

in the Adviser or Financial Institution; and

(3) Any corporation or partnership of which the Adviser or Financial Institution is an officer, director, or employee, or in which the Adviser or Financial Institution is a partner.

(c) Investment advice is in the “Best Interest” of the Retirement Investor when the Adviser and Financial Institution providing the advice act with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person would exercise based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor, without regard to the financial or other interests of the Adviser, Financial Institution, any Affiliate or other party.

(d) “Debt Security” means a “debt security” as defined in Rule 10b–10(d)(4) of the Exchange Act that is:

(1) U.S. dollar denominated, issued by a U.S. corporation and offered pursuant to a registration statement under the Securities Act of 1933;

(2) An “Agency Debt Security” as defined in FINRA Rule 6710(l) or its successor; or

(3) A “U.S. Treasury Security” as defined in FINRA Rule 6710(p) or its successor.

(e) “Financial Institution” means the entity that (i) employs the Adviser or otherwise retains such individual as an independent contractor, agent or registered representative, and (ii) customarily purchases or sells Debt Securities for its own account in the ordinary course of its business, and that is:

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

(2) A bank or similar financial institution supervised by the United States or state, or a savings association (as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1))), but only if the advice resulting in the compensation is provided through a trust department of the bank or similar financial institution or savings association which is subject to periodic examination and review by federal or state banking authorities; and

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

(f) “Independent” means a person that:

(1) Is not the Adviser or Financial Institution or an Affiliate;

(2) Does not receive compensation or other consideration for his or her own

account from the Adviser, Financial Institution or an Affiliate; and

(3) Does not have a relationship to or an interest in the Adviser, Financial Institution or an Affiliate that might affect the exercise of the person’s best judgment in connection with transactions described in this exemption.

(g) “Individual Retirement Account” or “IRA” means any trust, account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in Code section 408(a) and a health savings account described in Code section 223(d).

(h) A “Material Conflict of Interest” exists when an Adviser or Financial Institution has a financial interest that could affect the exercise of its best judgment as a fiduciary in rendering advice to a Retirement Investor regarding Principal Transactions.

(i) “Plan” means an employee benefit plan described in ERISA section 3(3) and any plan described in Code section 4975(e)(1)(A).

(j) “Principal Transaction” means a purchase or sale of a Debt Security where an Adviser or Financial Institution is purchasing from or selling to a Plan, participant or beneficiary account, or IRA on behalf of the Financial Institution’s own account or the account of a person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the Financial Institution.

(k) “Retirement Investor” means:

(1) A fiduciary of a non-participant directed Plan subject to Title I of ERISA with authority to make investment decisions for the Plan;

(2) A participant or beneficiary of a Plan subject to Title I of ERISA with authority to direct the investment of assets in his or her Plan account or to take a distribution; or

(3) The beneficial owner of an IRA acting on behalf of the IRA.

Signed at Washington, DC, this 14th day of April, 2015.

**Phyllis C. Borzi,**

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

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## DEPARTMENT OF LABOR

### Employee Benefits Security Administration

#### 29 CFR Part 2550

[Application Number D–11687]

ZRIN 1210–ZA25

### Proposed Amendment to Prohibited Transaction Exemption (PTE) 75–1, Part V, Exemptions From Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers and Banks

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

**ACTION:** Notice of Proposed Amendment to PTE 75–1, Part V.

**SUMMARY:** This document contains a notice of pendency before the Department of Labor of a proposed amendment to PTE 75–1, Part V, a class exemption from certain prohibited transactions provisions of the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (the Code). The provisions at issue generally prohibit fiduciaries of employee benefit plans and individual retirement accounts (IRAs), from lending money or otherwise extending credit to the plans and IRAs and receiving compensation in return. PTE 75–1, Part V, permits the extension of credit to a plan or IRA by a broker-dealer in connection with the purchase or sale of securities; however, it does not permit the receipt of compensation for an extension of credit by broker-dealers that are fiduciaries with respect to the assets involved in the transaction. The amendment proposed in this notice would permit investment advice fiduciaries to receive compensation when they extend credit to plans and IRAs to avoid a failed securities transaction. The proposed amendment would affect participants and beneficiaries of plans, IRA owners, and fiduciaries with respect to such plans and IRAs.

**DATES:** *Comments:* Written comments concerning the proposed class exemption must be received by the Department on or before July 6, 2015.

*Applicability:* The Department proposes to make this amendment applicable eight months after publication of the final amendment in the **Federal Register**.

**ADDRESSES:** All written comments concerning the proposed amendment to the class exemption should be sent to

the Office of Exemption Determinations by any of the following methods, identified by ZRIN: 1210-ZA25:

*Federal eRulemaking Portal:* <http://www.regulations.gov> at Docket ID number: EBSA-2014-0016. Follow the instructions for submitting comments.

*Email to:* [e-OED@dol.gov](mailto:e-OED@dol.gov).

*Fax to:* (202) 693-8474.

*Mail:* Office of Exemption Determinations, Employee Benefits Security Administration, (Attention: D-11687), U.S. Department of Labor, 200 Constitution Avenue NW., Suite 400, Washington, DC 20210.

*Hand Delivery/Courier:* Office of Exemption Determinations, Employee Benefits Security Administration, (Attention: D-11687), U.S. Department of Labor, 122 C St. NW., Suite 400, Washington, DC 20001.

*Instructions.* All comments must be received by the end of the comment period. The comments received will be available for public inspection in the Public Disclosure Room of the Employee Benefits Security Administration, U.S. Department of Labor, Room N-1513, 200 Constitution Avenue NW., Washington, DC 20210. Comments will also be available online at [www.regulations.gov](http://www.regulations.gov), at Docket ID number: EBSA-2014-0016 and [www.dol.gov/ebsa](http://www.dol.gov/ebsa), at no charge.

*Warning:* All comments will be made available to the public. Do not include any personally identifiable information (such as Social Security number, name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines.

**FOR FURTHER INFORMATION CONTACT:**

Susan Wilker, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, (202) 693-8824 (this is not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

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

*Public Hearing:* The Department plans to hold an administrative hearing within 30 days of the close of the comment period. The Department will ensure ample opportunity for public comment by reopening the record following the hearing and publication of the hearing transcript. Specific information regarding the date, location and submission of requests to testify will be

published in a notice in the **Federal Register**.

**Executive Summary**

*Purpose of Regulatory Action*

The Department is proposing this amendment to PTE 75-1, Part V, in connection with its proposed regulation under ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) (Proposed Regulation), published elsewhere in this issue of the **Federal Register**. The Proposed Regulation specifies when an entity is a fiduciary by reason of the provision of investment advice for a fee or other compensation regarding assets of a plan or IRA (*i.e.*, an investment advice fiduciary). If adopted, the Proposed Regulation would replace an existing regulation that was adopted in 1975. The Proposed Regulation is intended to take into account the advent of 401(k) plans and IRAs, the dramatic increase in rollovers, and other developments that have transformed the retirement plan landscape and the associated investment market over the four decades since the existing regulation was issued. In light of the extensive changes in retirement investment practices and relationships, the Proposed Regulation would update existing rules to distinguish more appropriately between the sorts of advice relationships that should be treated as fiduciary in nature and those that should not.

This notice proposes an amendment to PTE 75-1, Part V, that would allow broker-dealers that are investment advice fiduciaries to receive compensation when they extend credit to plans and IRAs to avoid failed securities transactions entered into by the plan or IRA. In the absence of an exemption, these transactions would be prohibited under ERISA and the Code. In this regard, ERISA and the Code generally prohibit fiduciaries from lending money or otherwise extending credit to plans and IRAs, and from receiving compensation in return.

ERISA section 408(a) specifically authorizes the Secretary of Labor to grant administrative exemptions from the prohibited transaction provisions.<sup>1</sup> Regulations at 29 CFR 2570.30 to 2570.52 describe the procedures for

<sup>1</sup> Code section 4975(c)(2) authorizes the Secretary of the Treasury to grant exemptions from the parallel prohibited transaction provisions of the Code. Reorganization Plan No. 4 of 1978 (5 U.S.C. app. at 214 (2000)) generally transferred the authority of the Secretary of the Treasury to issue administrative exemptions under Code section 4975 to the Secretary of Labor. This amendment to PTE 75-1, Part V, would provide relief from the indicated prohibited transaction provisions of both ERISA and the Code.

applying for an administrative exemption. Before granting an exemption, the Department must find that it is administratively feasible, in the interests of plans, their participants and beneficiaries and IRA owners, and protective of the rights of participants and beneficiaries of such plans and IRA owners. Interested parties are permitted to submit comments to the Department through July 6, 2015. The Department plans to hold an administrative hearing within 30 days of the close of the comment period.

*Summary of the Major Provisions*

The amendment to PTE 75-1, Part V, proposed in this notice would allow investment advice fiduciaries that are broker-dealers to receive compensation when they lend money or otherwise extend credit to plans or IRAs to avoid the failure of a purchase or sale of a security. The proposed exemption contains conditions that the broker-dealer lending money or otherwise extending credit must satisfy in order to take advantage of the exemption. In particular, the potential failure of the securities transaction may not be a result of the action or inaction of the fiduciary, and the terms of the extension of credit must be at least as favorable to the plan or IRA as terms the plan or IRA could obtain in an arm's length transaction with an unrelated party. Certain advance written disclosures must be made to the plan or IRA, in particular, with respect to the rate of interest or other fees charged for the loan or other extension of credit.

**Regulatory Impact Analysis**

*Executive Order 12866 and 13563 Statement*

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

the agencies will periodically review their existing significant regulations to make the agencies' regulatory programs more effective or less burdensome in achieving their regulatory objectives.

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

## Background

### *Proposed Regulation*

As explained more fully in the preamble to the Department's Proposed Regulation under ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B), also published in this issue of the **Federal Register**, ERISA is a comprehensive statute designed to protect the interests of plan participants and beneficiaries, the integrity of employee benefit plans, and the security of retirement, health, and other critical benefits. The broad public interest in ERISA-covered plans is reflected in the imposition of stringent fiduciary responsibilities on parties engaging in important plan activities, as well as in the tax-favored status of plan assets and investments. One of the chief ways in which ERISA protects employee benefit plans is by requiring that plan fiduciaries comply with fundamental obligations rooted in the law of trusts. In particular, plan fiduciaries must

manage plan assets prudently and with undivided loyalty to the plans and their participants and beneficiaries.<sup>2</sup> In addition, they must refrain from engaging in "prohibited transactions," which ERISA forbids because of the dangers posed by the fiduciaries' conflicts of interest with respect to the transactions.<sup>3</sup> When fiduciaries violate ERISA's fiduciary duties or the prohibited transaction rules, they may be held personally liable for the breach.<sup>4</sup> In addition, violations of the prohibited transaction rules are subject to excise taxes under the Code.

The Code also has rules regarding fiduciary conduct with respect to tax-favored accounts that are not generally covered by ERISA, such as IRAs. Although ERISA's general fiduciary obligations of prudence and loyalty do not govern the fiduciaries of IRAs, these fiduciaries are subject to the prohibited transaction rules. In this context, fiduciaries engaging in the prohibited transactions are subject to an excise tax enforced by the Internal Revenue Service. Unlike participants in plans covered by Title I of ERISA, IRA owners do not have a statutory right to bring suit against fiduciaries for violation of the prohibited transaction rules and fiduciaries are not personally liable to IRA owners for the losses caused by their misconduct. Nor can the Secretary of Labor bring suit to enforce the prohibited transactions rules on behalf of IRA owners.

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

The statutory definition deliberately casts a wide net in assigning fiduciary

responsibility with respect to plan and IRA assets. Thus, "any authority or control" over plan or IRA assets is sufficient to confer fiduciary status, and any persons who render "investment advice for a fee or other compensation, direct or indirect" are fiduciaries, regardless of whether they have direct control over the plan's or IRA's assets and regardless of their status as an investment adviser or broker under the federal securities laws. The statutory definition and associated fiduciary responsibilities were enacted to ensure that plans and IRAs can depend on persons who provide investment advice for a fee to provide recommendations that are untainted by conflicts of interest. In the absence of fiduciary status, the providers of investment advice would neither be subject to ERISA's fundamental fiduciary standards, nor accountable for imprudent, disloyal, or tainted advice under ERISA or the Code, no matter how egregious the misconduct or how substantial the losses. Plans, individual participants and beneficiaries, and IRA owners often are not financial experts and consequently must rely on professional advice to make critical investment decisions. The significance of financial advice has become still greater with increased reliance on participant-directed plans and IRAs for the provision of retirement benefits.

In 1975, the Department issued a regulation, at 29 CFR 2510.3-21(c)(1975) defining the circumstances under which a person is treated as providing "investment advice" to an employee benefit plan within the meaning of section 3(21)(A)(ii) of ERISA (the "1975 regulation").<sup>5</sup> The 1975 regulation narrowed the scope of the statutory definition of fiduciary investment advice by creating a five-part test that must be satisfied before a person can be treated as rendering investment advice for a fee. Under the 1975 regulation, for advice to constitute "investment advice," an adviser who does not have discretionary authority or control with respect to the purchase or sale of securities or other property of the plan must—(1) render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing or selling securities or other property (2) on a regular basis (3) pursuant to a mutual agreement, arrangement or understanding, with the plan or a plan fiduciary that (4) the advice will serve as a primary basis for investment

<sup>2</sup> ERISA section 404(a).

<sup>3</sup> ERISA section 406. ERISA also prohibits certain transactions between a plan and a "party in interest."

<sup>4</sup> ERISA section 409; *see also* ERISA section 405.

<sup>5</sup> The Department of Treasury issued a virtually identical regulation, at 26 CFR 54.4975-9(c), which interprets Code section 4975(e)(3).

decisions with respect to plan assets, and that (5) the advice will be individualized based on the particular needs of the plan. The regulation provides that an adviser is a fiduciary with respect to any particular instance of advice only if he or she meets each and every element of the five-part test with respect to the particular advice recipient or plan at issue. A 1976 Department of Labor Advisory Opinion further limited the application of the statutory definition of “investment advice” by stating that valuations of employer securities in connection with employee stock ownership plan (ESOP) purchases would not be considered fiduciary advice.<sup>6</sup>

As the marketplace for financial services has developed in the years since 1975, the five-part test may now undermine, rather than promote, the statutes’ text and purposes. The narrowness of the 1975 regulation allows professional advisers, consultants and valuation firms to play a central role in shaping plan investments, without ensuring the accountability that Congress intended for persons having such influence and responsibility when it enacted ERISA and the related Code provisions. Even when plan sponsors, participants, beneficiaries and IRA owners clearly rely on paid consultants for impartial guidance, the regulation allows consultants to avoid fiduciary status and the accompanying fiduciary obligations of care and prohibitions on disloyal and conflicted transactions. As a consequence, these advisers can steer customers to investments based on their own self-interest, give imprudent advice, and engage in transactions that would otherwise be categorically prohibited by ERISA and Code, without any liability under ERISA or the Code.

In the Department’s Proposed Regulation defining a fiduciary under ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B), the Department seeks to replace the existing regulation with one that more appropriately distinguishes between the sorts of advice relationships that should be treated as fiduciary in nature and those that should not, in light of the legal framework and financial marketplace in which plans and IRAs currently operate.<sup>7</sup> Under the Proposed Regulation, plans include IRAs.

The Proposed Regulation describes the types of advice that constitute “investment advice” with respect to plan or IRA assets for purposes of the definition of a fiduciary at ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B). The proposal provides, subject to certain carve-outs, that a person renders investment advice with respect to a plan or IRA if, among other things, the person provides, directly to a plan, a plan fiduciary, a plan participant or beneficiary, IRA or IRA owner one of the following types of advice:

(1) A recommendation as to the advisability of acquiring, holding, disposing or exchanging securities or other property, including a recommendation to take a distribution of benefits or a recommendation as to the investment of securities or other property to be rolled over or otherwise distributed from a plan or IRA;

(2) A recommendation as to the management of securities or other property, including recommendations as to the management of securities or other property to be rolled over or otherwise distributed from the plan or IRA;

(3) An appraisal, fairness opinion or similar statement, whether verbal or written, concerning the value of securities or other property, if provided in connection with a specific transaction or transactions involving the acquisition, disposition or exchange of such securities or other property by the plan or IRA; and

(4) A recommendation of a person who is also going to receive a fee or other compensation for providing any of the types of advice described in paragraphs (1) through (3), above.

In addition, to be a fiduciary, such person must either (1) represent or acknowledge that it is acting as a fiduciary within the meaning of ERISA or the Code with respect to the advice, or (2) render the advice pursuant to a written or verbal agreement, arrangement or understanding that the advice is individualized to, or that such advice is specifically directed to, the advice recipient for consideration in making investment or management decisions with respect to securities or other property of the plan or IRA.

For advisers who do not represent that they are acting as ERISA or Code fiduciaries, the Proposed Regulation provides that advice rendered in conformance with certain carve-outs will not cause the adviser to be treated as a fiduciary under ERISA or the Code.

order to give the public a full opportunity to evaluate and comment on the new proposal and updated economic analysis.

For example, under the “seller’s carve-out,” counterparties in arm’s length transactions with plans may make investment recommendations without acting as fiduciaries if certain conditions are met.<sup>8</sup> Similarly, the proposal contains a carve-out from the fiduciary status for providers of appraisals, fairness opinions, or statements of value in specified contexts (e.g., with respect to ESOP transactions). The proposal additionally carves out from fiduciary status the marketing of investment alternative platforms, certain assistance in selecting investment alternatives and other activities. Finally, the Proposed Regulation contains a carve-out from fiduciary status for the provision of investment education.

#### *Prohibited Transactions*

The Department anticipates that the Proposed Regulation will cover many broker-dealers who do not currently consider themselves to be fiduciaries under ERISA or the Code. If the Proposed Regulation is adopted, these entities will become subject to the prohibited transaction restrictions in ERISA and the Code that apply to fiduciaries. The lending of money or other extension of credit between a fiduciary and a plan or IRA, and the plan’s or IRA’s payment of compensation to the fiduciary in return may be prohibited by ERISA section 406(a)(1)(B) and Code section 4975(c)(1)(B) and (D).

As relevant to this notice, the Department understands that broker-dealers can be required, as part of their relationships with clearing houses, to complete securities transactions entered into by the broker-dealer’s customers, even if a particular customer does not perform on its obligations. If a broker-dealer is required to advance funds to settle a trade entered into by a plan or IRA, or purchase a security for delivery on behalf of a plan or IRA, the result can potentially be viewed as a loan of money or other extension of credit to the plan or IRA. Further, in the event a broker-dealer steps into a plan’s or IRA’s shoes in any particular transaction, it may charge interest or other fees to the plan or IRA. These transactions potentially violate ERISA section 406(a)(1)(B) and Code section 4975(c)(1)(B) and (D).

<sup>8</sup> Although the preamble adopts the phrase “seller’s carve-out” as a shorthand way of referring to the carve-out and its terms, the regulatory carve-out is not limited just to sellers but rather applies more broadly to counterparties in arm’s length transactions with plan investors with financial expertise.

<sup>6</sup> Advisory Opinion 76-65A (June 7, 1976).

<sup>7</sup> The Department initially proposed an amendment to its regulation under ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) on October 22, 2010, at 75 FR 65263. It subsequently announced its intention to withdraw the proposal and propose a new rule, consistent with the President’s Executive Orders 12866 and 13563, in

### Prohibited Transaction Exemptions

ERISA and the Code counterbalance the broad proscriptive effect of the prohibited transaction provisions with numerous statutory exemptions. For example, ERISA section 408(b)(14) and Code section 4975(d)(17) specifically exempt transactions resulting from the provision of fiduciary investment advice to a participant or beneficiary of an individual account plan or IRA owner, including extensions of short term credit for settlements of securities trades, where the advice, resulting transaction, and the adviser's fees meet certain conditions. The Secretary of Labor may grant administrative exemptions under ERISA and the Code on an individual or class basis if the Secretary finds that the exemption is (1) administratively feasible, (2) in the interests of plans, their participants and beneficiaries and IRA owners, and (3) protective of the rights of the participants and beneficiaries of such plans and IRA owners.

Over the years, the Department has granted several conditional class exemptions from the prohibited transactions provisions of ERISA and the Code. The Department has, for example, permitted investment advice fiduciaries to receive compensation from a plan or IRA (*i.e.*, a commission) for executing or effecting securities transactions as agent for the plan.<sup>9</sup> Elsewhere in this issue of the **Federal Register**, a new "Best Interest Contract Exemption" is proposed for the receipt of compensation by fiduciaries who provide investment advice to IRAs, plan participants, and certain small plans. Receipt by fiduciaries of compensation that varies, or compensation from third parties, as a result of advice to plans, would otherwise violate ERISA section 406(b) and Code section 4975(c). As part of the re-proposal of the regulation defining a fiduciary, the Department is proposing to condition these existing and newly-proposed exemptions on the fiduciary's commitment to adhere to certain impartial professional conduct standards; in particular, when providing investment advice that results in varying or third-party compensation, investment advice fiduciaries will be required to act in the best interest of the plans and IRAs they are advising.

The class exemptions described above do not provide relief for any extensions of credit that may be related to a plan's or IRA's investment transactions. PTE

75-1, Part V,<sup>10</sup> permits such an extension of credit to a plan or IRA by a broker-dealer in connection with the purchase or sale of securities. Specifically, the Department has acknowledged that the exemption is available for extensions of credit for: the settlement of securities transactions; short sales of securities; the writing of option contracts on securities, and purchasing of securities on margin.<sup>11</sup>

Relief under PTE 75-1, Part V, is limited in that the broker-dealer extending credit may not have or exercise any discretionary authority or control (except as a directed trustee) with respect to the investment of the plan or IRA assets involved in the transaction, *nor render investment advice within the meaning of 29 CFR 2510.3-21(c) with respect to those plan assets*, unless no interest or other consideration is received by the broker-dealer or any affiliate of the broker-dealer in connection with the extension of credit. Therefore, broker-dealers that are deemed fiduciaries under the amended regulation would not be able to receive compensation for extending credit under PTE 75-1, Part V.

As part of its development of the Proposed Regulation, the Department has considered public input indicating the need for additional prohibited transaction exemptions for investment advice fiduciaries. The Department was informed that relief was needed for broker-dealers to extend credit to plans and IRAs to avoid failed securities transactions, and to receive compensation in return. In the Department's view, the extension of credit to avoid a failed securities transaction falls within the contours of the existing relief provided by PTE 75-1, Part V, for extensions of credit "[i]n connection with the purchase or sale of securities." Accordingly, broker-dealers that are not fiduciaries may receive compensation for extending credit to avoid a failed securities transaction. The Department is proposing this amendment to extend such relief to investment advice fiduciaries.

### Description of the Proposal

This proposed amendment would add a new Section (c) to PTE 75-1, Part V, that would provide an exception to the requirement that fiduciaries not receive compensation under the exemption. Section (c) would provide that a fiduciary within the meaning of ERISA section 3(21)(A)(ii) or Code section

4975(e)(3)(B) may receive reasonable compensation for extending credit to a plan or IRA to avoid a failed purchase or sale of securities involving the plan or IRA.

In conjunction with such relief, Section (c) includes several conditions. First, the potential failure of the purchase or sale of the securities may not be the result of the action or inaction by the broker-dealer or any affiliate.<sup>12</sup> Additionally, the terms of the extension of credit must be at least as favorable to the plan or IRA as the terms available in an arm's length transaction between unaffiliated parties.

Finally, the plan or IRA must receive written disclosure of certain terms prior to the extension of credit. This disclosure does not need to be made on a transaction by transaction basis, and can be part of an account opening agreement or a master agreement. The disclosure must include the rate of interest or other fees that will be charged on such extension of credit, and the method of determining the balance upon which interest will be charged. The plan or IRA must additionally be provided with prior written disclosure of any changes to these terms.

The required disclosures are intended to be consistent with the requirements of Securities and Exchange Act Rule 10b-16,<sup>13</sup> which governs broker-dealers' disclosure of credit terms in margin transactions. The Department understands that it is the practice of many broker-dealers to provide such disclosures to all customers, regardless of whether the customer is presently opening a margin account. To the extent such disclosure is provided, the disclosure terms of the proposed exemption would be satisfied.

The proposal would define the term "IRA" as any trust, 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.<sup>14</sup> The

<sup>12</sup> Because of this limitation, the Department views it as unnecessary to condition this exemption on the fiduciary's adherence to the impartial conduct standards, including the best interest standard, that are incorporated into the newly proposed exemptions and proposed amendments to other existing exemptions.

<sup>13</sup> 17 CFR 240.10b-16.

<sup>14</sup> The Department has previously determined, after consulting with the Internal Revenue Service, that plans described in 4975(e)(1) of the Code are included within the scope of relief provided by PTE 75-1 because it was issued jointly by the Department and the Service. See PTE 2002-13, 67 FR 9483 (March 1, 2002) (preamble discussion). For simplicity and consistency with the other new proposed exemptions and proposed amendments to other existing exemptions published elsewhere in

<sup>9</sup> See PTE 86-128, Exemption for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers, 51 FR 41686 (November 18, 1986), as amended, 67 FR 64137 (October 17, 2002).

<sup>10</sup> 40 FR 50845 (October 31, 1975), as amended, 71 FR 5883 (February 3, 2006).

<sup>11</sup> See Preamble to PTE 75-1, Part V, 40 FR 50845 (Oct. 31, 1975); ERISA Advisory Opinion 86-12A (March 19, 1986).

proposed amendment also would revise the recordkeeping provisions of the exemption to require the broker-dealer engaging in the covered transaction, as opposed to the plan or IRA, to maintain the records. The proposed revision to the recordkeeping requirement would make it consistent with other existing class exemptions as well as the recordkeeping provisions of the other notices of proposed exemption published in this issue of the **Federal Register**.

#### *Applicability Date*

The Department is proposing that compliance with the final regulation defining a fiduciary under ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) will begin eight months after the publication of the final regulation in the **Federal Register** (Applicability Date). The Department proposes to make this amendment, if granted, applicable on the Applicability Date.

#### *No Relief Proposed From ERISA Section 406(a)(1)(C) or Code Section 4975(c)(1)(C) for the Provision of Services*

If the proposed amendment is granted, the exemption will not provide relief from a transaction prohibited by ERISA section 406(a)(1)(C), or from the taxes imposed by Code section 4975(a) and (b) by reason of Code section 4975(c)(1)(C), regarding the furnishing of goods, services or facilities between a plan and a party in interest or between an IRA and a disqualified person. The provision of investment advice to a plan or IRA is a service to the plan or IRA and compliance with this exemption will not relieve an investment advice fiduciary of the need to comply with ERISA section 408(b)(2), Code section 4975(d)(2), and applicable regulations thereunder.

#### *Paperwork Reduction Act Statement*

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

burden (time and financial resources) is minimized; collection instruments are clearly understood; and the Department can properly assess the impact of collection requirements on respondents.

Currently, the Department is soliciting comments concerning the proposed information collection request (ICR) included in the Proposed Amendment to Prohibited Transaction Exemption (PTE) 75-1, Part V, Exemptions from Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers and Banks, as part of its proposal to amend its 1975 rule that defines when a person who provides investment advice to an employee benefit plan or IRA becomes a fiduciary. A copy of the ICR may be obtained by contacting the PRA addressee shown below or at <http://www.RegInfo.gov>.

The Department has submitted a copy of the Proposed Amendment to PTE 75-1, Part V, to the Office of Management and Budget (OMB) in accordance with 44 U.S.C. 3507(d) for review of its information collections. The Department and OMB are particularly interested in comments that:

- Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

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

PRA Addressee: Address requests for copies of the ICR to G. Christopher Cosby, Office of Policy and Research, U.S. Department of Labor, Employee

Benefits Security Administration, 200 Constitution Avenue NW., Room N-5718, Washington, DC 20210. Telephone (202) 693-8410; Fax: (202) 219-5333. These are not toll-free numbers. ICRs submitted to OMB also are available at <http://www.RegInfo.gov>.

As discussed in detail below, Section (c)(3) of the proposed amendment requires that prior to the extension of credit, the plan must receive from the fiduciary written disclosure of (i) the rate of interest (or other fees) that will apply and (ii) the method of determining the balance upon which interest will be charged in the event that the fiduciary extends credit to avoid a failed purchase or sale of securities, as well as prior written disclosure of any changes to these terms. Section (d) requires broker-dealers engaging in the transactions to maintain records demonstrating compliance with the conditions of the PTE. These requirements are information collection requests (ICRs) subject to the Paperwork Reduction Act.

The Department believes that the disclosure requirement is consistent with the disclosure requirement mandated by the Securities and Exchange Commission (SEC) in 17 CFR 240.10b-16(1) for margin transactions. Although the SEC does not mandate any recordkeeping requirement, the Department believes that it would be a usual and customary business practice for financial institutions to maintain any records necessary to prove that required disclosures had been distributed in compliance with the SEC's rule. Therefore, the Department concludes that these ICRs produce no additional burden to the public.

#### **General Information**

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under ERISA section 408(a) and Code section 4975(c)(2) does not relieve a fiduciary or other party in interest or disqualified person with respect to a plan from certain other provisions of ERISA and the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of ERISA section 404 which require, among other things, that a fiduciary discharge his or her duties respecting the plan solely in the interests of the plan's participants and beneficiaries and in a prudent fashion in accordance with ERISA section 404(a)(1)(B);

(2) Before a class exemption amendment may be granted under

ERISA section 408(a) and Code section 4975(c)(2), the Department must find that the class exemption as amended is administratively feasible, in the interests of the plan and of its participants and beneficiaries and IRA owners, and protective of the rights of the plan's participants and beneficiaries and IRA owners;

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

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

#### Proposed Amendment

Under the authority of ERISA section 408(a) and Code section 4975(c)(2), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637, October 27, 2011),<sup>15</sup> the Department proposes to amend PTE 75–1, Part V, to read as follows:

The restrictions of section 406 of the Employee Retirement Income Security Act of 1974 (the Act) and the taxes imposed by section 4975(a) and (b) of the Internal Revenue Code of 1986 (the Code), by reason of section 4975(c)(1) of the Code, shall not apply to any extension of credit to an employee benefit plan or an individual retirement account (IRA) by a party in interest or a disqualified person with respect to the plan or IRA, provided that the following conditions are met:

(a) The party in interest or disqualified person:

(1) Is a broker or dealer registered under the Securities Exchange Act of 1934; and

(2) Does not have or exercise any discretionary authority or control (except as a directed trustee) with respect to the investment of the plan or IRA assets involved in the transaction, nor does it render investment advice (within the meaning of 29 CFR 2510.3–21) with respect to those assets, unless no interest or other consideration is received by the party in interest or disqualified person or any affiliate thereof in connection with such extension of credit.

(b) Such extension of credit:

(1) Is in connection with the purchase or sale of securities;

(2) Is lawful under the Securities Exchange Act of 1934 and any rules and regulations promulgated thereunder; and

(3) Is not a prohibited transaction within the meaning of section 503(b) of the Code.

(c) Notwithstanding section (a)(2), a fiduciary within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) may receive reasonable compensation for extending credit to a plan or IRA to avoid a failed purchase or sale of securities involving the plan or IRA if:

(1) The potential failure of the purchase or sale of the securities is not the result of action or inaction by such fiduciary or an affiliate;

(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;

(3) Prior to the extension of credit, the plan or IRA receives written disclosure of (i) the rate of interest (or other fees) that will apply and (ii) the method of determining the balance upon which interest will be charged, in the event that the fiduciary extends credit to avoid a failed purchase or sale of securities, as well as prior written disclosure of any changes to these terms. This Section (c)(3) will be considered satisfied if the plan or IRA receives the disclosure described in the Securities and Exchange Act Rule 10b–16;<sup>16</sup> and

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

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

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

(e) Notwithstanding anything to the contrary in subsections (a)(2) and (b) of section 504 of the Act, the records referred to in paragraph (d) are unconditionally available for examination during normal business hours by duly authorized employees of (1) the Department of Labor, (2) the Internal Revenue Service, (3) plan participants and beneficiaries and IRA owners, (4) any employer of plan participants and beneficiaries, and (5) any employee organization any of whose members are covered by such plan.

For purposes of this exemption, the terms “party in interest,” “disqualified person” and “fiduciary” shall include such party in interest, disqualified person, or fiduciary, and any affiliates thereof, and the term “affiliate” shall be defined in the same manner as that term is defined in 29 CFR 2510.3–21(e) and 26 CFR 54.4975–9(e). Also for the purposes of this exemption, the term “IRA” means any trust, 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.

Signed at Washington, DC, this 14th day of April, 2015.

**Phyllis C. Borzi,**

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

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#### DEPARTMENT OF LABOR

#### Employee Benefits Security Administration

#### 29 CFR Part 2550

[Application Number D–11850]

**ZRIN: 1210–ZA25**

#### **Proposed Amendment to and Proposed Partial Revocation of Prohibited Transaction Exemption (PTE) 84–24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies and Investment Company Principal Underwriters**

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

**ACTION:** Notice of Proposed Amendment to and Proposed Partial Revocation of PTE 84–24.

<sup>15</sup> For purposes of this proposed amendment, references to ERISA should be read to refer as well to the corresponding provisions of the Code.

<sup>16</sup> 17 CFR 240.10b–16.