act relating to the Nebraska Protections in Annuity Transactions Act.</td>
<td>Insurers and Independent Producers.</td>
</tr>
<tr>
<td>New Mexico</td>
<td>Regulation</td>
<td>Suitability and Annuity Transactions</td>
<td>Insurers and Independent Producers.</td>
</tr>
<tr>
<td>New York</td>
<td>Regulation</td>
<td>Suitability and Best Interests in Life Insurance and Annuity Transactions</td>
<td>Insurers and Independent Producers.</td>
</tr>
<tr>
<td>North Carolina</td>
<td>Regulation</td>
<td>Annuity Transactions</td>
<td>Insurers and Independent Producers.</td>
</tr>
<tr>
<td>Ohio</td>
<td>Regulation</td>
<td>Suitability in Annuity Transactions</td>
<td>Insurers and Independent Producers.</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>Regulation</td>
<td>Standards of Ethical Practices</td>
<td>Insurers and Independent Producers.</td>
</tr>
<tr>
<td>Oregon</td>
<td>Legislation</td>
<td>An Act Relating to Annuities</td>
<td>Insurers and Independent Producers.</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>Regulation</td>
<td>Suitability in Annuity Transactions</td>
<td>Insurers and Independent Producers.</td>
</tr>
<tr>
<td>South Carolina</td>
<td>Regulation</td>
<td>Suitability in Annuity Transactions</td>
<td>Insurers and Independent Producers.</td>
</tr>
<tr>
<td>South Dakota</td>
<td>Legislation</td>
<td>An Act to Revise Annuity Sales Standards</td>
<td>Insurers and Independent Producers.</td>
</tr>
<tr>
<td>Tennessee</td>
<td>Regulation</td>
<td>Suitability in Annuity Transactions and Revisions and Standards Required for Certain Annuity Transactions and Benefits Under Certain Annuity Contracts</td>
<td>Insurers and Independent Producers.</td>
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<tr>
<td>Texas</td>
<td>Legislation</td>
<td>Rules Governing Suitability in Annuity Transactions</td>
<td>Insurers and Independent Producers.</td>
</tr>
<tr>
<td>Virginia</td>
<td>Regulation</td>
<td>Concerning the Best Interest Standard for Annuity Transactions.</td>
<td>Insurers and Independent Producers.</td>
</tr>
<tr>
<td>Wisconsin</td>
<td>Legislation</td>
<td>Regulation Governing Suitability in Annuity Transactions.</td>
<td>Insurers and Independent Producers.</td>
</tr>
</tbody>
</table>

In addition, three states, that have not yet enacted legislation or finalized regulations have introduced legislation or proposed regulations that would impose conduct standards and disclosure requirements on various financial institutions.

**NAIC Annuity Transactions Model Regulation #275**

As shown in the table above, much of the legislative and regulatory action among states focuses on insurers and independent producers. In February 2020, the NAIC membership approved revisions to its Suitability in Annuity Transactions Model Regulation to include a “best interest” standard of conduct. When the Department conducted its analysis of states in July of 2023, 39 states had adopted the NAIC Model Regulation #275.

Since then, additional states may have adopted the Model Regulation. In August 2023, the NAIC reported that 43 states had adopted it.

The revisions were in response to both the SEC and the Department’s work.
in the regulatory space and reflected some movement in the direction of greater uniformity, although significant differences remain, as partially discussed below. The NAIC Model Regulation includes a best interest obligation comprised of a care obligation, a disclosure obligation, a conflict of interest obligation, and a documentation obligation, applicable to an insurance producer. If these obligations are met, the producer is treated as satisfying the best interest standard. The care obligation states that the producer, in making a recommendation, must exercise reasonable diligence, care and skill to:

- Know the consumer’s financial situation, insurance needs and financial objectives;
- Understand the available recommendation options after making a reasonable inquiry into options available to the producer;
- Have a reasonable basis to believe the recommended option effectively addresses the consumer’s financial situation, insurance needs and financial objectives over the life of the product, as evaluated in light of the consumer profile information; and
- Communicate the basis or bases of the recommendation.

The conflict of interest obligation requires the producer to “identify and avoid or reasonably manage and disclose material conflicts of interest, including material conflicts of interest related to an ownership interest.” “Material conflict of interest” is defined as “a financial interest of the producer in the sale of an annuity that a reasonable person would expect to influence the impartiality of a recommendation,” but the definition expressly carves out “cash compensation or non-cash compensation” from treatment as sources of conflicts of interest. The NAIC Model Regulation also provides that it does not apply to transactions involving contracts used to fund an employee pension or welfare plan covered by ERISA.

The NAIC expressly disclaimed that its standard creates fiduciary obligations and the obligations in the Model Regulation differ in significant respects from those in Regulation Best Interest. For example, in addition to disregarding compensation as a source of conflicts of interest, the specific care, disclosure, conflict of interest, and documentation requirements, do not expressly incorporate the obligation not to put the producer’s interests before the customer’s interests, even though compliance with their terms is treated as meeting the “best interest” standard. The care obligation in the Model Regulation only requires that the adviser “[h]ave a reasonable basis to believe the recommended option effectively addresses the consumer’s financial situation.” In contrast, Regulation Best Interest requires that, when making a recommendation, the broker-dealer “exercises reasonable diligence, care, and skill to . . . [h]ave a reasonable basis to believe that the recommendation is in the best interest of a particular retail customer.” and the exemptions proposed here, consistent with ERISA’s text, require that advice reflect the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor.

In recent insurance industry litigation against the Department, the plaintiffs described the differences between “the requirements of an ERISA fiduciary and an insurance agent operating under the NAIC model regulation [as] extensive.” Among the numerous differences they identified is the fact that, “the NAIC model regulation does not define conflicts of interest or the requirements pertaining to such conflicts as broadly as ERISA.” Additionally, they asserted that “the NAIC model regulation does not contain a ‘prudence’ standard” and characterized “these best interest requirements . . . [as] a far cry from the obligations imposed on an ERISA fiduciary.”

The Department of Labor, uniquely among the regulators, can impose uniform standards for the provision of investment advice to retirement investors. It is neither limited to the regulation of securities, nor to insurance products, but rather can set a uniform fiduciary standard for the regulation of conflicts of interest with respect to any advice on any investment products recommended to retirement investors. The Department believes that retirement investors and the regulated community are best served by a consistent, protective, and understandable fiduciary standard.

Market Conditions and Impacts of Conflicts of Interest

Financial products, commission structures, and investment services are constantly evolving. The major market developments that the Department considered with respect to the proposed amendments are discussed below.

Market Developments, Mutual Fund Share Classes

The 2016 Final Rule and recent SEC actions highlighted inherent conflicts of interest in how broker-dealers or investment advisers are compensated for recommending certain share classes of mutual funds. Since then, share classes without traditional conflicts of interest have increased in popularity. For instance, data published by the Investment Company Institute (ICI) in 2021 show that no-load mutual funds, or mutual funds without commissions, accounted for 46 percent of long-term mutual fund gross sales in 2000, 79 percent in 2015, and 89 percent in 2021. The ICI attributed the increase in no-load funds to two growing trends: investors paying intermediaries for advice through direct fees rather than indirectly through funds and the popularity of retirement accounts that invest in institutional, no-load share classes.

Sethi, Spiegel, and Szapiro (2019) found that the Department’s 2016 Final Rule reduced flows into funds with excess loads or loads that were higher than would otherwise be expected based on the fund’s characteristics.
Mitchell, Sethi, and Szapiro (2019) found that while mutual funds with excess loads have historically received greater inflows, since 2010 the correlation between excess loads and inflows has been lower. The authors attribute this change to an “increased focus on broker practices” and “a culture of accountability.”

Meanwhile, other types of share classes have emerged and grown more prevalent, including unbundled and semi-bundled share classes. In a traditional, bundled share class, the investor pays the mutual fund a load or 12b-1 fee, and the mutual fund pays a portion back to an intermediary, such as the intermediary that sold the fund to the investor. Alternatively, in an unbundled or “clean” share class, the investor pays any intermediaries directly, while in a semi-bundled share class, the fund pays sub-accounting fees for recordkeeping services and uses revenue sharing for other services, such as distribution.

The different compensation arrangement for each of the types of share classes creates different types and magnitudes of conflicts for financial professionals.

Adoption of these new share classes has spread quickly. Mitchell, Sethi, and Szapiro (2019) found that between July 2018 to August 2019, relatively few unbundled share classes were launched into the market and that more bundled share classes closed in that timeframe than semi-bundled and unbundled combined. Additionally, they found that unbundled share classes received almost five times as much new money as semi-bundled share classes. While flows to semi-bundled share classes fluctuated, they received net positive flows overall during this period.

Market Developments, the Insurance Market

Before it was vacated, the 2016 Final Rule had begun exerting substantial influence on financial advice and products in the insurance market, particularly with regard to annuities. There are three common types of annuities offered by insurance companies:

- In a variable annuity, an insurance company invests in an investment option chosen by the investor, which is often a mutual fund. The return of the variable annuity reflects the return on the underlying investments. Variable annuities have often been referred to as “mutual funds in an insurance wrapper.”
- In a fixed annuity, an insurance company agrees to pay the investor no less than a specified rate of interest during the asset accumulation phase and to pay a specified amount per dollar in the decumulation phase.
- In an indexed annuity, an insurance company agrees that the investor returns linked to the performance of a market index. However, unlike a variable annuity, the terms in the contract and the method used to calculate gains and losses may result in actualized gains or losses that differ from the gains and losses experienced by the index.

As the financial structure of each type of annuity varies, so does the risk of conflicted advice. Variable and fixed-indexed annuity commissions tend to be similar, while fixed rate income and immediate annuity commissions are generally lower. Similar to mutual funds, insurance agents and brokers are often compensated through load fees for selling variable annuities.

The commission paid varies significantly, from as little as 0 percent to as much as 10 percent of the investment with the most common amount being 7 percent. The 2016 Final Rule discouraged sales of the typical load funds. Between 2016 and 2018, the sale of fee-based variable annuities, or I-share class variable annuities, increased by 43 percent. Following the vacatur of the 2016 Final Rule in 2018, fee-based variable annuity sales decreased, falling by 28 percent between 2018 and 2020. More recently, sales have rebounded, increasing 76 percent between 2020 and 2021. The significant increases in I-share class variable annuities have been driven by demand for fee-based products among fee-based advisers. They have been the second most popular variable annuity contract type since 2016, though they still only comprised 9.5 percent of retail variable annuity sales in 2021. The Department does not have similar trend data on sales of fee-based fixed annuities.

Summary

The recent regulatory and market developments, combined with the judicial vacatur of the 2016 Final Rule, provide for a different baseline than the pre-2016 Final Rule baseline. While some reforms and improvements in the delivery of advice have endured despite the vacatur, without new regulatory action, gains made to some products and markets that are not covered by recent regulatory actions by the Department, SEC, or states, could be derailed. Other regulatory agencies have worked to reduce conflicts of interest, but this has resulted in a “patchwork” approach to regulating advice arrangements of retirement investments, which has already resulted in the most conflicted advisers moving to markets with the least oversight.
This proposal would extend important and effective protections broadly to retirement investors. Specifically, the proposal would replace the 1975 regulation’s five-part test with a new fiduciary status test, which would capture more financial investment transactions in which the investor is reasonably relying on the advice individualized to the investor’s financial needs and best interest. This proposal would also increase the number of rollover recommendations being considered as fiduciary advice, which would enhance protections to retirement investors, particularly in regard to recommendations regarding annuities.

In accordance with OMB Circular A–4, Table 2 depicts an accounting statement summarizing the Departments’ assessment of the benefits, costs, and transfers associated with this regulatory action. The Department is unable to quantify all benefits, costs, and transfers of the proposal but has sought, where possible, to describe these non-quantified impacts. The effects in Table 2 reflect non-quantified impacts and estimated direct monetary costs resulting from the provisions of the proposal.

### Table 2—Accounting Statement

**Benefits:**
Non-Quantified (please also see the Transfers section of this table):

- Increase uniformity in the regulation of financial advice for retirement investors, across different market segments and market participants.
- Protect consumers from losses that can result from advisory conflicts of interest (without unduly limiting consumer choice or adviser flexibility).
- Facilitate retirement investors’ trust in advisers.
- Facilitate more efficient capital allocation

<table>
<thead>
<tr>
<th>Costs</th>
<th>Estimate</th>
<th>Year dollar</th>
<th>Discount rate</th>
<th>Period covered</th>
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<tr>
<td>Annualized</td>
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<td>2023</td>
<td>7 percent</td>
<td>2024–2033</td>
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<tr>
<td>Monetized ($Million/Year)</td>
<td>220.4</td>
<td>2023</td>
<td>3 percent</td>
<td>2024–2033</td>
</tr>
</tbody>
</table>

**Quantified Costs:**

The Department expects that entities would not incur additional costs from the proposed amendments to PTE 77–4, PTE 80–83, and PTE 83–1. However, the Department expects that entities would incur costs directly from the proposed amendments to the following PTEs:

- The annualized cost estimates in PTE 2020–02 reflect estimated costs associated with reviewing the proposal, preparing written disclosures for investors, preparing written disclosures for PEPs, reviewing and updating policies and procedures, reviewing and updating the retrospective review, and preparing rollover documentation.
- The annualized cost estimates in PTE 84–24 reflect estimated costs associated with reviewing the rule, providing disclosures to retirement investors, establishing written policies and procedures, conducting a retrospective review, and maintaining recordkeeping.
- The annualized cost estimates in PTE 75–1 reflect estimated costs associated with maintaining recordkeeping.
- The annualized cost estimates in PTE 86–128 reflect estimated costs associated with maintaining recordkeeping. In addition, the annualized cost estimates in PTE 86–128 reflect estimated costs associated with extending the exemption requirements on IRAs. These costs include preparing and distributing the written authorization from the authorizing fiduciary to the broker-dealer, preparing and mailing the required information to the authorizing fiduciary, preparing and distributing the annual termination form, preparing and distributing the quarterly report, collecting and generating the information required for the annual report, and collecting and generating the information required for the report of commissions paid.

The quantified costs are significantly lower than costs in the 2016 RIA due to the smaller scope of the proposal relative to the 2016 Final Rule as well as compliance structures adopted by the industry to reduce conflicted advice in response to state regulations, Regulation Best Interest, PTE 2020–02, and the Department’s 2016 Rulemaking. The methodology for estimating the costs of the proposed amendments to the rule and PTEs is consistent with the methodology and assumptions used in the 2020 analysis for the current PTE 2020–02.
The Benefits section provides a qualitative description of the expected gains to investors; however, the available data do not allow the Department to break down those gains into component social welfare “benefits” and “transfers.” Transfers identified in this analysis include:

- Lower fees and expenses for participants paid to financial institutions.
- Reallocation of investment capital to different asset classes, share classes, or investment products.
- Shifts in the assets in plans and IRAs.

### 4. Affected Entities

The table below summarizes the estimated number of entities that would be affected by the proposed amendments to the Rule and each of the PTEs. These estimates are discussed in greater detail below.

#### TABLE 3—AFFECTED FINANCIAL ENTITIES

<table>
<thead>
<tr>
<th>Prohibited transaction exemptions</th>
<th>2020–02</th>
<th>75–1</th>
<th>77–4</th>
<th>80–83</th>
<th>86–128</th>
<th>84–24</th>
</tr>
</thead>
<tbody>
<tr>
<td>Retirement Plans</td>
<td>765,124</td>
<td>765,124</td>
<td>277,390</td>
<td>6,886</td>
<td>1,000</td>
<td>1,722</td>
</tr>
<tr>
<td>Individual Retirement Accounts</td>
<td>3,119,832</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pooled Employer Plans</td>
<td>382</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pooled Plan Providers</td>
<td>134</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Broker-Dealers</td>
<td>1,894</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Discretionary Fiduciaries</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Registered Investment Advisers</td>
<td>15,982</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pure Robo-Advisers</td>
<td>200</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Insurance Companies</td>
<td>183</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>215</td>
</tr>
<tr>
<td>Captive Insurance Agents and Brokers</td>
<td>1,577</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Insurance Producers</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Banks</td>
<td>2,048</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>4,000</td>
</tr>
<tr>
<td>Mutual Fund Companies</td>
<td></td>
<td>812</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Investment Company Principal Underwriters</td>
<td>20</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Pension Consultants</td>
<td>1,011</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1,011</td>
</tr>
</tbody>
</table>

Plains and Participants

The proposed amendments to the rule and related PTEs would affect plans that receive investment advice from a financial institution. Participants may be affected by advice they receive directly and by advice that is received by their plan’s administrators and fiduciaries. As of 2021, there were approximately 765,000 private sector retirement plans with 146 million participants and $13.2 trillion in assets that would be affected by these proposals. Approximately 46,000 of these plans were defined benefit plans, with 31 million participants and $3.7 trillion in assets, and approximately 719,000 are defined contribution plans with 115 million participants and $9.5 trillion in assets.290 The Department recognizes that some plans, such as simplified employee pension (SEP) plans and Savings Incentive Match Plan for Employees IRA (SIMPLE IRA) plans, are exempt from filing and are not included in these estimates but would typically be affected by the proposal. The Department expects that participants in general would benefit from the stronger, uniform standards imposed by the proposed amendments to the rule and PTEs.

Participants who receive investment advice would be directly affected by the proposed amendments. Plans, particularly participants receiving one-time advice as to whether they should roll over their retirement savings. These participants are discussed in the section on IRA owners, below.

Similarly, plans receiving fiduciary investment advice would also be directly affected by the proposed amendments. The Department believes that most of these plan fiduciaries are compliant with the existing PTE 2020–02. Accordingly, the Department expects that plans would be only minimally affected by the proposed amendments to the rule. The Department requests comment on how plans currently compliant with PTE 2020–02 would be affected. As amended, PTE 86–128, PTE 84–24, and PTE 77–4 would directly affect subsets of plans, described below.

The proposed amendments to PTE 86–128 would limit the scope of the amendment to transactions in which a fiduciary uses its fiduciary authority to cause the plan or IRA to pay a fee to such trustee for effectuating or executing securities transactions as an agent for the plan. Using 2021 Form 5500 data, the Department estimates that 1,257 unique plans hired service providers that denoted on the Schedule C that they were a discretionary trustee. Further, among these plans, 801 plans

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290 Private Pension Plan Bulletin: Abstract of 2021 Form 5500 Annual Reports, Employee Benefits Security Administration (2021; forthcoming). Table A1. Table A1 reports that there were 765,124 pension plans, consisting of 46,388 defined benefit plans and 718,736 defined contribution plans. Due to a rounding discrepancy, the sum of defined benefit and defined contribution plans does not equal the aggregate of the plans. Additionally, some individuals participate in two or more plans, so the number of individuals covered is lower than the number of gross participants.
also reported that the discretionary trustee provided investment management services or received investment management fees paid directly or indirectly by the plan.\textsuperscript{291} Based on the range of values (801 and 1,257), the Department estimates on average, 1,000 plans have discretionary fiduciaries with full discretionary control. As small plans do not file the Schedule C, this estimate may be an underestimate. The Department requests comment on how many plans have discretionary fiduciaries with full discretionary control and how many would continue to rely on PTE 86–128 under the proposed amendments.

The Department estimates that of the estimated 1,000 plans discussed above, 7.5 percent are new accounts or new financial advice relationships.\textsuperscript{292} Based on these assumptions, the Department estimates that 75 plans would be affected by the proposed amendments to PTE 86–128.\textsuperscript{293}

For PTE 84–24, the Department estimates that 7.5 percent of plans are new accounts or new financial advice relationships\textsuperscript{294} and that 3 percent of plans will use the exemption for covered transactions.\textsuperscript{295} Based on these assumptions, the Department estimates that 1,722 plans would be affected by the proposed amendments to PTE 84–24.\textsuperscript{296}

To estimate the number of plans affected by the proposed amendments to PTE 77–4, the Department estimated the number of plans relying on a mutual fund company. The Department does not have data on what percentage of plans receive fiduciary advice through mutual fund companies. A 2013 Deloitte/ICI survey found that 37 percent of 401(k) plans have a mutual fund company as their service provider.\textsuperscript{297} Based upon ICI analyses and Form 5500 data that examines the percentage of plans that are invested in registered investment companies, the Department estimates that 24.7 percent of defined benefit plans have mutual fund companies as money managers.\textsuperscript{298} Applying these percentages to the universe of pension plans that filed a Form 5500 in 2021 yields a total of approximately 277,390 plans with service provider relationships with mutual fund companies.\textsuperscript{299} Thus, the Department estimates that 277,390 plans would be affected by the proposed amendments to PTE 77–4. The Department acknowledges that this estimate likely overestimates the number of plans affected by the proposed amendments.

Individual Retirement Account (IRA) Owners

The proposed amendments to the rule and PTEs 2020–02, 84–24, 75–1, and 86–128 would also impact IRA owners receiving investment advice. According to Cerulli Associates, there were 67.8 million IRA owners holding $11.5 trillion in assets in 2022.\textsuperscript{300} Approximately 85 percent of the assets are held in traditional IRAs, 10 percent in Roth IRAs, and 5 percent in SEP, Salary Reduction Simplified Employee Pension (SARSEP), and SIMPLE IRAs.\textsuperscript{301} Some owners hold multiple IRAs. The Department estimates that the number of IRA accounts is 83.3 million by applying the ratio of IRA accounts to IRA owners observed in EBRI’s administrative database.\textsuperscript{302}

\textsuperscript{291} Estimates based on 2021 Form 5500 data.

\textsuperscript{292} EBRS identified 57,575 new plans in its 2021 Form 5500 filings, or 7.5 percent of all Form 5500 pension plan filings.

\textsuperscript{293} The number of new plans is estimated as: 1,000 plans × 7.5 percent of plans are new = 75 new plans. The number of new IRAs is estimated as: 19,000 new IRAs × 2.1 percent of IRAs are new = 410 new IRAs.

\textsuperscript{294} EBRS identified 57,575 new plans in its 2021 Form 5500 filings, or 7.5 percent of all Form 5500 pension plan filings.

\textsuperscript{295} In 2020, 7 percent of traditional IRAs were held by insurance companies. See Investment Company Institute, The Role of IRAs in US Households’ Saving for Retirement, 2020, 27(1) ICI Research Perspective (2021), https://www.ici.org/system/files/attachments/pdf/per27-01.pdf. This number has been adjusted downward to 3 percent to account for the fact that some transactions are not covered by this exemption.

\textsuperscript{296} 759,124 plans × 7.5 percent of plans are new = 1,722 plans. Each of these plans likely also has service provider relationships with mutual fund companies.

\textsuperscript{297} The Department uses this estimate as a proxy for the number of mutual fund companies as service providers with mutual fund companies. See Deloitte & Investment Company Institute, Defined Contribution/401(k) Fee Study, (August 2014).

\textsuperscript{298} Based on Form 5500 Data 2000–2010, defined benefit plan assets are approximately 33 percent less likely than defined contribution plans to be invested in a registered investment company.

\textsuperscript{299} In 2020, 7 percent of traditional IRAs were held by insurance companies. See Investment Company Institute, The Role of IRAs in US Households’ Saving for Retirement, 2020, 27(1) ICI Research Perspective (2021), https://www.ici.org/system/files/attachments/pdf/per27-01.pdf. This number has been adjusted downward to 3 percent to account for the fact that some transactions are not covered by this exemption.

\textsuperscript{300} The Department estimates that 24.7 percent of defined benefit plans have mutual fund companies as money managers. Applying these percentages to the universe of pension plans that filed a Form 5500 in 2021 yields a total of approximately 277,390 plans with service provider relationships with mutual fund companies. Thus, the Department estimates that 277,390 plans would be affected by the proposed amendments to PTE 77–4. The Department acknowledges that this estimate likely overestimates the number of plans affected by the proposed amendments.

\textsuperscript{301} The Department estimates that 277,390 plans would be affected by the proposed amendments to PTE 77–4. The Department acknowledges that this estimate likely overestimates the number of plans affected by the proposed amendments.

\textsuperscript{302} The Department does not have data on what percentage of plans receive fiduciary advice through mutual fund companies. A 2013 Deloitte/ICI survey found that 37 percent of 401(k) plans have a mutual fund company as their service provider. Based upon ICI analyses and Form 5500 data that examines the percentage of plans that are invested in registered investment companies, the Department estimates that 24.7 percent of defined benefit plans have mutual fund companies as money managers. Applying these percentages to the universe of pension plans that filed a Form 5500 in 2021 yields a total of approximately 277,390 plans with service provider relationships with mutual fund companies. Thus, the Department estimates that 277,390 plans would be affected by the proposed amendments to PTE 77–4. The Department acknowledges that this estimate likely overestimates the number of plans affected by the proposed amendments.

\textsuperscript{303} According to Cerulli Associates, in 2022, almost 4.5 million DC plan accounts with $779 billion in assets were rolled over into an IRA. Additionally, 0.7 million DC plan accounts of which $66 billion in assets were rolled over to other employer-sponsored plans.

\textsuperscript{304} The Department used IRS data from 2020 to estimate overall rollovers into IRAs, which is 5.7 million taxpayers and $618 billion. Adding the figures for plan-to-plan rollovers, the Department estimates the total number of rollovers at 6.4 million accounts with $864 billion in assets.

\textsuperscript{305} The Department requests comment on these estimates.

\textsuperscript{306} The proposed amendments to the rule and PTE 2020–02 would affect retirement investors who roll over money from a plan or IRA into another plan or IRA. A 2020 survey found that 46 percent of recent retirees who had at least $30,000 in retirement savings had rolled at least some of their savings into an IRA. According to Cerulli Associates, in 2022, almost 4.5 million DC plan accounts with $779 billion in assets were rolled over into an IRA. Additionally, 0.7 million DC plan accounts of which $66 billion in assets were rolled over to other employer-sponsored plans. The Department used IRS data from 2020 to estimate overall rollovers into IRAs, which is 5.7 million taxpayers and $618 billion. Adding the figures for plan-to-plan rollovers, the Department estimates the total number of rollovers at 6.4 million accounts with $864 billion in assets.

\textsuperscript{307} The Department requests comment on these estimates.

\textsuperscript{308} The Department estimates that the total number of rollovers that will be overseen by an ERISA fiduciary under the amended rule. In 2022, 49 percent of DC plan-to-IRA rollovers with 63 percent of DC plan rollover assets were intermediated by a financial advisor.
Department assumes that advisers intermediating rollovers are ERISA fiduciaries, this estimate is an upper bound. The Department then applies the estimate of DC plan-to-IRA rollovers to all types of rollovers. Accordingly, the Department estimates that 3.1 million rollovers and $431 billion in rollover assets would be affected by the proposed amendments to PTE 2020–02.308 The Department requests comments on these estimates.

As amended, PTE 86–128 and PTE 84–24 would each affect subsets of the number of IRAs discussed above. The Department’s estimates of the IRAs that would be affected by the proposed amendments to PTE 86–128 and PTE 84–24 are discussed below.

The proposed amendments to PTE 84–24 would affect new IRA accounts. The Department does not have data on the number of new IRA accounts that are opened each year. However, in 2022, of the 67.8 million IRA owners, 1.4 million, or approximately 2.1 percent, opened an IRA for the first time.309 The Department used this statistic to estimate that 2.1 percent of IRA accounts are new each year. The Department acknowledges that some IRA owners may have multiple IRAs, and as such, this statistic may underestimate the percentage of new IRAs opened.310 Additionally, the Department estimates that about 3 percent of these new IRAs, or approximately 52,000 IRAs, would use PTE 84–24 for covered transactions.311 The Department requests comments on these assumptions, particularly with regard to the percent of IRAs that are new accounts each year.

The proposed amendments to PTE 86–128 would limit the scope of the amendment to transactions in which a fiduciary uses its fiduciary authority to cause the plan or IRA to pay a fee to such trustee for effectuating or executing securities transactions as an agent for the plan, without providing investment advice. The Department lacks reliable data on the number of managed IRAs that would experience such a transaction in a given year. For the purpose of this analysis, the Department assumes that there are 10,000 managed IRAs. To err on the side of caution, the Department assumes that all managed IRAs would have a relationship with a discretionary fiduciary. As discussed above for PTE 84–24, the Department assumes 2.1 percent of IRA accounts are new each year. This results in an estimate of 210 managed IRAs that are new accounts or new financial advice relationships.312 The Department requests comment on these estimates, particularly on the number of IRAs that are managed accounts.

These estimates likely overestimate the number of IRA owners that would be affected by the proposed amendments, since IRA owners would only be affected by the proposed rule and amendments to PTEs when they have a relationship with certain financial entities or are conducting financial certain transactions, as defined by the revised fiduciary definition and the conditions for exemptive relief of each PTE. In addition to the specific requests for comment, the Department welcomes general comments on how IRAs and rollovers are likely to be affected by the proposed amendments.

Pooled Plan Providers and Pooled Employer Plans

The proposed amendments to PTE 2020–02 would affect PPPs and PEPs. As of August 22, 2023, 134 PPPs had filed an initial Form PR Pooled Plan Provider Registration (Form PR) and 382 PEPs were registered with the Department, though this number does not include all PEPs operating on fiscal years whose filing deadline may be delayed.313 Due to these data limitations, the Department assumes a universe of 134 PPPs and 382 PEPs for its cost estimate.314

The Department does not have data on what percent of PPPs or PEPs would be affected by PTE 2020–02. For the purposes of this analysis, the Department assumes that all PPPs and PEPs would be affected. The Department requests comment on this assumption.

Summary of Affected Financial Entities

In its economic analysis for its 2020 rulemaking, the Department included all financial institutions eligible for relief on a variety of transactions and compensation that may not have been covered by prior exemptions in its cost estimate. In 2020, the Department acknowledged that not all these entities will serve as investment advice fiduciaries to plans and IRAs within the meaning of Title I and the Code. Additionally, the Department acknowledged that because other exemptions are also broadly available to these entities, it is unclear how widely financial institutions will rely upon the new exemptions and which firms are most likely to choose to rely on them.

This analysis, like the analysis from 2020, includes all financial institutions eligible for relief in its cost estimate. These estimates are subject to caveats similar to those in 2020. The Department requests comments on which, and how many, financial institutions may rely on each of the exemptions, as amended.

Additionally, the proposed rule would expand the definition of a fiduciary such that an advice provider would be a fiduciary if they make an investment recommendation to a retirement investor for a fee or compensation and any of the following circumstances apply: (1) the advice provider (directly or indirectly) has investment discretion over the retirement investor’s assets, (2) the advice provider (directly or indirectly) provides investment recommendations on a regular basis as part of their business and the recommendation is provided under circumstances indicating that it is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor’s best interest, or (3)

311(10,000 managed IRAs × 2.1 percent of IRAs are new) = 210 IRAs.
the advice provider represents or acknowledges they are a fiduciary when making investment recommendations.

Registered Investment Advisers

Registered investment advisers providing investment advice to retirement plans or retirement investors and registered investment advisers acting as pension consultants would be directly affected by the proposed amendments to PTE 2020–02. Generally, investment advisers must register with either the SEC or with state securities authorities, as appropriate.315

Investment advisers registered with the SEC are generally larger than state-registered investment advisers, both in staff and in regulatory assets under management.316 For example, according to one report, 64 percent of state-registered investment advisers manage assets under $30 million while investment advisers must register with the SEC if they manage assets of $110 million or more.317 In addition, according to one survey of SEC-registered investment advisers, about 47 percent of SEC-registered investment advisers reported 11 to 50 employees.318 In contrast, an examination of state-registered investment advisers reported less than two employees.319

As of December 2021, there were 14,714 SEC-registered investment advisers, of which 9,254 provided advice to retail investors while 5,460 provided advice to non-retail investors. Of the 14,714 SEC-registered investment advisers, 325 were dual-registered as broker-dealers.320 To avoid double counting when estimating compliance costs, the Department counted dually registered firms as broker-dealers and excluded them from the count of registered investment advisers.321 Therefore, the Department estimates that there be 14,389 SEC-registered investment advisers.

Additionally, as of December 2021, there were 15,987 state-registered investment advisers, of which 283 are dually registered as a broker-dealer.322 In 2018, 125 state-registered investment advisers were also registered with the SEC.323 To avoid double counting, the Department counted dually registered firms as broker-dealers and excluded them from the count of state-registered investment advisers. Similarly, the Department counted investment advisers registered with the SEC and a state as SEC-registered investment advisers. Accordingly, for the purposes of this analysis, the Department considers 15,579 state-registered investment advisers. In 2021, 54 percent of registered investment advisers provided employer-sponsored retirement benefits consulting.324 Based on this statistic, the Department estimates that 16,182 registered investment advisers, including 7,770 SEC-registered investment advisers and 8,412 state-registered investment advisers state, would be affected by the proposed amendments.325

As discussed in the Baseline section, PTE 2020–02 excludes investment advisors providing pure robo-advice. The proposed amendments would include these entities; however, pure robo-advisers would have a different baseline from registered investment advisers currently under PTE 2020–02. As discussed below, the Department estimates that there are 200 pure robo-advisers.326 Accordingly, the Department estimates that 15,982 registered investment advisers who do not provide pure robo-advice are currently eligible for relief under PTE 2020–02.327 The Department does not have data on how many of these firms provide advice only to retirement investors that are plan participants, plan beneficiaries, or IRA owners, rather than the workplace retirement plans themselves. These firms are fiduciaries under the Investment Advisers Act and already operate under standards broadly similar to those required by PTE 2020–02.328

Robo Advisers

The proposed changes to PTE 2020–02 would make investment advice providers providing pure robo-advice eligible for relief under the exemption. While there has been a significant increase in robo-advice in recent years,329 the market for robo-advice has shifted away from pure robo-advice to a hybrid approach which combines features of robo-advisers and traditional human advisers.330 This is partly driven by investor preference. For instance, one survey found that only 45 percent of investors were comfortable using online only advice services.331 Another driver is larger financial institutions entering the market with hybrid robo-advice.

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321 The Department applied this exclusion rule to those required by PTE 2020–02.328
322 These firms are fiduciaries under the Investment Advisers Act and already operate under standards broadly similar to those required by PTE 2020–02.328
323 For more information on this estimate, refer to the Robo-Advisers discussion in the Affected Entities section.
324 As discussed below, the Department estimates that there are 200 pure robo-advisers. Accordingly, the Department estimates that 15,982 registered investment advisers would be affected by the proposed amendments and are not pure robo-advisers. The number of registered investment advisers is estimated as: [(14,389 SEC-registered investment advisers + 15,579 state-registered investment advisers) × 54%] – 200 robo-advisers = 15,982 registered investment advisers.
While the first robo-advisers were standalone firms, many existing financial firms, including banks, broker-dealers, technology firms, and asset managers, have entered the market,\textsuperscript{332} many by acquiring existing pure robo-advice platforms.\textsuperscript{333} Robo-advisers often vary in terms of hands-on assistance.\textsuperscript{334} The most basic models use computer algorithms to offer investment advice to plan fiduciaries, plan participants and beneficiaries, and IRA owners. Under PTE 75–1, robo-advisers would still be able to receive reasonable compensation for extending credit to a plan or IRA if (1) the potential failure of the purchase or sale of the securities is not caused by such fiduciary or an affiliate, and (2) the terms of the extension of credit are at least as favorable to the plan or IRA as the terms available in an arm’s length transaction between unaffiliated parties. Any broker-dealers seeking relief for investment advice, however, would be required to rely on the amended PTE 2020–02.

According to data provided by the SEC, there were 3,508 registered broker-dealers as of December 2021. Of those, approximately 70 percent, or 2,447 broker-dealers, reported retail customer activities, while approximately 30 percent, or 1,061 broker-dealers, were estimated to have no retail customers.\textsuperscript{337} Not all broker-dealers perform services for employee benefit plans. In 2021, 54 percent of registered investment advisers provided employer-sponsored retirement benefits consulting.\textsuperscript{338} Assuming the percentage of broker-dealers providing advice to retirement plans is the same as the percent of investment advisers providing services to plans, the Department estimates 54 percent, or 1,894 broker-dealers, would be affected by the proposed amendments.\textsuperscript{339} The Department requests comment on this estimate.

The proposed amendments to PTE 86–128 would affect investment advice fiduciaries. The proposed amendments would remove provisions that had provided relief for certain plans not covering employees, such as IRAs. Investment advice fiduciaries to IRAs would, instead, have to rely on another exemption, such as PTE 2020–02. While fiduciaries that exercise full discretionary authority or control with respect to IRAs may continue to rely on the exemption, the proposed amendments to PTE 86–128 would impose additional requirements on fiduciaries of employee benefits plans that affect or execute securities transactions and the independent plan fiduciaries authorizing the plan or IRA to engage in the transactions with an authorizing fiduciary.

The Department lacks reliable data on the number of investment advice providers who are discretionary fiduciaries that would rely on the amended exemption. For the purposes of this analysis, the Department assumes that the number of discretionary fiduciaries relying on the exemption is no larger than the number of broker-dealers estimated to be affected by the amendments to PTE 2020–02, or 1,894 investment advice providers while acknowledging the number is likely significantly smaller.\textsuperscript{340} The Department requests comment on this assumption, particularly with regard to what types of entities would be likely to rely on the amended exemption, as well as any underlying data.

Insurance Companies

The proposed amendments to PTE 2020–02 and PTE 84–24 would affect insurance companies and captive agents.

The existing version of PTE 84–24 granted relief for captive insurance agents, insurance agents who are overseen by a single insurance company; however, the proposed amendments would exclude insurance companies and captive agents currently relying on the exemption for investment advice. These entities would be required to comply with the requirements of PTE 2020–02 for relief involving investment advice. As a result, the estimates for PTE 84–24 discussed below likely overestimate the reliance on the exemption. The Department requests comment on the extent to which entities currently relying on PTE 84–24 would continue to rely on the exemption.

Insurance companies are primarily regulated by states and no single


\textsuperscript{333}Andrew Welsch, Robo-Advisors Changed Investing, But Can They Survive Independently, Barron’s (February 2022), https://www.barrons.com/articles/robo-advisors-changed-investing-but-can-they-survive-independently-5165472100.


\textsuperscript{337}Estimates are based on the SEC’s FOCUS filings and Form ADV filings.


\textsuperscript{339}The estimated number of retail broker-dealers affected by this exemption is estimated as: (2,447 retail broker-dealers × 54%) = 1,321 retail broker dealers.

\textsuperscript{340}SEC Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion From the Definition of Investment Adviser, 84 FR 33681, 33685–86 (July 12, 2019).
regulator records a nationwide count of insurance companies. Although state regulators track insurance companies, the total number of insurance companies cannot be calculated by aggregating individual state totals, because insurance companies often operate in multiple states. In the Department’s 2016 RIA, it estimated that 398 insurance companies wrote annuities. The Department continues to use this estimate although the number may have changed during the intervening years. Furthermore, this may be an overestimate because some of these insurance companies may not sell annuity contracts in the IRA or Title I retirement plan markets. The Department requests information on the number of insurance companies underwriting annuities that would be affected by this proposal.

Annuity sales reached record highs in 2022. Total annuity sales in 2022 amounted to $312.8 billion, while indexed annuity sales amounted to $79.8 billion, or approximately 26% of total annuity sales. During the first two quarters of 2023, indexed annuity sales accounted for 27% of total annuity sales. Recent legislative developments may lead to an expansion in this market. A 2021 survey asked insurers what impacts they expected to see from the Setting Every Community Up for Retirement Enhancement Act of 2019 (the SECURE Act). It found that 58 percent of insurers thought the SECURE Act would result in a significant increase in the number of plan sponsors offering in-plan annuities, and 63 percent of insurers thought the SECURE Act would lead to a significant increase in the number of plan participants allocating a portion of their plan balances to an annuity option. With increasing usage of annuities in plans, the future impact on plans, participants, assets, and insurance companies will be greater. It also increases the need for plan fiduciaries to receive advice that is subject to a best interest standard.

Insurance companies sell insurance products through (1) their employees or “captvie insurance agents” who work directly for an insurance company or as independent contractors and exclusively sell the insurance company’s products, and/or (2) independent agents that sell multiple insurance companies’ products. In recent years, the market has seen a shift away from captive distribution towards independent distribution. The Department does not have strong data on the number of insurance companies using captive agents or independent producers. Based on data on the sales of individual annuities by distribution channel, the Department estimates that, of annuities distributed through either a captive or independent distribution channel, approximately 46 percent of sales are done through captive distribution channels and 54 percent of sales are done through independent distribution channels.

For the purpose of this analysis, the Department assumes that the number of companies selling annuities through captive distribution channels and independent distribution channels is proportional to the sales completed by each distribution channel. The Department recognizes that the distribution of sales by distribution channel is likely different from the distribution of insurance companies by distribution channel. The Department requests comment on how many insurance companies sell annuities through captive and independent distribution channels. The Department also requests comment on whether how many insurance companies may rely on both methods of distribution.

Following from this assumption, the Department estimates that 70 percent of large insurance companies distribute annuities through captive channels and would rely on PTE 2020–02 for transactions involving investment advice. Further, the Department estimates that 215 insurance companies distribute annuities through independent channels and would rely on PTE 84–24 for transactions involving investment advice. The Department estimates that 70 of the 398 insurance companies are large entities. In the absence of data relating to the distribution channel differences by firm size, the Department uses the aggregate rate in its estimates. That is, the Department assumes that 46 percent of large insurance companies (32 insurance companies) sell annuities through captive distribution channels, while the remaining 177 insurance companies selling annuities through independent distribution channels, are assumed to be small. Additionally, 54 percent of large insurance companies (38 insurance companies) sell annuities through independent distribution channels, while the remaining 177 insurance companies selling annuities through independent distribution channels are assumed to be small. The Department requests comment on this assumption.

Proposal

The proposal would also affect independent insurance producers that recommend annuities from unaffiliated companies

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344 According to the Insurance Information Institute, in 2022, independent broker dealers accounted for 20 percent of individual annuities sales, independent agents accounted for 18 percent of sales, agent accounts accounted for 15 percent of sales, banks accounted for 24 percent of sales, full-service national broker-dealers accounted for 17 percent of sales, direct response accounted for 3 percent of sales, and other methods accounted for 2 percent of sales. For the purposes of this analysis, the Department considers those sales made by career agents and full-service national broker-dealers to be “captive,” and those made by independent broker dealers and independent agents to be “independent.” To estimate the proportion of sales completed through “captive” and “independent” channels, the Department estimates that 6% of sales associated with direct response and “other methods” from the calculation. The Department assumes that 46 percent of sales by banks are captive, while 54 percent of sales by banks are captive.
financial institutions to retirement investors, as well as the financial institutions whose products are recommended. While captive insurance agents are employees of an insurance company, other insurance agents are “independent” and work with multiple insurance companies. Though these independent insurance producers may rely on PTE 2020–02, the Department believes they are more likely to rely on PTE 84–24, which is tailored to the industry under the proposal. For this reason, the Department only considers captive insurance agents in the analysis for PTE 2020–02. The Department requests comment on how captive insurance agents and independent insurance producers would be affected by the proposed amendments to PTE 2020–02 and PTE 84–24.

The Department estimates that the independent agent distribution channel has sales of about $56 billion since this channel is 18 percent of individual annuity sales and total U.S. annuity sales reached $312.8 billion in 2022.350 It is challenging to estimate the number of independent producers selling annuities to the retirement market. A new release referencing a study reported that there were approximately 40,000 independent property-casualty agents and brokers in the United States.351 The Department assumes that the number of independent producers selling annuities to the retirement market who would use the exemption under its proposed provisions would be about 10 percent of this figure, or 4,000 independent producers. This assumption is based on anecdotal evidence. The Department requests comment on these assumptions, as well as information as to how much of an independent producer’s business focuses on the retirement market (i.e., the shares of independent producers serving the retirement market that receive less than one percent of their sales from the retirement market, between one and twenty-five percent, between twenty-five and seventy-five percent, or more than seventy-five percent).

The proposed amendments would not impose any conditions on insurance intermediaries, such as independent marketing organizations, field marketing organizations, or brokerage general agencies. These entities do not have supervisory obligations over independent insurance producers under state or federal law that are comparable to those of the other entities, such as insurance companies, banks, and broker-dealers, nor do they have a history of exercising such supervision in practice. They are generally described as wholesaling and marketing and support organizations that are not tasked with ensuring compliance with regulatory standards. In addition, they are not subject to the sort of capital and solvency requirements imposed on state-regulated insurance companies and banks.

Pension Consultants

The Department expects that pension consultants would continue to rely on the existing PTE 84–24. Based on 2021 Form 5500 data, the Department estimates that 1,011 pension consultants serve the retirement market.352 The proposed amendment would exclude pension consultants for plans and IRAs currently relying on the existing PTE 84–24 for investment advice. As such, any pension consultants relying on the existing exemption for investment advice would be required to comply with PTE 2020–02 for relief. In this analysis, the Department includes pension consultants in the affected entities for continued relief for the existing provisions of PTE 84–24 as well as the amended PTE 2020–02.

The Department acknowledges that this approach likely overestimates the entities and related costs to complying with the exemptions. The Department requests comment on whether principal company underwriters would continue to rely on the existing provisions of 84–24 or would rely on the amended 2020–02.

Principal Company Underwriter

The Department expects that some investment company underwriters for plans and IRAs rely on the existing PTE 84–24 for advice. The Department does not have data allowing it to estimate how many investment company principal underwriters would choose to rely on the exemption, but based on its experience, the Department expects investment company principal underwriters relying on PTE 84–24 to be rare. For the purposes of this analysis, the Department assumes that 10 investment company principal underwriters for plans and 10 investment company principal underwriters for IRAs would use this exemption once with one client plan.

The proposed amendment would exclude investment company principal underwriters for plans and IRAs currently relying on the existing PTE 84–24 for investment advice. As such, any principal company underwriter relying on the existing exemption for investment advice would be required to comply with PTE 2020–02 for relief. In this analysis, the Department includes principal company underwriters in the affected entities for continued relief for the existing provisions of PTE 84–24 as well as the amended PTE 2020–02.

Banks and Credit Unions

The proposed amendments to PTE 75–1, PTE 80–83, and PTE 2020–02 would affect banks and credit unions. There are 4,672 federally insured depository institutions in the United States, consisting of 4,096 commercial banks and 576 savings institutions.353 Additionally, there are 4,686 federally insured credit unions.354 In 2017, the GAO estimated that approximately two percent of credit unions have private deposit insurance.355-Based on this estimate, the Department estimates that there are approximately 96 credit unions with private deposit insurance.
and 4,782 credit unions in total. The Department requests comment on what proportion of credit unions offer IRAs and what proportion sell share certificate products. The Department also requests comment on how many banks and credit unions currently rely on PTE 2020–02, PTE 75–1, and PTE 80–83 for investment advice.

The proposed amendments would exclude entities currently relying on the existing PTE 75–1 and PTE 80–83 for investment advice. The Department does not have a reliable data source on how many banks currently rely on these exemptions. PTE 75–1 allows banks to engage in certain classes of transactions with employee benefit plans and IRAs. The Department assumes that half of these banks, or 2,048 banks would use PTE 75–1. As amended, PTE 80–83 allows banks to purchase, on behalf of employees, securities issued by a corporation indebted to the bank that is a party in interest to the plan. The Department estimates that 25 fiduciary-banks with public offering services currently rely on the amended PTE 80–83. The Department requests comment on how many banks currently rely on PTE 75–1 and PTE 80–83 and how many of these entities rely on the exemptions for relief concerning investment advice.

Banks relying on the existing exemptions for investment advice would be required to comply with PTE 2020–02 for relief for advice. Banks would be permitted to act as financial institutions under PTE 2020–02 if they or their employees are investment advice fiduciaries with respect to retirement investors.

The Department understands that banks most commonly use “networking arrangements” to sell retail non-deposit investment products, including equities, fixed-income securities, exchange-traded funds, and variable annuities. Under such arrangements, bank employees are limited to performing only clerical or ministerial functions in connection with brokerage transactions. However, bank employees may forward customer funds or securities and may describe, in general terms, the types of investment vehicles available from the bank and broker-dealer under the arrangement. Similar restrictions on bank employees’ referrals of insurance products and state-registered investment advisers exist. The Department believes that, in most cases, such referrals would not constitute fiduciary investment advice within the meaning of the proposal. The Department, however, also requests comment on what other types of activities banks or credit unions may engage in that would require reliance on PTE 2020–02.

The Department currently estimates that no banks or credit unions would be impacted by the proposed amendments to PTE 2020–02 but requests comments on this assumption. The Department does not have sufficient data to estimate the costs to banks or credit unions of complying with PTE 2020–02 for investment advice services because it does not know how frequently these entities use their own employees to perform activities that would otherwise be covered by the prohibited transaction provisions of ERISA and the Code. The Department seeks comment on the frequency with which employees recommend their products to retirement investors and how they currently ensure such recommendations are prudent to the extent required by ERISA. The Department requests comment on the magnitude of any such costs and solicits data that would facilitate their quantification in the proposal.

Mutual Fund Companies

The proposed amendments would modify PTE 77–4 such that mutual fund companies providing services to plans can no longer rely on the exemption when giving investment advice. Under the proposal, these mutual funds would need to rely on PTE 2020–02 for relief concerning investment advice.

According to the ICI, in 2022, there were 812 mutual fund companies. The Department assumes that all of these companies are service providers to pension plans, providing investment management services.

Mortgage Pool Sponsors

PTE 83–1 provides relief for the sale of certificates by the sponsor of a mortgage pool to a plan or IRA when the sponsor, trustee, or insurer of the mortgage pool is a fiduciary with respect to the plan or IRA assets invested in such certificates. The proposed amendments would modify PTE 83–1 to exclude any relief for investment advice. Under the proposal, these entities would need to rely on PTE 2020–02 for relief concerning investment advice. The Department requests comment on how many of these entities rely on PTE 83–1 and how many of these entities rely on PTE 83–1 for investment advice.

5. Benefits and Transfers

The Department believes that, as a result of this proposal, retirement investors would achieve higher net returns on average in the long run by selecting better investments or paying lower fees. More specifically, this proposal would generate economic gains for retirement investors by:

• increasing uniformity in the regulation of financial advice for retirement investors, across different market segments and market participants,

• protecting consumers from losses that can result from advisory conflicts of interest (without unduly limiting consumer choice or adviser flexibility),

• giving retirement investors increased trust and confidence in their advisers and in the reliability of their advice, and

• facilitating more efficient capital allocation.

These represent gains to investors, which may manifest as pure social welfare “benefits,” as some resources that were previously inefficiently used to acquire financial products and services are now available for more valuable uses. Other improvements may take the form of “transfers” of social welfare to retirement investors from other entities in society. The available data do not allow the Department to quantify the gains to investors or the components social welfare “benefits” and “transfers.” These transfers represent a beneficial gain to retirement investors and are a primary objective of the proposed rule and PTE.

If some transactions have increased net returns for certain parties and decreased returns of equal magnitude for other parties, that would represent a transfer. If the increase in net returns for the first group is larger than the corresponding decrease for the second group, then only the equivalent portion would be transfers and the amount of the additional net returns would represent benefits. For example, non-
regulatory regimes are not unique to the United States. For instance, Anagol et al. (2017) found that when agents selling life insurance in India were required to disclose commissions for one particular product, they were much less likely to recommend it to clients. Instead, the agents recommended products that did not have this requirement, but which had higher and opaque commissions. Smith argued that recognizing the overlapping services by regulatory regimes that are not uniform allow advisers to engage in regulatory arbitrage, leaving their clients vulnerable to conflicts of interest. This proposed rule would help create a uniform standard, as it would apply to all retirement investment advice. This would address concerns the Department has about lower standards for advice related to insurance products and other investments that are not securities, advice that broker-dealers render to investors. Financial services firms are already making recommendations in both the retail and non-retail market to utilize a uniform, well-designed rules can make markets fairer for competitors and reduce the risk to retirement investors. Uniform, well-designed rules can make markets fairer for competitors and friendly for customers, leading to more efficient market outcomes. They can also promote efficiency by allowing firms that offer multiple products or make recommendations in both the retail and non-retail market to utilize a common compliance structure. Financial services firms are already moving toward new approaches in how they offer advice, including more fee-based advice models, flatter compensation models, and integrating technology. The proposed amendments to the rule and exemptions would help ensure that these new approaches evolve toward less conflicted and more innately impartial business models. These types of technology-enhanced models—whether pure robo-adviser or hybrid models—will contain the overall costs associated with providing investment advice and strategies and will help low-balance account holders obtain investment advice at an affordable cost.

This proposal would generate additional economic benefits and transfers by extending important and effective protections broadly to cover all advice given to retirement investors. In this analysis, the Department identifies three specific areas in which retirement investors would benefit from an extension of protections: one-time advice regarding the rollover of assets, advice on non-security annuity products, and advice given to ERISA plan fiduciaries. These types of advice are discussed in the following sections.

Protections Concerning Rollover Investment Advice

The proposal would generate benefits for, and transfers to, savers by reducing conflicts related to one-time advice concerning rollovers. Frequently, participants are better off leaving their 401(k) account in the retirement plan rather than rolling it over to an IRA, particularly if the 401(k) plan has low fees and high-quality investment options. Large 401(k) plans often have lower fees than IRAs, though smaller 401(k) plans sometimes find it difficult to keep fees low. IRAs often utilize application to all retirement investment advice would help different market participants and different financial products compete on similar terms for IRA and plan business. This would reduce the risk to retirement investors. Uniform, well-designed rules can make markets fairer for competitors and friendlier for customers, leading to more efficient market outcomes. They can also promote efficiency by allowing firms that offer multiple products or make recommendations in both the retail and non-retail market to utilize a common compliance structure. Financial services firms are already moving toward new approaches in how they offer advice, including more fee-based advice models, flatter compensation models, and integrating technology. The proposed amendments to the rule and exemptions would help ensure that these new approaches evolve toward less conflicted and more innately impartial business models. These types of technology-enhanced models—whether pure robo-adviser or hybrid models—will contain the overall costs associated with providing investment advice and strategies and will help low-balance account holders obtain investment advice at an affordable cost.

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retail shares in mutual funds with substantially higher fees than the institutional share classes that employer-sponsored plans typically utilize. A 2022 Pew Charitable Trusts study analyzed the difference between median institutional and retail share class expense ratios across all mutual funds that offered at least one institutional share and one retail share in 2019. They found that the median retail shares of equity funds had annual expenses that were 37 percent higher than institutional shares. Over the course of saving for retirement, the impact of even small differences in fees was significant.364

The investment fiduciaries of 401(k) plans also have responsibilities under ERISA to act in the best interests of, and solely for the benefit of, the plan participants, whereas IRA providers do not have such responsibilities.365 Turner and Klein (2014) suggested that the services and investment performance associated with higher fees paid in an IRA are not necessarily justified.366 Meaning a plan participant would be able to obtain similar investment performance and services in a lower cost 401(k) plan. For instance, Turner, Klein, and Stein (2015) found that most financial advisers told federal workers about the benefits of rolling over into an IRA, such as having a larger number of investment options and more lenient withdrawal options, without mentioning the higher costs that would be incurred relative to keeping their savings in the Thrift Savings Plan, which has extremely low fees.367 If fewer participants roll over their 401(k) plan account balances into IRAs, and instead keep their account balances in plans sponsored by former or new employers, this would result in transfers between different segments of the market. To consider one example, there may be a transfer from service providers who specialize in serving IRAs to service providers who specialize in serving defined contribution plans. As a second example, retirement investors often pay lower fees in plans where they can access institutional share classes than they do in IRAs where they use retail share classes. This represents a transfer from actors in the financial industry to retirement investors.

Protections Concerning Annuity Investment Advice

The proposal would generate additional benefits by extending protections to investment advice from insurance agents or independent producers to IRA investors. The annuity products offered by insurance companies are notoriously complex, leaving retirement investors reliant on advice from the insurance agent, broker, or independent producer selling the annuity. The fees and adviser incentives are similarly complex, often in a way that can conceal the full magnitude of the fees. Other regulators have highlighted the complexity of many annuity products. For example, FINRA stated:

Annuities are often products investors consider when they plan for retirement—so it pays to understand them. They also are often marketed as tax-deferred savings products. Annuities come with a variety of fees and expenses, such as surrender charges, mortality and expense risk charges and administrative fees. Annuities also can have high commissions, reaching seven percent or more.368

As described in the baseline discussion above, fixed annuities, variable annuities, and indexed annuities differ significantly in risk. For instance, while the insurer carries the investment risk for fixed annuities, the investor carries the investment risk for variable annuities and indexed annuities.369 Additionally, they differ in regulatory standards and the required protections owed to customers. While variable annuities and some indexed annuities are considered securities subject to SEC and FINRA regulation,370 the standard of care owed to a customer for other types of annuities depends on the state regulation.

One area of concern for the Department is how financial entities selling annuities are compensated, which may result in a conflict of interest. According to the 2015 Warren Report, which examined 15 of the largest annuity companies in the United States, 87 percent of the annuity companies offered “kickbacks” to their agents in exchange for sales to retirees.371 Further, insurance agents, brokers, and independent producers are often compensated through load fees for selling variable and fixed annuities fees.372 As discussed in the Baseline section discussion on market developments in the insurance market, research has found load fees create a conflict of interest in investment advice, leading to decreased returns.373

The Department is also particularly concerned about vulnerable retirement investors who lack a basic understanding of investment fundamentals and the complexities associated with indexed annuities. FINRA cautions that, “indexed annuities are complex financial instruments, and retirement experts warn that such annuities include a number of features that may result in lower returns than an investor may expect.”374 While indexed annuities have a minimum guaranteed rate of return tied to an underlying index, the guaranteed rate does not cover all of a premium.375 Moreover, while the rate of return of the indexed annuity is linked to performance of the index, indexed annuity returns are subject to contractual limitations which effectively cap returns. FINRA identified the following contractual limitations observed in indexed annuities:

- Participation rates explicitly set the percentage of index returns that are credited to the annuity;
- Spread, margin, or asset fees are subtracted from the index returns; and


365 Ibid.


One regulator noted, “With billions of dollars in sales to be made, insurance companies may offer commissions as high as 10 percent to agents to sell products like long-term deferred annuities to senior citizens.”381 As described by the regulator:

Some unscrupulous sellers use high-pressure sales pitches, seminars, and telemarketing. Beware of agents who “cold call” you, contact you repeatedly, offer “limited time offers,” show up without an appointment, or won’t meet with you if your family is present. Beware of estate planning “seminars” that are actually designed to sell annuities. Beware of seminars that offer free meals or gifts. In the end, they are rarely free. Beware of agents who give themselves fake titles to enhance their credibility.382

Supporting this call for caution, Egan et al. (2019) found substantial amounts of misconduct disputes in the sales of annuities between 2005 and 2015.383 Research shows that fiduciary protections in the annuity markets lead to better outcomes for investors. By analyzing deferred annuity sales at a large financial services provider during 2013 to 2015, Bhattacharya et al. (2020) found that fiduciary duty increases risk-adjusted returns by 25 basis points.384


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382 Ibid.


This results from a compositional shift in the set of products purchased by investors. Fiduciary duty protections tend to shift sales towards fixed indexed annuities and away from variable annuities. Within variable annuities, sales shifted towards products with more and higher quality investment options. The authors obtained these findings by exploiting the variation in fiduciary duties between broker-dealers and registered investment advisers as well as the variation between states as to whether broker-dealers are subject to a common law fiduciary duty.

Bhattacharya et al. (2020) also found that fiduciary duty led to a 16 percent reduction in the number of broker-dealers, which they described as a “potentially small” effect. There was no change in total annuity sales. Furthermore, the reduction in broker-dealers did not result in poor quality products being sold. The authors developed a model that shows that the benefits of improved advice under a fiduciary standard, offset by the reduction in the number of broker-dealers and the advice they provide, yields an overall effect of increasing average returns by 20 basis points. On the whole, these results indicate that this proposal would improve the quality of advice in the investment market and protect the welfare of investors and retirees.385

The Bhattacharya et al. (2020) model is particularly helpful in that it provides a framework to illustrate the quantitative impact of extending the fiduciary duty. It takes into account both empirical findings—the increase in returns of 25 basis points and the exit of 16 percent of the broker-dealers. While the model illustrates how these results would apply to the larger market, the results are still subject to the limitations of the empirical analysis, which looked only at certain types of annuities sold by one large firm. The authors examined the effects of variation in state-level fiduciary laws, but it is unclear how similar those would be to the effects of a national regulation.

Approximately $3.8 trillion in pension entitlements are held in annuities at life insurance companies, including those within IRAs.386 The recommendation of many of these assets are already subject to a best interest

385 Ibid.

standard; for example, they were sold by a registered investment adviser or sold in a state with a fiduciary standard. It is difficult to know exactly how many assets fall into this category, but for illustrative purposes, let us assume that 50 percent of the market is not currently subject to a best interest standard and would be under the proposal and would therefore expect an increase in average returns of 20 basis points as suggested by Bhattacharya et al. In this scenario, the expansion of fiduciary duty would lead to gains for investors (a mix of societal benefits and transfers) of $3.6 billion, assuming a 20 basis point increase in returns.387

Good regulation may also improve the overall investment advice market. According to Egan, Ge, and Tang (2022), after the Department issued its 2016 Final Rule, total variable annuity sales fell significantly—primarily driven by a 52 percent decrease in annuities with expenses in the highest quartile, suggesting that broker-dealers responded to the 2016 Final Rule by placing greater weight on investor interests. These impacts persisted even after the rule was vacated by the Fifth Circuit. Critics of the Department’s 2016 Final Rule often refer to a decline in variable annuity sales as evidence of the 2016 Final Rule having negative effects. Egan, Ge, and Tang (2002) conclude, however, that investors on average experienced a net benefit from the Rule, even taking into account the fact that some investors were no longer participating in the annuity market.388

Other commentators observed that even if the 2016 Final Rule could have reduced investors’ access to certain services or products, the impact would have been on services and products that were not in the investors’ best interest.389

The benefits of this proposal’s application of fiduciary status to investment advice from insurance agents, brokers, and independent producers include eliminating the incentives for regulatory arbitrage by those agents. Without this proposal, insurers and insurance intermediaries can secure excess profits at investors’ expense by rewarding investment advice providers for giving biased advice in ways that broker-dealers operating under Regulation Best Interest cannot.

Protections Concerning Advice Given to Plan Fiduciaries

This proposal would also yield economic benefits by extending protections to advice given to ERISA plan fiduciaries. Accordingly, the proposal would ensure that investors and the Secretary could enforce the fiduciary protections by pursuing claims for fiduciary misconduct involving ERISA-covered plans. When a broker-dealer currently provides advice to plan fiduciaries, the advice is not covered by Regulation Best Interest because the plan fiduciaries are not retail customers.390 Pool et al. (2016) offered evidence that mutual fund companies acting as service providers to 401(k) plans display favoritism toward their own affiliated funds, even when their performance is worse, generating “significant subsequent negative abnormal returns for participants investing in the fund.”391 This proposal aims to reduce or eliminate such harmful favoritism.

Pool et al. (2022) demonstrated that funds which offer defined contribution plan recordkeepers revenue-sharing payments are more likely to be added as investment options on plan menus and are also more likely to be retained. Additionally, plans whose menus include funds that share revenue had higher expense ratios resulting in significantly higher fees.392 Pool states that this is “consistent with the notion that . . . less transparent indirect payments allow record keepers to extract additional rents from plan participants.”393 Fiduciaries can negotiate the specific formula and methodology under which revenue sharing will be credited to the plan or plan service providers, indirectly reducing the fees the plan pays which could in turn mitigate the conflict, but this requires a sophisticated understanding of the underlying agreement.394 Given the proliferation of fee arrangements for investment advice that are increasingly less transparent to clients and regulators as well as the variation in standards and safeguards across advice markets, the Department believes it is critical to extend protections associated with fiduciary status under ERISA, to protect retirement investors’ assets.

Plan fiduciaries receive advice on many important topics. For defined contribution plans, these topics can include plan design provisions such as investment alternatives, whether the plan should have automatic enrollment, default contribution rates, and default investments. For defined benefit plans, it can include selection of investments and investment strategies as well as distribution options. Given the large number of participants in ERISA plans and the huge asset holdings of such plans, the benefits of protecting the advice received by plan fiduciaries is likely to be substantial.

Increased Confidence in Advisers and in the Reliability of their Advice

The market for financial advice generally works best when investors trust investment advice providers and their trust is well-placed. Both conditions are necessary for optimal results. If investors distrust investment advice providers, they will incur higher costs to select a provider and monitor their conduct. Their provider may also incur higher costs to counter prospective and existing customers’ distrust. Distrustful investors may be less likely to obtain beneficial advice and more likely not to follow beneficial advice.395 Likewise, if investors trust investment advice providers more than is warranted, they may reduce their monitoring of the advisor’s actions and accept less transparency in policies, procedures and fees, making them more vulnerable to harm from advice that is biased by advisory conflicts.396 A 2019 survey regarding the Australian financial advice industry reported that the biggest barriers for consumers in accessing financial advice are cost (35 percent), limited financial

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387 0.20% x $3.6 trillion x 50% = $3.6 billion.
390 Pool et al. (2016) demonstrated that funds which offer defined contribution plan recordkeepers revenue-sharing payments are more likely to be added as investment options on plan menus and are also more likely to be retained. Additionally, plans whose menus include funds that share revenue had higher expense ratios resulting in significantly higher fees.
391 Pool states that this is “consistent with the notion that . . . less transparent indirect payments allow record keepers to extract additional rents from plan participants.”
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395 Increased confidence in advisers and in the reliability of their advice.
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circumstances in which it is “not worth getting financial advice” (29 percent), the desire to manage an individual’s own finances (26 percent), a lack of trust (19 percent), or a lack of perceived value in paying for financial advice (18 percent).397

By holding all retirement investment advice providers to standards that rightly instill trust, this proposal would facilitate efficient, trust-based relationships between retirement investors and investment advice providers of all types, so investors would be more likely to obtain and follow beneficial advice, at lower cost.

There is extensive evidence that investors, including retail investors and ERISA plan fiduciaries, are often subject to behavioral biases that lead to costly systematic investment errors. There is evidence that good advice can improve saving and investing decisions. Accordingly, the proposal may result in a beneficial reallocation of investment capital. Montmarquette and Viennot-Briot (2015) provided evidence that “having a financial advisor for at least four years has a positive and significant impact on financial assets” and that “the positive effect of advice on wealth creation cannot be explained by asset performance alone: the greater savings discipline acquired through advice plays the major role.”398

Fisch et al. (2016) also provided evidence that “highlight[s] the potential value of professional advice in mitigating the effects of financial illiteracy in retirement planning.”399 Fisch et al. recruited Amazon Mechanical Turk users (MTurk sample), a crowdsourcing marketplace, to allocate a hypothetical ten thousand dollars among ten investments options as part of a 401(k) plan. Separately, professional advisers—registered investment advisers, broker-dealers or dual registrants—were asked to allocate ten thousand dollars on behalf of a hypothetical 30-year-old, single client, with no children, a lower middle-class income and no substantial outside savings or investments. They found that professional advisers, on average, selected portfolios with higher returns, allocated more money to cheaper index funds, paid lower fees, and accessed more information in connection with the allocation decision than the MTurk sample. For example, professional advisers were “uniformly sensitive to the fact that the equity risk premium and the 30-year time horizon of the allocation decision warranted substantial equity exposure—facts that the low-literacy investors seemed to be unaware.”400 Overall, professional advisers had a higher level of financial knowledge, which enabled them to make better retirement investing decisions from which unsophisticated investors could benefit.

Enforcement

Under the proposal, the full range of covered investment advice interactions with Title I plans would be subject to the Department's robust enforcement program as well as to a private right of action. In general, participants and beneficiaries have the right to bring suit under ERISA 502(a) against fiduciaries who breach their duties and obligations to the plan, including engaging in non-exempt prohibited transactions. This private right of action, which ensures participants and beneficiaries have ready access to the Federal courts, provides critical protection of tax-advantaged retirement plans. For advice interactions not currently covered by relevant standards of conduct, such as much advice provided to plan fiduciaries, these enforcement measures will help to ensure the proposal is implemented effectively. For advice interactions that are subject to state regulation, under the proposal they will likely have stronger oversight, which will provide greater protections to investors.

Charoenwong et al. (2019) showed that regulatory oversight has an important impact on investment advice.401 They studied a policy reform that did not affect the laws or rules that registered investment advisers were operating under; instead, it changed the regulatory oversight. The reform shifted some advisers from a federal regulator, the SEC, to state-securities regulators. Registered investment advisers who shifted to the state-securities regulators received 30–40 percent more complaints from customers, relative to the unconditional complaint rate. This effect mainly resulted from fiduciary violations. Furthermore, the vigor of the enforcement program mattered: the more resources a state-securities regulator had, the fewer complaints there tended to be.

The proposal would also ensure the imposition of appropriate excise taxes for prohibited transactions involving both ERISA-covered plans and IRAs. As part of their retrospective review, financial institutions would be required to report to the Department of the Treasury any non-exempt prohibited transactions in connection with fiduciary investment advice, correct those transactions, and pay any resulting excise taxes. Failure to report, correct, and pay an excise tax, in addition to existing factors, would make a financial institution ineligible to rely on PTE 2020–02 and PTE 84–24. The Department believes these additional conditions would provide important protections to retirement investors by enhancing the existing protections of PTE 2020–02 and PTE 84–24.

Implications for Retirement Savings Estimates

To understand the potential magnitude of savings for retirement investors from the proposed rule, the Department believes the experience following the 2016 rulemaking and SEC’s Regulation Best Interest provides context. As discussed in the baseline discussion, the regulatory and market environments have shifted since the 2016 Rule, and accordingly, the Department acknowledges that there is significant uncertainty about the magnitude of savings that would result for retirement investors as a result of the proposed rulemaking. The Department requests comment on this point.

One major market development resulting from the 2016 Final Rule and exemptions involved the development of new mutual fund share classes designed to eliminate advisory conflicts attributable to variation in commissions. As discussed in the Baseline section, Mitchell, Sethi, and Szapiro (2019) found that the share classes that are less likely to have traditional conflicts of interest have become more popular in recent years.402 In 2020, 94 percent of 401(k) mutual fund assets were invested in no-load funds, compared to 66 percent in 2000.403


400 Id.

401 Ben Charoenwong, Alan Kwan, & Tarik Umar, Does Regulatory Jurisdiction Affect the Quality of Investment-Advisor Regulation, 109(10) American Economic Review (October 2019), [https://www.aeaweb.org/articles?id=10.1257/ae.20180412].
In the 2016 RIA, the Department estimated that broker-sold mutual funds underperformed direct-sold mutual funds by approximately 50 basis points per year.\footnote{Employee Benefits Security Administration, Regulating Advice Markets: Definition of the Term “Fiduciary” Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions, pp. 162, (April 2016), https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.} In response to this estimate, Morningstar opined that transparency improvements associated with such shares “should encourage advisors to provide high quality advice to remain competitive” and that “50 basis points is a reasonable estimate of savings to investors from reducing conflicted advice.”\footnote{Aron Szapiro & Paul Ellenbogen, Early Evidence on the Department of Labor Conflict of Interest Rule, 10.20955/es.2014.18.} Their support of the Department estimate was based on a study looking at mutual fund T shares. However, this share class has faded following the revocation of the 2016 rule.\footnote{412 413 The performance reduction presented in Christoffersen, Evans, and Musto (2013) does not include loads paid by investors in front-end-load funds.} As a result, it is largely uncertain how many retirement investors would have adopted the new share class had it been permitted to go fully into effect. For the purposes of this illustration, if it were assumed that half of the roughly $2.0 trillion assets invested in long-term mutual funds with front-end load fees were transitioned into T shares, investors could have saved approximately $5 billion.\footnote{409 YiLi Chien, Fiduciary Duty—Evidence from Variable Annuities, 35(12) Economic Synopses (2014), https://doi.org/10.20955/es.2014.18. 411 Mercer Bullard, Geoffrey C. Friesen, & Travis Sapp, Mutual Fund Flows and Investor Returns: An Empirical Examination of Fund Investor Timing Ability, 31(9) Journal of Banking and Finance 2796–2816 (2007), https://www.sciencedirect.com/science/article/abs/pii/S0378426606001422.}

The Department acknowledges that the Morningstar study only looks at the IRA market, specifically examining share classes designed for retail investors. The proposed rule, of course, applies more broadly than just to IRAs. The Department believes the proposed rule would encourage continued market trends away from share classes with traditional conflicts of interest.

However, Mitchell, Sethi, and Szapiro (2019) also found that the newer share classes appear to have their own conflicts that are opaque to investors and regulators, such as revenue sharing.\footnote{Mitchell, Jasmin Sethi, & Aron Szapiro, Regulation Best Interest Meets Opague Practices: It’s Time to Dive Past Surface-Level Conflicts, Morningstar Policy Research (April 2017).} Many of the commonly considered potential conflicts of interest are embedded in a bundled share class arrangement, where the investor pays the mutual fund a load or 12b–1 fee, and the mutual fund pays a portion back to an intermediary, such as the intermediary that sold the fund to the investor. Semi-bundled share classes use revenue sharing or sub-accounting fees.

The damages associated with conflicts of interest in compensation structures are exacerbated in that many of these compensation structures incentivize excessive trading. Good advice can help investors avoid timing errors when trading by reducing panic-selling during large and abrupt downturns. However, conflicted advice providers may profit by encouraging natural inclination to trade more and “chase returns,” an activity that tends to produce harmful timing errors.\footnote{409 YiLi Chien, Fiduciary Duty—Evidence from Variable Annuities, 35(12) Economic Synopses (2014), https://doi.org/10.20955/es.2014.18.}

Friesen and Sapp (2007) found that equity mutual fund investors made timing decisions that reduced fund investor average returns by 1.56 percent annually.\footnote{410 Geoffrey Friesen & Travis Sapp, The Cost of Chasing Returns, 18 The Cost of Chasing Returns, 18 Economic Synopses (2014), https://doi.org/10.20955/es.2014.18.} Their evidence “suggests that those investors who are most likely relying on advice from a broker perform especially poorly from a timing standpoint.”

Bullard, Friesen, and Sapp (2008) found that the difference in performance between load and no-load funds has two components: the difference in prospectus returns across share classes and the difference in investor returns resulting from differences in investor timing.\footnote{411 Mercer Bullard, Geoffrey C. Friesen, & Travis Sapp, Mutual Fund Flows and Investor Returns: An Empirical Examination of Fund Investor Timing Ability, 31(9) Journal of Banking and Finance 2796–2816 (2007), https://www.sciencedirect.com/science/article/abs/pii/S0378426606001422.} Additionally, Christoffersen, Evans, and Musto (2013) found that as the size of the load-share increased, mutual fund returns decreased. This suggests that the greater the adviser’s conflict of interest, the worse off the IRA investor can expect to be.\footnote{412 413 The performance reduction presented in Christoffersen, Evans and Musto (2013) does not include loads paid by investors in front-end-load funds.}

The nature of the conflicts facing broker-dealers in the mutual fund space is similar to that facing insurance agents and independent producers in the annuity space. As discussed in the Baseline section, commissions earned by selling annuities vary considerably even within a certain type of product.\footnote{415 The commission paid varies significantly, from as little as 0 percent to as much as 10 percent of the investment with the most common amount being 7 percent. See Mark Egan, Shan Ge, & Johnny Tang, Conflicting Interests and the Effect of Fiduciary Duty—Evidence from Variable Annuities, 35(12) The Review of Financial Studies 5334–5486 (December 2022), https://academic.oup.com/rfs/article-abstract/53/12/5334/67452.} For example, commissions for variable annuities vary widely, creating a strong incentive for brokers to sell some variable annuities over others. Egan, Ge, and Tang (2022) showed that variable annuity sales were four times more sensitive to brokers’ financial interests than to investors’ financial interests.\footnote{416 Mark Egan, Shan Ge, & Johnny Tang, Conflicting Interests and the Effect of Fiduciary Duty—Evidence from Variable Annuities, 35(12) The Review of Financial Studies 5334–5486 (December 2022), https://academic.oup.com/rfs/article-abstract/53/12/5334/67452.}
After the Department published its 2015 proposal, sales of high-expense variable annuities fell by 52 percent, which Egan, Ge, and Tang (2022) attributed to sales becoming more sensitive to expenses and insurers increasing the availability of low-expense products. In fact, the authors stated that the “regulatory change improved the distribution of products available to investors along the extensive margin, in terms of the annuities available for sale, as well as the intensive margin, in terms of the actual annuities sold by brokers.” Thus, the authors concluded, the 2016 Final Rule resulted in improved investor welfare, increasing risk-adjusted returns of investors by up to 30 basis points per year, with two-thirds of the effect associated with investors moving into lower-expense products and the remainder from sales of annuities with more desirable investment options and characteristics.417 The long-run impact of such a regulation can be estimated by applying the 30 basis point figure to the assets held in variable annuities in 2018, which was $2.2 trillion, yielding a total annual increase in risk-adjusted returns of approximately $6.6 billion.418 Because the 2016 Final Rule was vacated, its long-run effects on the annuity market remain unknown. The current proposal, however, would help ensure a long-run positive impact on the market for variable annuities.

The Department is also concerned about the risks faced by retirement investors purchasing indexed annuities. The benefits from improved investment advice from the proposal would differ from those estimated by Egan, Ge, and Tang (2022), as they would affect a different segment of the market with distinctive characteristics.

The recent SEC actions extended new protections to retail customers advised by broker-dealers on securities transactions. According to the SEC, the Conflict of Interest Obligation under Regulation Best Interest is “intended to reduce the agency costs that arise when a broker-dealer and its associated persons provide a recommendation to a retail customer by addressing the effect of the associated person’s or broker-dealer’s conflicts of interest on the recommendation.” In its Economic Analysis, the SEC explored the market mechanisms by which this and other provisions would benefit retail investors. The SEC estimated that the present value of potential future mutual fund fee reductions after Regulation Best Interest would be between $14 billion to $76 billion.419 The SEC separately estimated that the potential present value of improved future mutual fund performance net of fees (which would overlap with fee reductions) would be between $7 billion to $35 billion. The SEC noted that these estimates represented only “some of the potential benefits” and that more benefits were expected. It also noted that while its estimates focused on mutual funds, it expected that “the same or similar dynamics could apply to other financial products.”

As discussed above, the preliminary evidence that is available for the mutual fund and annuity markets following the 2016 Final Rule and SEC’s Regulation Best Interest reinforces the Department’s view that well-designed terms that raise advisory conduct standards and mitigate advisory conflicts would benefit retirement investors. The Department requests comment on how the investment advice market has evolved since following the enactment of such regulatory actions, with particular interest in how investment returns, net of fees, have changed for mutual funds and annuities.

6. Impact of the Proposal on Small Savers

Some observers have argued that some small savers, individuals, or households with low account balances or of modest means, will lose access to investment advice under this type of regulation and will be worse off. The Department has considered in detail the overall impact of the proposal on small savers.

The Department recognizes that investment advice is often very valuable for small savers. There is also ample evidence and broad consensus that many U.S. consumers struggle to make and implement good retirement saving and investment decisions without effective help. Many lack the skills, motivation, or discipline to accumulate adequate savings, optimize their investment strategies, and thereby realize financial security in retirement.420 Less sophisticated savers are especially vulnerable to the detrimental effects of conflicted advice.421 The Department believes that small savers are unusually vulnerable to the detrimental effects of conflicted advice. With fewer economic resources, small savers are particularly susceptible to any practices that diminish their resources by extracting unnecessary fees or by yielding lower returns. These savers cannot afford to lose any of their retirement savings. Yet conflicts sometimes lead advisers to recommend products with lower expected net returns than available alternatives.

Consumers’ losses from advisory conflicts tend to exceed what can be justified as fair compensation for good advice as these consumers could often benefit more from competitively priced impartial advice.422 However, advisory conflicts have historically distorted the market in ways that have prevented consumers from accessing less conflicted investment alternatives. Less sophisticated investors frequently do not know how much they are paying for advice and are not equipped to effectively monitor the quality of the advice they receive.423 Indeed, Agnew et al. (2021) found in an experimental setting that younger, less financially literate, and less numerate participants were more likely to hire a low-quality adviser.424 It is possible that they do not

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417 Id.
418 This is an estimate based on variable annuity assets in 2018 of $2.2 trillion, as reported in the referenced study. See Mark Egan, Shan Ge, & Johnny Tang, Conflicting Interests and the Effect of Fiduciary Duty—Evidence from Variable Annuities, 35(12) The Review of Financial Studies 5346 (December 2022), https://academic.oup.com/rfs/article-abstract/35/12/5346/6674521.
419 Regulation Best Interest, 84 FR 33458, 33491 (July 12, 2019).
420 Employee Benefits Security Administration, Regulating Advice Markets Definition of the Term “Fiduciary” Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions, pp. 136–40, (April 2016), https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf. "many IRA investors lack sophistication": 136 (older individuals often "lack even a rudimentary understanding of stock and bond prices, risk diversification, portfolio choice, and investment fees"); and 137 ("only one-half of individuals aged 50 and older in the United States can correctly answer two simple financial questions that involve calculations. Many respondents failed to correctly conclude that $100 would grow to more than $102 after five years if interest accrues at 2 percent per year, while others were unable to determine that an account earning interest at 1 percent while inflation was 2 percent would lose buying power").
423 Julie Agnew, Hazel Bateman, Christine Eckert, Fedor Ishakov, Jordan Louviere, and Susan Thorp. Who Pays the Price for Bad Advice?: The Role of
understand the potential effects of their advisers’ conflicts.424 By itself, disclosure directly to the consumer is unlikely to change this without other protections also in place.425 Small investors often save using an IRA plan. Frequently this is the main vehicle they use to save for retirement; in fact, approximately two-thirds of households participating in a pension plan do not own an IRA.426 This proposal will require advice given to the plan fiduciaries to meet a fiduciary standard. Improvements in plan design and selection of investments on the menu will benefit small savers. The vast majority of small savers choose investments from their plan’s platform rather than investing through a brokerage account, if their plan even offers a brokerage account option.427 Research shows that low-income participants tend to be influenced by default options more than high income participants.428 Small savers will benefit from plan fiduciaries choosing default options that are well selected and well monitored.429

During the 2016 Rulemaking, the Department devoted considerable attention to the question of small investors’ access to financial services, including advice.429 The Department believed that the rule would benefit small investors and generally would not adversely affect their access to advice.430 It noted ongoing market innovations that promised to make good advice more affordable and predicted that the rule would accelerate these efforts.431 However, the Department also acknowledged the potential for short-term disruption and transition costs432 and noted that the services of independent brokers and insurance agents might be most affected.433 The 2016 Rulemaking was significantly different than the current rulemaking in that it imposed a fiduciary obligation on virtually all investment recommendations specifically directed to retirement investors, imposed demanding contract and warranty requirements in the IRA market, which gave investors a direct cause of action against firms and advisers for breach of the Impartial Conduct Standards, and represented a significant break from the then-existing regulatory baseline. Confronted with these significant changes, a number of industry commentators both during the rulemaking process of the 2016 Final Rule, and in the period immediately following the rule’s finalization, expressed concern that the regulatory changes could erode small investors’ access to affordable advice and to some beneficial financial products, primarily based on surveys conducted by the industry of its members. The Department carefully reviewed such comments and papers prior to the publishing of the 2016 Final Rule and found many contained analytic flaws that rendered the comments’ conclusions unsupported and unreliable. The Department accordingly discussed in the 2016 RIA its points of concern with the comments’ methods and conclusions.434 The Department also sought assistance from an outside consultant to help review the comment letters and claims.435 The consultant generally found “the studies lacking in rigor, failing to recognize emerging alternatives to traditional offerings of investment advice, incorrectly equating the benefits of conflicted advice to those of non-conflicted advice, or suffering from logical fallacies.”436 In 2021, the Hispanic Leadership Fund and Quantria prepared a paper on the effects of reinstatement of the 2016 Rule. Based on the same approach as Quantria’s prior paper, they estimated that reinstatement of the rule would reduce retirement savings of individuals with incomes below $100,000 by $40 billion over 10 years.436 The 2021 findings have shortcomings similar to those identified in the 2014 analysis, such as assuming such policy action would eliminate all financial advice received by these individuals or purporting causation from correlation.


427 In 2022, participants with annual income between $15,000 and $150,000 invested less than 0.5% of their defined contribution plan assets through a brokerage account. See Vanguard, How America Saves, (2023), https://institutional.vanguard.com/com/off/inst&transformation/has/2023/pdf/has-insights/how-america-saves-report-2023.pdf.


430 Employee Benefits Security Administration, Regulating Advice Markets Definition of the Term “Fiduciary” Conflicts of Interest—Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions, pp. 312–318 & 366–372, (April 2016), https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf. The Department believes that small savers ‘(that is, those individuals or households with low account balances and/or modest means) are most negatively impacted by the detrimental effects of conflicted advice. With fewer economic resources, small savers are particularly vulnerable to any practices that diminish their resources by extracting unnecessary fees or by yielding lower returns.” (p. 366.)


point out that several of the paper’s key assertions, such as many advisers will not be willing to operate under the fiduciary standard set out by the Department’s rule, do not have empirical support and are not consistent with current practices. Furthermore, the paper’s findings are not applicable to the current proposal because it assumes reinstatement of the 2016 Rulemaking, which was markedly different than the current proposal. For instance, the 2016 Final Rule required fiduciary advisers to enter into a written contract with a plan or IRA investor, which is not included in this proposal.

Similarly, the U.S. Chamber of Commerce cited surveys indicating that firms reported they might limit the availability of advice in some customer arrangements after the 2016 Final Rule and predicted that “up to 7 million IRA owners could lose access to investment advice altogether.”437 This prediction apparently did not consider the potential for customers to move to different firms or the availability of a full range of investment choices and advisory arrangements in the market as a whole. The Chamber of Commerce and others also pointed to an increase in the number of orphaned accounts from which advisers had resigned and argued that many small customers would move to automated advice arrangements.438

Additionally, in 2017, Deloitte prepared a report that suggested the 2016 Final Rule had accelerated the trend toward fee-based accounts.439 Deloitte interviewed and collected data from 21 Securities Industry and Financial Markets Association (SIFMA) member firms regarding their response to the 2016 Final Rule as of June 9, 2017, its initial applicability date.440 Of the member firms that participated in the study, nearly half reported that they maintained advice for all of their brokerage customers, while 29 percent limited advice and 24 percent eliminated advice. Firms that eliminated or limited their advised brokerage platforms gave retirement investors an option to either transition to a fee-based program, self-directed brokerage account, or in some cases, a new platform they were launching (e.g., robo-advice, call-center, self-directed). According to Deloitte, firms reported that many of the investors that moved into self-directed accounts either did not want to move to a fee-based account, had accounts too small to qualify for fee-based advisory accounts at the same firms, wished to retain investments that were not eligible for the same firms’ fee-based accounts, or some combination. In a report for the Financial Services Institute, a trade group representing independent financial firms and advisers, Oxford Economics (2017), predicted that “smaller investors will be offered robo-investing type account services and that these small, often entry level, novice investors would lose access to personalized financial planning.”441 According to a survey conducted by the Insured Retirement Institute, 70 percent of respondents either already had or were considering exiting smaller markets such as small employer-based plans and lower balance IRAs.442 In another survey, two-thirds of responding advisers said they believed that small investors would have less access to professional financial advice.443

The preliminary market reaction to the 2016 Rule, however, differed from those expected by the studies discussed above and are inconsistent with more rigorous academic research. In a survey conducted in September 2017, 92 percent of broker-dealers had not made changes to their handling of smaller, retail retirement accounts, although about 18 percent had raised their minimum account threshold and closed smaller accounts.444 In examining the effects of the 2016 Final Rule, Egan, Ge, and Tang (2022) found that while variable annuity sales had decreased, there is no evidence that the change affected investors with less wealth more than others. They concluded that variable annuity sales had become more sensitive to expenses and that insurers had increased the relative availability of low-expense products. Even if there is reporting error in the maximum upfront commission rates data, it would tend to underestimate the effect of brokerage commissions on investment transactions. Therefore, the study concluded that investor welfare had improved because of the 2016 Rulemaking, despite the fact that it was vacated.445

A majority of surveyed independent registered investment advisers believed that small investors would not lose access to advice due to the 2016 Final Rule.446 Some expected that young advisers just starting out would serve any abandoned investors to build their clientele.447 According to one report, many larger and more productive registered investment advisers viewed robo-advice platforms as a tool to expand their client base and attract young and low-asset investors, not simply as a tool to reduce costs.448

The surveys, papers, and predictions described above do not support a finding that small investors would lose or have lost access to personalized advice as a result of new protections, even under the 2016 Rulemaking, which imposed more onerous conditions—and liability—on firms and advisers than is true of the proposed rule and exemptions. The proposal broadly comports to Regulation Best Interest, and the Department is not aware of any substantial, documented reductions in access to advice as a result of Regulation Best Interest.

The proposal accommodates different types of business models. Still, it is possible that, as the market evolves, small investors and the firms that serve them will increasingly move away from commission-based full-service or “advised” brokerage accounts or commission-compensated advice from insurance agents. Instead, they may use one or more of the following: target-date funds (which adjusts risk allocation over time based on the target-date); receiving advice directly from investment firms (which allows for interaction with a live adviser though the advice tends to focus on in-house funds and investments); hourly engagement or subscription-based firms (which are particularly useful for financial planning); and robo-advice


440 Deloitte notes in the report that “The findings were made based on the analysis of information and data provided by the study participants to Deloitte. Deloitte has analyzed, aggregated and summarized the information provided, but was not asked to and did not independently verify, validate or audit the information presented by the study participants.”


442 Comment letter submitted by dated on April 17, 2017 (#1413).

443 Comment letter by Lincoln Financial Network dated March 17, 2017 (#1420).


digital advice as a potential solution to provide low-cost investment advice with specifically tailored outcomes to individual investors at scale.453 The Department has reason to believe that such alternative forms of advice have become more available in the U.S. and, as in the U.K., are beneficial to small investors. In recent years, the investment advice market has seen an increase in financial technology and robo-advice service providers, which cater to smaller savers. In 2017, Morningstar noted that advances in financial technology could increase personal advisers’ productivity and streamline compliance, enabling them to offer higher service levels affordably to small investors even as they adapt business practices to mitigate conflicts of interest.454 Because the core portfolio management functions are performed by computer algorithms, robo-adviser services generally can be expanded more easily than traditional advisory services. The marginal cost incurred by a robo-adviser to serve additional customers is very small relative to that incurred by traditional advisers. Robo-advisers often serve investors with assets under $300,455 and some robo-advisers do not require a minimum investment at all.456 The financial needs of small investors often can be easily met by basic services and given the low balance of many such accounts, there may be little need or justification for a more intensively personalized (and expensive) strategy. The increasing presence of robo-advice has proved to be such an innovation.

Many robo-advice providers claim to offer relatively conflict-free services, claiming no commission, no performance fees, and no compensation from third parties. Others claim to serve investors as fiduciaries. Robo-adviser offerings are typically comprised of ETFs that, in comparison to mutual funds, provide low-cost investment advice streams and payment shares that would create a conflict of interest for investment advisers (e.g., 12b–1 fees, subtransfer agent fees).457 Despite the increasing popularity of robo-advisers, empirical evidence on their performance and returns, especially during market downturns, is limited. In 2015, SEC Commissioner Kara Stein stated, “Do investors using robo-advisors appreciate that, for all their benefits, robo-advisors will not be on the phone providing counsel if there is a market crash?”458 However, a recent study by Liu et al. (2021) looked specifically at the impact of using robo-advisers on investment performance during the 2020 financial crisis caused by the COVID–19 global pandemic.459 Using portfolio and transaction data from investors at a Taiwanese mutual fund online investment platform, Liu et al. (2021) found that robo-advice significantly reduced the losses experienced by investors during the crisis and that investors using robo-advice adjusted risk levels and trading to adapt to changes in the market while other investors did not. Younger users and those with less investment experience benefited the most from robo-advice.

7. Reform in the United Kingdom

As regulators in several countries have identified failures in their investment advice markets, they have undertaken a range of regulatory and legislative initiatives that directly address conflicted investment advice. One of the most studied initiatives occurred in the developed pension markets of the United Kingdom, where the Financial Conduct Authority (FCA) issued new regulations effective January 1, 2013, called the Retail Distribution Review (RDR). The U.K. focused its new regulatory regime on more transparent fee-for-service compensation structures. The U.K. enacted an aggressive reform that banned commissions on all retail investment products, not just those

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451 Sarah Holden, Jack VanDerhei, & Steven Bass, Target Date Funds: Evidence Points to Growing Popularity and Appropriate Use by 401(k) Plan Participants, Employee Benefit Research Institute (2021).
453 The U.K. Financial Conduct Authority (FCA) has highlighted that digital advice can be more convenient for consumers and can offer efficiency and cost benefits. FCA, Feedback Statement on Call for Input: Regulatory Barriers to Innovation in Digital and Mobile Solutions (March 2016), http://www.fca.org.uk/static/fca/article-type/feedback-comment/files/fca16_02.pdf.
456 One example is Betterment. See Betterment, Pricing at Betterment, Betterment, https://www.betterment.com/pricing/.
related to retirement savings; required that customers in the U.K. be charged directly for advice; and raised qualification standards for advisers.

In marked contrast to these reforms, the Department’s proposal does not ban commissions or eliminate conflicted compensation structures, but rather relies upon conduct standards and oversight structures designed to minimize the harmful impact of conflicts of interest, while permitting a wide range of business practices and models. The Department’s proposal represents a middle ground between no reform and the outright bans on conflicted payments, allowing businesses to use a range of compensation practices while minimizing the harmful impact of conflicts of interest on the quality of advice.

Moreover, the Department’s proposed regulatory action is narrower than the rules passed by the U.K. as it does not prescribe additional qualification standards for existing financial advisers or broadly ban commissions. These rules also sought to overhaul the entire financial advice market, while this rule focuses on advice to retirement investors and seeks to harmonize all advice to retirement investors under a uniform standard and overstates structure, including disclosure requirements, rather than the existing patchwork of regulatory standards. Still, an important aim of all these interventions is to reduce incentives for financial advisers to recommend investments that are not in their client’s best interest and thereby increase investor confidence in financial advice.

The experience of the U.K. suggests that while there are transitional costs of overhauling the incentive structure and qualifications of the financial advisers, the changes have resulted in a modest increase in the number of adults accessing financial advice as well as their satisfaction with the advice they are receiving. In general, the U.K., experience, which was more broadly applied, indicates that these reforms will not result in a significant reduction of advice but will instead increase confidence in that advice’s value.

8. Cost

To estimate compliance costs associated with the proposal, the Department considers the marginal cost associated with the proposed amendments. The Department estimates that the proposal would impose total costs of $253.2 million in the first year and $216.2 million in each subsequent year. The estimated compliance costs associated with the proposed amendments in the rule and PTEs are summarized in the table below. Over 10 years, the costs associated with the proposal would total approximately $1,553.1 million, annualized to $221.1 million per year (using a 7 percent discount rate).

### Table 4—Summary of Marginal Cost and Per-Entity Cost by Exemption

<table>
<thead>
<tr>
<th>Exemption</th>
<th>Total Cost First Year</th>
<th>Total Cost Subsequent Years</th>
</tr>
</thead>
<tbody>
<tr>
<td>3(21)(A)(ii) of ERISA:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>PTE 2020–02</td>
<td>$231,516,275</td>
<td>$197,282,110</td>
</tr>
<tr>
<td>PTE 84–24</td>
<td>18,107,613</td>
<td>15,302,629</td>
</tr>
<tr>
<td>Mass Amendments:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>PTE 75–1</td>
<td>3,005,854</td>
<td>3,005,854</td>
</tr>
<tr>
<td>PTE 77–4</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>PTE 80–83</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>PTE 83–1</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>PTE 86–128</td>
<td>609,487</td>
<td>609,487</td>
</tr>
<tr>
<td>Total</td>
<td>253,241,229</td>
<td>216,200,080</td>
</tr>
</tbody>
</table>

The estimated costs associated with each exemption are broken down and explained below. More details can be found in the Paperwork Reduction Act sections of each respective exemption, also published in today’s Federal Register.

The quantified costs are significantly lower than costs in the 2016 RIA due to the smaller scope of the proposal relative to the 2016 Final Rule as well as compliance structures adopted by the industry to reduce conflicted advice in response to state regulations, Regulation Best Interest, PTE 2020–02, and the Department’s 2016 Rulemaking. The methodology for estimating the costs of the proposed amendments to the rule and PTEs is consistent with the methodology and assumptions used in the 2020 analysis for the current PTE 2020–02.

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460 “Non-advised” services, or execution-only sales, where no advice or recommendation is given, fall outside of the RDR. Thus, a commission is still permitted for non-advised annuity sales. The FCA is currently examining the risks that exist with the purchase of “non-advised” annuities. Please see: http://www.fca.org.uk/static/documents/consultation-papers/cp15-30.pdf.


462 The costs would be $1,880.2 million over 10-year period, annualized to $220.4 million per year if a 3 percent discount rate were applied.

463 As noted above, the Department is proposing to amend the following exemptions: PTE 2020–02 (Improving Investment Advice for Workers & Retirees), PTE 84–24 (Class Exemption for Certain Transactions Involving Mortgage Pool Investment Trusts) and PTE 86–128 (Class Exemption for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers).
entities would use the PTE 2020–02 and PTE 84–24 for such transactions. The Department recognizes that this may result in an overestimate.

The Department does not have information on how many retirement investors—including plan beneficiaries, plan participants, and IRA owners—receive electronic disclosures from investment advice fiduciaries. For the purposes of this analysis, the Department assumes that the percent of retirement investors receiving electronic disclosures would be similar to the percent of plan participants receiving electronic disclosures under the Department’s 2020 and 2002 electronic disclosure safe harbors.\textsuperscript{464} Accordingly, the Department estimates that 94.2 percent of the disclosures sent to retirement investors would be sent electronically, and the remaining 5.8 percent would be sent by mail.\textsuperscript{465} For disclosure sent by mail, the Department estimates that entities will incur a cost of $0.66\textsuperscript{466} for postage and $0.05 per page for material and printing costs.

Additionally, the Department assumes that several types of personnel would perform the tasks associated with information collection requests at an hourly wage rate of $63.45 for clerical personnel, $128.11 for a top executive, $133.05 for a computer programmer, $158.94 for an insurance sales agent, $159.34 for a legal professional, $190.63 for a financial manager, and $219.23 for a financial adviser.\textsuperscript{467}

Finally, the Department assumes affected entities would likely incur only incremental costs if they were already subject to rules or requirements from the Department or another regulator.

Costs Associated With Amendments to Section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974 and Section 4975(e)(3)(B) of the Code

As discussed in the Affected Entities section, the proposed amendment to the rule would change the definition of a fiduciary such that some financial institutions previously not considered fiduciaries would be so under the proposed rule. Additionally, some financial institutions, who already provide fiduciary services for some clients or types of services, would be required to act as a fiduciary for more services under the proposed rule.

Entities may incur some cost associated with the proposed amendments to regulations under section 3(21)(A)(ii) of ERISA and section 4975(e)(3)(B) of the Code. While most of the cost incurred would be associated with the proposed amendments to related PTEs, entities who did not previously identify as a fiduciary may also incur some transition costs. These costs would likely differ significantly by type of financial institution. For instance, retail broker-dealers subject to Regulation Best Interest or registered investment advisers subject to the Investment Advisers Act would be closer to satisfying the requirements of a fiduciary under ERISA than an insurance company or independent producer selling annuity products. The Department requests comment on how the costs these entities would incur as a result of becoming a fiduciary under this rule, as well as the underlying data to estimate these costs. The Department is particularly interested in costs that would not be incurred in satisfying the requirements to the PTEs, such as legal costs, fiduciary insurance costs, technology costs, human capital costs, or other costs of this nature. The Department also requests comment on how plans would be affected by the proposed rule.

Summary of Affected Entities

The entities that the Department expects to be affected by the proposed amendments to the PTE are also affected by the existing PTE 2020–02. The Department estimates that 19,290 financial institutions, composed of 1,894 broker-dealers, 15,982 registered investment advisers,\textsuperscript{468} 183 insurers, 200 pure robo-advisers, 1,011 pension consultants, and 20 investment company underwriters would be affected by the proposed amendments.\textsuperscript{469}

The Department recognizes that the proposed amendments may change the number of financial institutions who choose to rely on PTE 2020–02. Consistent with its initial analysis of the exemption in 2020, this analysis assumes that all eligible entities currently rely on the exemption and would continue to rely on the exemption if amended as proposed. As a result, this analysis does not reflect any change in the number of entities relying on the exemption in response to these amendments. The Department requests comment on how the proposed amendments might change the number of affected entities relying on PTE 2020–02.

Additionally, the Department recognizes that entities within the insurance industry are subject to different regulatory regimes, depending on the types of products they offer. The Department does not have data on what proportion of entities are subject to the requirements in the NAIC Model regulation, or obligations subject to regulation by the SEC or state insurance departments. The analysis below considers cost to comply if the entity currently meets none of the requirements. This likely is an overestimate, as many of these entities are already meeting some, if not most, of the requirements of this proposal. The Department requests comments on this assumption.

Costs To Review the Rule

The Department proposes to amend PTE 2020–02 to require the provision of additional disclosures to retirement investors receiving advice from financial institutions and to provide more guidance for financial institutions and investment professionals complying with the Impartial Conduct Standards and implementing the policies and procedures. This proposal is intended to align with other regulators’ rules and standards of conduct. As such, the Department expects that satisfying the proposal would not be unduly burdensome.

464 The Department estimates that 15,982 registered investment advisers that do not provide pure robo-advice.

465 For more information on how the number of each type of entity is estimated, refer to the Affected Entities section.
$27.7 million in the first year.\textsuperscript{470} This estimate also assumes all affected financial institutions expend the effort, however, that may not be the case as other arrangements may exist where individual financial firms receive compliance assistants from other sources. The Department asks for comments on this estimate.

Costs Associated With General Disclosures for Investors

Costs Associated With Modifications of Existing Disclosure Requirements

As discussed in the preamble, Section II(b) currently requires financial institutions to provide certain disclosures to retirement investors before engaging in a transaction pursuant to the exemption. These disclosures are included in the labor rate of $159.34 and would need to modify their disclosures in response to this amendment; however, the Department expects that the disclosures required under the existing form of PTE 2020–02 likely satisfy this requirement for most financial institutions covered under the existing exemption. For the purposes of this analysis, the Department assumes that 10 percent of financial entities under the existing exemption would need to update their disclosures and that it would take a legal professional at a financial institution, on average, 10 minutes to update existing disclosures.

Robo-advisers, pension consultants, and investment company underwriters, who are not covered under the existing exemption would need to draft the acknowledgement. The Department estimates that it would take a legal professional at these entities, on average, 30 minutes to draft the acknowledgement. Updating and drafting the acknowledgement is estimated to result in a cost of approximately $0.1 million in the first year.\textsuperscript{471}

The proposed amendments would also expand on the existing requirement for a written description of the services provided to also require a statement on whether the retirement investor would pay for such services, directly or indirectly, including through third-party payments. The Department assumes it would take a legal professional at a financial institution under the existing exemption 30 minutes to update existing disclosures to include this information. Robo-advisers, pension consultants, and investment company underwriters, who are not covered under the existing exemption, would need to draft a written description of services provided, which the Department estimates would take a legal professional 5 hours and a legal professional at a small institution one hour, on average, to prepare such a draft.\textsuperscript{472} The Department requests comment on how long it would take entities of varying size to prepare such a disclosure. This results in an estimated cost of approximately $1.8 million in the first year.\textsuperscript{473}

The Department requests comment on the average time estimates to satisfy each of the new requirements in the proposed amendments.

Costs Associated With New Disclosure Requirements

As amended, PTE 2020–02 would require financial institutions to provide investors with the following additional disclosures:

1. A written statement of the best interest standard of care owed; and
2. A written statement that the retirement investor has the right to obtain specific information regarding costs, fees, and compensation, described in dollar amounts, percentages, formulas, or other means reasonably designed to present full and fair disclosure that is materially accurate in scope, magnitude, and nature, sufficient detail to permit the Retirement Investor to make an informed judgment about the costs of the transaction and about the significance and severity of the Conflicts of Interest, and describes how the Retirement Investor can get the information, free of charge.

Under the Investment Advisers Act and the SEC’s Regulation Best Interest, most registered investment advisers and broker-dealers with retail investors already provide disclosures that the

\textsuperscript{470} The burden is estimated as: (19,290 entities × 9 hours) = 173,610 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: (38,580 entities × 9 hours) × $159.34 = $27,663,017.

\textsuperscript{471} The number of financial entities needing to update their written description of services is estimated as: (200 robo-advisers + 1,011 pension consultants + 20 investment company underwriters) = 1,231 financial institutions drafting new descriptions. Of these, 960 financial institutions, or 10 robo-advisers, 930 pension consultants, and 20 investment company underwriters are considered small entities. For more information, refer to the Affected Entities discussion in the Regulatory Flexibility Act section of this document.

\textsuperscript{472} As discussed in the Regulatory Flexibility Act analysis, the Department estimates that 10 robo-advisers, 930 pension consultants, and 20 investment company underwriters are considered small entities. For more information, refer to the Affected Entities discussion in the Regulatory Flexibility Act section of this document.

\textsuperscript{473} The number of financial entities needing to update their written description of services is estimated as: (18,059 financial institutions) × 30/60 minutes) + (960 small financial institutions × 1 hour) + (960 small financial institutions × 1 hour) = 11,345 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: (18,059 financial institutions × 30/60 minutes) + (960 small financial institutions × 1 hour) + (960 small financial institutions × 1 hour) = $1,807,712.
The Department expects that the written statement of the Best Interest standard of care owed would not take a significant amount of time to prepare and would be uniform across clients. The Department assumes that a legal professional employed by a broker-dealer or registered investment advisers, on average, would take 30 minutes to modify existing disclosures and that it would take insurers, robo-advisers, pension consultants, and investment company underwriters, on average, one hour to prepare the statement. This results in a cost estimate of approximately $1.7 million in the first year.

The added requirement of a written statement informing the investor of their right to obtain a written description of the financial institution’s policies and procedures and information regarding costs, fees, and compensation would require financial institutions to maintain records to allow them to meaningfully respond to investors’ requests to demonstrate how the financial institution and its investment professionals are compensated in connection with their recommendations. The Department expects that many financial institutions’ disclosures already substantially comply with this regulation or would require modest adjustments to do so. To satisfy this requirement, the Department estimates that a legal professional for broker-dealers and registered investment advisers would require, on average, 30 minutes to modify existing statements and that it would take insurers, robo-advisers, pension consultants, and investment company underwriters, on average, one hour to prepare the statement. This results in a cost estimate of approximately $1.7 million in the first year.

The Department requests comment on the average time estimates to satisfy each of the new requirements in the proposed amendments.

Costs Associated With the Provision of Disclosures to Retirement Investors

Financial institutions would incur costs associated with preparing and sending the new disclosure requirements. The Department does not have data on the number of retirement investors that have relationships with financial institutions that would engage in transactions covered under the amended exemption. For the purposes of this analysis, the Department uses the number of participants who roll over defined contribution plan assets to IRAs as a proxy for the number of retirement investors that would receive general disclosures. Accordingly, the Department estimates that approximately 3.2 million retirement investors have relationships with financial institutions and are likely to engage in transactions covered under this PTE.

Of these 3.2 million retirement investors, it is assumed that 5.8 percent, or 184,643 retirement investors would receive paper disclosures. The Department assumes that there would not be a measurable increase in the time burden for a clerical worker to prepare the additional disclosures for individuals already receiving disclosures. The Department estimates that providing the additional disclosures would require two additional pages, resulting in a material cost estimate of $18,464.

Financial institutions would also incur costs associated with preparing and sending requested written descriptions of policies and procedures and information regarding costs, fees, and compensation. The Department does not have data on how often investors would request this information. The Department assumes that, on average, each financial institution would receive 10 such requests annually and that most financial institutions already have such information available. The Department requests comments on the assumption that financial institutions readily have this information available and the time necessary to gather such information.

The Department estimates it would take a clerical worker five minutes to distribute, regardless of whether it is sent electronically or by mail. This results in an estimated cost of approximately $1.0 million. As discussed at the beginning of the cost section, the Department assumes that 5.8 percent of these disclosures (11,188 disclosures) would be mailed. Financial institutions would incur $0.66 for postage and $0.10 for the paper and printing costs of two pages for each of the disclosures, which the Department estimates to cost approximately $8,503.

Summary Costs Associated With the General Disclosures

The Department estimates that the total cost associated with preparing and providing the general disclosures discussed above would be approximately $6.3 million in the first year and $1.0 million in subsequent years.

Costs Associated With Rollover Documentation and Disclosure for Financial Institutions

Comparing to the requirements in the existing exemption, the proposed amendment would clarify the rollover disclosure requirements in Sections II(b)(3) and II(c)(3) of PTE 2020–02. Before engaging in a rollover or making

474 The burden is estimated as: ([1,894 broker-dealers + 15,982 registered investment advisers] × [30 minutes + 60 minutes]) + ([183 insurers + 200 robo-advisers + 1,011 pension consultants, and 20 investment company underwriters] × 1 hour) = 10,352 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: ([1,894 broker-dealers + 15,982 registered investment advisers] × [30 minutes + 60 minutes]) + ([183 insurers + 200 robo-advisers + 1,011 pension consultants, and 20 investment company underwriters] × 1 hour) = 10,352 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: (184,643 paper disclosures × 2 pages × $0.05) + (19,290 financial institutions × 10 disclosures × $0.66) ÷ (5.8%) = $8,503.

475 The cost is estimated as: (19,290 financial institutions × 10 disclosures) × (5 minutes + 60 minutes) × 18,075 hours. A labor rate of $63.45 is used for a clerical worker. The labor rate is applied in the following calculation: (19,290 financial institutions × 10 disclosures) × (5 minutes + 60 minutes)] × $0.66) ÷ (5.8%) = $8,503.

476 The cost is estimated as: (19,290 financial institutions × 10 disclosures) × (5 minutes + 60 minutes) = 16,075 hours. A labor rate of $63.45 is used for a clerical worker. The labor rate is applied in the following calculation: (19,290 financial institutions × 10 disclosures) × (5 minutes + 60 minutes]) × $0.66) ÷ (5.8%) = $8,503.

477 The cost is estimated as: (19,290 financial institutions × 10 disclosures) × (5 minutes + 60 minutes) = 16,075 hours. A labor rate of $63.45 is used for a clerical worker. The labor rate is applied in the following calculation: (19,290 financial institutions × 10 disclosures) × (5 minutes + 60 minutes]) × $0.66) ÷ (5.8%) = $8,503.

478 The cost is estimated as: (19,290 financial institutions × 10 disclosures) × (5 minutes + 60 minutes) = 16,075 hours. A labor rate of $63.45 is used for a clerical worker. The labor rate is applied in the following calculation: (19,290 financial institutions × 10 disclosures) × (5 minutes + 60 minutes]) × $0.66) ÷ (5.8%) = $8,503.

479 The burden is estimated as: (200 robo-advisers + 1,011 pension consultants, and 20 investment company underwriters) × 1 hour] × $159.34 = $1,649,488.

480 The cost is estimated as: (19,290 financial institutions × 10 disclosures × 2 pages × $0.05) + (19,290 financial institutions × 10 disclosures × $0.66) ÷ (5.8%) = $8,503.

481 The cost is estimated as: (19,290 financial institutions × 10 disclosures × 2 pages × $0.05) + (19,290 financial institutions × 10 disclosures × $0.66) ÷ (5.8%) = $8,503.

482 The cost is estimated as: (19,290 financial institutions × 10 disclosures × 2 pages × $0.05) + (19,290 financial institutions × 10 disclosures × $0.66) ÷ (5.8%) = $8,503.

483 The cost is estimated as: (19,290 financial institutions × 10 disclosures × 2 pages × $0.05) + (19,290 financial institutions × 10 disclosures × $0.66) ÷ (5.8%) = $8,503.
a recommendation to a plan participant as to the post-rollover investment of assets, the investment professional must consider and document their conclusions as to whether a rollover is in the retirement investor’s best interest and provide that documentation to the retirement investor. Relevant factors to consider must include but are not limited to:

(i) the alternatives to a rollover, including leaving the money in the plan or IRA, if applicable;

(ii) the comparative fees and expenses;

(iii) whether an employer or other party pays for some or all administrative expenses; and

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

As discussed in the Affected Entities section, the Department estimates that 3,119,832 rollovers would be affected by the proposed amendments to PTE 2020–02.487

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. In addition, some firms may voluntarily document significant investment decisions to demonstrate compliance with applicable law, even if not required. SIFMA commissioned Deloitte to conduct a survey of its member firms to learn how they expected to implement Regulation Best Interest. The survey was conducted by December 31, 2019, prior to Regulation Best Interest’s effective date of June 30, 2020. Just over half (52 percent) of the firms surveyed will require their financial advisers to provide best interest rationale documentation for rollover recommendations.484 The Department estimates that documenting each rollover recommendation will require 30 minutes for a personal financial adviser whose firms currently do not require rollover documentation and five minutes for financial advisers whose firms already require them to do so. This results in an estimated annual cost of approximately $193.8 million.485

The Department requests comment on how long such documentation would take.

The Department assumes financial institutions that do not have enhanced technology capabilities for other regulations will take a mixed approach, combining current technology solutions with manual processes. Accordingly, the Department estimates that financial institutions already requiring rollover documentation will face no more than a nominal burden increase, and only to the extent that their current compliance systems do not meet the requirements of this exemption. Those firms currently not documenting rollover recommendations will likely face a larger, but still somewhat limited burden.

Costs Associated With Disclosures for PEPs

Financial institutions providing investment advice for PEPs must give each participating employer an additional disclosure detailing any amounts the financial institution pays to or receives from the PFP or its affiliates, in addition to any conflicts of interest that arise in connection with the investment advice it provides to a PEP. According to filings submitted to the Department as of August 22, 2023, there are 382 PEPs and 134 PPPs.486

The Department does not have data on what percent of PEPs would be affected by the exemption. For the purposes of this analysis, the Department assumes that all PEPs would be affected. The Department requests comment on this assumption. The Department assumes that, on average, one financial institution would need to prepare one disclosure for each PEP in the first year. The Department requests comment on this assumption and how frequently PFPs would provide investment advice to a PEP within the framework of the exemption. The Department estimates that, on average, it would take a legal professional at each entity two hours to prepare the disclosure, resulting in a cost of approximately $0.1 million in the first year.487

In addition to providing the disclosure described above to each PEP, financial institutions must also provide these disclosures to each participating employer. According to filings submitted to the Department by August 22, 2023, there are 955 employers in PEPs.488 The Department assumes that all of these disclosures will be sent electronically. Distributing the disclosures is estimated to take clerical personnel one minute per disclosure, resulting in an estimated cost of approximately $1.010.489

Costs Associated With Annual Report of Retrospective Review for Financial Institutions

PTE 2020–02 currently requires financial institutions to conduct a retrospective review at least annually that is reasonably designed to prevent violations of, and achieve compliance with the conditions of this exemption, the Impartial Conduct Standards, and the policies and procedures governing compliance with the exemption. The Department is clarifying that the Financial Institution must update the policies and procedures as business, regulatory, and legislative changes and events dictate, and to ensure they remain prudently designed, effective, and compliant with the exemption. Under the original exemption, financial institutions were already required to maintain their policies and procedures. The Department’s estimates for any additional cost for entities updating their policies and procedures are discussed in the discussion of costs associated with written policies and procedures for financial institutions, below.

Robo-advisers, pension consultants, and investment company underwriters, who are not covered under the existing exemption, would incur costs associated with conducting the annual review. The Department does not have data on how many would incur costs associated with this requirement; however, the Department expects that many of these entities already develop an audit report. The Department assumes that 10 percent of these entities do not currently

482 For more information on how the number of IRA rollovers is estimated, refer to the Affected Entities section. In light of ongoing litigation, the Department is assuming for purposes of this discussion that all Affected entities will become subject to these requirements, regardless of whether they currently provide fiduciary investment advice.

483Deloitte, Regulation Best Interest: How Wealth Management Firms are Implementing the Rule Package, Deloitte (Mar. 6, 2020).

484The burden is estimated as: (3,119,833 rollovers × 48% × [30 minutes + 60 minutes]) + (3,119,833 rollovers × 52% × [5 minutes + 60 minutes]) ÷ 863,953 hours. A labor rate of $219.23 is used for a personal financial adviser. The labor rate is applied in the following calculation: (3,119,833 rollovers × 48% × [30 minutes + 60 minutes]) + (3,119,833 rollovers × 52% × [5 minutes + 60 minutes]) × $219.23 = $193,788,961.

485For more information on this estimate, refer to the Affected Entities section.

486The burden is estimated as: (382 financial institutions × 2 hours) ÷ 764 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: (382 financial institutions × 2 hours) × $159.34 = $121,736.

487For more information on this estimate, refer to the Affected Entities section.

488Estimates are based on 2021 EFAST filings as of August 22, 2023. The inaugural filing deadline for Form 5500 filings for PEPs with plan years beginning after January 1, 2021 was July 31, 2022. The Department based its estimates on those filings it received by August 22, 2023. However, since this is the first year PEPs could file, the Department anticipates that this understates the true number of PEPs affected by this proposed rule.

489The burden is estimated as: (955 employers × (1 minute + 60 minutes)) ÷ 63.45 is used for a clerical worker. The labor rate is applied in the following calculation: (955 employers × (1 minute + 60 minutes)) × 63.45 = $1,010.
produce an audit report, while the remaining 90 percent would need to make modifications to satisfy the requirements. This results in an estimate of 123 entities not currently producing audit reports, of which 96 are small entities and 27 are large entities.\textsuperscript{490} The Department requests comment on this assumption.

The Department estimates that it would take a legal professional five hours for small firms and ten hours for large firms to produce a retrospective review report, resulting in an estimated cost of $0.1 million.\textsuperscript{491} The Department estimates that it would take a legal professional one hour for small firms and two hours for large firms to modify existing reports, on average. This results in an estimated cost of $0.2 million.\textsuperscript{492}

The Department estimates it will take a certifying officer two hours for small firms and four hours for large firms to review the report and certify the exemption, resulting in an estimated cost burden of approximately $0.6 million.\textsuperscript{493}

The results in a total cost annual cost of $0.9 million.\textsuperscript{494}

\textsuperscript{490} The number of total entities affected is estimated as: (200 robo-advisers + 1,011 pension consultants + 20 investment company underwriters) \times 10\% = 123 entities. As discussed in the Regulatory Flexibility Act analysis of this document, 10 robo-advisers, 930 pension consultants, and 20 investment company underwriters are estimated to be small entities. The number of small entities affected is estimated as: (10 robo-advisers + 930 pension consultants + 20 investment company underwriters) \times 10\% = 96 small entities.

\textsuperscript{491} The burden is estimated as: $190.63 \times (96 financial institutions \times 10 hours) \times 10\% = $119,505. The Department assumes that a legal professional would prepare and send their complete policies and procedures to the Department upon request. Based on the number of past cases as well as current open cases that would merit such a request, the Department estimates that it would take 15 minutes. The Department requests comment on these assumptions. The Department estimates that the requirement would result in an estimated cost of approximately $2.6 million in the first year and $1.5 million in subsequent years.\textsuperscript{497}

\textsuperscript{492} The number of total entities affected is estimated as: (200 robo-advisers + 1,011 pension consultants + 20 investment company underwriters) \times 10\% = 1,106 entities. As discussed in the Regulatory Flexibility Act analysis of this document, 10 robo-advisers, 930 pension consultants, and 20 investment company underwriters are estimated to be small entities. The number of small entities affected is estimated as: (10 robo-advisers + 930 pension consultants + 20 investment company underwriters) \times 10\% = 96 small entities.

\textsuperscript{493} The burden is estimated as: $197.3 million and a per-firm cost of $12.002 in the first year and a total cost of $197.3 million and a per-firm cost of $10.227 in subsequent years.\textsuperscript{499}

Costs Associated With Written Policies and Procedures for Financial Institutions

The time required to establish, maintain, and enforce written policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards would depend on the size and complexity as of the financial institution. The Department estimates that this would take a legal professional 10 hours at a large firm and five hours at a small firm in the first year and 30 minutes in subsequent years.\textsuperscript{495} The Department assumes that most financial institutions affected by the existing exemption likely already satisfy much of this requirement, as it would be a customary business practice to periodically review required policies and procedures.

The proposed amendments would also require financial institutions to provide their complete policies and procedures to the Department upon request. Based on the number of past cases as well as current open cases that would merit such a request, the Department estimates that the Department would request 165 policies and procedures in the first year and 50 policies and procedures in subsequent years. The Department assumes that a clerical worker would prepare and send their complete policies and procedures to the Department and that it would take them 15 minutes. The Department requests comment on these assumptions. The Department estimates that the requirement would result in an estimated cost of approximately $2,600 for policies and procedures in subsequent years.\textsuperscript{497}

\textsuperscript{494} As discussed in the Regulatory Flexibility Act analysis, the Department estimates that 960 entities, consisting of 10 robo-advisers, 930 pension consultants, and 20 investment company underwriters, are considered small entities. For more information, refer to the Affected Entities Discussion in the Regulatory Flexibility Act section of this document.

\textsuperscript{495} The burden is estimated as: (165 \times 15 minutes + 60 minutes) = 41 hours. A labor rate of $63.45 is used for a legal professional. The labor rate is applied in the following calculation: (165 \times 15 minutes + 60 minutes) \times $63.45 = $2,617.40.

\textsuperscript{496} The burden is estimated as: (50 \times 15 minutes + 60 minutes) = 12.5 hours. A labor rate of $63.45 is used for a clerical worker. The labor rate is applied in the following calculation: (50 \times 15 minutes + 60 minutes) \times $63.45 = $793.55.

\textsuperscript{497} The cost in the first year is estimated as: ($2,635.404 + $2,617.40) = $2,638,021. The cost in subsequent years is estimated as: ($231.6 million and a per-firm cost of $12.002 in the first year and a total cost of $197.3 million and a per-firm cost of $10.227 in subsequent years.\textsuperscript{499}

Summary of Total Cost for the Proposed Amendments to PTE 2020–02

The Department estimates that in order to meet the additional conditions of the amended PTE 2020–02, affected entities would incur a total cost of $231.6 million and a per-firm cost of $12.002 in the first year and a total cost of $197.3 million and a per-firm cost of $10.227 in subsequent years.\textsuperscript{499} The number of small entities affected is estimated as: (200 robo-advisers + 1,011 pension consultants + 20 investment company underwriters) \times 10\% = 96 small entities. Costs Associated With Written Policies and Procedures for Financial Institutions

The Department recognizes that entities within the insurance industry are subject to different regulatory regimes, depending on the types of products they offer. The Department does not have data what proportion of

\textsuperscript{498} The first-year total cost includes: ($27,663,017 for rule review + $6,422,616 for general disclosures + $193,788,961 for rollover disclosures + $907,865 for the retrospective review + $2,736,095 for policies and procedures) = $231,518,275. The total cost in subsequent years includes: ($1,536,834 + $6,422,616 for general disclosures + $907,865 for the retrospective review + $1,537,627 for policies and procedures) = $1,537,627. The Department recognizes that entities within the insurance industry are subject to different regulatory regimes, depending on the types of products they offer. The Department does not have data what proportion of

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entities are subject to the requirements in the NAIC Model regulation, SEC, or state insurance departments. The analysis below considers the full cost of compliance. This likely is an overestimate, as many of these entities are already meeting some, if not most, of the requirements of this proposal. The Department requests comment on this assumption.

Summary of Affected Entities

The Department expects that 5,246 financial entities would be affected by the proposed amendments, consisting of 1,011 pension consultants, 10 investment company principal underwriters that service plans, 10 investment company principal underwriters that service IRAs, 4,000 independent producers, and 215 insurance companies would be affected by the proposed amendments to PTE 84–24. Additionally, the Department estimates that 1,722 plans would be affected by the proposed amendments.

Costs to Rule Review

The Department estimates that the financial entities—including pension consultants, investment company principal underwriters, and insurance companies—currently relying on the exemption and independent producers affected by the proposed amendments would need to review the rule. The Department estimates that such a review will take a legal professional, on average, two hours to review the rule, resulting in an estimated cost of approximately $1.7 million.

Costs Associated With Preparing General Disclosure Documents

For more generalized disclosures, the Department assumes that insurance companies would prepare and provide disclosures to independent producers selling their products. However, some of the disclosures are tailored specifically to the independent producer. For these, the Department assumes that the disclosure would need to be prepared by the independent producer themselves. The Department recognizes that some may rely on intermediaries in the distribution channel to prepare more specific disclosures and that the costs associated with the preparation would be covered by a commission retained by the intermediary for its services. The costs for the intermediary to prepare the disclosure may result in an increase in commission. The Department expects that this increase in commission would not exceed the cost of preparing the disclosure in-house.

The Department is including model language in the preamble to PTE 84–24 that details what should be included in fiduciary acknowledgment for financial institutions. The Department assumes that the time associated with preparing the disclosures would be minimal. Further, these disclosures are expected to be uniform in nature. Accordingly, the Department estimates that these disclosures would not take a significant amount of time to prepare.

Due to the nature of independent producers, the Department assumes that most financial institutions would make draft disclosures available to independent producers, pertaining to their fiduciary status. However, the Department expects that a small percentage of independent producers may draft their own disclosures. The Department assumes that an in-house attorney for all 215 insurance companies and 5 percent of independent producers, or 200 independent producers, would spend 10 minutes of legal staff time to produce a written acknowledgement in the first year. This results in an estimated cost of approximately $11,000 in the first year.

Regarding the required written statement of the Best Interest standard of care owed by the independent producer, the Department similarly assumes that most financial institutions would make draft disclosures available to independent producers. The Department assumes that an in-house attorney for all 215 insurance companies and 5 percent of independent producers, or 200 independent producers, would spend 30 minutes of legal staff time to prepare the statement in the first year. This results in an estimated cost of approximately $33,100 in the first year.

The written description of the services provided and the products the independent producer is licensed to sell would likely need to be produced by the independent producer. The Department recognizes that many independent producers may not have the internal resources to prepare such disclosure. The Department expects that some may rely on intermediaries in the distribution channel to prepare the disclosures and some may seek external legal support. However, the Department expects that the costs associated with the preparation would be covered by commissions retained by the intermediary for its services or by the fee paid to external legal support. As such, the Department still attributes this cost to the independent producer. The Department requests comment on this assumption.

Accordingly, the Department assumes that all 4,000 independent producers in this analysis would need to prepare the disclosure. The Department assumes that for each of these independent producers, an attorney would spend 30 minutes of legal staff time drafting the written description. This results in an estimated cost of approximately $0.3 million in the first year.

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502 The burden is estimated as: (4,000 independent producers × 30 minutes) = 120,000 minutes. A labor rate of $33.10 per hour is applied in the following calculation: $120,000 × $33.10 = $3,972,000.

503 The burden is estimated as: (4,000 independent producers × 200 independent producers × 30 minutes) = 24,000,000 minutes. A labor rate of $33.10 per hour is applied in the following calculation: $24,000,000 × $33.10 = $794,400,000.

504 The burden is estimated as: (215 insurance companies × 200 independent producers × 10 minutes) = 43,000 minutes. A labor rate of $10.00 per hour is applied in the following calculation: $43,000 × $10.00 = $430,000.

505 The burden is estimated as: (215 insurance companies × 200 independent producers × 30 minutes) = 12,900,000 minutes. A labor rate of $33.10 per hour is applied in the following calculation: $12,900,000 × $33.10 = $426,710,000.
Similarly, the Department expects that the statement of the independent producer’s material conflicts of interest and the amount of insurance commission paid in connection with the purchase by a retirement investor of the recommended annuity would need to be prepared by the individual producer. As with the written statement on the description of services, the Department recognizes that many independent producers may not have the internal resources to prepare such disclosures, however they may already have similar statements to satisfy other legal requirements. The Department expects that some may rely on intermediaries in the distribution channel to prepare the disclosures and some may seek external legal support. However, the Department expects that the costs associated with the preparation would be covered by commissions retained by the intermediary for its services or by the fee paid to external legal support. As such, the Department still attributes this cost to the independent producer. The Department requests comment on this assumption.

Accordingly, the Department assumes that all 4,000 independent producers in this analysis would need to prepare the disclosure. The Department assumes that, for each of these entities, an attorney would spend one hour of legal staff time drafting the written description. This results in an estimated cost of approximately $0.6 million the first year.

Costs Associated With Documenting Whether a Rollover Is in the Investor’s Best Interest, Before Recommending an Annuity, Engaging in a Rollover, or Making a Recommendation to a Plan Participant as to the Post-Rollover Investment of Assets Currently Held in a Plan

In addition, the proposed amendment would require an independent producer to provide a disclosure to investors that documents their consideration as to whether a recommended annuity or rollover is in the retirement investor’s best interest. Due to the nature of this disclosure, the Department assumes that the content of the disclosure would need to be prepared by the independent producer. The Department recognizes that some may rely on intermediaries in the distribution channel, and some may seek external legal support to assist with drafting the disclosures. However, the Department expects that most independent producers would prepare the disclosure themselves. The Department requests comment on this assumption.

The Department estimates that 52,449 retirement investors would receive documentation on whether the recommended annuity is in their best interest each year. The Department assumes that, for each of these retirement investors, an independent producer would spend one hour of a financial manager’s time drafting the documentation. This results in an estimated cost of approximately $8.3 million annually.

Costs Associated With the Provision of Disclosures to Retirement Investors

The Department does not have data on the number of retirement investors that have relationships with independent producers that would engage in transactions covered under the exemption. For the purposes of this analysis, the Department uses its estimate for the number of new IRA accounts held by insurance companies as a proxy for the number of retirement investors that have relationships with independent producers that would engage in transactions covered under the exemption. As such, the Department estimates that 52,449 retirement investors would receive documentation on whether the recommended annuity is in their best interest each year.

As discussed at the beginning of the cost section, the Department assumes that 5.8 percent of disclosures sent to retirement investors would be mailed. Accordingly, of the estimated 52,449 affected retirement investors, 3,042 retirement investors are estimated to receive paper disclosures.

For paper copies, a clerical staff member is assumed to require five minutes to prepare and mail the required information to the retirement investor. This requirement results in an estimated labor cost of approximately $16,100. The Department assumes that this information would include seven pages, resulting annual cost burden for material and paper costs of approximately $3,100. Additionally, independent producers would be required to send the documentation to the insurance company. The Department expects that such documentation would be sent electronically and result in a de minimis burden. The Department requests comment on this assumption.

Summary Costs Associated With Disclosures

The estimates described above result in a total cost estimate of $9.4 million in the first year and $8.4 million in subsequent years.

Costs Associated With Policies and Procedures

The proposed amendment would require insurance companies to establish, maintain, and enforce written policies and procedures to review each recommendation from an independent producer before an annuity is issued to a retirement investor. The insurance company’s policies and procedures must mitigate conflicts of interest to the extent that a reasonable person reviewing the policies and procedures and incentive practices as a whole would conclude that they do not create an incentive for the independent producer to place its interests, or those of the insurance, or any affiliate or related entity, ahead of the interests of the retirement investor. Insurance companies’ policies and procedures include a prudent process for determining whether to authorize an independent producer to sell the insurance company’s annuity contracts to retirement investors, and for taking

\[ \text{Total Cost} = \text{Cost of Documents} + \text{Labor Cost} \]

\[ \text{Cost of Documents} = \left( \frac{52,449}{52,449} \right) \times 0.6 \text{ million} \]

\[ \text{Labor Cost} = \left( \frac{52,449}{52,449} \right) \times 8.3 \text{ million} \]

\[ \text{Total Cost} = 0.6 \text{ million} + 8.3 \text{ million} = 8.9 \text{ million} \]
action to protect retirement investors from independent producers who have failed or are likely to fail to adhere to the impartial conduct standards, or who lack the necessary education, training, or skill. Finally, insurance companies must provide their complete policies and procedures to the Department within 10 days upon request.

These requirements are consistent with, though more protective than, the requirements in NAIC Model Regulation 275. Model Regulation 275 has been updated and revised several times; however, both the 2010 Model Regulation 275 and the 2020 revisions to Model Regulation 275 include a requirement to “establish and maintain procedures for the review of each recommendation prior to issuance of an annuity.” 516 While the 2010 version required such procedures “are designed to ensure that there is a reasonable basis to determine that a recommendation is suitable,” 517 the 2020 version requires such procedures “are designed to ensure there is a reasonable basis to determine that the recommended annuity would effectively address the particular consumer’s financial situation, insurance needs and financial objectives.” 518 The 2020 revisions impose a higher best interest standard, compared to the suitability standard in 2010 standard.

Most states have adopted some form of the Model Regulation 275, and, to date, 39 states have adopted the most recent version. 519 The Harkin amendment, Section 989 of the Dodd-Frank Act requires states to adopt rules that meet or exceed the minimum requirements of model regulation modifications within five years of adoption. 520

While many insurance companies may have policies and procedures in place that would largely satisfy the requirements of the proposed amendments, the Department expects that many would need to change and improve policies and procedures to be fully compliant. The Department requests comment on how extensive and costly changes to existing policies and procedures would need to be, both in terms of establishing and updating policies and procedures and in terms of the annual review in subsequent years.

The Department expects that satisfying this requirement would be more time consuming for larger entities due to the complexity of their business. The Department assumes that, for each large insurance company, an in-house attorney would spend on average, 10 hours of legal staff time drafting or modifying the policies and procedures, and for each small insurance company, an in-house attorney would spend on average, five hours of legal staff time. This results in an estimated cost of approximately $0.2 million in the first year. 521 The Department requests comment on this assumption.

In the following years, the Department assumes for each insurance company, an in-house attorney would spend two hours of legal staff time reviewing. This results in an estimated cost of approximately $66,500 in subsequent years. 522

The proposed rule would also require insurance companies to review each of the independent producer’s recommendations before an annuity is issued to a retirement investor to ensure compliance with the Impartial Conduct Standards and other conditions of this exemption. Given the requirements established in both the 2010 and 2020 versions of Model Regulation 275, the Department expects that reviewing recommendations before an annuity is issued is common industry practice. Accordingly, the Department expects that for those insurance companies already complying with Model Regulation 275, the cost to review and comply with the proposed amendment would be small. The Department lacks data on how many recommendations are already reviewed or how many additional recommendations would need to be reviewed based on this proposal. The Department requests data and comment to inform its estimate.

The proposed amendments would also require insurance companies to provide their complete policies and procedures to the Department upon request. As discussed above for PTE 2020–02, the Department estimates that it would request 165 policies and procedures in the first year and 50 in subsequent years. Assuming that the number of requests for the entities covered under PTE 2020–02 is equivalent to the number of requests for the entities covered under PTE 84–24, the Department assumes that it will request two policies and procedures from insurers in the first year and one request in subsequent years, on average. 523 This results in an estimated cost of approximately $30 in the first year and $15 in subsequent years. 524

The Department believes that policies and procedures requested by the Department under the proposed PTE 84–24 would be accounted for in the paperwork burden of PTE 2020–02. Accordingly, this analysis does not include an additional burden.

The Department estimates that satisfying the requirements described above would result in an estimated total cost of approximately $0.2 million in first year and $68,500 in subsequent years. 525

514 NAIC, Model Suitability Regulations, § 6(F)(1)(d) NAIC (2010), https://naic.soutronglobal.net/Portal/Public/en-GB/RecordView/Index/25201. 515 NAIC, Model Suitability Regulations, § 6(F)(1)(d) NAIC (2010), https://naic.soutronglobal.net/Portal/Public/en-GB/RecordView/Index/25201. 516 This language was included in both the 2010 and 2020 versions of Model Regulation 275. See NAIC, Model Suitability Regulations, § 6(F)(1)(d) NAIC (2010), https://naic.soutronglobal.net/Portal/Public/en-GB/RecordView/Index/25201. 519 Harkin, Model Suitability Regulations, § 6(F)(1)(d) NAIC (2020). 520 NAIC, Model Suitability Regulations, § 6(F)(1)(d) NAIC (2010), https://naic.soutronglobal.net/Portal/Public/en-GB/RecordView/Index/25201. 521 This is estimated as: (177 small insurance companies × 5 hours) + (38 large insurance companies × 10 hours) = 1,265 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(177 small insurance companies × 5 hours) + (38 large insurance companies × 10 hours)] × $159.34 = $201,565. 522 This is estimated as: (215 insurance companies × 2 hours) × $159.34 = $68,516.
Costs Associated With Retrospective Review

The proposed amendment would require insurance companies to conduct a retrospective review at least annually. The review would be required to be reasonably designed to prevent violations of and achieve compliance with (1) the Impartial Conduct Standards, (2) the terms of this exemption, and (3) the policies and procedures governing compliance with the exemption. The review would be required to evaluate the effectiveness of the supervision system, any noncompliance discovered in connection with the review, and corrective actions taken or recommended, if any. The retrospective review must also include a review of independent producers’ rollover recommendations and the required rollover disclosure. As part of this review, the insurance company must prudently determine whether to continue to permit individual independent producers to sell the insurance company’s annuity contracts to retirement investors. Additionally, the insurance company must update the policies and procedures as business, regulatory, and legislative changes and events dictate, and to ensure that they remain prudently designed, effective, and comply with the exemption.

The insurance company annually must provide a written report to a Senior Executive Officer which details the review. The Senior Executive must annually certify that (A) the officer has reviewed the report of the retrospective review report; (B) the insurance company has, within 90 days of discovery, reported to the Department of the Treasury any non-exempt prohibited transaction discovered by the insurance company in connection with investment advice covered under Code section 4975(e)(3)(B), advised the independent producer of the violation and any resulting excise taxes owed under Code section 4975(e)(3), (C) the insurance company has, within 90 days of discovery, reported to the Department of Labor of the violation via email; (C) the insurance company has established policies and procedures prudently designed to ensure that independent producers achieve compliance with the conditions of this exemption, and has updated and modified the policies and procedures as appropriate after consideration of the findings in the retrospective review report; and (D) the insurance company has in place a prudent process to modify such policies and procedures.

Insurance companies would also be required to provide the independent producer with the underlying methodology and results of the retrospective review. The Department assumes that the insurance company would provide the methodology and results electronically. The Department lacks data on the average number of independent producers selling annuities per insurance company. For the purposes of this analysis, the Department assumes that, on average, each independent producer sells the products of three insurance companies. From each of these insurance companies, they may sell multiple products. As such, the Department assumes that each year, insurance companies would need to prepare a total 12,000 retrospective reviews, or on average, each insurance company would need to prepare approximately 56 retrospective reviews. The Department requests comment on this estimate.

The Department assumes that, for each independent producer selling an insurance company’s products, an in-house attorney at the insurance company would spend one hour of legal staff time, on average, conducting and drafting the retrospective review. This results in an estimated cost of approximately $1.9 million. The Department assumes it would take a Senior Executive Officer 15 minutes to review and certify the report. This results in an estimated annual cost of approximately $0.4 million.

The Department estimates that it would take clerical staff five minutes each to prepare and send each of the estimated 12,000 retrospective reviews. This results in an estimated annual cost of approximately $63,500. The Department expects that the results would be provided electronically, thus the Department does not expect there to be any material costs with providing independent producers with the retrospective review.

The Department estimates that satisfying the requirements for retrospective reviews would result in an estimated total annual cost of approximately $2.4 million.

Costs Associated With Recordkeeping

The proposed amendment would change the current recordkeeping requirements to incorporate a new provision that is similar to the recordkeeping provision in PTE 2020–02. This requirement would replace the more limited existing recordkeeping requirement in the current version of PTE 84–24, which requires sufficient records to demonstrate that the conditions of the exemption have been met. The Department does not have data on how many pension consultants, insurance companies, and investment company principal underwriters would continue to rely on PTE 84–24 as amended without also complying with the amended PTE 2020–02. In this analysis, the Department assumes that all of the pension consultants and investment company principal underwriters continuing to rely on the amended PTE 84–24 would also rely on the amended on the PTE 2020–02. Thus, to avoid double counting the compliance cost, this analysis does not include the cost associated with the proposed recordkeeping requirement for these entities.

For this analysis, the Department only considers the cost for insurance companies and independent producers complying with the proposed recordkeeping requirements. The Department estimates that the additional time needed to maintain records to be consistent with the exemption would require an independent producer two hours, resulting in an estimated cost of $1.3 million.

The proposed amendment would require fiduciaries engaging in all transactions covered by the exemption to maintain records necessary for the
following entities to determine whether the conditions of this exemption have been met.

1. any authorized employee of the Department or the IRS or another state or federal regulator.

2. any fiduciary of a plan that engaged in a transaction pursuant to this exemption.

3. any contributing employer and any employee organization whose members are covered by a plan that engaged in a transaction pursuant to this exemption.

4. any participant or beneficiary of a plan or beneficial owner of an IRA acting on behalf of the IRA that engaged in a transaction pursuant to this exemption.

The Department does not have data on how often independent producers would receive requests for records. For the purposes of this analysis, the Department assumes that, on average, independent producer would receive 10 requests per year and that preparing and sending each request would take a legal professional, on average, 30 minutes. Based on these assumptions, the Department estimates that the proposed amendments would result in an annual cost of approximately $3.2 million. The Department requests comment on how often financial institutions would receive requests for records, who would prepare such reports, and how long the preparation of such records would take.

This results in a total annual cost of $4.5 million associated with recordkeeping.

Summary of Total Cost for the Proposed Amendments to PTE 84–24

The Department estimates that in order to meet the additional conditions of the amended PTE 84–24, affected entities would incur a total cost of $18.1 million in the first year and $15.3 million in subsequent years.

Costs Associated With the Mass Amendments

The following analysis summarizes the proposed changes and associated costs to PTE 75–1, PTE 77–4, PTE 1980–3, and 86–128. For more information on the cost estimates, refer to the Paperwork Reduction Act statements for the proposed amendments, published elsewhere in today’s edition of the Federal Register.

Costs Associated With Recordkeeping in Parts V

The Department concludes that this requirement produces no additional burden to the public.

Costs Associated With Recordkeeping in Parts II and V

The Department is also amending PTE 75–1 Parts II and V to adjust the recordkeeping requirement to shift the burden from plans and IRAs to financial institutions. The amended class exemption requires financial institutions engaging in the exempted transactions (rather than the plans or IRAs) to maintain all records pertaining to such transactions for six years and provide access to the records upon request to the specified parties.

The Department has estimated that the amount of time needed for financial professionals to maintain records for the financial institutions to be consistent with the exemption and to make the record available for inspection would require four hours, on average, resulting in an estimated cost of $3.0 million.

Costs Associated With Removing Fiduciary Investment Advice From Parts III and IV

Finally, the Department is proposing to amend PTE 75–1 Parts III and IV, which currently provide relief for investment advice fiduciaries, by removing fiduciary investment advice from the covered transactions. Investment advice providers would instead have to rely on the amended PTE 2020–02 for exemptive relief covering investment advice transactions. The Department believes that since investment advice providers were already required to provide records and documentation under PTE 2020–02, this amendment would not result in additional costs.

Summary of Total Cost for the Proposed Amendments to PTE 75–1

The Department estimates that in order to meet the additional conditions of the amended PTE 75–1, affected entities would annually incur a total cost of $3.0 million.

Costs Associated With PTE 77–4, PTE 80–83, PTE 83–1

Summary of Affected Entities

The amendment to PTE 77–4 would affect mutual fund companies. As discussed in the Affected Entities section, the Department estimates that

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534 The burden is estimated as: (4,000 independent producers × 10 requests) × (30 minutes = 60 minutes) = 20,000 hours. A labor rate of $158.94 is used for an independent producer. The labor rate is applied in the following calculation: [(4,000 independent producers × 10 requests) × (30 minutes = 60 minutes)] ÷ $158.94 = $3,178,800

535 The annual cost is estimated as: $(1,340,036 to maintain records + $3,178,800 to distribute records) = $4,518,836

536 The first-year total cost includes: $(1,671,795 for rule review + $9,355,525 for general disclosures + $200,197 for policies and procedures + $2,359,860 for the retrospective review + $4,518,836 for recordkeeping) = $18,107,629. The total cost in subsequent years includes: $(8,355,401 for disclosures + $68,532 for policies and procedures + $2,359,860 for the retrospective review + $4,518,836 for recordkeeping) = 15,302,629. Note, the total values may not equal the sum of the parts due to rounding.

537 For more information on how the number of each type of entity is estimated, refer to the Affected Entities section.


539 The burden is estimated as: (3,942 financial institutions × 4 hours) = 15,768 hours. A labor rate of $190.63 is used for a financial manager. The labor rate is applied in the following calculation: (3,942 × 4 hours) ÷ $190.63 = $3,005,854.

540 This cost is the estimated $3,005,854 cost to maintain recordkeeping.
825 mutual fund companies would be affected by the amended PTE 77–4.\(^{541}\)

PTE 80–83 allows banks to purchase, on behalf of employee benefit plans, securities issued by a corporation indebted to the bank that is a party in interest to the plan. The Department estimates that 25 fiduciary-banks with public offering services would be affected by the amended PTE 80–83.\(^{542}\)

PTE 83–1 provides relief for the sale of certificates in an initial issuance of certificates by the sponsor of a mortgage pool to a plan or IRA when the sponsor, trustee, or insurer of the mortgage pool is a fiduciary with respect to the plan or IRA assets invested in such certificates.

Summary of Total Cost for the Proposed Amendments to PTE 77–4, PTE 80–83, and PTE 83–1

The Department is proposing to amend PTE 77–4, PTE 80–83, and PTE 83–1 which currently include relief for investment advice fiduciaries, by removing fiduciary investment advice from the covered transactions. Investment advice providers would instead have to rely on the amended PTE 2020–02 for exemptive relief covering investment advice transactions. The Department believes that since investment advice providers were already required to provide documentation under PTE 2020–02, these amendments would not result in additional costs.

Costs Associated With PTE 86–128

The Department is proposing to amend Section VI of PTE 86–128 to require financial institutions to maintain for six years the records necessary for the Department, the IRS, the plan fiduciary, the contributing employer, or employee organization whose members are covered by the plan, plan participants, plan beneficiaries, and IRA owners to determine whether conditions of this exemption have been met.

In addition, the amendment would extend and impose conditions on IRAs. Section III of PTE 86–128 imposes requirements on investment advice providers and the independent plan fiduciaries authorizing the IRA to engage in the transactions with the investment advice providers ("authorizing fiduciary") under the conditions contained in the exemption.

Summary of Affected Entities

The amendment to PTE 86–128 would affect fiduciaries of employee benefit plans that effect or execute securities transactions and independent plan fiduciaries that authorize the plan or IRA to engage in the transactions. As discussed in the Affected Entities section, the Department estimates that 1,894 investment advice providers would be affected by the proposed amendments to PTE 86–128. Additionally, the Department estimates that 10,000 IRAs will engage in transactions covered under this class exemption, of which 210 are new IRAs.\(^{543}\)

With the removal of exemptive relief for investment advice, the Department requests comment on what types of financial institutions would continue to rely on PTE 86–128, as well as how many entities would do so. Additionally, the Department requests comment on how many plans or managed IRAs would receive services from these entities.

Costs Associated With Recordkeeping

Each of the estimated 1,894 investment advice providers will maintain these records on behalf of their client plans in their normal course of business. The Department estimates that the additional time needed to maintain records consistent with the exemption would require a financial professional 30 minutes annually, resulting in an estimated cost of $0.2 million.\(^{544}\) The Department estimates that the proposed amendments would also require 15 minutes of clerical time to prepare and send the documents for inspection, resulting estimated cost of approximately $30,000.\(^{545}\)

Costs Associated With Written Authorization From the Authorizing Fiduciary to the Investment Advice Provider

Authorizing fiduciaries of IRAs entering into a relationship with an investment advice provider are required to provide the investment advice provider with advance written authorization to perform transactions for the IRA. The Department estimates that there are approximately 210 IRAs that are new or that enter new arrangements each year.\(^{546}\) Therefore, the Department estimates that approximately 210 authorizing fiduciaries are expected to send an advance written authorization. It is assumed that a legal professional will spend 15 minutes per IRA reviewing the disclosures and preparing an authorization form, resulting in an estimated cost of approximately $9.\(^{547}\)

As discussed at the beginning of the cost section, the Department assumes that 5.8 percent of these authorizations will be mailed. For paper and electronic authorizations, the Department assumes that clerical staff will spend five minutes per participant to prepare and send the authorization, resulting in an estimated labor cost of approximately $1.100.\(^{548}\) It is assumed that the authorization will be two pages and paper authorizations will cost $0.76 each, which results in a cost burden of approximately $9.\(^{549}\)

This results in a total cost for the written authorization of approximately $9,500.\(^{550}\)

Costs Associated With the Provision of Materials for the Evaluation of Authorization of Transaction

Prior to a written authorization, the investment advice provider must provide the authorizing fiduciary with a copy of the exemption, a form for termination of authorization, a description of broker’s placement.

\(^{541}\) For more information on how the number of each type of entity is estimated, refer to the Affected Entities section.

\(^{542}\) For more information on how the number of each type of entity is estimated, refer to the Affected Entities section.

\(^{543}\) For more information on how the number of each type of entity is estimated, refer to the Affected Entities section.

\(^{544}\) The Department estimates that there are 10,000 managed IRAs. Of these managed IRAs, the Department assumes that 210 are new accounts or new financial advice relationships. See Cerulli Associates. “U.S. Retirement End-Investor 2023: Personalizing the 401(k) Investor Experience.” Exhibit 6.02. The Cerulli Report., and that 100 percent of these managed IRAs will engage in transactions covered under this class exemption. These assumptions are applied in the following manner: 10,000 managed IRAs × 2.1 percent of plans = new × 100 percent of plans with broker-dealer relationships = 210 IRAs.

\(^{545}\) The burden is estimated as: (210 IRAs × (15 minutes = 60 minutes) per IRA × $150.34 per hour) = 52.5 hours. A labor rate of $150.34 is used for a legal professional. The labor rate is applied in the following calculation: (210 IRA × (15 minutes = 60 minutes) per IRA) × $150.34 per hour = $8,365.

\(^{546}\) The burden is estimated as: (210 IRA × (5 minutes = 60 minutes) per IRA) = 17.5 hours. A labor rate of $150.34 is used for a legal professional. The labor rate is applied in the following calculation: (210 IRA × (5 minutes = 60 minutes) per IRA) × $150.34 per hour = $8,365.

\(^{547}\) The burden is estimated as: (2 pages × $0.05 per page) + $0.66 for postage = $0.71. The mailing rate is applied in the following calculation: (210 authorizations for IRAs × 5.8%) = $0.76 = $9.

\(^{548}\) This is estimated as: ($8,365 to prepare the written authorization + $1,110 to send the written authorization + $9 for material costs) = $9,485.
practices, and any other reasonably available information. The Department assumes that this information is readily available. As discussed at the beginning of the cost section, the Department assumes that 5.8 percent of these authorizations will be mailed, while the remaining 94.2 percent will be delivered electronically. A clerical staff member is assumed to require five minutes per participant to electronically send and mail the required information to the authorizing fiduciary. This information will be sent to the authorizing fiduciaries of 210 IRAs entering into an agreement with an investment advice provider. Based on the above, the Department estimates that this requirement results in estimated cost of approximately $1,100.551 It is assumed that this information will be seven pages and paper distribution will cost $1.01 each, which results in an estimated cost of approximately $12.552

This results in a total cost of approximately $1,100.553

Costs Associated With the Provision of an Annual Termination Form

Investment advice providers must annually supply each authorizing fiduciary with a form expressly providing an election to terminate the written authorization. It is assumed that legal professionals with each of the estimated 1,894 investment advice providers would spend one hour preparing the termination forms, which results in an estimated cost of approximately $0.3 million.554

As discussed in the Affected Entities section, the Department estimates that 10,000 IRAs will engage in transactions covered under this class exemption and would receive the form.555 As discussed at the beginning of the cost section, the Department assumes that 5.8 percent of IRAs will receive paper copies of the termination forms. The Department estimates that clerical staff will spend five minutes per IRA preparing and distributing the paper and electronic termination forms, resulting in an estimated cost of approximately $52.900.556 It is assumed that the form will be two pages, so paper copies will cost $0.76 each for materials and postage, which results in a cost burden of approximately $441.557

This results in a total cost of 0.4 million.558

Cost Associated With Transaction Reporting

The investment advice provider engaging in a covered transaction must give the authorizing fiduciary either a confirmation slip for each securities transaction or a quarterly report. As discussed above, the provision of the confirmation is already required under SEC regulations. Therefore, if the transaction reporting requirement is satisfied by sending confirmation slips or quarterly reporting, no additional hour and cost burden will occur.

Costs Associated With the Annual Statement

Investment advice providers are required to send to each authorizing fiduciary an annual report that contains the same information as the quarterly report, including all security transaction-related charges, the brokerage placement practices, and a portfolio turnover ratio. As such, the Department does not expect that financial institutions would incur an additional burden to produce the annual statement, aside from what is already incurred to produce the quarterly report. Additionally, the Department assumes that this information could be sent with the provision of annual termination form requirement, and no additional burden has been reported. It is assumed that the annual statement will be five pages, and the paper and print costs are $0.25 each. Therefore, the overall cost burden for the paper and print costs is approximately $58.561

Investment advice providers are required to report the total of all transaction-related charges incurred by the plan in connection with covered transactions, the allocation of such charges among various persons, as well as a conspicuous statement about the negotiability of brokerage commissions and an estimate of future commission rates to the plan fiduciaries. The information must be tracked, assigned to specific plans, and reported. It is assumed that it costs the investment advice provider $3.30 per IRA to track this information.562 With approximately 10,000 affected IRAs, this results in a cost burden of approximately $33,000 annually.563

551 The burden is estimated as: (210 IRAs × (5 minutes + 60 minutes) per IRA) = 17.5 hours. A labor rate of $63.45 is used for a clerical worker. The labor rate is applied in the following calculation: (210 materials packages for IRAs × 5.8%) × $1.01 = $12.

552 This is estimated as: (7 pages × $0.05 per page) + $0.66 for postage = $1.01; The mailing cost is applied in the following calculation: (210 materials packages for IRAs × 5.8%) × $1.01 = $12.

553 This is estimated as: ($1.10 to prepare the information + $12 for materials and postage) = $13.12.

554 The burden is estimated as: (1,894 investment advice providers × 1 hour per broker-dealer) = 1,894 hours; A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: (1,894 investment advice providers × 1 hour per broker-dealer) × $159.34 per hour = $330,790.

555 For more information on how the number of IRAs is estimated, refer to the Affected Entities section.

556 The burden is estimated as: (10,000 IRAs × (5 minutes + 60 minutes) per IRA) = 833 hours. A labor rate of $63.45 is used for a clerical worker. The labor rate is applied in the following calculation: (10,000 IRAs × 5.8%) × $1.01 = $12.

557 The mailing cost is estimated as: (2 pages × $0.05 per page) + $0.66 for postage = $0.76; The mailing rate is applied in the following calculation: (10,000 IRAs × 5.8%) × $0.76 = $441.

558 This cost is estimated as: ($301,790 to prepare the termination form + $52,875 to distribute the termination form + $441 for material and postage costs) = $335,106.

559 The mailing cost is estimated as: (5 pages × $0.05 per page) = $0.25. The mailing cost is applied in the following calculation: (10,000 IRAs × 5.8%) × $0.25 = $145.

560 For more information on how the number of IRAs is estimated, refer to the Affected Entities section.

561 The mailing cost is estimated as: (2 pages × $0.05 per page) = $0.10. The mailing cost is applied in the following calculation: (10,000 IRAs × 5.8%) × $0.10 = $58.

562 This estimate is based on information from a Request for Information and from industry sources.

563 This burden is estimated as: (10,000 IRAs × $3.30) = $33,000.
This results in a total cost of approximately $33,100.564 Summary of Total Cost for the Proposed Amendments to PTE 86–128

The Department estimates that in order to meet the additional conditions of the amended PTE 86–128, affected entities would annually incur a total cost of $0.6 million.565

9. Regulatory Alternatives

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

Broader Rule

The Department considered proposing a definition of an investment advice fiduciary that would be broader in scope, similar to the 2016 Final Rule. In promulgating the 2016 Final Rule, the Department expanded the definition of a fiduciary beyond the five-part test included in the 1975 regulation. The 2016 Final Rule covered as fiduciary investment advice:

- recommendations by a person who represents or acknowledges their fiduciary status under the Act or the Code;
- advice rendered pursuant to a written or verbal agreement, arrangement or understanding that the advice is based on the particular investment needs of the retirement investor;
- recommendations directed to a specific retirement investor or investors regarding the advisability of a particular investment or management decision with respect to securities or other investment property of the plan or IRA; and
- recommendations to buy, sell or hold assets held in IRAs and non-ERISA investment property of the plan or IRA;

The Department is aware that insurance companies sometimes sell insurance products through independent agents that sell multiple insurance companies’ products. In connection with this business structure, when the Department finalized PTE 2020–02, the Department explained that insurance companies could rely on either PTE 2020–02 or PTE 84–24. As a result, the Department considered the option of leaving PTE 84–24 unaltered.

In developing this proposal, the Department has crafted a more focused definition that would consider the scope issues identified by the Fifth Circuit while still protecting retirement investors. The Department was also cognizant of stated concerns of some stakeholders that the compliance costs associated with the broader 2016 Final Rule would lead to adverse consequences such as increases in the cost of investment advice and potential loss of access by retirement investors with small account balances.

The current proposal bases investment advice fiduciary status on circumstances that indicate the retirement investor may place trust and confidence in the recommendation as a professional recommendation based upon the particular needs of the investor. The proposal reflects the Department’s interpretation of the text of the statute, as informed by the Fifth Circuit’s emphasis on relationships of trust and confidence. Accordingly, the proposed definition, unlike the 2016 Final Rule, does not automatically treat as fiduciary advice all compensated recommendations directed to a specific retirement investor regarding the advisability of a particular investment or management decision with respect to securities or other investment property of the plan or IRA. For example, an entity can satisfy the test under (c)(1)(ii) of this proposal, only if they satisfy each part, including the requirement that the retirement adviser provides investment advice on a regular basis as part of their business. This is more limiting than the 2016 Final Rule, and it ensures that individuals like human resource professionals discussing 401(k) investment options, and the car salesman who recommends a retiree cash in their 401(k) for a new convertible are not caught up in the definition. In publishing this proposal, the Department has stated its concerns with respect to the 2016 Final Rule, specifically regarding access to investment advice for all retirement investors.

No Amendment to PTE 84–24

The Department is aware that insurance companies sometimes sell insurance products through independent agents that sell multiple insurance companies’ products. In connection with this business structure, when the Department finalized PTE 2020–02, the Department explained that insurance companies could rely on either PTE 2020–02 or PTE 84–24. As a result, the Department considered the option of leaving PTE 84–24 unaltered.

Through outreach with financial institutions after issuing PTE 2020–20, the Department heard concerns from insurance companies that distribute annuities through independent agents who do not work for any one insurance company and are not obligated to recommend only one company’s annuities. The Department understands that this compliance issue has been resolved by reliance on PTE 84–24.

However, the Department is concerned that PTE 84–24, if left in its current state, offers few of the protections provided by PTE 2020–02. Further, insurance companies’ continued reliance on PTE 84–24 instead of PTE 2020–02 could prevent retirement investors from being able to fully compare varying products and services. In order to address these

564 This cost is estimated as: ($58 for material and post costs + $33,000 to track relevant information for mailing annual reports) = $33,058.
565 The annual cost is estimated as: ($180,527 for recordkeeping + $30,044 for preparing and sending documents for inspection + $9,485 for the written authorization + $1,123 for the materials for the evaluation of authorization of transaction + $315,106 for the annual termination form + $145 for materials for the annual statement + $33,058 for the report on commissions paid) = $609,487. Note, the total may not equal the sum of components due to rounding.
concerns, the Department proposes to amend PTE 84–24 to provide an exemption to independent insurance producers to sell annuities or other insurance products. The proposed amendment addresses insurance industry concerns regarding the workability of PTE 2020–02’s conditions, while providing a tailored exemption for insurance companies and independent agents that ensures that fiduciary investment advice with respect to all products is delivered pursuant to the same core principles that protect retirement investors.

Including an Individual Contract Requirement

The Department also considered amending PTE 2020–02 to include an enforceable written contract between the financial institution and the retirement investor. While the predecessor to PTE 2020–02, the Best Interest Contract Exemption,566 required such an enforceable contract, PTE 2020–02 did not include a contract or warranty provision enforceable by IRA owners.

In crafting the proposed amendment, the Department reviewed the decision to not include an enforceable written contract in PTE 2020–02 but concluded that the better course of action was not to include such a requirement. Given that the Fifth Circuit found that the contractual requirement for IRAs exceeded the scope of the Department’s authority, a proposal attempting to reinstate that requirement would likely be invalidated in the Fifth Circuit, leading to uncertainty in the regulated community. Such uncertainty could lead to the potential for disruption in the market for investment advice, and in drafting an exemption that does not include an enforceable written contract, the Department intends to avoid this potential disruption.

Instead, the exemption includes many protective measures and targeted opportunities for the Department to review compliance within its existing oversight and enforcement authority under ERISA. For example, financial institutions’ reports regarding their retrospective review are required to be certified by a senior executive officer of the financial institution and provided to the Department within 10 business days of request. The exemption also includes eligibility provisions, which the Department believes will encourage financial institutions and investment professionals to maintain an appropriate focus on compliance with legal requirements and with the exemption.

The Department also intends to ensure that financial institutions relying on the exemption comply with excise tax provisions. The Department has proposed to bolster this protection by requiring financial institutions, as part of their retrospective review, to report to the Department of the Treasury any non-exempt prohibited transactions in connection with fiduciary investment advice, correct those transactions, and pay any resulting excise taxes. Further, the proposed amendment would add failure to report, correct, and pay an excise tax to the list of factors that could make a financial institution ineligible to rely on PTE 2020–02. The Department believes these additional conditions would provide important protections to retirement investors by enhancing the existing protections of PTE 2020–02.

Relying on Disclosure Alone

Some commenters responding to the 2015 NPRM567 argued that disclosure of potential adviser conflicts is, by itself, sufficient to protect plan and IRA owners’ interests. According to these comments, if conflicts are transparent, then investors can choose between more and less conflicted advisers. The commenters advocated that the Department should issue broad PTEs that exempt all or almost all existing and potential adviser business models and compensation arrangements on the sole condition that material conflicts be disclosed. The Department does not believe that disclosure alone is adequately protective of retirement investors. The Department chose not to take that approach in the 2016 Final Rule and chooses not to take that approach with this proposal.

As discussed above in the “Need for Regulatory Action” section, most retirement investors are not financially sophisticated, and even those who are financially sophisticated are unlikely to detect lapses in the quality of financial advice. Due to the complexity of some disclosures as well as investors’ propensity to ignore lengthy disclosures, disclosures often fail to accomplish their goals. Retirement investors regularly fail to understand advisers’ conflicts, let alone the impacts that those conflicts could have on their investments. A large body of research discussed in the RIA for the 2016 Final Rule suggested that disclosures alone can have, at best, a minor impact on conflicts, and can sometimes exacerbate the conflicted behavior.568 Advisers may inflate the bias in their advice to counteract any discounting that might occur because of the disclosure of conflicts.569 In addition, even when inexpert retirement investors receive easy-to-understand disclosures alerting them to conflicts, there is no ready way for them to use that knowledge to improve investment outcomes, inasmuch as they are still dependent on the adviser’s recommendations and expertise.

Adding a Requirement for a Web Disclosure

The Department considered amending PTE 2020–02 and PTE 84–24 to require financial institutions to disclose the sources of third-party compensation received in connection with recommended investment products on a public web page. The Department believes such disclosures would allow market-based forces to extend protections to consumers by discouraging and eliminating the most conflicted compensation practices. Moreover, public disclosure of firms’ compensation arrangements with the third parties whose products they recommend would provide an additional focus on firm-level, as opposed to individual adviser-level, conflicts of interest.

Such public disclosure could produce market effects similar to public disclosures required by the SEC (e.g., public companies’ 10–K filings). Conflicted compensation practices are often complex, opaque, and shrouded from view. Requiring public disclosure of conflicted compensation practices would allow investment professionals, experts, and consultants, as well as academic researchers, to draw attention to the concerning aspects of the conflicts and even rate firms based on the scope of their conflicts. As noted by Landier and Thesmar (2011), data availability feeds research intensity.570 A wide range of literature suggest that when financial data are available to researchers, these researchers uncover problematic behaviors and draw attention to the behaviors, which has the effect of curbing the practices in the future.571 Making compensation

566 See 81 FR 21002 (Apr. 8, 2016).
567 See FR 21927 (Apr. 20, 2015).
568 See FR 20946, 20560–51 (Apr. 8, 2016).
information publicly available could allow intermediaries and consultants to package this information as part of their ratings and evaluations, likely improving investor information.

Further, a web disclosure of this nature may encourage financial institutions to stop engaging in conflicted behaviors due to litigation risk from unsatisfied clients, risk of complaints made to the Department that might result in enforcement actions, and the risk to their public reputations.

The Department estimates that, if such a disclosure were required, it would require eight hours of labor annually from a computer programmer, on average, resulting in an annual cost of approximately $20.5 million for PTE 2020–02. And $4.5 million for PTE 84–24.

The Department welcomes comments on the accuracy of Department’s estimates on the required time to maintain the disclosure, and how many financial institutions currently have the technology infrastructure to post a web disclosure. The Department is also interested in the benefits of such a disclosure, as well as in any data that commenters may have that estimate how frequently retirement investors may visit a web page that includes such disclosures, and the extent to which various consultants and financial intermediaries would likely use the website to assist retirement investors and others.

Allowing for More Parties To Review Records

For the proposed amendment to PTE 2020–02, the Department considered allowing more parties to review the records necessary to determine whether the exemption is satisfied, such as:

- any authorized employee of the Department or the Department of the Treasury,
- any fiduciary of a plan that engaged in a transaction pursuant to this exemption,
- any contributing employer, any employee organization whose members are covered by a plan that engaged in a transaction pursuant to this exemption, and
- any participant or beneficiary of a plan or beneficial owner of an IRA acting on behalf of the IRA that engaged in a transaction pursuant to this exemption.

The Department does not have data on how often financial institutions would receive such requests. For the purposes of this analysis, the Department assumes that, on average, financial institutions would receive 10 requests per year and that preparing and sending each request would take a legal professional, on average, 30 minutes. Based on these assumptions, the Department estimates that the proposed amendments would result in an annual cost of approximately $15.4 million.

The Department requests comment on how often financial institutions would receive requests for records, who would prepare such reports, and how long the preparation of such records would take.

10. Uncertainty

In estimating costs associated with rollover documentations, the Department faces uncertainty in determining the number of rollovers affected by the amendments to PTE 2020–02 and PTE 84–24. Some financial services professionals who do not generally serve as fiduciaries may act in a fiduciary capacity when making certain rollover recommendations, and thus will be affected by the exemptions. Alternatively, the opposite can also be true. Financial services professionals who generally serve as fiduciaries may act in a non-fiduciary capacity in handling certain rollover recommendations, and thus will not be affected by the exemptions. Thus, there is uncertainty in estimating the cost of compliance.

The Department welcomes any comment and data that can help estimate the number of rollovers affected by the exemptions. The Department also invites comments about financial services professionals’ practices for documenting rollover recommendations, particularly the extent to which financial services professionals use standardized forms or templates to document the reasons for recommending rollovers and how long on average it would take for a financial services professional to document a rollover recommendation.

While the Department expects that the proposed rule would result in lower fees and expenses for plan participants, the Department faces uncertainty in estimating the magnitude of savings. The Department welcomes any comments and data that can help estimate the amount of decrease in fees and expenses. The Department also expects the proposed rule would result in a reallocation of capital, but the Department faces uncertainty in estimating the new market equilibrium across products and services. The Department welcomes any comments and data that can help estimate how much capital may be reallocated and how much efficiency will be gained.

G. Paperwork Reduction Act

As part of its continuing effort to reduce paperwork and respondent burden, the Department conducts a preclearance consultation program to allow the general public and Federal agencies to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA). This helps 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.

The Department is soliciting comments regarding the information collection request (ICR) included in the proposed amendments to the prohibited transaction exemptions. To obtain a copy of the ICR, contact the PRA addressee below or go to RegInfo.gov. The Department has submitted a copy of

575 The Department assumes that financial services professionals would spend, on average, 10 minutes to document the basis for rollover recommendations in addition to their work researching and determining the recommendations. The Department understands that financial services professionals seek and gather information regarding investor profiles in accordance with other regulators’ rules. Further, financial professionals often discuss the basis for their recommendations and associated risks with 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 a relatively short time to document justifications for rollover recommendations. However, the Department welcomes comments about the burden hours associated with documenting rollover recommendations.
the rule 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 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 electronically delivered responses).

Commenters may send their views on the Departments’ PRA analysis in the same way they send comments in response to the proposed rule as a whole (for example, through the www.regulations.gov website), including as part of a comment responding to the broader proposed rule. Comments are due by January 2, 2024 to ensure their consideration.

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

By mail: James Butikofer, Office of Research and Analysis, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Avenue NW, Room N–5718, Washington, DC 20210.

By email: ebsa.opr@dol.gov.

There is no paperwork burden associated with the proposed rule. However, there is paperwork burden associated with the amendments to PTEs 75–1, 84–24, 86–128, and 2020–02. The Department estimates that the proposed amendments would not affect the paperwork burden related to PTEs 77–4, 80–3, and 83–1. The PRA analysis for the amendments is included with each of the respective amendments.

PTE 75–1

Type of Review: Revision of an existing collection.
Agency: Employee Benefits Security Administration, Department of Labor.
Titles: Prohibited Transaction Exemption 75–1 (Security Transactions with Broker-Dealers, Reporting Dealers and Banks).
OMB Control Number: 1210–0092.
Affected Public: Businesses or other for-profits; not for profit institutions.
Estimated Number of Respondents: 3,942.
Estimated Number of Annual Responses: 3,942.
Frequency of Response: Initially, Annually, When engaging in exempted transaction.
Estimated Total Annual Burden Hours: 15,768 hours.
Estimated Total Annual Burden Cost: $0.

PTE 84–24
Type of Review: Revision of an Existing Collection.
Agency: Employee Benefits Security Administration, Department of Labor.
Title: Prohibited Transaction Exemption (PTE) 84–24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters.
OMB Control Number: 1210–0158.
Affected Public: Businesses or other for-profits; not for profit institutions.
Estimated Number of Respondents: 7,221.
Estimated Number of Annual Responses: 119,376.
Frequency of Response: Initially, Annually, When engaging in exempted transaction.
Estimated Total Annual Burden Hours: 123,726 hours.
Estimated Total Annual Burden Cost: $8,457.

PTE 86–128
Type of Review: Revision to an existing collection.
Agency: Employee Benefits Security Administration, Department of Labor.
Titles: PTE 86–128 (Securities Broker-Dealers).
OMB Control Number: 1210–0059.
Affected Public: Businesses or other for-profits; not for profit institutions.
Estimated Number of Respondents: 2,179.
Estimated Number of Annual Responses: 33,570.
Frequency of Response: Initially, Annually, When engaging in exempted transaction.
Estimated Total Annual Burden Hours: 3,942 hours.
Estimated Total Annual Burden Cost: $37,034.

PTE 2020–02
OMB Control Number: 1210–0163.
Affected Public: Businesses or other for-profits; not for profit institutions.
Estimated Number of Respondents: 19,290.
Estimated Number of Annual Responses: 6,504,119.
Frequency of Response: Initially, Annually, When engaging in exempted transaction.
Estimated Total Annual Burden Hours: 1,044,050 hours.
Estimated Total Annual Burden Cost: $167,296.

H. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) §76 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. 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. Below is the Department’s IRFA.

1. Need for and Objectives of the Rule

As discussed earlier, the Department believes that changes to the marketplace since 1975, when “fiduciary” was first defined, have made the existing definition inadequate and obsolete. This proposal will update the definition of “fiduciary” to reflect changes to the retirement and financial advice marketplace since 1975 and add important protections to existing prohibited transaction class exemptions. More detail can be found in the “Need for Regulatory Action” section of this RIA.

Smaller plans may be more exposed to conflicts of interest on the part of service providers, because they are less likely than larger plans to receive investment assistance from a service provider that is acting as a fiduciary. Smaller plans have historically received investment assistance from insurance brokers or broker-dealers, who may be subject to conflicts of interest. Larger plans may also have sufficient resources and in-house expertise to make investment decisions without outside assistance. Additionally, many sponsors of smaller plans may have a lack of knowledge of whether the providers to the plan are fiduciaries and how the provider’s compensation varies

576 5 U.S.C. 601 et seq.
577 5 U.S.C. 601(2), 603(a); also see 5 U.S.C. 551.
579 Id.
based on the investment options selected. 580

2. Affected Small Entities

The Small Business Administration (SBA)581 582 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 $47.0 million in annual receipts. Over 97 percent of broker-dealers 583 and 99 percent of registered investment advisers 584 are small businesses according to the SBA size standards.

The Department requests comments on the appropriateness of the size standards used to evaluate the impact of the proposal on small entities.

In its economic analysis for its 2020 rulemaking, the Department included all entities eligible for relief on a variety of transactions and compensation that may not have been covered by prior exemptions in its cost estimate. In 2020, the Department acknowledged that not all these entities will serve as investment advice fiduciaries to plans and IRAs within the meaning of Title I and the Code. Additionally, the Department acknowledged that because other exemptions are also currently available to these entities, it is unclear how widely financial institutions will rely upon the new exemptions and which firms are most likely to choose to rely on it.

This analysis, like the analysis from 2020, includes all entities eligible for relief in its cost estimate. These estimates are subject to caveats like those in 2020, though this proposal will expand the parties that will be considered investment advice fiduciaries and also will narrow the exemption alternatives.

The Department requests comments on which, and how many, entities may rely on each of the exemptions, as amended.

Registered Investment Advisers

Small, registered investment advisers who provide investment advice to retirement plans or retirement investors and registered investment advisers who act as pension consultants would be directly affected by the proposed amendments to PTE 2020–02. As discussed in the Affected Entities section of the RIA, the Department estimates that 16,182 registered investment advisers, including 200 robo-advisers, would be affected by the proposed amendments.585 The Department estimates that 98.7 percent of broker-dealers are small businesses according to the SBA size standards.586 Based on these statistics, the Department estimates that 15,775 registered investment advisers, including those registered with the SEC and the state, would be affected by the proposed amendments.587

Robo Advisers

The proposed changes to PTE 2020–02 would affect robo-advisers. As discussed in the RIA, the Department estimates that 200 robo-advisers will be affected by the proposed amendments.

The Department does not have information about how many small broker-dealers provide investment advice to plan fiduciaries, plan participants and beneficiaries, and IRA owners. However, the Department believes that few broker-dealers, including small broker-dealers, will continue to rely on PTE 75–1 and PTE 86–128 for transactions that do not involve investment advice.

Broker-Dealers

Small broker-dealers who provide investment advice to retirement plans or retirement investors and registered investment advisers who act as pension consultants would be directly affected by the proposed amendments to PTE 2020–02. Additionally, the proposed amendments would modify PTE 75–1 and PTE 86–128 such that small broker-dealers would no longer be able to rely on the exemption for investment advice. The Department requests comments on the appropriateness of the size standards used to evaluate the impact of the proposal on small entities.

TABLE 5—AFFECTED SMALL FINANCIAL ENTITIES

<table>
<thead>
<tr>
<th>Prohibited transaction exemptions</th>
<th>2020-02</th>
<th>84-24</th>
<th>75-1</th>
<th>77-4</th>
<th>80-83</th>
<th>86-128</th>
</tr>
</thead>
<tbody>
<tr>
<td>Broker-Dealers</td>
<td>1,835</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Registered Investment Advisers</td>
<td>15,775</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Discretionary Fiduciaries</td>
<td>10</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Insurance Companies</td>
<td>151</td>
<td>177</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Insurance Producers</td>
<td></td>
<td>3,960</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Banks</td>
<td></td>
<td></td>
<td>1,568</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mutual Fund Companies</td>
<td></td>
<td></td>
<td>796</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Investment Company Principal Underwriters</td>
<td>20</td>
<td>20</td>
<td></td>
<td></td>
<td></td>
<td>20</td>
</tr>
<tr>
<td>Pension Consultants</td>
<td>930</td>
<td>930</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

580 Id.
581 13 CFR 121.201.
583 This is estimated on the percent of entities with less than $47.0 million for the industry Securities Brokerage, NAICS 523120. See NAICS Association, Count by NAICS Industry Sectors, NAICS Association, https://www.naics.com/business-lists/counts-by-naics-code/.
584 This is estimated on the percent of entities with less than $47.0 million for the industry Investment Advice, NAICS 523930. See NAICS Association, Count by NAICS Industry Sectors, NAICS Association, https://www.naics.com/business-lists/counts-by-naics-code/.
585 For more information on this estimate, refer to the Affected Entities section of the RIA.
586 This is estimated on the percent of entities with less than $47.0 million for the industry Investment Advice, NAICS 523930. See NAICS Association, Count by NAICS Industry Sectors, NAICS Association, https://www.naics.com/business-lists/counts-by-naics-code/.
587 The number of small investment advisers, who do not provide pure robo-advice, is estimated as: (16,182 investment advisers – 200 robo-advisers) × 98.7% = 15,775 small investment advisers.
588 For more information on this estimate, refer to the Affected Entities section of the RIA.
589 This is estimated on the percent of entities with less than $47.0 million for the industry Securities Brokerage, NAICS 523120. See NAICS Association, Count by NAICS Industry Sectors, NAICS Association, https://www.naics.com/business-lists/counts-by-naics-code/.
that 1,835 small broker-dealers would be affected by the proposed amendments.596 The Department requests comment on this estimate.

**Discretionary Fiduciary**

The proposed amendments to PTE 86–128 would delete Section IV(a), which provides an exclusion from the conditions of the exemption for certain plans not covering employees, including IRAs, to increase the safeguards available to these retirement investors. Therefore, investment advice fiduciaries to IRAs would have to rely on another exemption, such as PTE 2020–02.

Fiduciaries that exercise full discretionary authority or control with respect to IRAs could continue to rely on PTE 86–128, as long as they comply with all of the exemption’s conditions. Under PTE 86–128, discretionary fiduciaries would still be able to effect or execute securities transactions. Any discretionary fiduciaries seeking relief for investment advice, however, would be required to rely on the amended PTE 2020–02. The Department requests comment on this assumption. Particularly with regard to what types of entities would be likely to rely on the amended exemption, as well as any underlying data.

596 The estimated number of retail broker-dealers affected by this exemption is estimated as: (1,894 broker-dealers × 96.9%) = 1,835 broker dealers.

597 The number of large insurance companies with annual receipts less than $15.0 million for the retirement market is estimated as: (1,577 captive agents × 99.0%) = 1,561 captive insurance agents and brokers that would be affected by the proposed amendments. The Department estimates that 99 percent of these captive agents work for small entities.597 Thus, the Department estimates there are 1,561 captive insurance agents and brokers that would be affected by the proposed amendments.

598 Independent Producers

The proposal would also affect independent insurance producers that recommend annuities from unaffiliated financial institutions to retirement investors, as well as the financial institutions whose products are recommended. While captive insurance agents are employees of an insurance company, other insurance agents are “independent” and work with multiple insurance companies. Though these independent insurance producers may rely on PTE 2020–02, the Department believes they are more likely to rely on PTE 84–24. For this reason, the Department only considers captive insurance agents in the analysis for PTE 2020–02. The Department requests comment on how captive insurance agents and independent insurance producers would be affected by the proposed amendments to PTE 2020–02 and PTE 84–24.

The Independent Insurance Agents and Brokers of America estimated that there were 40,000 independent producers in 2022. The Department does not have data on what percent of independent producers serve the retirement market. For the purposes of this analysis, the Department assumes that 10 percent, or 4,000, of these independent producers serve the retirement market. The Department estimates that 99 percent of these entities are small entities. As such, the Department estimates that 3,960


595 The number of large insurance companies using a captive distribution channel is estimated as: (70 large insurance companies × 46%) = 32 insurance companies. The number of small insurance companies using a captive distribution channel is estimated as: 183 insurance companies – 32 large insurance companies = 151 small insurance companies.

596 The number of large insurance companies using an independent distribution channel is estimated as: (70 large insurance companies × 54%) = 38 insurance companies. The number of small insurance companies using an independent distribution channel is estimated as: 183 insurance companies – 38 large insurance companies = 145 small insurance companies.


598 The number of captive insurance agents is calculated as: (1,577 captive agents × 99%) = 1,561 captive insurance agents serving the annuity market.

small independent producers would be affected by the proposed amendment.

Pension Consultants
The Department expects that pension consultants would continue to rely on the existing 84–24; however, the proposed amendment would exclude pension consultants for plans and IRAs currently relying on the existing PTE 84–24 for investment advice. As such, any pension consultants relying on the existing exemption for investment advice would be required to comply with PTE 2020–02 for relief. In this analysis, the Department includes pension consultants in the affected entities for continued relief for the existing provisions of PTE 84–24 as well as the amended PTE 2020–02.

As discussed in the Affected Entities section of the RIA, the Department estimates that 1,011 pension consultants serve the retirement market. The Department estimates that approximately 92 percent of these entities are small entities.600 As such, the Department estimates that 930 pension consultants would be affected by the proposed amendments.

Principal Company Underwriter
The Department expects that some investment company principal underwriters for plans and IRAs rely on the existing PTE 84–24. The proposed amendment would exclude investment company principal underwriters for plans and IRAs currently relying on the existing PTE 84–24 for investment advice. As such, any principal company underwriter relying on the existing exemption for investment advice would be required to comply with PTE 2020–02 for relief. In this analysis, the Department includes principal company underwriters in the affected entities for continued relief for the existing provisions of PTE 84–24 as well as the amended PTE 2020–02.

As discussed in the Affected Entities section, the Department assumes that 10 investment company principal underwriters for plans and 10 investment company principal underwriters for IRAs will use this exemption once with one client plan. The Department estimates that approximately 97 percent of these entities are small entities.601 As a result, the Department estimates that all 10 of the estimated small investment company principal underwriters for plans and all 10 of the estimated small investment company principal underwriters for IRAs would be affected by the proposed amendments.

Banks and Credit Unions
The proposed amendments to PTE 80–83, PTE 75–1, and PTE 2020–02 would affect banks. The proposed amendments would affect banks currently relying on the existing PTE 80–83 and PTE 75–1 for investment advice. Banks relying on the existing exemptions for investment advice would be required to comply with PTE 2020–02 for relief. Banks with discretionary control could still rely on PTE 80–83 and PTE 75–1.

The Department estimates that approximately 77 percent of commercial banks are small banks.602 As discussed in the Affected Entities section of the RIA, the Department estimates that 4,096 banks would use the amended PTE 75–1, of which 3,135 commercial banks are estimated to be small.603 Additionally, in the Affected Entities section of the RIA, the Department estimates that 25 fiduciary-banks with public offering services would use the amended PTE 80–83, of which, 19 are estimated to be small.604 The Department recognizes that these estimates assume that the proportion of small banks using the aforementioned PTEs would be the same as the proportion of all banks using the PTEs. The Department recognizes that the banking industry within the United States is characterized by high market concentration.605

600 This is estimated on the percent of entities with annual receipts less than $45.5 million for the industry Third Party Administration of Insurance and Pension Funds, NAICS 524292. See NAICS Association, Count by NAICS Industry Sectors, NAICS Association, https://www.naics.com/business-lists/counts-by-naics-code/.
601 This is estimated on the percent of entities with annual receipts less than $47.0 million for the industry Investment Banking and Securities Intermediation, NAICS 523150. See NAICS Association, Count by NAICS Industry Sectors, NAICS Association, https://www.naics.com/business-lists/counts-by-naics-code/.
602 This is estimated on the percent of commercial banks with assets less than $850 million. See Federal Deposit Insurance Corporation, FOIA RIS Data Bulk Download, Federal Deposit Insurance Corporation, (December 2022), https://www.fdic.gov/foia/ris/index.html.
603 The number of small commercial banks that would use PTE 80–83 is estimated as: [25 fiduciary-banks with public offering services × 76.5%] = 19 banks.
604 The number of small banks that would use PTE 80–83 is estimated as: [25 fiduciary-banks with public offering services × 76.5%] = 19 banks.
605 The number of small banks that would use PTE 80–83 is estimated as: [25 fiduciary-banks with public offering services × 76.5%] = 19 banks.
606 For more information on how the number of credit unions is estimated, refer to the Affected Entities section of the RIA.
607 This is estimated on the percent of entities with annual receipts less than $40 million for the industry First Lien Consumer Credit, NAICS 522611. See NAICS Association, Count by NAICS Industry Sectors, NAICS Association, https://www.naics.com/business-lists/counts-by-naics-code/.
608 This is estimated on the percent of entities with annual receipts less than $40 million for the industry First Lien Consumer Credit, NAICS 522611. See NAICS Association, Count by NAICS Industry Sectors, NAICS Association, https://www.naics.com/business-lists/counts-by-naics-code/.
609 This is estimated on the percent of entities with annual receipts less than $40 million for the industry First Lien Consumer Credit, NAICS 522611. See NAICS Association, Count by NAICS Industry Sectors, NAICS Association, https://www.naics.com/business-lists/counts-by-naics-code/.
610 This is estimated on the percent of entities with annual receipts less than $40 million for the industry First Lien Consumer Credit, NAICS 522611. See NAICS Association, Count by NAICS Industry Sectors, NAICS Association, https://www.naics.com/business-lists/counts-by-naics-code/.
611 This is estimated on the percent of entities with annual receipts less than $40 million for the industry First Lien Consumer Credit, NAICS 522611. See NAICS Association, Count by NAICS Industry Sectors, NAICS Association, https://www.naics.com/business-lists/counts-by-naics-code/.
612 This is estimated on the percent of entities with annual receipts less than $40 million for the industry First Lien Consumer Credit, NAICS 522611. See NAICS Association, Count by NAICS Industry Sectors, NAICS Association, https://www.naics.com/business-lists/counts-by-naics-code/.
entities would need to rely on PTE 2020–02 for relief concerning investment advice. The Department requests comment on how many small entities currently rely on PTE 83–1, and how many of these entities rely on PTE 83–1 for investment advice.

3. Impact of the Rule

The Department believes the costs associated with the proposed amendments are modest because the proposal was developed in consideration of other regulatory conduct standards. The Department believes that many financial institutions and investment professionals have already developed compliance structures for similar regulatory standards. The Department does not expect that the proposal will impose a significant compliance burden on small entities. As discussed, the Department estimates that the proposal would impose costs of approximately $253.2 million in the first year and $216.2 million in each subsequent year, of which approximately $248.0 million in the first year and $212.7 million in each subsequent year would be imposed on small financial institutions.

The table below summarizes the estimated aggregate cost for small entities due to the proposed amendments to each exemption. The following section describes estimated cost for each entity type for each exemption.

**TABLE 6—SUMMARY OF TOTAL COST AND AVERAGE PER-ENTITY COST BY EXEMPTION**

<table>
<thead>
<tr>
<th>Exemption</th>
<th>Total cost</th>
<th>Per-entity cost</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>First year</td>
<td>Subsequent years</td>
</tr>
<tr>
<td>PTE 84–24</td>
<td>$17,425,393</td>
<td>$14,733,328</td>
</tr>
<tr>
<td>PTE 2020–02</td>
<td>227,505,836</td>
<td>194,922,497</td>
</tr>
<tr>
<td>Mass Amendments:</td>
<td></td>
<td></td>
</tr>
<tr>
<td>PTE 75–1</td>
<td>2,594,856</td>
<td>2,594,856</td>
</tr>
<tr>
<td>PTE 77–4</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>PTE 80–83</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>PTE 83–1</td>
<td>444,296</td>
<td>444,296</td>
</tr>
<tr>
<td>PTE 1986–128</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Total</td>
<td>247,970,380</td>
<td>212,694,976</td>
</tr>
</tbody>
</table>

Note: The sum of the columns may not sum to total due to rounding.

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Preliminary Assumptions and Cost Estimate Inputs

The Department also assumes affected entities will likely incur only incremental costs if they are already subject to rules or requirements from the Department or another regulator. The Department acknowledges that not all entities will decide to use the amended PTE 2020–02 and PTE 84–24 for transactions resulting from fiduciary investment advice. Some may instead rely on other existing exemptions that better align with their business models. However, for this cost estimation, the Department assumes that all eligible entities will use the PTE 2020–02 and PTE 84–24 for such transactions. The Department recognizes that this may result in an overestimate, as not all entities will necessarily rely on these exemptions.

The Department does not have information on how many retirement investors receiving electronic disclosures from the Department would need to rely on PTE 2020–02 or PTE 84–24 for such transactions. The Department estimates that this may result in an overestimate, as not all entities will necessarily rely on these exemptions.

As discussed in the Affected Entities section of the Regulatory Flexibility Analysis, the Department estimates that 18,721 small financial institutions would be affected by the proposal, comprised of 1,835 broker-dealers, 15,775 registered investment advisers, 10 robo-advisers, 151 insurance companies, 20 investment company principal underwriters, and 930 pension consultants.

Cost To Review the Rule

The Department estimates that all 18,721 of the small financial institutions affected would each need to review the rule, as it applies to their business. The Department estimates that such a review will take a legal professional, on average, nine hours to review the rule, resulting in a total cost of $26.9 million.

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For more information on how the number of each type of entity is estimated, refer to the Affected Entities section of the Regulatory Flexibility Act analysis.

613 The burden is estimated as: (18,721 entities × 9 hours) = 168,489 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is
Cost Associated With Disclosures

The proposed amendments would require small entities to modify existing general disclosures and develop additional general disclosures to those required under the existing exemption. For more information on the changed requirements for each disclosure, refer to the descriptions in the preamble and RIA of this document. The Department estimates the marginal cost for each of the disclosure requirements as:

- Drafting or updating a written acknowledgement that the financial institution and its investment professional are fiduciaries is estimated to result in an aggregate cost of approximately $123,647.614
- Drafting a written description of service provided is estimated to result in an aggregate cost of $1.6 million in the first year.615
- Drafting the written statement of the Best Interest standard of care owed is estimated to result in an aggregate cost of $1.6 million in the first year.616

The burden is estimated as: (30 minutes \times 10 disclosures) + (15,775 registered investment advisers) = 960 financial institutions drafting new disclosures. The number of financial entities needing to draft their written acknowledgement is estimated as: (10 robo-advisers + 930 pension consultants + 20 investment company underwriters) = 960 financial institutions updating existing disclosures. The number of financial entities needing to draft their written acknowledgement is estimated as: (18,721 financial institutions \times 30 minutes + 60 minutes) = 15,775 registered investment advisers + 151 insurers) = 1,776 financial institutions drafting new disclosures. The burden is estimated as: (17,761 financial institutions \times 10 minutes + 60 minutes) = 9,841 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(1,835 broker-dealers + 15,775 registered investment advisers) \times (30 minutes + 60 minutes)] + [(151 insurers + 10 robo-advisers + 930 pension consultants, and 20 investment company underwriters)] \times 1 hour] \times $159.34 = $1,576,828. For more information on the assumptions included in this calculation, refer to the RIA of this document.

The burden is estimated as: (928 PEPs \times 19,290 financial institutions) = 97.1%. The number of PEPs serviced by small financial institutions is estimated to result in an aggregate cost of approximately $118,230 in the first year.620

The Department estimates that this would result in 928 disclosures sent to employers of PEPs.622 This results in an annual cost of approximately $981.622

The Department estimates that the total cost for 18,721 small financial institutions to update their disclosure materials and distribute the newly required disclosures is $6.0 million during the first year and $1.0 million in each subsequent year.

Cost Associated With Rollover Documentation and Disclosure

As discussed in the cost section of the RIA, the Department estimates that, 3,119,832 rollovers would be affected.623 The Department lacks reliable data on the number of rollovers that would involve small financial institutions. For the purposes of this analysis, the Department assumes the percent of rollovers conducted by small institutions is proportional to the percent of small financial institutions. Accordingly, the Department estimates that 99 percent of these rollovers, or 3,088,633 rollovers, would involve small financial institutions. The Department requests comments on these assumptions.

Applying these assumptions to the 18,721 small financial institutions, using the same methodology described above to calculate the rollover cost associated with RIA operations, the total cost is estimated to be $371,382,607. For more information on these assumptions, refer to the RIA of this document.
documentation costs for all firms, the
Department estimates a total annual cost of
approximately $191.9 million.624

Costs Associated With Annual Report of
Retrospective Review for Financial Institutions

PTE 2020–02 requires financial institutions to conduct a retrospective review at least annually that is reasonably designed to prevent violations of and achieve compliance with the conditions of this exemption, Impartial Conduct Standards, and the policies and procedures governing compliance with the exemption. While entities covered by the existing exemption would not incur additional costs with this requirement, robo-advisers, pension consultants, and investment company underwriters, who are not covered under the existing exemption, would incur costs associated with conducting the annual review. This requirement is estimated to result in an annual aggregate cost of $0.2 million.625

Additionally, the Department estimates the cost for a certifying officer to review the report and certify the exemption would result in an estimated annual cost burden of approximately $366,000.626

Cost Associated With Written Policies and Procedures

Entities that were not previously complying with PTE 2020–02 would incur the cost to develop policies and procedures in the first year. The requirements to maintain and review policies and procedures is estimated to result in an aggregate cost of $2.2 million in the first year627 and $1.5 million in subsequent years.628

The proposed amendments would also require financial institutions to provide their complete policies and procedures to the Department upon request. Based on the number of past cases as well as current open cases that would merit such a request, the Department estimates that the Department would request a total of 165 policies and procedures in the first year and 50 policies and procedures in subsequent years. Assuming the number of requests from small institutions is proportionate to the number of small financial institutions, the Department estimates that it would request 160 policies and procedures in the first year and 49 in subsequent years.629

The Department estimates that the requirement would result in an estimated cost of approximately $2,538 in the first year and $777 in subsequent years.631

The cost for a firm receiving the request would be approximately $80 in years when a request is made and no cost in most years when no request is made.

Summary of Total Cost

The Department estimates that in order to meet the additional conditions of the amended PTE 2020–02, affected entities would incur a total cost of $227.5 million in the first year and $194.9 million in subsequent years. The cost by requirement and entity type is summarized in the table below.

### Table 7—Three-Year Average Cost by Type of Entity and Requirement

<table>
<thead>
<tr>
<th>Rule Review:</th>
<th>Broker-dealer</th>
<th>SEC registered investment adviser</th>
<th>State-registered investment adviser</th>
<th>Insurance company</th>
<th>Robo-adviser</th>
<th>Pension consultant</th>
<th>Investment company underwriter</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>$877,167</td>
<td>$3,571,765</td>
<td>$3,969,000</td>
<td>$72,181</td>
<td>$4,780</td>
<td>$444,559</td>
<td>$9,560</td>
</tr>
<tr>
<td>Per-Entity</td>
<td>478</td>
<td>478</td>
<td>478</td>
<td>478</td>
<td>478</td>
<td>478</td>
<td>478</td>
</tr>
</tbody>
</table>

| Disclosure: | Total              | $249,624                        | 1,016,368                       | 1,129,414         | 28,559      | 2,414            | 224,469                       |
| Per-Entity  | 136               | 136                             | 136                             | 189               | 241         | 241              | 241                           |

| Rollover Disclosure: | Total               | 18,804,889                      | 76,572,316                     | 85,088,322        | 1,547,433   | 102,479          | 9,680,548                     |
| Per-Entity  | 2                  | 2                               | 2                               | 2                 | 2           | 2                | 2                             |

| Policies and Procedures: | Total               | 146,328                        | 595,837                        | 662,103           | 12,041      | 3,453            | 321,138                       |
| Per-Entity  | 80                 | 80                             | 80                             | 80                | 345         | 345              | 345                           |

| Retrospective Review: | Total               | 6,043                          | 562,032                        | 12,041            | 6,906       | 3,453            | 6,906                         |
| Per-Entity  | 604                | 604                            | 604                            | 604               | 604         | 604              | 604                           |

624 The burden is estimated as: (3,088,633 rollovers × 48% × 30 minutes + 60 minutes) + (3,088,633 rollovers × 52% × 5 minutes + 60 minutes) = 875,113 hours. A labor rate of $219.23 is used for a personal financial adviser. The labor rate is applied in the following calculation: (3,088,633 rollovers × 48% × 30 minutes + 60 minutes) + (3,088,633 rollovers × 52% × 5 minutes + 60 minutes) ÷ $219.23 = $191,850,954. For more information on the assumptions included in this calculation, refer to the RIA of this document.

625 The number of small entities not currently producing audit reports is estimated as: (10 robo-advisers + 930 pension consultants + 20 investment company underwriters) × 10% = 96 small entities. The number of small entities needing to modify existing audit reports is estimated as: (10 robo-advisers + 930 pension consultants + 20 investment company underwriters) × 90% = 864 small entities. The burden is estimated as: (96 financial institutions × 1 hour) = 96 hours × $219.23 = $21,415.34. For more information on the assumptions included in this calculation, refer to the RIA of this document.

626 The burden is estimated as: (18,721 small financial institutions × 30 minutes + 60 minutes) × $219.23 = $21,415.34. For more information on the assumptions included in this calculation, refer to the RIA of this document.

627 The burden is estimated as: (17,761 × 30 minutes + 60 minutes) + (1,916,000 × 5 minutes + 60 minutes) = 9,361 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: (17,761 × 30 minutes + 60 minutes) + (1,916,000 × 5 minutes + 60 minutes) × $159.34 = $1,491,502.

628 The burden is estimated as: (18,721 small financial institutions/19,290 financial institutions) = 97.1%. The number of policies and procedures requested from small financial entities in the first year is estimated as: (165 × 97.1%) = 160. The number of policies and procedures requested from small financial entities in the first year is estimated as: (50 × 97.1%) = 49.

629 The burden is estimated as: (18,721 small financial institutions × 30 minutes + 60 minutes) × $219.23 = $21,415.34. For more information on the assumptions included in this calculation, refer to the RIA of this document.

630 The burden is estimated as: (49 × 15 minutes + 60 minutes) × 12 hours. A labor rate of $63.45 is used for a clerical worker. The labor rate is applied in the following calculation: (49 × 15 minutes + 60 minutes) × $63.45 = $2,538. For more information on the assumptions included in this calculation, refer to the RIA of this document.

631 The burden is estimated as: (49 × 15 minutes + 60 minutes) × 12 hours. A labor rate of $63.45 is used for a clerical worker. The labor rate is applied in the following calculation: (49 × 15 minutes + 60 minutes) × $63.45 = $777. For more information on the assumptions included in this calculation, refer to the RIA of this document.
Cost Associated With PTE 84–24

Summary of Affected Entities

As discussed in the Affected Entities section of the Regulatory Flexibility Analysis, the Department expects that 5,087 small financial entities would be affected by the proposed amendments, including 930 pension consultants, 20 investment company principal underwriters, 3,960 independent producers, and 177 insurance companies.632

Cost To Review the Rule

The Department estimates that all 5,087 of the small financial institutions affected would each need to review the rule, as it applies to their business. The Department estimates that such a review will take a legal professional, on average, two hours to review the rule, resulting in a total cost of $1.6 million in the first year.633

Costs Associated With Disclosures

The proposed amendment would require small independent producers to provide disclosures to retirement investors before engaging in a transaction covered by this exemption. For more information on the changed requirements for each disclosure, refer to the descriptions in the preamble and RIA of this document. The Department estimates the marginal cost for each of the disclosure requirements as:

- Drafting or updating a written acknowledgement that the financial institution and its investment professional are fiduciaries is estimated to result in an aggregate cost of approximately $10,000.634
- Drafting the written statement of the Best Interest standard of care owed is estimated to result in an aggregate cost of $29,900.635
- Drafting or updating a written description of service provided is estimated to result in an aggregate cost of $0.3 million.636
- Drafting a written statement of the independent producer’s material conflicts of interest and the amount of insurance commission paid in connection with the purchase by a retirement investor of the recommended annuity is estimated to result in an aggregate cost of $0.6 million. 637

For small entities, the Department estimates that developing the disclosures described above would result in a total cost of $1.0 million in the first year.

Cost Associated With Rollover Documentation and Disclosure

The proposed amendment would require an independent producer to provide a rollover disclosure that is similar to the disclosure required in the proposed amendment to PTE 2020–02. As discussed in the RIA, the Department assumes that such disclosures would be prepared by the independent producer. The Department requests comment on whether this would be true for small independent producers.

In the RIA, the Department estimates that 52,449 retirement investors would receive documentation on whether the recommended annuity is in their best interest each year.638 The Department does not have data on what proportion of rollovers would be produced by small independent producers. For the purposes of this analysis, the Department assumes that the proportion of rollovers advised by small independent producers is equal to the proportion of independent producers that are small. The Department estimates that 99 percent of rollovers would be produced by small independent producers.639 The Department estimates a small independent producer would need to provide 51,925 rollover disclosures annually. This results in an estimated cost of approximately $8.3 million annually.640 These costs likely reflect an

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632 For more information on how the number of each type of entity is estimated, refer to the Affected Entities section.
633 The burden is estimated as: (5,087 entities \times 2 hours) = 10,174 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: (5,087 entities \times 2 hours) \times $159.34 = $1,621,125.
634 The burden is estimated as: (177 financial institutions + (3,960 independent producers \times 5\%)) \times (30 minutes + 60 minutes) = 63 hours. A labor rate of approximately $159.34 is used for a legal professional. The labor rate is applied in the following calculation: (3,960 independent producers \times 30 minutes + 60 minutes) \times $159.34 = $315,493.
635 The burden is estimated as: (3,960 independent producers \times 1 hour) = 3,960 hours. A labor rate of approximately $159.34 is used for a legal professional. The labor rate is applied in the following calculation: (3,960 independent producers \times 1 hour) \times $159.34 = $630,986.
636 The burden is estimated as: (3,960 independent producers \times 30 minutes + 60 minutes) \times $159.34 = $159,340.
637 The burden is estimated as: (3,960 independent producers \times 24 hours) = 3,960 hours. A labor rate of approximately $158.94 is used for an independent producer. The labor rate is applied in the following calculation: (51,925 rollovers \times 24 hours) \times $158.94 = $158,940.
638 For information on this estimate, refer to the estimate of IRAs affected by the proposed amendments to PTE 84–24 in the Affected Entities section of the RIA.
640 The burden is estimated as: (51,925 rollovers \times 1 hour) = 51,925 hours. A labor rate of approximately $158.94 is used for an independent producer. The labor rate is applied in the following calculation: (51,925 rollovers \times 1 hour) \times $158.94 = $8,300,000.
overestimate of the total cost, as it assumes that small independent producers would make the same number of recommended rollovers as the average independent producer. The Department requests comment on how many rollover recommendations a small independent producer is likely to make in a given year, on average.

Costs Associated With the Provision of Disclosures to Retirement Investors

The Department estimates that the number of disclosures that would need to be provided to retirement investors is equal to the number of rollover disclosures, or 51,925 disclosures. Preparing and sending the general disclosures described above is estimated to result in an estimated cost of approximately $18,968.64.

Additionally, independent producers would be required to send the documentation to the insurance company. The Department expects that such documentation would be sent electronically and result in a de minimis burden. The Department requests comment on this assumption.

Costs Associated With the Retrospective Review

The proposed amendment would require small insurance companies to conduct a retrospective review at least annually. The review would be required to be reasonably designed to prevent violations of and achieve compliance with (1) the Impartial Conduct Standards, (2) the terms of this exemption, and (3) the policies and procedures governing compliance with the exemption. The review would be required to evaluate the effectiveness of the supervision system, any noncompliance discovered in connection with the review, and corrective actions taken or recommended, if any. Insurance companies would be required to annually provide a written report that details the review to a senior executive officer for certification. Insurance companies would also be required to provide the independent producer with

the underlying methodology and results of the retrospective review.

As discussed in the RIA, the Department estimates that insurance companies would need to prepare a total of 12,000 retrospective reviews.642 The Department does not have data on the proportion of retrospective reviews that would be prepared by small insurance companies. For the purpose of this analysis, the Department assumes that the number of retrospective reviews prepared by small insurance companies is proportionate to the number of small insurance companies. This results in an estimate of 9,879 retrospective reviews.643

The Department estimates that conducting and drafting the retrospective review would result in an estimated annual cost of $1.6 million.644 Additionally, the Department estimates the cost for a certifying officer to review the report and certify the exemption would result in an estimated cost burden of $0.3 million.645 Finally, the Department estimates that the requirement to provide the methodology and results to each independent producer would result in an annual cost of approximately $52,200.646

Costs Associated With Policies and Procedures

The proposed amendment would require insurance companies to establish, maintain, and enforce written policies and procedures for the review of each independent producer’s recommendation before an annuity is issued to a retirement investor. The insurance company’s policies and procedures must mitigate conflicts of interest to the extent that a reasonable person reviewing the policies and procedures and incentive practices as a whole would conclude that they do not create an incentive for the independent producer to place its interests, or those of the insurance, or any affiliate or related entity, ahead of the interests of the retirement investor. Insurance companies’ policies and procedures include a prudent process for determining whether to authorize an independent producer to sell the insurance company’s annuity contracts to retirement investors, and for taking action to protect retirement investors from independent producers who have failed or are likely to fail to adhere to the impartial conduct standards, or who lack the necessary education, training, or skill. Finally, insurance companies must provide their complete policies and procedures to the Department within 10 days upon request. Finally, insurance companies must provide their complete policies and procedures to the Department within 10 days upon request.

The Department estimates that drafting or modifying the policies and procedures and procedures would result in an estimated cost of approximately $0.1 million in the first year.647 The requirement to review policies and procedures annually would result in an estimated cost of approximately $56,406 in subsequent years.648 Providing policies and procedures to the Department upon request is estimated to result in a de minimis annual cost.649

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643 The number of retrospective reviews prepared by small insurance companies is estimated as: [12,000 × (1/9)] = 9,879 retrospective reviews.
644 This is estimated as: (9,879 retrospective reviews × 1 hour) = 9,879 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: (9,879 retrospective reviews × 1 hour) × $159.34 = $1,574,120. For more information on the assumptions included in this calculation, refer to the RIA of this document.
645 The burden is estimated as: (9,879 retrospective reviews × 15 minutes) = 2,470 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: (9,879 retrospective reviews × 15 minutes) × $159.34 = $1,574,120. For more information on the assumptions included in this calculation, refer to the RIA of this document.
646 This is estimated as: (9,879 retrospective reviews × 15 minutes) = 2,470 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: (9,879 retrospective reviews × 15 minutes × $159.34) = $1,574,120. For more information on the assumptions included in this calculation, refer to the RIA of this document.
647 This is estimated as: (177 small insurance companies × 5 hours) = 885 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: (177 small insurance companies × 5 hours) × $159.34 = $141,016. For more information on the assumptions included in this calculation, refer to the RIA of this document.
648 This is estimated as: (177 insurance companies × 2 hours) = 354 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: (177 insurance companies × 2 hours) × $159.34 = $56,406. For more information on the assumptions included in this calculation, refer to the RIA of this document.
649 This is estimated as: (177 insurance companies × 12 requests) = 2,124 requests. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: (177 insurance companies × 12 requests × $159.34) = $56,406. For more information on the assumptions included in this calculation, refer to the RIA of this document.
650 The number of requests in the first year is estimated as 177 small insurance companies × 39 requests in PTE 2020–02/4,430 small financial institutions in PTE 2020–02 = 2 requests. The number of requests in subsequent years is estimated as: 177 insurance companies × 12 requests in PTE 2020–02/4,430 small financial institutions in PTE 2020–02 = 1 request. The burden is estimated as: ((2 × 15 minutes) + 60 minutes) = 0.50 hours. A labor rate of $63.45 is used for a clerical worker. The labor rate is applied in the following calculation: ((2 × 15 minutes) + 60 minutes) × $63.45 = $31.73.
Costs Associated With the Recordkeeping

The proposed amendment would amend the current recordkeeping requirements to incorporate new provisions that are similar to the recordkeeping provision in PTE 2020–02 for all entities relying on the exemption. The Department estimates that the additional time needed to maintain records for the financial institutions to be consistent with the exemption would require an insurance company and independent producer two hours annually, resulting in an estimated annual cost of $1.3 million. Additionally, the Department estimates that the requirement to distribute records upon request would result in an estimated annual cost of $3.1 million.

Summary of Total Cost

The Department estimates that in order to meet the additional conditions of the amended PTE 84–24, affected entities would incur a total cost of $17.4 million in the first year and $14.7 million in subsequent years. The per-entity cost by type of entity is broken down in the table below.

### Table 8—Cost by Type of Entity and Requirement, First Year

<table>
<thead>
<tr>
<th>Requirement</th>
<th>Independent producer</th>
<th>Insurance agents and pension consultants</th>
<th>Financial institutions/insurance companies</th>
<th>Mutual fund underwriters</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rule Review:</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>$1,261,973</td>
<td>$296,372</td>
<td>$56,406</td>
<td>$6,374</td>
</tr>
<tr>
<td>Per-Entity</td>
<td>319</td>
<td>319</td>
<td>319</td>
<td>319</td>
</tr>
<tr>
<td>Disclosure:</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>9,239,440</td>
<td>18,802</td>
<td>1,060</td>
<td></td>
</tr>
<tr>
<td>Per-Entity</td>
<td>2,434</td>
<td>1,348</td>
<td>106</td>
<td></td>
</tr>
<tr>
<td>Policies and Procedures:</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Per-Entity</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Retrospective Review:</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Per-Entity</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Recordkeeping:</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>4,405,817</td>
<td>56,406</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Per-Entity</td>
<td>397</td>
<td>397</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>14,907,230</td>
<td>296,372</td>
<td>2,215,417</td>
<td>6,374</td>
</tr>
<tr>
<td>Per-Entity</td>
<td>3,960</td>
<td>319</td>
<td>12,835</td>
<td>319</td>
</tr>
<tr>
<td>SBA:</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Threshold (in millions)</td>
<td>15.0</td>
<td>45.5</td>
<td>47.0</td>
<td>47.0</td>
</tr>
<tr>
<td>Per-Entity Cost as a Percentage of SBA Threshold</td>
<td>0.021%</td>
<td>0.001%</td>
<td>0.027%</td>
<td>0.001%</td>
</tr>
</tbody>
</table>

Costs Associated With the Mass Amendments

Cost Associated With PTE 75–1

Summary of Affected Entities

The amendment to PTE 75–1 would affect banks, reporting dealers, and broker-dealers registered under the Security Exchange Act of 1934. As discussed in the Affected Entities section above, the Department estimates that 3,403 financial institutions, comprised of 1,835 broker-dealers and 1,568 banks, would use PTE 75–1.

Costs Associated With Disclosure Requirements in Part V

The Department proposes to amend PTE 75–1 Part V to allow an investment advice fiduciary to receive reasonable compensation for extending credit to a plan or IRA to avoid a failed purchase or sale of securities involving the plan or IRA if certain conditions are met. Prior to the extension of credit, the plan or IRA must receive written a disclosure, including the interest rate or other fees that will be charged on the credit extension as well as the method of determining the balance upon which interest will be charged. As discussed in the RIA, the Department expects that these disclosures are common business practice and would not create an additional burden on small broker-dealers or banks.

650 This is estimated as: (3,960 independent producers + 177 insurance companies) × 2 hours = 8,274 hours. A labor rate of $158.94 is used for an independent producer. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: [3,960 independent producers × 2 hours × $158.94] + [177 insurance companies × 2 hours × $159.34] = $1,315,211.

651 The burden is estimated as: (3,960 independent producers × 10 requests) × (30 minutes + 60 minutes) = 19,800 hours. A labor rate of $158.94 is used for an independent producer. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(3,960 independent producers × 10 requests) × (30 minutes + 60 minutes)] × $158.94 = $3,147,012.

Costs Associated With Recordkeeping in Parts II and V

Additionally, the Department proposes to amend Parts II and V to adjust the recordkeeping requirement to shift the burden from plans and IRAs to financial institutions. The amended class exemption requires financial institutions engaging in the exempted transactions (rather than the plans or IRAs) to maintain all records pertaining to such transactions for six years and provide access to the records upon request to the specified parties. The Department estimates that the total cost for small financial institutions to maintain recordkeeping and provide access to records upon request is approximately $2.6 million annually.

652 For more information on how the number of each type of entity is estimated, refer to the Affected Entities sections of the RIA and the Regulatory Flexibility Analysis.

653 For more information on these conditions, refer to the Preamble and RIA of this document.
and the per-firm cost is approximately $763 annually.654

Costs Associated With Removing Fiduciary Investment Advice From Parts III and IV

Finally, the Department is proposing to amend Parts III and IV, which currently provide relief for investment advice fiduciaries, by removing fiduciary investment advice from the covered transactions. Investment advice providers would instead have to rely on the amended PTE 2020–02 for exemptive relief covering investment advice transactions. The Department believes that since investment advice providers were already required to provide records and documentation under PTE 2020–02, this amendment would not result in additional costs.

Summary of Total Cost

The Department estimates that in order to meet the additional conditions of the amended PTE 75–1, affected entities would annually incur a total cost of approximately $2.6 million and a per-firm cost of approximately $763. The per-entity cost by type of entity is broken down in the table below.

### Table 9—Cost by Type of Entity and Requirement

<table>
<thead>
<tr>
<th>Recordkeeping:</th>
<th>Broker-dealers</th>
<th>Commercial banks</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total (in millions)</td>
<td>$1,399,224</td>
<td>$1,195,631</td>
</tr>
<tr>
<td>Per-Entity</td>
<td>763</td>
<td>763</td>
</tr>
<tr>
<td>Total (in millions)</td>
<td>$1,399,224</td>
<td>$1,195,631</td>
</tr>
<tr>
<td>Per-Entity</td>
<td>763</td>
<td>763</td>
</tr>
<tr>
<td>SBA Threshold (in millions)</td>
<td>47.0</td>
<td>850</td>
</tr>
<tr>
<td>Per-Entity Cost as a Percentage of SBA Threshold</td>
<td>0.0016%</td>
<td>0.0001%</td>
</tr>
</tbody>
</table>

Costs Associated With PTE 77–4, PTE 80–83, and PTE 83–1

Summary of Affected Entities

The amendment to PTE 77–4 would affect mutual fund companies. As discussed in the Affected Entities section, the Department estimates that 812 mutual fund companies would be affected by the amended PTE 77–4.655

PTE 80–83 allows banks to purchase, on behalf of employee benefit plans, securities issued by a corporation indebted to the bank that is a party in interest to the plan. The Department estimates that 19 small fiduciary-banks with public offering services would be affected by the amended PTE 80–83.656

PTE 83–1 provides relief for the sale of certificates in an initial issuance of certificates by the sponsor of a mortgage pool to a plan or IRA when the sponsor, trustee, or insurer of the mortgage pool is a fiduciary with respect to the plan or IRA assets invested in such certificates.

Summary of Total Cost

The Department is proposing to amend PTE 77–4, PTE 80–83, and PTE 83–1 by removing fiduciary investment advice from the covered transactions. Investment advice providers would instead have to rely on the amended PTE 2020–02 for exemptive relief covering investment advice transactions. As discussed in the Affected Entities section, the Department estimates that 10,000 IRAs, of which 203 are new IRAs that would be overseen by a small investment advice provider,658 As such, the Department estimates that, each year, there are 9,690 IRAs, of which 203 are new IRAs that would be overseen by a small investment advice provider.

Costs Associated With Recordkeeping

The Department is proposing to amend Section VI of PTE 86–128 to require financial institutions to maintain for six years the records necessary for the Department, IRS, plan fiduciary, contributing employer or employee organization whose members are covered by the plan, participants and beneficiaries and IRA owners to determine whether conditions of this exemption have been met. As discussed above, the Department estimates that 395 small-business investment advice providers would be affected by this recordkeeping requirement. Applying this assumption to the cost calculations described above, the Department estimates that the total cost for small-business investment advice providers to maintain recordkeeping is $204,011.
annually \(^{660}\) and the per-firm cost is $111 annually.  

Cost Associated With the Written Authorization From the Authorizing Fiduciary to the Broker-Dealer

Authorizing fiduciaries of IRAs entering into a relationship with an investment advice provider are required to provide the investment advice provider with advance written authorization to perform transactions for the IRA. As discussed in the Summary of Affected Entities section for this exemption in this analysis, the Department estimates that approximately 44 authorizing fiduciaries are expected to send an advance written authorization. Applying this assumption to the cost calculations described above, the Department estimates that the total cost to send an advance written authorization is approximately $9,169 annually.\(^{661}\) The per-transaction cost is $8.45 annually, and the per-firm cost is $8.50 annually.

Cost Associated With the Provision of an Annual Termination Form

Financial institutions must annually supply each authorizing fiduciary with a form expressly providing an election to terminate the written authorization. The Department estimates that 395 investment advice providers would prepare the termination form, and 9,690 IRAs would receive the form. Applying these assumptions to the cost calculations described above, Department estimates that the total cost to prepare and send the annual termination form is approximately $197,857 annually.\(^{663}\) The per-transaction cost is $20 annually, and the per-firm cost is $108 annually.

Transaction Reporting

The investment advice provider engaging in a covered transaction must give the authorizing fiduciary either a confirmation slips for each securities transaction or a quarterly report containing specified information. As discussed above, the provision of the confirmation is already required under SEC regulations. Therefore, if the transaction reporting requirement is satisfied by sending confirmation slips, no additional hour and cost burden will occur.

Annual Statement

Broker-dealers are required to send an annual report to each authorizing fiduciary containing the same information as the quarterly report and all security transaction-related charges, the brokerage placement practices, and a portfolio turnover ratio. The Department assumes this information could be sent together. Therefore, the clerical staff hours required to prepare and distribute the report has been included with the provision of annual termination form requirement, and no additional burden has been reported.

However, collecting and generating the information required for the annual report is reported as a burden. As discussed above, the Department estimates that 2,100 IRAs will receive an annual report. Applying these assumptions to the cost calculations described above, the Department estimates that the total cost to collect and generate information for the annual report is $141 annually.\(^{664}\) The per-account cost is $0.01 annually, and the per-firm cost is $0.08 annually.

Report of Commissions Paid

A discretionary trustee must provide each authorizing fiduciary with an annual report that separately shows the commissions paid to affiliated brokers and non-affiliated brokers on both a total dollar basis and a cents-per-share basis. The burden to prepare and distribute the report is included with the provision of annual termination form requirement, because both items are required to be sent annually. However, the collection and generation of the information for the quarterly report is reported as a burden. As described above, the Department estimates that 2,100 IRAs will receive a report of the commissions paid. Applying this assumption to the cost calculations described above, the Department estimates that the total cost to collect and generate information for the report of commission paid is $56 annually.\(^{665}\) The per-account cost is

\[^{660}\text{The burden for a clerical worker to prepare the information is estimated as: 203 IRAs \times (5 minutes + 60 minutes) per IRA = 51 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: 203 IRA \times (5 minutes + 60 minutes) \times $159.34 per hour = $8,087. The burden of clerical staff to send the authorization is estimated as: 203 IRA \times (5 minutes + 60 minutes) per IRA \times $63.45 = $1,073. The material and postage cost are $0.05 per page + $0.66 for postage) = $12. For more information on the assumptions included in this calculation, refer to the RIA of this document.}\]

\[^{661}\text{The burden for a legal professional to prepare the forms is estimated as: 1,835 broker-dealers \times (30 minutes + 60 minutes) \times $190.63 per hour = $17 hours. A labor rate of $159.34 is used for a clerical worker. The labor rate is applied in the following calculation: 203 broker-dealers \times (30 minutes + 60 minutes) \times $190.63 per hour \times $190.63 per hour \times 0.58% paper \times 7 pages \times $0.05 per page + $0.66 for postage) = $161,94,194. The burden for a clerical worker to prepare and send the forms is estimated as: 9,900 IRAs \times (5 minutes + 60 minutes) = 808 hours. A labor rate of $63.45 is used for a clerical worker. The labor rate is applied in the following calculation: 9,900 IRA \times (5 minutes + 60 minutes) \times $63.45 = $1,073. The material and postage cost are $0.05 per page + $0.66 for postage) = $12. For more information on the assumptions included in this calculation, refer to the RIA of this document.}\]

\[^{663}\text{The burden for a clerical worker to prepare the information is estimated as: 203 IRAs \times (5 minutes + 60 minutes) per IRA = 17 hours. A labor rate of $190.63 for a financial manager and a clerical worker, respectively. The labor rate is applied in the following calculation: (1,835 broker-dealers \times (30 minutes + 60 minutes) \times $190.63 per hour + (1,835 broker-dealers \times (5 minutes + 60 minutes) \times $63.45) = $204,011. For more information on the assumptions included in this calculation, refer to the RIA of this document.}\]

\[^{664}\text{The mailing cost is estimated as: 5 pages \times $0.05 per page + $0.25 + $141. For more information on the assumptions included in this calculation, refer to the RIA of this document.}\]

\[^{665}\text{The mailing cost is estimated as: 2 pages \times $0.05 per page + $0.25. For more information on the assumptions included in this calculation, refer to the RIA of this document.}\]
$0.01 annually, and the per-firm cost is less than $0.03 annually.

Financial institutions are also required to report total of all transaction-related charges incurred by the plan in connection with covered transactions, the allocation of such charges among various persons, as well as a conspicuous statement about the negotiability of brokerage commissions and an estimate of future commission rates to the plan fiduciaries. The information must be tracked, assigned to specific plans, and reported. As described above, the Department estimates that 9,690 IRAs will be affected by this requirement. Applying this assumption to the cost calculations described above, the Department estimates that the total cost to report this information is $31,977 annually. The per-account cost is $3.30 annually, and the per-firm cost is $17 annually.

This results in a total annual cost of $32,033.667

Summary of Total Cost

The Department estimates that in order to meet the additional conditions of the amended PTE 86–128, affected entities would annually incur a total cost of $444,296 and a per-firm cost of $242. The per-entity cost is broken down in the table below.

<table>
<thead>
<tr>
<th>Requirement</th>
<th>Total Cost</th>
<th>Per-entity Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>Provision of Materials for Evaluation of Authorization of Transaction</td>
<td>$1,085</td>
<td>0.59</td>
</tr>
<tr>
<td>Annual Termination Form</td>
<td>$197,857</td>
<td>108</td>
</tr>
<tr>
<td>Annual Statement</td>
<td>$141</td>
<td>0.08</td>
</tr>
<tr>
<td>Report of Commissions Paid</td>
<td>$32,033</td>
<td>17</td>
</tr>
<tr>
<td>Total</td>
<td>$444,296</td>
<td>242</td>
</tr>
</tbody>
</table>

SBA Threshold (in millions) | 47.0
Per-Entity Cost as a Percentage of SBA Threshold | 0.0005%

### 4. Duplicate, Overlapping, or Relevant Federal Rules

The rules in ERISA and the Code that govern advice on the investment of retirement assets overlap with SEC rules that govern the conduct of investment advisers and broker-dealers that advise retail investors. The Department considered conduct standards set by other regulators, such as SEC, NAIC, and FINRA, in developing the proposal, with the goal of avoiding overlapping or duplicative requirements. If the requirements overlap, the Department believes that such a disclosure would cost small fiduciary investment advice providers to the stringent standards outlined in PTE 2020–02. Therefore, the proposed amendments clarify and tighten the existing text of PTE 2020–02 to enhance the disclosure requirements and strengthen the disqualification provisions.

The Department has considered requiring financial institutions to disclose the sources of third-party compensation received in connection with recommended investment products on a public web page in PTE 2020–02. When considering this requirement, the Department discussed exempting small financial institutions from this disclosure. The Department estimates that such a disclosure would cost small entities $4.8 million 668 with an average per-entity cost of $1,064. The Department requests comment on whether small financial institutions current provide website disclosures or have the technological infrastructure to do so.

### I. Unfunded Mandate Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 669 requires each federal agency to prepare a written statement assessing the effects of any federal mandate in a proposed or final rule that may result in an expenditure of $100 million or more (adjusted annually for inflation with the base year 1995) in any one year by state, local, and tribal governments, in the aggregate, or by the private sector. That threshold is approximately $177 million in 2023. For purposes of the Unfunded Mandates Reform Act, this proposal is expected to have an impact on the private sector. For the purposes of the proposal, the RIA shall meet the UMRA obligations.

### J. Federalism Statement

Executive Order 13132 outlines the fundamental principles of federalism. It also requires federal agencies to adhere to specific criteria in formulating and implementing policies that have “substantial direct effects” on the states, the relationship between the national government and states, or on the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that have these federalism implications must estimated as: (4,512 small financial institutions × 8 hours) × $133.05 = $4,802,573. 668Unfunded Mandates Reform Act of 1995, Public Law 104–4, 109 Stat. 48, (1995).

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666 This burden is estimated as: $3.30 = $31,977. For more information on the assumptions included in this calculation, refer to the RIA of this document.

667 This burden is estimated as: $0.01 annually, the per-firm cost is less than $0.03 annually.

668 This estimate is based on the assumption that satisfying this requirement would require a computer programmer professional. The cost is estimated as: (4,512 small financial institutions × 8 hours) × $133.05 = $4,802,573.
consult with state and local officials throughout the process of developing the proposed regulation. As discussed throughout this analysis, this proposed regulatory action would affect the insurance industry pertaining to annuities. These entities are also regulated by states, many of whom, as discussed in the discussion of the regulatory baseline, have taken regulatory or legislative actions. The Department has carefully considered the regulatory landscape in the states and worked to ensure that its proposed regulations would not impose obligations on advisers that are inconsistent with their responsibilities under state law, including the obligations imposed in states that based their laws on the NAIC Model Regulation. Nor would these proposed regulations impose obligations or costs on the state regulators. As discussed above, however, the Department has increased the protections afforded by many of these laws, consistent with its own responsibilities under ERISA, and has endeavored to lend greater uniformity on the provision of advice to retirement investors, so that advisers covered by the rule must all abide by a uniform fiduciary standard. The Department has had discussions with state insurance regulators and state-regulated parties about these issues including the need to ensure that retirement investors have sufficient protection when receiving investment advice. The Department expects to continue discussions with state insurance regulators to ensure that this proposed regulation complements the protections provided by the NAIC Model Rule. The Department also expects to continue its discussion with state securities regulators.

**Authority**


**List of Subjects in 29 CFR Part 2510**

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

For the reasons set forth in the preamble, the Department is proposing to amend part 2510 of subchapter B of Chapter XXV of Title 29 of the Code of Federal Regulations as follows:
fiduciary, within the meaning of section 3(21)(A) of the Act or section 4975(e)(3)(B) of the Code, with respect to a plan or an IRA solely because such person exercises transactions for the purchase or sale of securities on behalf of such plan or IRA in the ordinary course of its business as a broker, dealer, or bank, pursuant to instructions of a fiduciary with respect to such plan or IRA; if:

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

(ii) The instructions specify

(A) The security to be purchased or sold,

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

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

(D) The minimum or maximum quantity of such security which may be purchased or sold within such price range, or, in the case of a security issued by an open-end investment company registered under the Investment Company Act of 1940, the minimum or maximum quantity of such security which may be purchased or sold, or the value of such security in dollar amount which may be purchased or sold, at the price referred to in paragraph (d)(1)(ii)(B) of this section.

(2) A person who is a broker-dealer, reporting dealer, or bank which is a fiduciary with respect to a plan or IRA solely by reason of the possession or exercise of discretionary authority or discretionary control in the management of the plan or IRA or the management or disposition of plan or IRA assets in connection with the execution of a transaction or transactions for the purchase or sale of securities on behalf of such plan or IRA which fails to comply with the provisions of paragraph (d)(1) of this section shall not be deemed to be a fiduciary regarding any assets of the plan or IRA with respect to which such broker-dealer, reporting dealer or bank does not have any discretionary authority, discretionary control, or discretionary responsibility, does not exercise any authority or control, does not render investment advice (as defined in paragraph (c)(1) of this section) for a fee or other compensation, and does not have any authority or responsibility to render such investment advice, provided that nothing in this paragraph shall be deemed to:

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

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

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

(f) Definitions. For purposes of this section—

(1) The term “control” means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(2) The term “control” means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(3) The term “IRA” means any account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code.

(4) The term “IRA owner” means, with respect to an IRA, either the person who is the owner of the IRA or the person for whose benefit the IRA was established.

(5) The term “IRA fiduciary” means a person described in section 4975(e)(3) of the Code with respect to an IRA.

(6) The term “plan” means any employee benefit plan described in section 3(3) of the Act and any plan described in section 4975(e)(1)(A) of the Code.

(7) The term “plan fiduciary” means a person described in section 3(21)(A) of the Act and/or 4975(e)(3) of the Code with respect to a plan. For purposes of this section, a participant or beneficiary of the plan who is receiving advice is not a “plan fiduciary” with respect to the plan.

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

(9) The term “beneficiary” means, for a plan described in section 3(3) of the Act, a person described in section 3(8) of the Act.

(10) The phrase “recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property” means recommendations:

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

(ii) As to the management of securities or other investment property, including, among other things, recommendations on investment policies or strategies, portfolio composition, selection of other persons to provide investment advice or investment management services, selection of investment account arrangements (e.g., account types such as brokerage versus advisory) or voting of proxies appurtenant to securities; and
Department of Labor
Employee Benefits Security Administration
29 CFR Part 2550
[Application No. D–12057]
ZRIN 1210–ZA32
Proposed Amendment to Prohibited Transaction Exemption 2020–02

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

ACTION: Notice of Proposed Amendment to Class Exemption PTE 2020–02.

SUMMARY: This document contains a notice of pendency before the Department of Labor (the Department) of a proposed amendment to class prohibited transaction exemption (PTE) 2020–02, which provides relief for certain compensation received by investment advice fiduciaries. The proposed amendment would affect participants and beneficiaries of Plans, IRA owners, and fiduciaries with respect to such Plans and IRAs.

DATES: Public Comments. Comments are due on or before January 2, 2024. Public Hearing. The Department anticipates holding a public hearing approximately 45 days following the date of publication in the Federal Register. Specific information regarding the date, location, and submission of requests to testify will be published in a notice in the Federal Register.


Docket: For access to the docket to read background documents or comments, including the plain-language summary of the proposal required by the Providing Accountability Through Transparency Act of 2023, please go to the Federal eRulemaking Portal at http://www.regulations.gov. See SUPPLEMENTARY INFORMATION below for additional information regarding comments.

Public Hearing.

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

SUPPLEMENTARY INFORMATION:

Warning: All comments received will be included in the public record without change and will be made available online at http://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 http://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 http://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 proposed amendment to PTE 2020–02 would provide additional protections for employee benefit plans described in ERISA section 3(3) and any plan described in Code section 4975(e)(1)(A) (Plans) and investors and additional clarity for investment advice fiduciaries seeking to receive compensation for their advice, including as a result of advice to roll over assets from a Plan to an IRA, is a fiduciary subject to Title I of the Act.

(h) Continued applicability of State law regulating insurance, banking, or securities. Nothing in this section shall be construed to affect or modify the provisions of section 514 of Title I of the Act, a fiduciary of such a plan, or a participant or beneficiary of such plan, including a recommendation concerning the rollover of assets currently held in a plan to an IRA, is a fiduciary subject to Title I of the Act.

As described elsewhere in this edition of the Federal Register, the Department is proposing to amend the regulation defining when a person renders “investment advice for a fee or other compensation, direct or indirect” with...