4510-29-P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

[Application No. D-12057]

ZRIN 1210-ZA32

Amendment to Prohibited Transaction Exemption 2020-02

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

ACTION: Amendment to Class Exemption PTE 2020-02.

SUMMARY: This document contains a notice of amendment to class prohibited transaction exemption (PTE) 2020-02, which provides relief for investment advice fiduciaries to receive certain compensation that otherwise would be prohibited. The amendment affects participants and beneficiaries of employee benefit plans, individual retirement account (IRA) owners, and fiduciaries with respect to such plans and IRAs.

DATES: The amendment is effective [INSERT DATE THAT IS 150 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Susan Wilker, telephone (202) 693-8540, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The Employee Retirement Income Security Act of 1974 (ERISA) provides, in relevant part, that a person is a fiduciary with respect to a plan to the extent they render investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or have any authority or responsibility to do so. [1] Title I of ERISA (referred to herein as Title I) imposes duties and restrictions on persons who are "fiduciaries" with respect to employee benefit plans. ERISA section 404 provides that Title I plan fiduciaries must act with the "care, skill, prudence, and diligence under the circumstances then prevailing that a prudent [person] acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims," and that they also must discharge their duties with respect to a plan "solely in the interest of the participants and beneficiaries."[2]

In addition to fiduciary obligations, ERISA has prohibited transaction rules that "categorically bar[]" plan fiduciaries from engaging in transactions deemed "likely to injure the pension plan."[3] These prohibitions broadly forbid a fiduciary from "deal[ing] with the assets of the plan in his own interest or for his own account," and "receiv[ing] any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan."[4] Congress gave the Department of Labor (the Department) broad authority to grant conditional administrative exemptions from the prohibited transaction

[1] Section 3(21)(A)(ii) is codified at 29 U.S.C. 1002(3)(21)(A)(ii). The provision is in Title I of the ERISA (referred to herein as Title I), which is codified in Title 29 of the U.S. Code. This preamble refers to the codified provisions in Title I by reference to sections of ERISA, as amended, and not by their numbering in Section 29 of the U.S. Code.

[2] ERISA section 404(a).

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

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

provisions, but only if the Department finds that the exemption is (1) administratively feasible for the Department, (2) in the interests of the plan and of its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries of such plan.[5]

ERISA's Title II (also referred to herein as the Code), includes a parallel provision in section 4975(e)(3)(B), which defines a fiduciary of a tax-qualified plan, including individual retirement accounts (IRAs). Title II governs the conduct of fiduciaries to plans defined in Code section 4975(e)(1), which includes IRAs.[6] Some plans defined in Code section 4975(e)(1) are also covered by Title I of ERISA, but the definitions of such plans are not identical. Although Title II does not directly impose specific duties of prudence and loyalty on fiduciaries as Title I does in ERISA section 404(a), it prohibits fiduciaries from engaging in conflicted transactions on many of the same terms as Title I.[7] Under the Reorganization Plan No. 4 of 1978, which Congress subsequently ratified in 1984,[8] Congress generally granted the Department authority to interpret the fiduciary definition and issue administrative exemptions from the prohibited transaction provisions in Code section 4975.[9]

On December 18, 2020, the Department exercised this authority and adopted PTE 2020-02, a prohibited transaction exemption for investment advice fiduciaries with respect to employee benefit plans and IRAs. This exemption ensured that those saving for retirement could have access to high quality advice by requiring fiduciary advice providers to render advice that is

[5] ERISA section 408(a), 29 U.S.C. 1108(a).
[6] For purposes of the final rule, the term "IRA" is defined as any account or annuity described in Code section 4975(e)(1)(B) – (F), and includes individual retirement accounts, individual retirement annuities, health savings accounts, and certain other tax-advantaged trusts and plans.
[7] 26 U.S.C. 4975(c)(1); *cf. id.* at 4975(f)(5), which defines "correction" with respect to prohibited transactions as placing a plan or an IRA in a financial position not worse than it would have been in if the person had acted "under the highest fiduciary standards."
[8] Sec. 1, Pub. L. 98-532, 98 Stat. 2705 (Oct. 19, 1984).
[9] 5 U.S.C. App. 752 (2018).

in their plan and IRA customers' best interest in order to receive any compensation that would otherwise be prohibited by ERISA and the Code.

On October 31, 2023, the Department released the proposed Retirement Security Rule: Definition of an Investment Advice Fiduciary (the Proposed Rule), along with proposed amendments to administrative prohibited transaction exemptions available to investment advice fiduciaries.[10] The Department designed the Proposed Rule to ensure that the protections established by Titles I and II of ERISA would uniformly apply to all investment advice that is provided to "Retirement Investors"[11]), concerning the investment of their retirement assets, and that Retirement Investors' reasonable expectations are honored when they receive investment advice from financial professionals who hold themselves out as trusted advice providers.

At the same time the Department published the Proposed Rule, it also released the proposed amendment to PTE 2020-02 (the Proposed Amendment), proposed amendments to PTEs 75-1, 77-4, 80-83, 83-1, and 86-128 that apply to the provision of investment advice (the Mass Amendment), and proposed amendments to PTE 84-24 and invited all interested persons to submit written comments on each.[12]

The Department received written comments on the Proposed Amendment, and on December 12 and 13, 2023, it held a virtual public hearing where witnesses provided commentary on the Proposed Amendment. After carefully considering the comments it received

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

[11] As defined in Section V(l), Retirement Investor means a Plan, Plan participant or beneficiary, IRA, IRA owner or beneficiary, Plan fiduciary within the meaning of ERISA section (3)(21)(A)(i) or (iii) and Code section 4975(e)(3)(A) or (C) with respect to the Plan, or IRA fiduciary within the meaning of Code section 4975(e)(3)(A) or (C) with respect to the IRA.

[12] The Proposed Amendment was released on October 31, 2023, and was published in the *Federal Register* on November 3, 2023. 88 FR 75979.

and the testimony presented at the hearing, the Department is granting the final amendment to PTE 2020-02 that is discussed herein (the Final Amendment) on its own motion pursuant to its authority under ERISA section 408(a) and Code section 4975(c)(2) and in accordance with its exemption procedures set forth in 29 CFR part 2570, Subpart B (76 FR 66637 (October 27, 2011)).[13]

Elsewhere in this edition of the *Federal Register*, the Department is finalizing (1) the Proposed Rule defining when a person renders "investment advice for a fee or other compensation, direct or indirect" with respect to any moneys or other property of an employee benefit plan for purposes of the definition of a "fiduciary" in ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) (the "Regulation"), (2) the Mass Amendment, and (3) the amendment to PTE 84-24.

Comments and Description of the Amendment to PTE 2020-02.

As discussed below, the Department is broadening PTE 2020-02 to cover more transactions and revising some of the exemption's conditions to emphasize the core standards underlying the exemption. Consistent with the Proposed Amendment and PTE 2020-02 as it was originally granted in December 2020, this Final Amendment ensures that trusted advisers adhere to fundamental standards of fiduciary conduct when they receive compensation that otherwise is prohibited by ERISA and the Code as a result of recommending investment products and services to Retirement Investors.[14]

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[13] Reorganization Plan No. 4 of 1978 (5 U.S.C. App. 1 (2018)) generally transferred the authority of the Secretary of the Treasury to grant administrative exemptions under Code section 4975 to the Secretary of Labor. Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications were amended effective April 8, 2024 (29 CFR part 2570, Subpart B (89 FR 4662 (January 24, 2024)).

[14] When using the term "adviser," the Department does not refer only to investment advisers registered under the Investment Advisers Act of 1940 or under state law, but rather to any person rendering fiduciary investment advice

Under these core standards, Financial Institutions[15] and the "Investment Professionals"[16] who work for them must:

- acknowledge their fiduciary status[17] in writing to the Retirement Investor;
- disclose their services and material conflicts of interest to the Retirement Investor;
- adhere to Impartial Conduct Standards requiring them to:
    - investigate and evaluate investments, provide advice, and exercise sound judgment in the same way that knowledgeable and impartial professionals would in similar circumstances (the Care Obligation);
    - never place their own interests ahead of the Retirement Investor's interest, or subordinate the Retirement Investor's interests to their own (the Loyalty Obligation);
    - charge no more than reasonable compensation and, if applicable, comply with Federal securities laws regarding "best execution"; and
    - avoid making misleading statements about investment transactions and other relevant matters;

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under the Regulation. For example, as used herein, an adviser can be an individual who is, among other things, a representative of a registered investment adviser, a bank or similar financial institution, an insurance company, or a broker-dealer.

[15]As defined in Section V(d) and including registered investment advisers, banks or similar institutions, insurance companies, broker-dealers and non-bank trustees.

[16] As defined in Section V(g)).

[17] For purposes of this disclosure, and throughout the exemption, the term "fiduciary status" is limited to fiduciary status under Title I of ERISA, the Code, or both. While this exemption uses some of the same terms that are used in the SEC's Regulation Best Interest and/or in the Investment Advisers Act and related interpretive materials issued by the SEC or its staff, the Department retains interpretive authority with respect to satisfaction of this exemption.

- adopt firm-level policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards and mitigate conflicts of interest that could otherwise cause violations of those standards;
- document and disclose the specific reasons for any rollover recommendations; and
- conduct an annual retrospective compliance review.

This Final Amendment builds on the existing conditions and:

- expands the exemption's scope to include recommendations of any investment product, regardless of whether the product is sold on a principal or agency basis;
- adds non-bank Health Savings Account (HSA) trustees and custodians to the definition of Financial Institution with respect to HSAs;
- revises the disclosure requirements in the Final Amendment to more closely track other regulators' disclosure requirements with respect to the provision of investment advice;
- limits 10-year disqualification to serious misconduct that has been determined in a court proceeding;
- provides new streamlined exemption provisions for Financial Institutions that give fiduciary advice in connection with a Request for Proposal (RFP) to provide investment management services as an ERISA section 3(38) investment manager; and
- makes certain other minor revisions to, and clarifications of, existing provisions of the exemption.

In addition, although the Department proposed to expand the recordkeeping requirement in the exemption, the Final Amendment maintains the recordkeeping provisions already in PTE 2020-02 without change.

The Final Amendment, which is described in more detail below, is part of the Department's broader package of changes to the definition of fiduciary advice and associated exemptions published elsewhere in today's *Federal Register*. The Department has worked to ensure that each separate regulatory action being finalized today, while capable of operating independently, works together within ERISA's existing framework. Together, these changes reduce the gap in protections that previously existed with respect to ERISA-covered investments and level the playing field for all investment advice fiduciaries. Still, the amended Regulation and each of the PTEs operate independently and should continue to do so if any component of the rulemaking is invalidated.

The Department notes the views of some commenters that it should have delayed making changes so that Financial Institutions, Investment Professionals, and the Department could have gained more experience with PTE 2020-02, as currently written, or that it should even have foregone making any changes at all in light of new standards of care imposed on broker-dealers by the Securities and Exchange Commission (SEC), and on insurance companies and insurance agents by State insurance regulators. In making changes to PTE 2020-02, however, the Department has paid close attention to the work of other regulators, and sought to build upon and complement, rather than disrupt, their compliance structures. For example, the Department has designed the Final Amendment in manner that should place Financial Institutions that have already built robust compliance structures in compliance with the SEC's Regulation Best Interest: the Broker-Dealer Standard of Conduct (Regulation Best Interest)[18] in a strong position to comply with the closely aligned revised conditions of PTE 2020-02.

[18] 17 CFR § 240.15l–1.

The Final Amendment also reflects the Department's ongoing review of issues of fact, law, and policy related to PTE 2020-02, and more generally, its regulation of fiduciary investment advice.[19] Moreover, the changes described herein reflect the Department's experience facilitating compliance with PTE 2020-02, consideration of the input it received from meetings with stakeholders since the exemption originally was finalized in 2020, and the comments received, and testimony provided, at the virtual hearing in response to the Proposed Amendment and the proposed regulation.

As discussed in greater detail below, the Department has concluded that, as amended, the exemption is flexible, workable, and provides a sound and uniform framework for Financial Institutions and Investment Professionals to provide high quality investment advice to Retirement Investors. The amended exemption also is broadly available to be relied on by Financial Institutions and Investment Professionals, without regard to their business model, fee structure, or type of product recommended, subject to their compliance with fundamental standards that protect Retirement Investors. To the extent that Financial Institutions and Investment Professionals honor terms of the amended exemption, Retirement Investors will benefit from the application of a common standard to all fiduciary investment advice

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[19] See Emp. Benefits Sec. Admin. (EBSA), U.S. Dep't of Lab., New Fiduciary Advice Exemption: PTE 2020-02 Improving Investment Advice for Workers & Retirees Frequently Asked Questions (Apr. 2021), ("2021 FAQs"), *available at* https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/faqs/new-fiduciary-advice-exemption.pdf. "Q5. Will the Department take more actions relating to the regulation of fiduciary investment advice?: The Department is reviewing issues of fact, law, and policy related to PTE 2020-02, and more generally, its regulation of fiduciary investment advice. The Department anticipates taking further regulatory and sub-regulatory actions, as appropriate, including amending the investment advice fiduciary regulation, amending PTE 2020-02, and amending or revoking some of the other existing class exemptions available to investment advice fiduciaries. Regulatory actions will be preceded by notice and an opportunity for public comment. Additionally, although future actions are under consideration to improve the exemption, the Department believes that core components of PTE 2020-02, including the Impartial Conduct Standards and the requirement for strong policies and procedures, are fundamental investor protections which should not be delayed while the Department considers additional protections or clarifications."

recommendations to Retirement Investors that ensures they will receive prudent and loyal investment recommendations from Financial Institutions and Investment Professionals competing on a level playing field that is protective of Retirement Investors' interests.

Applicability Date

The Final Amendment is applicable to transactions pursuant to investment advice provided on or after [INSERT DATE THAT IS 150 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER] (the "Applicability Date"). For transactions engaged in pursuant to investment advice recommendations that were provided before the Final Amendment's Applicability Date, the prior version of PTE 2020-02 will remain available for all parties that are currently relying on the exemption.[20]

Several commenters stated that the Proposed Amendment's Applicability Date (60-days after publication in the *Federal Register*) did not provide sufficient time for Financial Institutions and Investment Professionals to fully comply with the amended conditions. In response to these comments, the Department is adding a new Section VI, which provides a phase-in period for the one-year period beginning [INSERT DATE THAT IS 150 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]. Thus, Financial Institutions and Investment Professionals may receive reasonable compensation under Section I of the amended exemption during this phase-in period if they comply with the Impartial Conduct Standards in Section II(a) and the fiduciary acknowledgment requirement under Section II(b)(1). This one-year phase-in period is the same as the one-year compliance period the Department provided when it originally granted PTE 2020-02.

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[20] To the extent a party receives ongoing compensation for a recommendation that was made before the Applicability Date, including through a systematic purchase payment or trailing commission, the amended PTE 2020-02 would not apply unless and until new investment advice is provided.

The Department confirms that if a transaction occurred before the Applicability Date or pursuant to a systematic purchase program established before the Applicability Date, the restrictions of ERISA section 406(a)(1)(A), 406(a)(1)(D), and 406(b) and the sanctions imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(A), (D), (E) and (F), will not apply to: (1) the receipt, directly or indirectly, of reasonable compensation by a Financial Institution, Investment Professional, or any Affiliate and Related Entity, as such terms are defined in Section V, in connection with investment advice; or (2) the purchase or sale of an asset in a principal transaction, and the receipt of a mark-up, mark-down, or other payment, in either case as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) and regulations thereunder. Also, no party would be required to comply with the amended conditions for a transaction that occurred before the Applicability Date.

Expanded Exemption Scope

The Department is expanding the scope of PTE 2020–02 in the Final Amendment to make it more broadly available, as requested by industry commenters. As amended, the exemption is available for Financial Institutions and Investment Professionals to receive reasonable compensation for recommending a broad range of investment products to Retirement Investors, including insurance and annuity products. Both the existing exemption and the Proposed Amendment provided narrower relief. Specifically, Section I(b) of the Proposed Amendment stated:

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

(1) The receipt of reasonable compensation; and

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

Some commenters expressed concern that the scope of covered transactions in the Proposed Amendment was unduly limited. As support, some commenters pointed to the Department's proposed simultaneous repeal of other exemptions covering investment advice and expressed concern that they would need to rely on PTE 2020-02 or PTE 84-24 for any compensation for providing investment advice. One commenter noted that some investment advice fiduciaries that formerly could rely on the same exemption (*e.g.*, PTE 77-4) for both advice and for other transactions, such as asset management, would now have to rely on multiple exemptions. Another commenter suggested that PTE 2020-02 was not a good substitute for PTE 77-4 because it was more burdensome.

However, as the Department discussed in the preamble to the proposed Mass Amendment,[21] the Department is seeking to provide a single standard of care that would apply universally to all fiduciary investment advice, regardless of the specific type of product or advice provider. This uniform regulatory structure for investment advice will provide greater protection for Retirement Investors and create a level playing field among investment advice providers by ensuring that advice transactions are subject to a common set of standards that are specifically designed to protect Retirement Investors from the inherent dangers posed by conflicts of interest and to ensure prudent advice. These common standards, which are included in both this exemption and the amended PTE 84-24, importantly include the Impartial Conduct Standards,

[21] 88 FR 76032.

the policies and procedures requirement, and the obligation to conduct annual retrospective reviews, each of which is further described below. In the Department's judgment, the advice transactions that were formerly covered by PTE 77-4 and the other exemptions affected by the Mass Amendment are just as deserving of these core protections as other advice transactions, and the need for protection is just as great.

Several commenters emphasized the need for a universal standard covering investment advice provided to Retirement Investors. These commenters described Retirement Investors who reasonably expect their relationship with an investment advice provider to be one in which they can – and should – place trust and confidence in the advice provider's recommendations. In light of the asymmetry of information and knowledge between a Retirement Investor and an advice provider, commenters noted that the Retirement Investor is at increased risk that the advice provider will prioritize its own compensation at the expense of the Retirement Investor's savings.

To ensure that there is a common standard that Retirement Investors can rely on for all products and for all tax-advantaged retirement accounts, the Department is broadening this exemption to make it available for recommendations of all types of products by all fiduciary investment advice providers as defined in ERISA, the Code, and the final Regulation that the Department is issuing today.

Transactions With Parties In Interest

In this Final Amendment, the Department is expanding the scope of the PTE 2020-02 to permit Financial Institutions, Investment Professionals, and their Affiliates and Related Entities, to receive reasonable compensation (including commissions, fees, mark ups, mark downs, and other payments) that would otherwise be prohibited under ERISA and the Code as a result of providing investment advice within the meaning of ERISA section 3(21)(A)(ii), Code section

4975(e)(3)(B), and the final Regulation to Retirement Investors, including as part of a rollover from an employee benefit plan to an IRA. This is a change from the Proposed Amendment, and from the exemption that was finalized in 2020, which granted limited relief for "covered principal transactions" and "riskless principal transactions," as those terms were defined in the Proposed Amendment. The Final Amendment provides exemptive relief for all transactions—regardless of whether they are executed on a principal or agent basis. This expansion in the scope of the exemption responds to many commenters' concerns that the Proposed Amendment unduly narrowed the availability of the exemption, including the concerns of those who argued that the language in Section I of the exemption did not sufficiently clarify whether recommendations involving insurance and annuity products were covered transactions.

This expansion in scope also responds to many industry commenters who expressed particular concern that the Proposed Amendment of PTE 2020-02 and the proposed Mass Amendment would leave certain principal transactions that previously were covered by a class exemption without exemptive relief. Many of these commenters urged the Department to expand the scope of covered principal transactions in PTE 2020-02, including to provide relief for closed-end funds that are traded on a principal basis upon their inception. Some commenters asserted more generally that the Department was inappropriately substituting its own judgment for that of Retirement Investors and their fiduciary investment advice providers and effectively preventing Retirement Investors from purchasing a wide range of securities that are recommended.

However, other commenters disagreed. Some commenters urged the Department to further narrow the scope of Covered Principal Transactions. For example, one commenter encouraged the Department to add the limitation "for cash" to the definition of Covered Principal

Transaction, which would prevent in-kind transactions from being treated as covered principal transactions. This commenter asserted that such a change would reduce the complexity and the conflicts of interest that otherwise would be associated with such transactions. Other commenters generally supported the Department's Proposed Amendment with its limited coverage for principal transactions.

Although the Department is expanding the scope of the exemption, the Department continues to be concerned about the heightened conflicts of interest inherent in principal transactions. Principal transactions involve the purchase from, or sale to, a Plan or an IRA of an investment on behalf of the Financial Institution's own account or the account of a person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with the Financial Institution. Because an investment advice fiduciary engaging in a principal transaction is involved with both sides of the transaction, a Financial Institution or Investment Professional providing fiduciary investment advice in a principal transaction has a clear and direct conflict of interest.

In addition, the securities that are typically traded in principal transactions often lack pre-trade price transparency and can be illiquid. As a result, Retirement Investors may find it especially challenging to evaluate the reasonableness of recommended principal transactions. Because of these challenges, there is a danger that Financial Institutions and Investment Professionals will favor their own interests by selling unwanted investments from their inventory to unwitting investors, overcharge investors, or otherwise take advantage of investors and put their interests ahead of the investors' interests. Historically, the Department has provided relief for principal transactions that is limited in scope and subject to additional protective conditions because of these concerns.

After careful consideration of the comments, the Department is expanding the types of transactions that are covered by the exemption to ensure that Financial Institutions and Investment Professionals can recommend a wide variety of investment products to Retirement Investors. To the extent Financial Institutions and Investment Professionals comply with the stringent standards of care imposed by the Final Amendment and take seriously the exemption's requirements relating to policies and procedures, conflict mitigation, and retrospective review, the Department finds that the Final Amendment is both protective and flexible enough to accommodate a wide range of products, including relatively complex and risky investments. However, the Department cautions that, in order to comply with the exemptions' policies and procedures requirements, Financial Institutions selling products on a principal basis must carefully address how they will mitigate the inherent conflicts of interest associated with recommending these products to Retirement Investors.

More generally, Financial Institutions and Investment Professionals must take special care to protect the interests of Retirement Investors and to avoid favoring their own financial interests at the expense of Retirement Investors' interests. The greater the dangers posed by conflicts of interest, complexity, or risk, the greater the care Investment Professionals and Financial Institutions must take to ensure that their investment recommendations are prudent, loyal, and unaffected by either the Financial Institutions' or the Investment Professionals' conflicts of interest.

Financial Institutions and Investment Professionals

The amended exemption is broadly available for Financial Institutions and Investment Professionals, and their Affiliates and Related Entities, including (but not limited to) independent marketing organizations (IMOs), field marketing organization (FMOs), brokerage general agencies (BGAs) and others providing administrative support.

In this Final Amendment, the Department has made some ministerial changes to the existing definitions of Investment Professionals, Affiliates and Related Entities for clarity. In particular, the Department has clarified that the definition of "Related Entity" includes two components: (i) a party that has an interest in an Investment Professional or Financial Institution; and (ii) a party in which an Investment Professional or Financial Institution has an interest, in either case when that interest may affect the fiduciary's best judgment as a fiduciary. The Department has also made ministerial changes, such as changing "described" to "defined" in referencing ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B). Some commenters also suggested other changes in nomenclature, but the Department has concluded that the terms, as defined in the Final Amendment, are appropriately clear and consistent.

The Final Amendment also broadens the definition of the term Financial Institution to include non-bank trustees or custodians that are approved to serve in these capacities under Treasury Regulation 26 CFR §1.408-2(e) (as amended), but only to the extent they are serving as non-bank trustees or custodians with respect to HSAs. Several commenters requested the Department to expand the definition of Financial Institution under the exemption to include these non-bank trustees or custodians. As explained by some commenters, IRS-approved non-bank trustees and custodians are permitted to administer HSAs and are subject to numerous requirements under regulations and guidance issued by the Department of the Treasury.[22] Some

[22] According to the commenter, in order for a non-bank trustee or custodian to receive this certification, the entity must submit a written application to the Commissioner of the IRS demonstrating, generally, its ability to act within the accepted rules of fiduciary conduct, its capacity to account for large numbers of accountholders, its fitness to handle funds normally associated with the handling of retirement funds, sufficient net worth, and that its procedures

commenters stated that these non-bank trustees service a meaningful portion of the HSA market, and argued that without eligibility to use PTE 2020-02, they may be forced to exit the market. According to these commenters, with reduced competition and fewer choices, costs to HSA plan sponsors and participants could increase. One commenter further stated that the failure to include IRS-approved non-bank HSA trustees and custodians in the definition would be inconsistent with the intent of Congress to regulate such entities similarly to other Financial Institutions under ERISA and the Code.

After consideration of these comments, which were limited to concerns regarding HSAs, the Department is expanding the definition of Financial Institution in the Final Amendment to include non-bank trustees and non-bank custodians that are approved under Treasury Regulation 26 CFR 1.408-2(e) (as amended), but only to the extent they are serving in these capacities with respect to HSAs. The Department agrees with commenters that the initial and continuing requirements to remain certified by the Department of the Treasury as a non-bank trustee or custodian provide sufficient regulatory oversight of these entities to include them within the scope of this exemption as applied to HSAs. As amended, these non-bank trustees and custodians will be permitted to serve as Financial Institutions under Section V(d)(5). To implement this change, the Department is redesignating former Section V(e)(5) to (d)(6), which covers other entities that may become Financial Institutions under future individual exemptions.

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adhere to established rules of fiduciary conduct (including that all employees taking part in the performance of the entity's fiduciary duties are required to be bonded in an amount of at least $250,000). The entity is also required to undergo an annual audit of its books and records by a qualified public accountant to determine, among other things, whether the HSA accounts have been administered in accordance with applicable law. *See* Treasury Regulation 26 CFR 1.408-2(e) (as amended).

Retirement Investors

The Department is revising the definition of Retirement Investor in Section V(l) to be consistent with the definition in the final Regulation defining fiduciary investment advice. As revised, both the final Regulation and this Final Amendment define Retirement Investor to mean a Plan, Plan participant or beneficiary, IRA, IRA owner or beneficiary, Plan fiduciary within the meaning of ERISA section (3)(21)(A)(i) or (iii) and Code section 4975(e)(3)(A) or (C) with respect to the Plan, or IRA fiduciary within the meaning of Code section 4975(e)(3)(A) or (C) with respect to the IRA. The preamble to the final Regulation includes additional discussion of the term "Retirement Investor," which the Department is defining similarly in the Final Amendment to ensure its broad availability to investment advice fiduciaries.

These revisions should alleviate some commenters' concerns that advice providers may provide advisory tools and assistance to fiduciaries who, in turn, render investment advice to Retirement Investors. As revised, neither the final Regulation nor this Final Amendment treats investment advice fiduciaries under section 3(21)(A)(ii) of ERISA or Code section 4975(e)(3)(B) as Retirement Investors.

Exclusions

The Department is also finalizing its amendment to Section I(c) of the exemption, which limits the availability of PTE 2020-02 in certain circumstances. Specifically, section I(c)(1) excludes from the exemption relief provided to Title I Plans if the Investment Professional, Financial Institution, or any Affiliate providing the investment advice is: (A) the employer whose employees are covered by the Plan; or (B) the Plan's named fiduciary or administrator. However, a named fiduciary or administrator or their Affiliate (including a Pooled Plan Provider (PPP) registered with the Department of Labor under 29 CFR 2510.3-44) may rely on the exemption if it is selected to provide investment advice by a fiduciary who is Independent[23] of the Financial Institution, Investment Professional, and their Affiliates. The Department received several comments opposed to this exclusion, arguing that Financial Institutions should be able to charge fees for advice to their own employees under the conditions of the exemption. The Department, however, is not modifying this provision, because its position continues to be that employers generally should not use their employees' retirement benefits as a potential source of revenue or profit, without additional safeguards. Employers can always render advice and receive reimbursement for their direct expenses incurred in transactions involving their employees without the need for the exemptive relief provided in this exemption.[24]

The Department also has determined that it is inappropriate for PTE 2020-02 to be used by a Financial Institution or Investment Professional (or an affiliate thereof) that is the named fiduciary or plan administrator of a Title I Plan to receive additional compensation for providing investment advice to Retirement Investors who are participants in the Financial Institution's own Plan unless the Financial Institution or Investment Professional is selected to serve as an investment advice provider by a fiduciary that is Independent of them. Named fiduciaries and plan administrators have significant authority over plan operations and accordingly, it is imperative for the Financial Institution or Investment Professional to be selected by an

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[23] As defined in Section V(e), For purposes of subsection I(c)(1), a fiduciary is "**Independent**" of the Financial Institution and Investment Professional if:
(1) the fiduciary is not the Financial Institution, Investment Professional, or an Affiliate;
(2) the fiduciary does not have a relationship to or an interest in the Financial Institution, Investment Professional, or any Affiliate that might affect the exercise of the fiduciary's best judgment in connection with transactions covered by this exemption; and
(3) the fiduciary does not receive and is not projected to receive within its current Federal income tax year, compensation or other consideration for its own account from the Financial Institution, Investment Professional, or an Affiliate, in excess of two (2) percent of the fiduciary's annual revenues based upon its prior income tax year.
[24] A few existing prohibited transaction exemptions apply to employers. *See, e.g.,* ERISA section 408(b)(5) (statutory exemption that provides relief for the purchase of life insurance, health insurance, or annuities, from an employer with respect to a Plan or a wholly owned subsidiary of the employer).

Independent fiduciary who will monitor and hold them accountable for their performance as a provider of investment advice services to Retirement Investors covered by the Financial Institution's own Plan.

Pooled Employer Plans and Pooled Plan Providers

The Proposed Amendment would have been available for advice to Pooled Employer Plans (PEPs). Amended Section I(c) of the exemption would have permitted Pooled Plan Providers (PPPs), as defined in Section V(j), and their Affiliates to rely upon the exemption to provide investment advice if they are Financial Institutions within the meaning of the exemption, notwithstanding their status as named fiduciaries or plan administrators. The preamble to the Proposed Amendment stated that a PPP can provide investment advice to a PEP within the framework of the exemption and would allow PEPs to receive investment advice in the same manner as other ERISA plans.[25] While the Proposed Amendment would have created a separate category for PPPs, the Final Amendment clarifies that PPPs can rely on PTE 2020-02 when the PPP is selected by an Independent fiduciary. The change ensures that PPPs are treated in the same manner as any other Financial Institution.[26]

Commenters were generally supportive of the proposed approach, but some expressed concern about fiduciary and prohibited transaction issues related to a PPP's decision to hire affiliated parties or employer decisions to participate in a PEP. These issues are outside the scope of this exemption, because they are dependent on the particular facts and circumstances of a specific case. Accordingly, such issues would be better addressed outside the context of the relief

[25] 88 FR at 75982

[26] Under ERISA section 3(43)(B)(iii) employers retain fiduciary responsibility for the selection and monitoring of the PPP and any other named fiduciary of the plan, and an employer would be able to make this independent selection.

provide in this Final Amendment, which is focused on the receipt of reasonable compensation as a result of providing investment advice.

Robo-Advice

PTE 2020-02 initially excluded investment advice generated solely by an interactive website in which computer software-based models or applications provide investment advice based on investor-supplied personal information without any personal interaction with or advice from an Investment Professional (robo-advice). The Proposed Amendment included robo-advice within the scope of PTE 2020-02. While a few commenters expressed concern that the Department was favoring robo-advice, most commenters supported the Department's proposed inclusion. The commenters asserted that the inclusion would simplify compliance for Financial Institutions and Investment Professionals and expand access to investment advice at a lower cost for Retirement Investors. One commenter argued that by allowing some robo-advice, the Department was making the exemption available for certain instances of discretionary investment management, as long as it was not provided by a human. However, the Department confirms that the exclusion in Section I(c)(2) limits the exemption to fiduciary investment advice.

After considering these comments, the Department is finalizing this amendment as proposed to expand the scope of the exemption by removing Section I(c)(2), which excluded robo-advice from the exemption. As discussed in the preamble to the Proposed Amendment, the Department understands that Financial Institutions may use a combination of computer models and individual Investment Professionals to provide investment advice and implement a single set of policies and procedures that governs all investment recommendations. Like any other investment advice arrangement, Financial Institutions relying on computer models must satisfy the exemption's Impartial Conduct Standards and other protective conditions in order to receive exemptive relief. As stated above, the amended exemption is sufficiently protective and flexible to accommodate a wide range of investment advice arrangements, including robo-advice.

Therefore, after reviewing the comments, the Department has not been presented with any evidence that would lead it to conclude that robo-advice arrangements cannot comply with the same conditions that are applicable to other investment advice arrangements. Additionally, the failure to include such arrangements in the amended exemption could reduce access to an important and cost-effective means of delivering investment advice to many participants and beneficiaries. The Department does not agree with the suggestion of a few commenters that the inclusion of robo-advice in the exemption would give such arrangements an unfair competitive advantage, inasmuch as they are subject to the same conditions as other advisory arrangements under the terms of the exemption.

Investment Discretion

The Proposed Amendment would have redesignated Section I(c)(3) of PTE 2020-02 as Section I(c)(2) to exclude from the exemption investment advice that is provided to a Retirement Investor by a Financial Institution or Investment Professional when such Financial Institution or Investment Professional is serving in a fiduciary capacity other than as an investment advice fiduciary within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) (and the regulations issued thereunder). The Department is finalizing this provision as proposed. As discussed in the preamble to the Proposed Amendment, the Department does not intend to change the substance of this exclusion and is clarifying that Financial Institutions and Investment Professionals cannot rely on the exemption when they act in a fiduciary capacity other than as an investment advice fiduciary. The Department notes that other exemptions exist for other types of transactions, such as discretionary asset management.

Impartial Conduct Standards

Care Obligation and Loyalty Obligation

The Department is retaining the substance of the exemption's requirement for Financial Institutions and Investment Professionals to act in the Retirement Investor's "Best Interest" and finalizing proposed clarifications. However, the Department is replacing the term "Best Interest" in the Final Amendment with its two separate components: the Care Obligation and the Loyalty Obligation. The Final Amendment specifically refers to each obligation separately, although they are unchanged in substance from the previous version of PTE 2020-02 and the Proposed Amendment. Both the Care Obligation and the Loyalty Obligation must be satisfied when investment advice is provided. As defined in amended Section V(b), to meet the Care Obligation, advice must reflect the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor. As defined in amended Section V(h), to meet the Loyalty Obligation, the Financial Institution and Investment Professional must not place the financial or other interests of the Investment Professional, Financial Institution or any Affiliate, Related Entity, or other party ahead of the interests of the Retirement Investor or subordinate the Retirement Investor's interests to those of the Investment Professional, Financial Institution or any Affiliate, Related Entity.

The Department is changing its nomenclature for these two obligations in response to comments that the phrase "best interest" was used in many contexts throughout this rulemaking and by various regulators with possibly different shades of meaning. For example, in paragraph (c)(1)(i) of the final Regulation, fiduciary status is based, in part, on whether a recommendation is made under circumstances that would indicate to a reasonable investor in like circumstances that the recommendation "may be relied upon by the retirement investor as intended to advance the retirement investor's best interest." In the context of the final Regulation, however, "best interest" is not meant to refer to the specific requirements of the "Best Interest" standard used in PTE 2020-02, which incorporated ERISA's standards of prudence and loyalty, but rather to refer more colloquially to circumstances in which a reasonable investor would believe the advice provider is looking out for them and working to promote their interests. As discussed in the preamble to the proposed Amendment, the Department is also adding an example from the prior PTE 2020-02 preamble to the operative text of Section II(a)(1) specifying that it is impermissible for the Investment Professional to recommend a product that is worse for the Retirement Investor because it is better for the Investment Professional's or the Financial Institution's bottom line.

Similarly, in recommending whether a Retirement Investor should pursue a particular investment strategy through a brokerage or advisory account, the Investment Professional must base the recommendation on the Retirement Investor's financial interests, rather than any competing financial interests of the Investment Professional. For example, in order for an Investment Professional to recommend that a Retirement Investor enter into an arrangement requiring the Retirement Investor to pay an ongoing advisory fee to the Investment Professional, the Professional must prudently conclude that the Retirement Investor's interests would be better served by this arrangement than the payment of a one-time commission to buy and hold a long-term investment. In making recommendations as to account type, it is important for the Investment Professional to ensure that the recommendation carefully considers the reasonably expected total costs over time to the Retirement Investor, and that the Investment Professional base its recommendations on the financial interests of the Retirement Investor and avoid subordinating those interests to the Investment Professional's competing financial interests.

It bears emphasis, that this standard should not be read as somehow foreclosing the Investment Professional and Financial Institution from being paid on a transactional basis or ongoing basis, nor does it foreclose investment advice on proprietary products or investments that generate third-party payments,[27] or advice based on investment menus that are limited to such products, in part or whole. Financial Institutions and Investment Professionals are entitled to receive reasonable compensation that is fairly disclosed for their work. As further described below, Financial Institutions that offer a restricted menu of proprietary products or products that generate third-party payments must ensure their policies and procedures satisfy the conditions of Section II(c).

The Department received many comments on the Impartial Conduct Standards. Several commenters supported the principles-based approach, which they asserted provide fundamental investor protections that are necessary to ensure the advice is in the interest of the Retirement Investors. Some commenters noted how many investment advice professionals already hold themselves to similar professional standards of conduct. One commenter, in particular, stated that these high standards have not resulted in less access to advice.

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[27] The Department considers "third-party payments" to include such payments as sales charges when not paid directly to the Financial Institution, Investment Professional, or an Affiliate or Related Entity by a Retirement Investor; gross dealer concessions; revenue sharing payments; 12b-1 fees; distribution, solicitation or referral fees; volume-based fees; fees for seminars and educational programs; and any other compensation, consideration, or financial benefit provided to the Financial Institution, Investment Professional or an Affiliate or Related Entity by a third party as a result of a transaction covered by this exemption involving a Retirement Investor.

Other commenters objected to the Impartial Conduct Standards. Some commenters argued that the Department does not have authority to include these conditions in a prohibited transaction exemption. According to these commenters, because the Care Obligation and Loyalty Obligation are based on ERISA's prudence and loyalty requirements in Title I, the Department cannot require these standards to apply when advice is provided to an IRA or other Title II Plan. Some commenters suggested the Department instead rely on the standards finalized by the SEC or the National Association of Insurance Commissioners (NAIC). One commenter stated that the Department is deliberately extending ERISA Title I statutory duties of prudence and loyalty to brokers and insurance representatives who sell to IRA plans, although Title II has no such requirements.

The Department disagrees with these commenters. ERISA section 408(a) and Code section 4975(c)(2) expressly permit the Department (through the Reorganization Plan No. 4 of 1978) to grant "a conditional or unconditional exemption" as long as the exemption is "(A) administratively feasible, (B) in the interests of the plan and of its participants and beneficiaries, and (C) protective of the rights of participants and beneficiaries of the plan."[28] Nothing in these provisions forbids the Department from drawing on the same common law standards of prudence and loyalty that have been used in analogous contexts for hundreds of years, requires the Department to limit conditions to novel provisions that Congress did not include anywhere else in ERISA's text, or expresses a preference for including standards taken from other State or Federal regulatory structures while disregarding those set forth in ERISA. These standards are an essential part of ensuring the advice is in the interest of and protective of Retirement Investors

[28] ERISA section 408(a), Code section 4975(c)(2).

and are also administratively feasible and have been central to PTE 2020-02 since it was originally granted. In finalizing the Impartial Conduct Standards in 2020, the Department explained that this condition "merely recognizes that fiduciaries of IRAs, if they seek to use this exemption for relief from prohibited transactions, should adhere to a best interest standard consistent with their fiduciary status and a special relationship of trust and confidence."[29] Additionally, while Title I imposes a duty of care and a duty of loyalty on fiduciaries in all situations, the concept of care and loyalty are not unique to Title I or even to ERISA but are rather foundational principles of trust and agency law. The SEC imposes duties of care and loyalty on investment advisers and broker-dealers. The 2020 NAIC Suitability In Annuity Transactions Model Regulation 275 (the "NAIC Model Regulation") also relies on underlying principles of care and loyalty. These core requirements are not singularly reserved for Title I of ERISA and the Department disagrees that it is inappropriate to apply these requirements to investment advice fiduciaries to Title II plans who want to engage in otherwise statutorily prohibited transactions.

The Department received several comments on how this standard applies to insurance sales. A few commenters argued that the proposed revisions to PTE 2020-02 should take a different approach to recognize the unique aspects of its application to the insurance industry. Commenters pointed out differences between the NAIC Model Regulation standard and the exemption's Impartial Conduct Standards. One commenter accused the Department of "entrapping insurance agents" by holding them to the fiduciary standard based on their actions. However, a different commenter specifically supported the Department's proposal, stating that

[29] 85 FR 82822

NAIC Model Regulation does not require producers to act in the "best interest of their customers," and called out the need for a clear uniform standard.

A few commenters specifically raised questions about the continued applicability of Question 18 from the 2021 FAQs.[30] Question 18 asked, "[h]ow can insurance industry financial institutions comply with the exemption?" In response, the Department confirmed that PTE 2020-02 is available for insurance products, particularly for independent producers that work with multiple insurance companies. The Department confirms that the Department's reasoning in the response to FAQ 18 remains true for PTE 2020-02 as amended by the Final Amendment.

The Department is aware that insurance companies often sell insurance products and fixed (including indexed) annuities through different distribution channels. While some insurance agents are employees of an insurance company, other insurance agents are independent, and work with multiple insurance companies. PTE 2020-02 applies to all of these business models. In addition to PTE 2020-02, the Department is also simultaneously publishing amendments to PTE 84-24 elsewhere in this edition of the *Federal Register* which provide a pathway to compliance for insurance companies that market their products through independent insurance agents, without requiring the companies to assume or acknowledge fiduciary status.

However, insurance companies and agents may also rely upon PTE 2020-02 to the same extent as other Financial Institutions and Investment Professionals to receive relief for the receipt of otherwise prohibited compensation as a result of investment recommendations, including commissions. To the extent an insurance company that markets its products through independent agents chooses to rely on PTE 2020-02, the independent insurance agent and the financial

[30] See *supra* at note 19.

institution (i.e., the insurance company) must satisfy the exemption's conditions, including the fiduciary acknowledgement and the Impartial Conduct Standards with respect to that recommendation. In such cases, the insurance company must adopt policies and procedures to ensure it complies with the Impartial Conduct Standards and avoid incentives that place the insurance company's or the independent agent's interests ahead of the Retirement Investor's interest.

While independent producers may recommend products issued by a variety of insurance companies, PTE 2020-02 does not require insurance companies to exercise supervisory responsibility with respect to independent producers' sales of the products of unrelated and unaffiliated insurance companies for which the insurance company does not receive any compensation or have any financial interest.[31] When an insurance company is the supervisory financial institution for purposes of the exemption with respect to such an independent producer, its obligation is simply to ensure that the insurer, its affiliates, and related entities meet the exemption's terms with respect to the insurance company's annuity which is the subject of the transaction.

Under the exemption, the insurance company must:

- adopt and implement prudent supervisory and review mechanisms to safeguard the agent's compliance with the Impartial Conduct Standards when recommending the insurance company's products;

[31] As defined in PTE 84-24, an Independent Producer is "a person or entity that is licensed under the laws of a State to sell, solicit or negotiate insurance contracts, including annuities, and that sells to Retirement Investors products of multiple unaffiliated insurance companies, and (1) is not an employee of an insurance company (including a statutory employee as defined under Code section 3121(d)(e)); or (2) is a statutory employee of an insurance company which has no financial interest int the covered transaction."

- avoid improper incentives to preferentially recommend the products, riders, and annuity features that are most lucrative for the insurance company at the customer's expense;
- ensure that the agent receives no more than reasonable compensation for its services in connection with the transaction (e.g., by monitoring market prices and benchmarks for the insurance company's products, services, and agent compensation); and
- adhere to the disclosure and other conditions set forth in the exemption.

Under the exemption, the obligation of the insurance company with respect to independent producers is to oversee the recommendation and sale of its products by the independent producer, not the recommendations and sales by the independent producer involving another insurance company's products. Insurance companies could also comply with the exemption by creating oversight and compliance systems through contracts with insurance intermediaries such as IMOs, FMOs or BGAs. As one possible approach, an insurance intermediary could eliminate compensation incentives across all the insurance companies that work with the insurance intermediary, assisting each of the insurance companies with their independent obligations under the exemption. This might involve the insurance intermediary's review of documentation prepared by insurance agents to comply with the exemption, as may be required by the insurance company, or the use of third-party industry comparisons available in the marketplace to help independent insurance agents recommend products that are prudent for their retirement investor customers.

Finally, commenters raised an issue relating to administrative feasibility of PTE 2020-02 and its core conditions, arguing that it is too early to determine whether PTE 2020-02, as currently constituted, is administrable under ERISA section 408(a) and Code section 4975(c)(2), and that the Department has not provided evidence to evaluate whether it is administrable. Other commenters questioned the administrative feasibility of both PTE 84-24 and PTE 2020-02 more generally and took issue with the added or expanded conditions of both exemptions.

The Department notes, however, that the core conditions of both PTE 2020-02 and PTE 84-24, including all the Impartial Conduct Standards, reflect core fiduciary obligations that have been present in ERISA since its passage nearly fifty years ago, and that the duties of care and loyalty are rooted in trust law obligations that long predate ERISA. The Department and the financial services industry have decades of experience with the administration of these requirements and the Department is confident that Financial Institutions, Insurers and investment professionals can adopt supervisory structures and make investment recommendations that meet basic standards of prudence and loyalty, and that do not involve overcharging or misleading Retirement Investors.

Moreover, the changes to the exemptions accompany the Regulation, which makes significant changes to the prior rule on fiduciary investment advice, and those changes also reflect decades of experience with the prior rule and its shortcomings in the modern advice marketplace, as discussed in the preamble to the Regulation. In making revisions to PTE 2020-02, the Department has been careful to ensure that parties who are currently relying upon the exemption will be able to continue to do so, without undue additional burden or needless change, and many of the changes simply expand the scope of relief available. In addition, PTE 2020-02 and PTE 84-24 give firms considerable flexibility in adopting oversight structures to manage conflicts of interest and promote compliance. The Final Rule and the exemptions cover many transactions that would not have been treated as fiduciary advice prior to this rulemaking. Taken together, they fill gaps in the regulatory structure that were not effectively addressed by the 1975 rule or PTE 2020-02.

Based on its long experience with the advice rule, the existing exemption structure, and the core Impartial Conduct Standards, the Department has concluded that the proposed changes are necessary, administrable and consistent with the protective standards of ERISA section 408 and Code section 4975(c)(2). The Department also notes that similar regulatory efforts have been initiated and successfully administered by other State and Federal regulators. These regulatory efforts and structures include New York's Rule 187,[32] the NAIC Model Regulation, the SEC's Regulation Best Interest, and the regulation of advisers under the Investment Advisers Act.

Reasonable Compensation

The Department is retaining in the Final Amendment the reasonable compensation and best execution standards from PTE 2020-02 as proposed. Section II(a)(2)(A) provides that the compensation received, directly or indirectly, by the Financial Institution, Investment Professional, their Affiliates and Related Entities for their fiduciary investment advice services provided to the Retirement Investor must not exceed reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2). In addition, Section II(a)(2)(B) provides that the Financial Institution and Investment Professional must seek to obtain the best execution of the recommended investment transaction that is reasonably available under the circumstances as required by the Federal securities laws.

The Department received some comments objecting to the reasonable compensation standard. Some commenters stated that this standard is not specific enough and could chill an

[32] Suitability and Best Interest in Life Insurance and Annuity Transactions, 11 NYCRR 224

Investment Professional's willingness to recommend certain products that carry high commissions. Other commenters argued that this practice would ultimately limit the range of products available to Retirement Investors.

The Department is finalizing the reasonable compensation standard as proposed. The obligation to pay no more than reasonable compensation to service providers has been part of ERISA since its passage.[33] For example, the ERISA section 408(b)(2) and Code section 4975(d)(2) statutory exemptions expressly require that all types of services arrangements involving Plans and IRAs result in the service provider receiving no more than reasonable compensation. When acting as service providers to Plans or IRAs, Investment Professionals and Financial Institutions have long been subject to this requirement, regardless of their fiduciary status.

The reasonable compensation standard requires that compensation received by Financial Institutions and Investment Professionals not be excessive, as measured by the market value of the particular services, rights, and benefits the Investment Professional and Financial Institution are delivering to the Retirement Investor. Given the conflicts of interest associated with the commissions and other payments that are covered by the exemption and the potential for self-dealing, it is particularly important for the Department to require Investment Professionals' and Financial Institutions' adherence to these statutory standards, which are rooted in common-law principles.

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[33] The default rule under common law likewise requires that a trustee's compensation be reasonable. *E.g.*, *Nat'l Assoc. for Fixed Annuities v. Perez*, 217 F. Supp. 3d 1, 43-44 (D.D.C. 2016) ("[C]ommon law includes requirements of 'reasonable compensation' for trustees . . . ." (citations omitted)); Restatement (Third) of Trusts § 38(1) (2003) ("A trustee is entitled to reasonable compensation out of the trust estate for services as trustee . . . .").

The reasonable compensation standard applies to all covered transactions under the exemption, including those involving investment products that bundle services and investment guarantees or other benefits, such as annuity products. In assessing the reasonableness of compensation in connection with covered transactions involving these products, it is appropriate to consider the value of the guarantees and benefits as well as the value of the services. When assessing the reasonableness of compensation, Financial Institutions and Investment Professionals generally must consider the value of all the services and benefits provided to Retirement Investors for the compensation, not just some of the services and benefits. If Financial Institutions and Investment Professionals need additional guidance in this respect, they should refer to the Department's regulatory interpretations under ERISA section 408(b)(2) and Code section 4975(d)(2).[34]

No Materially Misleading Statements

The Department is also retaining the requirement in Section II(a)(3) of PTE 2020-02 that prohibits Financial Institutions and Investment Professionals from making materially misleading statements to Retirement Investors. The Department is also clarifying that the prohibition against misleading statements applies to both written and oral statements. In particular, the Department is also clarifying that this condition is not satisfied if a Financial Institution or Investment Professional omits information that is needed to make the statement not misleading in light of the circumstances under which it was made.

The Department received a comment expressing concern that this condition is too vague. The Department disagrees. As the Department explained when it granted PTE 2020-02,

[34] *See* 29 CFR 2550.408b-2.

"materially misleading statements are properly interpreted to include statements that omit a material fact necessary in order to make the statements, in light of the circumstances under which they were made, not misleading. Retirement Investors are clearly best served by statements and representations that are free from material misstatements and omissions."[35] The Final Amendment merely adds clarity by incorporating this understanding into the exemption's operative text. Numerous courts have similarly recognized that statements can be misleading by virtue of material omissions, as well as by affirmative misstatements.[36] This is not a unique or new concept for Financial Institutions. For example, in adopting Regulation Best Interest, the SEC reminded broker-dealers of their obligations under the anti-fraud provisions of Federal Securities laws for failure to disclose material information to their customers when they have a duty to make such disclosure.[37] Financial Institutions and Investment Professionals best promote the interests of Retirement Investors by ensuring that their communications with their customers are not materially misleading.

Accordingly, the Department is finalizing the provisions in the exemption related to materially misleading statements as proposed, with minor ministerial changes to the wording, such as moving the phrases "to the Retirement Investor" and "materially misleading" for clarity.

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[35] 85 FR 82826.

[36] *E.g.*, *Vest v. Resolute FP US Inc.*, 905 F.3d 985, 990 (6th Cir. 2018) ("[A] material omission qualifies as misleading information."); *Kalda v. Sioux Valley Physician Partners, Inc.*, 481 F.3d 639, 644 (8th Cir. 2007) ("Additionally, a fiduciary has a duty to inform when it knows that silence may be harmful and cannot remain silent if it knows or should know that the beneficiary is laboring under a material misunderstanding of plan benefits." (internal citations omitted)); *Krohn v. Huron Mem'l Hosp.*, 173 F.3d 542, 547 (6th Cir. 1999) ("[A] fiduciary breaches its duties by materially misleading plan participants, regardless of whether the fiduciary's statements *or omissions* were made negligently or intentionally.") (emphasis added); *see Mathews v. Chevron Corp.*, 362 F.3d 1172, 1183 (9th Cir. 2004).

[37] 84 FR 33348, note 303. The Department observes that this requirement is also consistent with, for example, the requirement under section 206 of the Advisers Act, which bars an investment adviser from making materially false or misleading statements *or omissions* to any client or prospective client. *See In the Matter of S Squared Tech. Corp.*, Release No. 1575 (S.E.C. Release No. Aug. 7, 1996). The SEC's Rule 10b-5 under the Exchange Act imposes a similar requirement. 17 CFR 240.10b-5(b). *See also SEC v. Cap. Gains Rsch. Bureau, Inc.*, 375 U.S. 180, 200 (1963) ("Failure to disclose material facts must be deemed fraud or deceit within its intended meaning").

Disclosure

The Department is generally finalizing the disclosure conditions with some modifications to the Proposed Amendment, as discussed below. While many commenters raised concerns about the burden that would be imposed on Financial Institutions if the Department required additional disclosure, others expressed support for the Department to impose additional disclosure obligations. It is important that Retirement Investors have a clear understanding of the compensation, services, and conflicts of interest associated with recommendations if they are to make fully informed decisions. Additionally, clear and accurate disclosures can deter Financial Institutions and Investment Professionals from engaging in otherwise abusive practices that they would prefer not to expose.

One commenter suggested revising the disclosure condition to provide that it is sufficient for the Retirement Investor to have received the disclosure, without necessarily placing the responsibility squarely on the Financial Institution and Investment Professional to make the required disclosures. The Department declines to change the exemption from the proposal in this manner. The Department notes that, while Financial Institutions can coordinate the transmittal of required disclosures with others and rely upon vendors and others to ensure transmittal, ultimately the responsibility to make required disclosures, including the fiduciary acknowledgement, rests with the Financial Institution and Investment Professionals as set out in the exemption. In the Department's view, the proper exercise of this responsibility is critical to ensuring that Retirement Investors receive important, accurate, and timely information, and to ensuring that Financial Institutions and Investment Professionals manage their fiduciary obligations with the seriousness they deserve.

In the preamble to the Proposed Amendment, the Department requested comments regarding whether Financial Institutions should be required to provide additional disclosures on third-party compensation to Retirement Investors on a publicly available website. One potential benefit of such disclosure would be to provide information about conflicts of interest that could be used, not only by Retirement Investors, but by consultants and intermediaries who could, in turn, use the information to rate and evaluate various advice providers in ways that would assist Retirement Investors. Industry commenters generally opposed the condition, stating that it would impose significant costs to continuously maintain such a website without a commensurate benefit to the Retirement Investors.

Based on these comments, the Department has determined not to include a website disclosure requirement as an exemption condition at this time. While the Department may reconsider this decision at some future date based on its experience with the Regulation and related exemptions, any such future amendments would be subject to public notice and comment through a formal rulemaking process. Consistent with the Recordkeeping conditions in Section IV, the Department intends, however, to regularly request that Financial Institutions provide their investor disclosures to the Department to ensure that they are providing sufficient information in a manner that the Retirement Investor can understand, and that the disclosures are serving their intended purpose.

Fiduciary Acknowledgment

The Department is retaining the requirement in PTE 2020-02 for Financial Institutions to provide a written acknowledgment of fiduciary status to the Retirement Investor. At or before the time a covered transaction (as defined in Section I(b) of the Final Amendment) occurs, the Financial Institution must provide a written acknowledgment that the Financial Institution and its

Investment Professionals are providing fiduciary investment advice to the Retirement Investor and are fiduciaries under Title I of ERISA, Title II of ERISA, or both with respect to the investment recommendation. Section II(b)(2) also requires the Financial Institution to provide a written statement of the Care Obligation and Loyalty Obligation owed by the Investment Professional and Financial Institution to the Retirement Investor. This disclosure must also be provided at or before the Financial Institution engages in the transaction.

The Department received many comments on this requirement. Some commenters supported clarifications that the acknowledgement must make clear that the recommendation is rendered in a fiduciary capacity, though some argued that the acknowledgment should be limited to specific transactions. For example, one commenter urged the Department to provide that the fiduciary acknowledgment must be an “unconditional” acknowledgment of fiduciary status in order to effectively address artful drafting by a Financial Institution that is intended to evade actual fiduciary status. Another commenter provided examples of disclosures that Financial Institutions have in place that are misleading to Retirement Investors. Many of these misleading disclosures state that the Financial Institution has fiduciary status, but then note there are exceptions or limitations to when the Financial Institution is acting as a fiduciary, without clearly taking a position on the Financial Institution's fiduciary status with respect to the particular recommendation. At best, this drafting may leave the Retirement Investor with many questions about when they are receiving fiduciary advice. At worst, it may leave the Retirement Investor with the mistaken impression that all recommendations it receives are provided in a fiduciary capacity when only some recommendations are subject to the protective conditions of this exemption. The Department agrees with these concerns, which provide further evidence of the need for the Final Amendment to include an unambiguous written acknowledgement requirement. Similarly, the requirement for a written statement of the Care Obligation and Loyalty Obligation is necessary to provide Retirement Investors with a clear statement of the duties Financial Institutions owe them.

Several commenters pointed to the history of Financial Institutions including fine print disclaimers of their fiduciary status. Disclosures have been used to undermine investors' reasonable expectations and the purpose of the fiduciary acknowledgment in Section II(b)(1) is to match the facts to the reasonable expectations of the Retirement Investor. Under the Final Amendment, Financial Institutions cannot acknowledge fiduciary status with respect to a recommendation, only to disclaim it in the fine print. The Final Amendment requires the Financial Institutions and Investment Professionals to acknowledge their fiduciary status with respect to *the* investment recommendation. This change prevents Financial Institutions from making the fiduciary acknowledgment and then including exclusions in fine print.

The Department believes that the requirement, as finalized, makes it unambiguously clear that the recommendation must be acknowledged as made in a fiduciary capacity under ERISA or the Code. It would not be sufficient, for example, to have an acknowledgement provide that "Firm A acknowledges fiduciary status under ERISA with respect to the recommendation to the extent the recommendation is treated by ERISA or Department of Labor regulations as fiduciary" because that statement does not explain when a recommendation would be treated as falling under the fiduciary requirements of ERISA and the Code. In contrast, the Department's model language below says, "We are making investment recommendations to you regarding your retirement plan account or individual retirement account as fiduciaries within the meaning of Title I of the Employee Retirement Income Security Act and/or the Internal Revenue Code, as applicable, which are laws governing retirement accounts."

A few commenters noted that neither Regulation Best Interest nor the NAIC Model Regulation requires a fiduciary acknowledgment. The Department recognizes that this is a difference between the requirements of this exemption and other sources of law. The point of the acknowledgment under PTE 2020-02 is to ensure that both the fiduciary and the Retirement Investor are clear that the particular recommendation is in fact made in a fiduciary capacity under ERISA or the Code, as defined under the regulation. The Retirement Investor should have no doubt as to the nature of the relationship or the associated compliance obligations. Anything short of that clear acknowledgment fails the exemption condition. It is not enough to alert the Retirement Investor to the fact that there may or may not be fiduciary obligations in connection with a particular recommendation, without stating that, in fact, the recommendation is made in the requisite fiduciary capacity.

Some commenters expressed concern with the timing of the acknowledgment. These commenters stated that Financial Institutions and Investment Professionals might have to acknowledge fiduciary status before they actually receive compensation and know that they are fiduciaries. Some commenters asked whether this acknowledgment might itself be a misleading statement that would be impermissible under Section II(a)(3) of the exemption. To address this concern, the Department has revised the language in Section II(b)(1) of the Final Amendment to further clarify that the disclosure must be provided "[a]t or before the time a covered transaction occurs, as defined in Section I(b)." In response to a specific comment, the Department is further clarifying that, "[f]or purposes of the disclosures required by Section II(b)(1)-(4), the Financial Institution or Investment Professional is deemed to engage in a covered transaction on the later of (A) the date the recommendation is made or (B) the date the Financial Institution or Investment Professional becomes entitled to compensation (whether now or in the future) by reason of making the recommendation." This is revised from the Proposed Amendment, which would have required the disclosure to acknowledge fiduciary status "when making an investment recommendation."

The Department is making these clarifications to confirm that the Financial Institution does not have to provide a fiduciary acknowledgment at its first meeting with the Retirement Investor. Instead, the fiduciary acknowledgment must be made at or before the time the covered transaction occurs.

One commenter opined that the fiduciary acknowledgement condition constitutes "compelled" and "viewpoint-based" speech in violation of the First Amendment and warrants application of a 'strict scrutiny' standard of review. As discussed in greater detail in the Regulation, neither the Regulation nor the Final Amendment prohibits speech based on content or viewpoint in any capacity. Instead, the Department simply imposes fiduciary duties on covered parties, and insists on adherence to Impartial Conduct Standards.

The Department also received many comments regarding whether the proposed fiduciary acknowledgment and statement of Best Interest standard amounted to an enforceable contract with the Retirement Investor to adhere to the requirements of PTE 2020-02. As several commenters noted, however, PTE 2020-02 does not impose any contract or warranty requirements on Financial Institutions or Investment Professionals. Instead, it simply requires up-front clarity about the nature of the relationship and services being provided. In marked contrast to the 2016 rulemaking, the Department has imposed no obligation on Financial Institutions or Investment Professionals to enter into enforceable contracts with or to provide enforceable warranties to their customers. The only remedies for violations of the exemption's conditions, and for engaging in a non-exempt prohibited transaction, are those provided by Title

I of ERISA, which specifically provides a right of action for fiduciary violations with respect to ERISA-covered plans, and Title II of ERISA, which provides for imposition of the excise tax under Code section 4975. Nothing in the exemption compels Financial Institutions to make contractually enforceable commitments, and as far as the exemption provides, they could expressly disclaim any enforcement rights other than those specifically provided by Title I of ERISA or the Code, without violating any of the exemption's conditions.

For that reason, arguments that the fiduciary acknowledgment requirement is inconsistent with the Fifth Circuit's opinion in *Chamber of Commerce v. United States Department of Labor*, 885 F.3d 360, 384-85 (5th Cir. 2018) (*Chamber*) are unsupported. In that case, the Fifth Circuit faulted the Department for having effectively created a private cause of action that Congress had not provided.[38] Under this exemption the Department does not create new causes of actions, mandate enforceable contractual commitments, or expand upon the remedial provisions of ERISA or the Code. Requiring clarity as to the nature of the services and relationship is a far cry from the creation of a whole new cause of action or remedial scheme. The Department does not compel fiduciary status or create new causes of action. It merely conditions the availability of the exemption, which is only necessary for plan fiduciaries to receive otherwise prohibited compensation, on Financial Institutions and Investment Professionals providing clarity that the transaction, in fact, involves a fiduciary relationship. In addition, the Department does not purport to bind other State or Federal regulators in any way or to condition relief on the availability of remedies under other laws. It no more creates a new cause of action than any other

[38] *Id.* at 384-85. *But see Nat'l Ass'n for Fixed Annuities v. Perez*, 217 F. Supp. 3d 1, 37 (D.D.C. 2016) (upholding the challenged provision and noting that "courts . . . have permitted IRA participants and beneficiaries to bring state law claims for breach of contract" (citing *Grund v. Del. Charter Guar. & Tr. Co.*, 788 F. Supp. 2d 226, 243-44 (S.D.N.Y. 2011))).

exemption condition or regulatory requirement that requires full and fair disclosures of services and fees. Moreover, the requirement promotes compliance and supports investor choice by requiring clarity as to the fiduciary nature of the relationship that the Financial Institution or Investment Professional is undertaking with the Retirement Investor.

The Department has a statutory obligation to ensure that any exemptions from the prohibited transaction provisions are "administratively feasible," "in the interests of," and "protective" of the "rights" of Retirement Investors. The fiduciary acknowledgment provides critical support to the Department's ability to make these findings. The Department notes that conditions requiring entities to acknowledge their fiduciary status have become commonplace in recently granted exemptions over the past two years. In this regard, in 2022 and 2023, the Department granted over a dozen exemptions to private parties in which an entity was required to acknowledge its fiduciary status in writing as a requirement for exemptive relief.[39] Written acknowledgement of fiduciary status was required by the Department as early as 1984, when the Department published PTE 84-14,[40] requiring an entity acting as a "qualified professional asset manager" (a QPAM) to have "acknowledged in a written management agreement that it is a

[39] *See, e.g.*, PTE 2023-03, Blue Cross and Blue Shield Association Located in Chicago, Illinois (88 FR 11676, Feb. 23, 2023); PTE 2023-04, Blue Cross and Blue Shield of Arizona, Inc., Located in Phoenix, Arizona (88 FR 11679, Feb. 23, 2023); PTE 2023-05, Blue Cross and Blue Shield of Vermont Located in Berlin, Vermont (88 FR 11681, Feb. 23, 2023); PTE 2023-06, Hawaii Medical Service Association Located in Honolulu, Hawaii (FR 88 11684, Feb. 23, 2023); PTE 2023-07, BCS Financial Corporation Located in Oakbrook Terrace, Illinois (88 FR 11686, Feb. 23, 2023); PTE 2023-08, Blue Cross and Blue Shield of Mississippi, A Mutual Insurance Company Located in Flowood, Mississippi (88 FR 11689, Feb. 23, 2023); PTE 2023-09, Blue Cross and Blue Shield of Nebraska, Inc. Located in Omaha, Nebraska (88 FR 11691, Feb. 23, 2023); PTE 2023-10, BlueCross BlueShield of Tennessee, Inc. Located in Chattanooga, Tennessee (88 FR 11694, Feb. 23, 2023); PTE 2023-11, Midlands Management Corporation 401(k) Plan Oklahoma City, OK (88 FR 11696, Feb. 23, 2023); PTE 2023-16, Unit Corporation Employees' Thrift Plan, Located in Tulsa, Oklahoma (88 FR 45928, July 18, 2023); PTE 2022-02, Phillips 66 Company Located in Houston, TX (87 FR 23245, Apr. 19, 2022); PTE 2022-03, Comcast Corporation Located in Philadelphia, PA (87 FR 54264, Sept. 2, 2022); PTE 2022-04, Children's Hospital of Philadelphia Pension Plan for Union-Represented Employees Located in Philadelphia, PA. (87 FR 71358, Nov. 22, 2022).
[40] 49 FR 9494 (March 13, 1984).

fiduciary with respect to each plan that has retained the QPAM."[41] Fiduciary investment advice providers to IRAs have always been subject to suit in State courts on State-law theories of liability, and this rulemaking does not alter this reality. This rulemaking does not alter the existing framework for bringing suits under State law against IRA fiduciaries and does not aim to do so. State regulators remain free to structure legal relationships and liabilities as they see fit to the extent not inconsistent with Federal law.

Model Disclosure

To assist Financial Institutions and Investment Professionals in complying with these conditions of the exemption, the Department confirms the following model language will satisfy the disclosure requirement in Section II(b)(1) and (2):

> We are making investment recommendations to you regarding your retirement plan account or individual retirement account as fiduciaries within the meaning of Title I of the Employee Retirement Income Security Act and/or the Internal Revenue Code, as applicable, which are laws governing retirement accounts. The way we make money or otherwise are compensated creates some conflicts with your financial interests, so we operate under a special rule that requires us to act in your best interest and not put our interest ahead of yours.
>
> Under this special rule's provisions, we must:
>
> - Meet a professional standard of care when making investment recommendations (give prudent advice) to you;

[41] PTE 84-14, Part V, Section (a).

- Never put our financial interests ahead of yours when making recommendations (give loyal advice);
- Avoid misleading statements about conflicts of interest, fees, and investments;
- Follow policies and procedures designed to ensure that we give advice that is in your best interest;
- Charge no more than what is reasonable for our services; and
- Give you basic information about our conflicts of interest.

While some commenters requested additional model language, the Department is not providing a model for the specific disclosures in Section II(b)(3), (4), and (5) because those disclosures will need to be tailored to the specific Financial Institution's business model. Although the model language above broadly applies to all the advice provider's recommendations, nothing in the exemption would prohibit the advice provider from limiting its fiduciary acknowledgment to specific recommendations or classes of recommendations if it was not acting as a fiduciary in other contexts. The exemption, however, will only cover recommendations that were subject to such an acknowledgment.

Relationship and Conflict of Interest Disclosure

In response to comments, the Department is amending the disclosure requirements of PTE 2020-02. As finalized, Section II(b)(3)-(4) requires the Financial Institution to disclose in writing all material facts relating to the scope and terms of the relationship with the Retirement Investor, including:

(3)(A) The material fees and costs that apply to the Retirement Investor's transactions, holdings, and accounts;

(3)(B) The type and scope of services provided to the Retirement Investor, including any material limitations on the recommendations that may be made to them; and

(4) All material facts relating to Conflicts of Interest that are associated with the recommendation.

This final pre-transaction disclosure is based on the SEC's Regulation Best Interest disclosure requirements.[42] The Department received many comments on the proposed disclosure obligations that focused, in particular, on differences between the SEC's Regulation Best Interest disclosures and the Department's proposed PTE 2020-02 disclosures. Some commenters also asserted that the proposed disclosure requirements of PTE 2020-02 would have imposed a burden on Financial Institutions without providing sufficient incremental benefits to Retirement Investors, above and beyond those provided by Regulation Best Interest. In the view of many commenters, Regulation Best Interest and the SEC's client relationship summary (also called Form CRS) already provided sufficient disclosure in the context of securities recommendations and could serve as the model for a more uniform set of disclosure requirements applicable to Retirement Investors without as much additional cost and burden.

Other commenters expressed support for the Department's proposed amendments that would have clarified and tightened the existing PTE 2020-02 disclosure requirements. These commenters supported ensuring that investors have sufficient information to make informed decisions about the costs of an investment advice transaction and about the significance and

[42] Similar obligations exist for investment advisers. "Under its duty of loyalty, an investment adviser must eliminate or make full and fair disclosure of all conflicts of interest which might incline an investment adviser— consciously or unconsciously—to render advice which is not disinterested such that a client can provide informed consent to the conflict." 2019 Fiduciary Interpretation (84 FR 33671); *see also SEC v. Cap. Gains Rsch. Bureau, Inc.*, 375 U.S. at 200 ("the darkness and ignorance of commercial secrecy are the conditions upon which predatory practices best thrive").

severity of the investment advice fiduciary's conflicts of interest. Some commenters also supported the proposed requirement for the disclosures to be written in plain English.

The Department's determination to base the Final Amendment's disclosure obligations on the SEC's Regulation Best Interest disclosure obligations is intended to ensure that Retirement Investors receive critical information that they need to make informed investment decisions, while reducing compliance burdens by establishing disclosure requirements that are consistent with the SEC's requirements. This is also responsive to several comments the Department received that highlighted disclosure requirements that commenters argued were more burdensome than the SEC's Regulation Best Interest disclosure requirements. Although this condition does not specifically require the disclosure be in "plain English" the Department notes the importance of plain language principles to ensure the Retirement Investors understand the information they receive.[43]

Some commenters were particularly concerned about the proposed requirement that Retirement Investors have the "right to obtain specific information regarding costs, fees, and compensation, described in dollar amounts, percentages, formulas" upon request based on the potential burden of such disclosures. Others supported the requirement, including one commenter stating that such information is necessary for Retirement Investors to make an informed judgment as to the costs of a transaction. After consideration of the comments, the Department has determined that the requirements to disclose material fees, costs, conflicts of interest, and services should be sufficient to permit the Retirement Investor to assess both the

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[43] In finalizing Regulation Best Interest, the SEC encouraged broker-dealers to use plain English in preparing any disclosures they make. The SEC provided examples such as the use of short sentences and active voice, and avoidance of legal jargon, highly technical business terms, or multiple negatives, 84 FR 33368-69.

costs of transactions and the scope and severity of conflicts, without imposing an additional "upon request" disclosure obligation.

In finalizing these disclosures based on the Regulation Best Interest disclosure obligation, however, the Department intends to monitor the effectiveness and utility of the disclosures closely to ensure they serve their intended purpose and give Retirement Investors full and fair notice of services, costs, charges, and conflicts of interest. Based upon its ongoing review of compliance and efficacy, the Department may revisit the scope and content of the disclosure obligations as part of future notice and comment rulemaking. At this time, the Department has concluded the best course of action is to align the disclosure conditions with the requirements of Regulation Best Interest, in order to provide a uniform and cost-effective approach to disclosures, consistent with the Department's statutory obligation to protect the interests of Retirement Investors.

Rollover Disclosure

The Department has also decided to make revisions to the rollover disclosure requirements. Under Section II(b)(5), before engaging in or recommending that a Retirement Investor engage in a rollover from a Plan that is covered by Title I of ERISA, or making a recommendation to a Plan participant or beneficiary as to the post-rollover investment of assets currently held in a Plan that is covered by Title I, the Financial Institution and Investment Professional must consider and document the bases for their recommendation to engage in the rollover, and must provide that documentation to the Retirement Investor. Relevant factors to be considered must include, to the extent applicable, but in any event are not limited to: (A) the alternatives to a rollover, including leaving the money in the Plan, if applicable; (B) the fees and expenses associated with the Plan and the recommended investment or account; (C) whether an employer or other party pays for some or all of the Plan's administrative expenses; and (D) the different levels of services and investments available under the Plan and the recommended investment or account. The Proposed Amendment specified that this requirement extended to recommended rollovers from a Plan to another Plan or IRA as defined in Code section 4975(e)(1)(B) or (C), from an IRA as defined in Code section 4975(e)(1)(B) or (C) to a Plan, from an IRA to another IRA, or from one type of account to another (e.g., from a commission-based account to a fee-based account).

In support of the rollover disclosure provision under the Proposed Amendment, one commenter highlighted the significance of a rollover decision and said that a "careful analysis" is needed, along with information about fees, expenses, and other investment options, in order to provide Retirement Investors with a "well-supported" recommendation. Another commenter suggested that the Department add consideration of a Retirement Investor's Social Security benefits.

Several commenters expressed concerns over the burden of the rollover documentation and disclosure requirements. Some suggested that the requirements should be limited to the rollovers from Title I Plans to IRAs, rather than including IRA-to-IRA or account-to-account transactions. These commenters argued that the additional requirement would be of limited value to the Retirement Investors while imposing significant costs on the Financial Institutions. Commenters requested that certain types of transactions be excluded, such as those involving a "required minimum distribution" (RMD), an inherited IRA or 401(k) account, investment education, or IRA-to-IRA transfers. Commenters suggested Retirement Investors already receive enough information, and asked if the requirements of this disclosure would be relevant.

The Department continues to believe that the information required to be included in the rollover disclosure is relevant to Retirement Investors. A Retirement Investor should understand what they are giving up in their employer's plan, as well as what they may gain from rolling over their retirement savings to an IRA. While the Department is not specifically adding a blanket requirement to document consideration of a Retirement Investor's Social Security benefit, it also agrees that the Retirement Investor's Social Security benefit may be an important component of the overall analysis to ensure any recommendation will meet the Care Obligation and Loyalty Obligation.

In response to comments about the challenges posed by the documentation requirements outside the plan context, the Department is narrowing the required rollover disclosure requirement in Section II(b)(5) so that it only applies to recommendations to rollovers from Title I Plans. Under the Final Amendment, PTE 2020-02 no longer will require disclosures regarding advice for a Retirement Investor to roll over its account from one IRA to another IRA or to change account type. The Department is also clarifying the language to confirm that the disclosure only applies to advice to engage in a rollover recommendation to a Plan participant or beneficiary as to the post-rollover investment of assets currently held in a Plan that is covered by Title I. The rollover disclosure requirement does not apply when a Financial Institution or Investment Professional does not make a recommendation, even if it does provide investment education.

The Department received comments expressing concern that the information required for the rollover disclosure will not be available to Financial Institutions. A few commenters urged the Department to address this by requiring plans covered by Title I of ERISA to make more information publicly available on their Forms 5500. Other commenters simply stated that

Investment Professionals and Financial Institutions would not be able to comply. As the Department explained in the preamble to the Proposed Amendment, however, Investment Professionals and Financial Institutions should make diligent and prudent efforts to obtain information about the fees, expenses, and investment options offered in the Retirement Investor's Plan account to comply with the amended rollover documentation and disclosure requirement of Section II(b)(5).

As the Department also explained in the preamble to the Proposed Amendment, the necessary information should be readily available to the Retirement Investor as a result of Department regulations mandating disclosure of plan-related information to the Plan's participants and beneficiaries that is found at 29 CFR 2550.404a-5. If the Retirement Investor refuses to provide such information, even after a full explanation of its significance, and the information is not otherwise readily available, the Financial Institution and Investment Professional should make a reasonable estimate of a Plan's expenses, asset values, risk, and returns based on publicly available information. The Financial Institution and Investment Professional should document and explain the assumptions used in the estimate and their limitations. In such cases, the Department confirms that the Financial Institution and Investment Professional could rely on alternative data sources, such as the Plan's most recent Form 5500 or reliable benchmarks on typical fees and expenses for the type and size of the Plan that holds the Retirement Investor's assets.

Moreover, while the Department is not imposing the same documentation and disclosure requirements on rollovers from IRA-to-IRA or from one account type to another, it is not relieving the fiduciary of its obligation under the Care Obligation and Loyalty Obligation to make prudent efforts to obtain information about the fees, expenses, and investment options offered in the different accounts or IRAs. It is hard to see how a fiduciary can make a prudent and loyal recommendation, without careful consideration of the financial merits of the alternative approaches. As the SEC has similarly observed with respect to Regulation Best Interest, although the Department has not imposed a specific documentation requirement comparable to the obligation for Plan to IRA rollovers, it is likely to be difficult for a firm to demonstrate compliance with its obligations, or to assess the adequacy of its policies and procedures, without documenting the basis for such recommendations.[44]

Good Faith and Disclosures Prohibited by Law Exceptions

The Department's Proposed Amendment would have added a new Section II(b)(6), which provides that Financial Institutions will not fail to satisfy their disclosure obligations under Section II(b) solely because they make an error or omission in disclosing the required information while acting in good faith and with reasonable diligence. The Financial Institution must disclose the correct information as soon as practicable, but not later than 30 days after the date on which it discovers or reasonably should have discovered the error or omission. Similarly, Section II(b)(7) allows Investment Professionals and Financial Institutions to rely in good faith on information and assurances from the other entities that are not Affiliates as long as they do not know or have reason to know that such information is incomplete or inaccurate. Under Section II(b)(8), the Financial Institution is not required to disclose information pursuant to Section II(b) if such disclosure is otherwise prohibited by law.

The Department did not receive substantive comments on these provisions and is finalizing these provisions as proposed.

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[44] See Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Care Obligations, Q16, available at https://www.sec.gov/tm/iabd-staff-bulletin-conflicts-interest.

Policies and Procedures

Under Section II(c), Financial Institutions must establish, maintain, and enforce written policies and procedures prudently designed to ensure that the Financial Institution and its Investment Professionals comply with the Impartial Conduct Standards and other exemption conditions. The Financial Institution's policies and procedures must mitigate Conflicts of Interest to the extent that a reasonable person reviewing the policies and procedures and incentive practices as a whole would conclude that they do not create an incentive for a Financial Institution or Investment Professional to place their interests, or those of any Affiliate or Related Entity, ahead of the interests of the Retirement Investor. The Department proposed to amend section II(c) to provide that Financial Institutions may not use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives that are intended, or that a reasonable person would conclude are likely, to result in recommendations that do not meet the Care Obligation or Loyalty Obligation. In addition, the Proposed Amendment would require Financial Institutions to provide their complete policies and procedures to the Department upon request within 10 business days of request.

The Department received many comments on the proposed amendments to the policies and procedures. Some of these commenters expressed support for the Department's clarifications, emphasizing the risks inherent in conflicted compensation. The Department also received comments in favor of the proposed requirement that Financial Institutions furnish to the Department complete policies and procedures within 10 business days, asserting that such a requirement would be a meaningful incentive for reasonably designed policies and procedures. Others asserted that the conditions were unworkable. Some commenters were particularly concerned about the requirement that Financial Institutions may not use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives that are intended, or that a reasonable person would conclude are likely, to result in recommendations that do not meet the Care Obligation or Loyalty Obligation.

Some commenters read the Proposed Amendment as banning differential compensation. One commenter characterized it as an attack on educational meetings and asserted that it conflicted with Regulation Best Interest and Financial Industry Regulatory Authority (FINRA) rules. The Department disagrees with the commenters' characterizations. The provision neither bans differential compensation, nor prohibits educational meetings. Although ERISA prohibits conflicted transactions between a plan and a fiduciary, the Department has granted this exemption specifically to allow Financial Institutions to receive compensation that varies based on the products they sell and that otherwise would be prohibited under ERISA section 406(b) and Code section 4975(c)(1)(E) and (F). However, in order to do so, the Financial Institution must pay attention to the conflicts that are inherent in its compensation system and must take special care to ensure that it does not create or implement compensation practices that are intended, or that a reasonable person would conclude are likely, to result in recommendations that do not meet the Care Obligation or Loyalty Obligation. Based on the foregoing, the Department is finalizing Section II(c) as proposed with minor edits made for clarity.

Some commenters argued that the Department should rely on other regulators' policies and procedures requirements. Other commenters expressed concern that other regulators are not sufficiently protective in this area. For example, although the NAIC Model Regulation technically requires that producers manage material conflicts of interest, it excludes cash and non-cash compensation from the definition of material conflicts of interest. Thus, the following forms of cash compensation are excluded from the NAIC Model Regulation as sources of conflicts of interest: any discount, concession, fee, service fee, commission, sales charge, loan, override, or cash benefit received by a producer in connection with the recommendation or sale of an annuity from an insurer, intermediary, or directly from the consumer; and the following types of "non-cash compensation," are excluded: health insurance, office rent, office support and retirement benefits. In contrast, the SEC expressly requires investment advisers and broker-dealers to manage such conflicts, including commissions and other forms of compensation.[45] The Department believes that a more uniform approach is appropriate so that all Retirement Investors are protected from conflicts of interest, and to ensure that investment recommendations are driven by the best interest of the Retirement Investor and not the competing interests of the Investment Professional in conflicted compensation arrangements, irrespective of the type of investment product recommended to them (e.g., a fixed indexed annuity as opposed to a security).

Accordingly, the Department is maintaining the language largely as proposed. While the Department acknowledges that many firms have already built protective structures based on SEC's Regulation Best Interest, the Investment Advisers Act of 1940,[46] or PTE 2020-02, they

[45] Regulation Best Interest explicitly requires that broker-dealers establish, maintain, and enforce written policies and procedures reasonably designed to identify and mitigate conflicts of interest at the associated person level. *See generally* 84 FR 33318, 33388; *see* Exchange Act rule 15*l*-1(a)(2)(iii)(B). With regards to investment advisers, the SEC has stated that "an adviser must eliminate or at least expose through full and fair disclosure all conflicts of interest which might incline an investment adviser— consciously or unconsciously—to render advice which was not disinterested." Commission Interpretation Regarding Standard of Conduct for Investment Advisers, 84 FR 33669, 33671 (July 12, 2019). The SEC staff has also said, "[w]hile compensation practices for financial professionals are an important potential source of conflicts of interest, the staff reminds firms that mitigating conflicts associated with these practices is just one aspect of how firms satisfy their conflict obligations." See Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Conflicts of Interest, available at https://www.sec.gov/tm/iabd-staff-bulletin-conflicts-interest.

[46] 15 U.S.C. 80b-1 et seq.

should be able to build or rely upon existing systems of supervision and compliance to meet their obligations, rather than build whole new structures, as the SEC observed with respect to broker-dealers' implementation of Regulation Best Interest.[47] Like the SEC, in adopting the policies and procedures requirement for conflict management, the Department has deliberately chosen not to take a highly prescriptive and inflexible approach. Instead, the Final Amendment permits compliance with policies and procedures that accommodate a broad range of business models, so long as they meet the overarching goals of ensuring adherence to the Care and Loyalty Obligations. The Final Amendment's requirement for Financial Institutions' policies and procedures to mitigate Conflicts of Interest is essential for the Department to satisfy its obligations under ERISA section 408(a) and Code section 4975(c)(2). The policies and procedures condition provides Financial Institutions with the flexibility to have different business models based on their specific business needs, while still ensuring that the fiduciary investment advice they provide to Retirement Investors meets the Impartial Conduct Standards.

The Department believes that Retirement Investors will best be protected by the objective standard provided under PTE 2020-02, which provides a strong benchmark for assessing policies and procedures. The exemption's principles-based standard focuses on whether a reasonable person would conclude that the Financial Institution's policies and procedures are likely to result in recommendations that do not meet the Care Obligation or Loyalty Obligation. This standard is consistent with Regulation Best Interest and provides an appropriate yardstick for assessing compliance while lending additional clarity and rigor to the obligation to manage adverse

[47] See Regulation Best Interest: The Broker-Dealer Standard of Conduct, Exchange Act Release No. 86031, 84 FR 33318, 33327 (June 5, 2019) ("Reg BI Adopting Release"). (recognizing that "some broker-dealers may rely on existing policies and procedures that address conflicts through methods such as compliance and supervisory systems that are consistent with the Conflict of Interest Obligation" under Regulation Best Interest).

incentives. In addition, SEC-registered investment advisers are required to "adopt and implement written policies and procedures reasonably designed to prevent violations, by [the adviser] and [its] supervised persons, of the [Advisers] Act and the rules that the Commission has adopted under the [Advisers Act]."[48] The approach in PTE 2020-02 provides the flexibility necessary for Financial Institutions to insulate Investment Professionals from conflicts of interest under the wide array of business and compensation models followed in today's marketplace.

The Department understands that many Financial Institutions, particularly insurance companies, rely on educational conferences, and stresses that this provision does not prohibit them. The exemption merely requires reasonable guardrails for conferences, especially if they involve travel. These conferences must be structured in a manner that ensures they are not likely to lead Investment Professionals to make recommendations that do not meet the exemption's Care Obligation or Loyalty Obligation. In addition, the Department notes that properly designed incentives that are simply aimed at increasing the overall amount of retirement saving and investing, without promoting specific products, would not violate the policies and procedures requirement. Similarly, notwithstanding contrary language in the preamble to the Proposed Amendment, the Department recognizes that it can be appropriate to tie attendance at conferences to sales thresholds in certain circumstances (for example, insurance companies could not reasonably be expected to provide training for independent agents who are not recommending their products).

On the other hand, Financial Institutions must take special care to ensure that training conferences held in vacation destinations are not designed to incentivize recommendations that

[48] See Rule 206(4)-7 (17 CFR 275.206(4)-7)

run counter to Retirement Investor interests. Firms should structure training events to ensure that they are consistent with the Care and Loyalty Obligations. Recommendations to Retirement Investors should be driven by the interests of the investor in a secure retirement. Certainly, Financial Institutions should avoid creating situations where the training is merely incidental to the event, and an imprudent recommendation to a Retirement Investor is the only thing standing between an Investment Professional and a luxury getaway vacation.

Similarly, the Department does not require Financial Institutions to categorically eliminate all sales quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, sales contests, quotas, or bonuses. Rather, Financial Institutions are only required to eliminate such incentives that are "intended, or that a reasonable person would conclude are likely, to result in recommendations that do not meet the Care Obligation or Loyalty Obligation."

While the SEC limited its categorical prohibition on sales contests to time-limited contests, as one commenter observed, the SEC has emphasized that the limited prohibition in Regulation Best Interest should not be read as automatically permitting other activities. Instead, the SEC stressed that "prohibiting certain incentives does not mean that all other incentives are presumptively compliant with Regulation Best Interest."[49] The SEC noted that "other incentives and practices that are not explicitly prohibited are permitted *provided that the broker-dealer establishes reasonably designed policies and procedures to disclose and mitigate the incentives created, and the broker-dealer and its associated persons comply with the Care Obligation and the Disclosure Obligation*" (emphasis added).[50] In fact, the SEC recognized that if a "firm

[49] Reg BI Adopting Release at 33397
[50] *Id*. at 33327

determines that the conflicts associated with these practices are too difficult to disclose and mitigate, the firm should consider carefully assessing whether it is able to satisfy its best interest obligation in light of the identified conflict and in certain circumstances, may wish to avoid such practice entirely."[51]

The Department's conflict-mitigation language was not newly introduced in the Proposed Amendment; it has been part of the Department's interpretation of PTE 2020-02 since the Department issued the 2021 FAQs.[52] For example, in Q16 of the FAQs, the Department asked what Financial Institutions should do to satisfy the standard of mitigation so that a reasonable person reviewing their policies and procedures and incentive practices as a whole would conclude that they do been not create an incentive for a Financial Institution or Investment Professional to place their interests ahead of the interest of the Retirement Investor.

In the FAQ, the Department wrote that Financial Institutions must take special care in developing and monitoring compensation systems to ensure that their Investment Professionals satisfy the fundamental obligation to provide advice that is in the Retirement Investor's best interest. By carefully designing their compensation structures, Financial Institutions can avoid incentive structures that a reasonable person would view as creating incentives for Investment Professionals to place their interests ahead of the Retirement Investor's interests. Accordingly, Financial Institutions must be careful not to use quotas, bonuses, prizes, or performance standards as incentives that a reasonable person would conclude are likely to encourage Investment Professionals to make recommendations to Retirement Investors that do not meet the

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[51] *Id*. at 33397.
[52] See *supra* note 19.

Care Obligation and Loyalty Obligation of the Final Amendment. The Financial Institution should aim to eliminate such conflicts to the extent possible, not create them.

The FAQs went on to clarify that the Department recognizes firms cannot eliminate all conflicts of interest, however, and the exemption accordingly stresses the importance of mitigating such conflicts. For example, as one means of compliance, a firm could ensure level compensation for recommendations to invest in assets that fall within reasonably defined investment categories, and exercise heightened supervision as between investment categories to the extent that it is not possible for the institution to eliminate conflicts of interest between these categories. In this regard, the Department stresses that it is not imposing an obligation on firms to eliminate all differential compensation, but rather to manage any conflicts of interest caused by such differentials so that the interest of the Retirement Investor is paramount, rather than misaligned relative to the financial interests of the Investment Professional or Financial Institution. The Department also stresses that any transitional efforts to move to other compensation models or policies and procedures should be careful to avoid harm to existing investors' holdings. In making recommendations as to account type, it is important for the Investment Professional to ensure that the recommendation carefully considers the reasonably expected total costs over time to the Retirement Investor, and that the Investment Professional base its recommendations on the financial interests of the Retirement Investor and avoid subordinating those interests to the Investment Professional's competing financial interests. If, for example, a Retirement Investor had previously invested in front-end load shares, but the Financial Institution decided to move away from recommending such shares as part of its effort to better manage Conflicts of Interest, the Financial Institution and Investment Professional would need to pay close attention to the Care Obligation and Loyalty Obligation before advising the Retirement Investor to exchange or liquidate existing holdings in such shares after having already borne the front-end expense.

Similarly, the Department disagrees with the few commenters who suggested that the conflict-mitigation requirement would necessarily prevent Financial Institutions and Investment Professionals from recommending such specific investments as Class A share mutual fund investors. One commenter specifically expressed concern that Retirement Investors may want to pay up front for certain additional rights that Class A shares can include, such as rights of appreciation (ROA) and/or rights of exchange (ROE). While the Department is not endorsing any particular products, the Department confirms that the exemption does not preclude the recommendation of such shares when the recommendation satisfies the Care Obligation and Loyalty Obligation for a particular Retirement Investor.

More generally, Financial Institutions' policies and procedures must include supervisory oversight of investment recommendations, particularly in areas in which differential compensation remains. For example, Financial Institutions' policies and procedures could provide for increased monitoring of Investment Professional recommendations at or near compensation thresholds, recommendations at key liquidity events for investors (e.g., rollovers), and recommendations of investments that are particularly prone to conflicts of interest, such as proprietary products and principal-traded assets. However, in many circumstances, supervisory oversight is not an effective substitute for meaningful mitigation or elimination of dangerous compensation incentives. The Department continues to believe that its principles-based approach to conflict management is the right one. It properly focuses Financial Institutions on conflict mitigation, recognizes the practical impossibility of eliminating all conflicts, and stresses Financial Institutions' fundamental responsibility to ensure that their policies and procedures for managing conflicts of interest are such that a reasonable person would conclude that the Financial Institution is avoiding incentives that are likely to encourage Investment Professionals to make recommendations to Retirement Investors that do not meet the Final Amendment's Care Obligation and Loyalty Obligation. While PTE 2020-02 does not require eliminating all conflicts, it does require Financial Institutions to take special care when addressing the conflicts that are present.

Proprietary Products

In the Proposed Amendment, the Department requested comment on whether it should provide additional guidance regarding when a Financial Institution or Investment Professional, acting as a fiduciary, recommends its proprietary products to a Retirement Investor, and, if so, the type of guidance that would be most useful. A few commenters asserted that, despite the Department specifically stating that the exemption allows for investment advice on proprietary products or investments that generate third-party payments, the Department's additional guidance undermined that confirmation. One commenter took the opposite approach, and suggested the Department prohibit Financial Institutions and Investment Professionals from receiving third-party payments or require any third-party payments to be offset or rebated to the Retirement Investor.

The Department is not prohibiting any types of compensation, and once again confirms that PTE 2020-02 does not preclude Financial Institutions from providing fiduciary investment advice on proprietary products or investments that generate third-party payments, or advice based on investment menus that are limited to such products, in part or whole. The principles-based nature of the exemption is applicable to all transactions. The Department further disagrees with comments that stated the Department imposed additional conditions on proprietary products. Instead, the Department has provided an example of how Financial Institutions may choose to comply with the exemption when recommending such products. The standards established by the exemption are the same for all Financial Institutions and Investment Professionals, and firms are given substantial leeway in developing policies and procedures that suit their business model, provided that those policies and procedures are crafted in such a way that a reasonable person reviewing the policies and procedures and incentive practices as a whole would conclude that they do not create an incentive for a Financial Institution or Investment Professional to place their interests ahead of the interests of the Retirement Investor.

As described in the preamble to the Proposed Amendment, to the extent a recommendation of proprietary products is fiduciary investment advice under the Regulation, one way that a Financial Institution could meet the terms of the Proposed Amendment (and the Final Exemption) is by prudently doing the following:

- Document in writing its limitations on the universe of recommended investments, the Conflicts of Interest associated with any contract, agreement, or arrangement providing for its receipt of third-party payments or associated with the sale or promotion of proprietary products.
- Document any services it will provide to Retirement Investors in exchange for third-party payments, as well as any services or consideration it will furnish to any other party, including the payor, in exchange for the third-party payments.
- Reasonably conclude that the limitations on the universe of recommended investments and Conflicts of Interest will not cause the Financial Institution or its Investment Professionals to receive compensation in excess of reasonable compensation for Retirement Investors as set forth in Section II(a)(2).

- Reasonably conclude that these limitations and Conflicts of Interest will not cause the Financial Institution or its Investment Professionals to recommend imprudent investments; and document in writing the bases for its conclusions.
- Inform the Retirement Investor clearly and prominently in writing that the Financial Institution limits the types of products that it and its Investment Professionals recommend to proprietary products and/or products that generate third-party payments.
    - In this regard, the notice should not simply state that the Financial Institution or Investment Professional "may" limit investment recommendations based on whether the investments are proprietary products or generate third-party payments, without specific disclosure of the extent to which recommendations are, in fact, limited on that basis.
- Clearly explains its fees, compensation, and associated Conflicts of Interest to the Retirement Investor in plain language.
- Ensure that all recommendations are based on the Investment Professional's considerations of factors or interests such as investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor.
- Ensure that, at the time of the recommendation, the amount of compensation and other consideration reasonably anticipated to be paid, directly or indirectly, to the Investment Professional, Financial Institution, or their Affiliates or Related Entities for their services in connection with the recommended transaction is not in excess of reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2).

- Ensure that the Investment Professional's recommendation reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor; and the Investment Professional's recommendation is not based on the financial or other interests of the Investment Professional or the Investment Professional's consideration of any factors or interests other than the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor.

An SEC Staff Bulletin entitled *Standards of Conduct for Broker-Dealers and Investment Advisers Conflicts of Interest* additionally provides guidance on how to manage conflicts to ensure compliance with obligations of care and conflict management. The SEC staff Bulletin provides strong guidance on how firms and Investment Professionals can build policies and procedures properly aligned with the Care and Loyalty Obligations set forth in the Final Exemption.[53]

Providing Policies and Procedures to the Department

The Department proposed Section II(c)(3) would have required Financial Institutions to provide their complete policies and procedures to the Department within 10 business days of request. One commenter expressed support, noting that this condition would provide a meaningful incentive for Financial Institutions to ensure that policies and procedures are

[53] See *supra* note 44, Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Conflicts of Interest, available at https://www.sec.gov/tm/iabd-staff-bulletin-conflicts-interest.

reasonably designed. Another commenter strongly urged the Department to eliminate this condition and instead rely on its subpoena authority, if necessary. One comment requested more time to provide the certification to the Department. In response to these comments, although the Department expects that these reports should already be completed at the time of the request and easily located, it recognizes the possibility of inadvertent non-compliance because of the tight timeline and has modified the requirement in the Final Amendment to give Financial Institutions Insurers 30 days to provide the documentation.

Retrospective Review

The Department is finalizing the proposed retrospective review requirement, with some ministerial changes for clarity. Section II(d) requires the Financial Institution to conduct a retrospective review, at least annually, that is reasonably designed to detect and prevent violations of, and achieve compliance with, the conditions of this exemption's requirements, including adherence to the Impartial Conduct Standards and establishing and implementing policies and procedures that govern compliance with the exemption's conditions. The Financial Institution must update its policies and procedures as business, regulatory, and legislative changes and events dictate, to ensure that its policies and procedures remain prudently designed, effective, and compliant with Section II(c). The methodology and results of the retrospective review must be reduced to a written report that is provided to a Senior Executive Officer of the Financial Institution.

Under Section II(d)(3) the Senior Executive Officer must certify annually that the officer has reviewed the retrospective review report, that the Financial Institution has filed (or will file timely, including extensions) Form 5330 reporting any non-exempt prohibited transactions discovered by the Financial Institution in connection with investment advice covered under Code section 4975(e)(3)(B), corrected those transactions, and paid any resulting excise taxes owed under Code section 4975(a) or (b). The certification must also include that the Financial Institution has written policies and procedures that meet the requirements set forth in Section II(c), and that the Financial Institution has established a prudent process to modify such policies and procedures as required by Section II(d)(1).

Under Section II(d)(4), the review, report, and certification must be completed no later than six months after the end of the period covered by the review. Section II(d)(5) requires that the Financial Institution retain the report, certification, and supporting data for a period of six years and make the report, certification, and supporting data available to the Department within 30 days of request to the extent permitted by law (including 12 U.S.C. 484 regarding limitations on visitorial powers for national banks).

The Department received many comments on the retrospective review conditions. Some commenters supported the requirement for Financial Institutions to undertake a regular process to ensure that their policies and procedures are reasonably designed to detect and prevent violations of, and achieve compliance with, the conditions of the exemption.

Other commenters raised concern that the retrospective review requirement imposes significant burdens on Financial Institutions, while providing limited benefits to Retirement Investors. One commenter expressed specific concern that the Department's use of the terms "effective" and "compliant" are undefined, creating unwarranted uncertainty for firms.

This condition, as drafted, provides important protections for Retirement Investors. The obligation to periodically review the effectiveness of policies and procedures and to determine compliance is critical to ensuring that they achieve their intended protective purposes and are not mere window dressing. Without such periodic assessments, it would be hard for a Financial

Institution to have confidence that its oversight structures are working to ensure compliance with the Impartial Conduct Standards. By uniformly requiring retrospective review, the exemption promotes fiduciaries' uniform compliance with the Impartial Conduct Standards, which is an important aim of this rulemaking. Furthermore, the Department has provided guidance on how Financial Institutions can structure their policies and procedures, which should assist Senior Executive Officers in making the required certifications.

Several commenters specifically raised concerns with the proposed requirement that the Financial Institution has filed (or will file timely, including extensions) Form 5330 reporting any non-exempt prohibited transactions discovered by the Financial Institution in connection with investment advice covered under Code section 4975(e)(3)(B), corrected those transactions, and paid any resulting excise taxes owed under Code section 4975(a) or (b). Some commenters argued the Department is exceeding the scope of its regulatory authority by conditioning relief on compliance with certain Code requirements.

However, the Department notes that it is within its authority to ensure Financial Institutions engaging in otherwise prohibited transactions comply with the law, including by paying the excise taxes owed on non-exempt prohibited transactions. The amended Retrospective Review requirement is consistent with the Fifth Circuit's reasoning in *Chamber*. The Department is not creating new remedies or causes of action for violations of Title II of ERISA, but merely ensuring that parties comply with the excise taxes Congress specifically imposed on such violations. This approach is wholly consistent with the Fifth Circuit's observation that "ERISA

Title II only punishes violations of the 'prohibited transactions' provision by means of IRS audits and excise taxes."[54]

One commenter additionally argued this condition overstates the obligation to file Form 5330 because there is no obligation to file if a transaction is self-corrected and no excise tax is due. The commenter misreads the exemption, however. The Department is not imposing any additional requirements to file Form 5330; rather, it is merely requiring that transactions that are reportable to the IRS are in fact reported. The Department notes that while self-correction is permitted, such correction must be made in a permissible manner and within the allowable time frame.

One commenter expressed concern about including this obligation as part of the Senior Executive Officer's certification. The Department notes, however, that it is the Financial Institution's obligation to correct the prohibited transaction, file IRS Form 5330, and pay the prohibited transaction excise tax, and so it is appropriate for the Senior Executive Officer to include this in the certification. The Department is including the excise tax requirement in the Final Amendment as proposed. The excise tax is the congressionally imposed sanction for engaging in a non-exempt prohibited transaction and provides a powerful incentive for compliance. Requiring certification by the Senior Executive Officer reinforces the importance of compliance, provides an important safeguard for compliance with the tax obligation when violations occur, and focuses the Institution's attention on instances where the conditions of this exemption have been violated, resulting in a non-exempt prohibited transaction.

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[54] *Chamber of Commerce* v. *U.S. Dep't of Labor,* 885 F.3d 360, 384 (5th Cir. 2018). For additional information regarding correcting prohibited transactions, see Voluntary Fiduciary Correction Program Under the Employee Retirement Income Security Act of 1974,71 FR 20262 (Apr. 19, 2006).

Another commenter suggested that the Department modify the conditions to expressly provide that these certifications and other obligations should be limited to an obligation of good faith and reasonable diligence in complying with the retrospective review required under Section II(d) of the Proposed Amendment and good faith calculation of any excise taxes payable with respect to such prohibited transactions. The Department is not making the commenter's requested specific text edits but notes that compliance with the Retrospective Review requirement of Section II(d) does not require perfection. For example, Section II(e) specifically allows Financial Institutions to correct violations that they find as part of their retrospective review.

Careful retrospective review of the effectiveness of a Financial Institution's policies and procedures is essential to ensuring compliance with the Impartial Conduct Standards, and necessary for the Department to make its statutory findings to grant this exemption. The review must occur at least annually and must be performed carefully enough that the Senior Executive Officer can make the required certification. In this connection, the Department notes that findings of violations, in litigation or otherwise, do not necessarily mean that the Financial Institution's policies and procedures are inadequate, or that its retrospective review was insufficient. While such findings mean that the specific transaction at issue failed to meet the terms of the exemption, violated the prohibited transaction rules, and would be subject to the excise taxes and any available remedies under ERISA, it does not follow that the Financial Institution's policies and procedures are necessarily deficient. Rather, such violations should be reviewed for lessons learned and to determine if broader corrections are necessary to avoid recurrence. Even strong policies and procedures cannot be perfectly effective in avoiding isolated violations. Another commenter expressed concern that the retrospective review is too focused on the review of the policies and procedures and rather than impose a new, separate requirement, the Department should rely on other regulators' retrospective review requirements, or even turn those requirements into safe harbors. However, such requirements are not universal, and to the extent other regulators at self-regulatory organizations, such as FINRA, require retrospective review, the Financial Institutions would not need to develop whole new systems, but rather could build upon their existing review system to the extent it did not already fully satisfy the requirements of this exemption. The purpose of retrospective review is to assess the compliance of Financial Institutions and Investment Professionals with the specific conditions of this exemption, ERISA, and the Code, as opposed to their compliance with different regulatory regimes, and to ensure corrective changes when necessary. These purposes would not be served by relying entirely on other regulators' review requirements, although the additional compliance burden should be minimal to the extent firms have built strong retrospective review procedures pursuant to such requirements.

Some commenters addressed the requirement that Financial Institutions provide the retrospective review report, certification, and supporting data to the Department within 10 business days of request. One commenter expressed support, noting that this condition would provide a meaningful incentive for Financial Institutions to ensure that policies and procedures are reasonably designed. Others expressed concern. One commenter suggested Financial Institutions should have 30 days to provide the report, certification, and supporting data, consistent with the requirement to provide the Department's policies and procedures upon request. Although the Department expects that these reports should already be completed at the time of the request and easily located, it recognizes the possibility of inadvertent non-compliance because of the tight timeline and has modified the requirement to give Financial Institutions 30 days to provide the documentations.

Self-correction

Section II(e) of the Final Amendment provides that a non-exempt prohibited transaction will not occur due to a violation of this exemption's conditions with respect to a covered transaction if the following requirements are met: (1) either the violation did not result in investment losses to the Retirement Investor or the Financial Institution made the Retirement Investor whole for any resulting losses; (2) the Financial Institution corrects the violation (3) the correction occurs no later than 90 days after the Financial Institution learned of the violation or reasonably should have learned of the violation; and (4) the Financial Institution notifies the person(s) responsible for conducting the retrospective review during the applicable review cycle and the violation and correction is specifically set forth in the written report of the retrospective review required under subsection II(d)(2). The Department is finalizing the self-correction provision as proposed, except, in response to several comments, the Department is removing the requirement to notify the Department of each violation.

Some commenters questioned the utility of this self-correction provision to advice providers seeking to comply. One commenter expressed specific concern that firms will be inclined to relax their approach to compliance based on the knowledge that, if violations occur and are detected, they can likely invoke the self-correction process and avoid sanctions. Another commenter requested clarification regarding how a Financial Institution would make a Retirement Investor whole for any resulting losses related to a violation of the conditions of the exemption. For example, if a condition has been violated and a rollover occurred, how would a Retirement Investor be made whole? In response to these comments, the Department notes that

Financial Institutions are not required to use the self-correction provision. However, if a Financial Institution chooses to self-correct, it must make the Retirement Investor whole for any and all resulting losses. If a rollover recommendation out of a Title I Plan cannot be undone, the Financial Institution should calculate the amount of resulting losses, including estimated investment and tax losses, and restore the Retirement Investor to the position they would have occupied but for the breach.

Some commenters raised concerns about the lack of a materiality threshold, and the requirement that all mistakes be reported and remediated, no matter how minor or inadvertent. In the Department's view, however, the self-correction provisions are measured and proportional to the nature of the injury. They simply require timely correction of the violation of the law and notice to the person responsible for retrospective review of the violation, so that the significance and materiality of the violation can be assessed by the appropriate person responsible for assessing the effectiveness of the firm's compliance oversight. In addition, to address commenters' concern about the burden associated with the self-correction provision, the Department deleted the requirement to report each correction to the Department in this Final Amendment. This change should ease the compliance burden. Furthermore, to the extent Financial Institutions would have been wary of utilizing the self-correction provision because they would have to report each self-correction to the Department, they should feel more comfortable correcting each violation they find that is eligible for self-correction after this modification. The Department notes, however, that it retains the authority to require Financial Institutions to provide evidence of self-corrections as part of its investigation program through the recordkeeping provisions in Section IV.

ERISA Section 3(38) Investment Managers

Several commenters requested broad exceptions to the exemption for investment advice that is provided to sophisticated investors or from advice providers that receive level compensation. The Department is not granting that sort of exception to the general conditions of PTE 2020-02. As discussed above, the amended exemption is broad and flexible and provides Financial Institutions with the flexibility to develop policies and procedures would allow a reasonable person reviewing its incentive practices as a whole to conclude that they do not create an incentive for a Financial Institution or Investment Professional to place their interests ahead of the Retirement Investors' interests. Financial Institutions that provide fiduciary investment advice can determine for themselves how they will comply with all the conditions of the exemption.

Several commenters asked the Department to clarify whether they would become fiduciaries when marketing their services, and specifically whether responding to a request for proposal (RFP) to provide ongoing services as a fiduciary under ERISA section 3(38) would count as providing fiduciary investment advice if the other provisions of the Regulation are satisfied. The Department discussed in the preamble to the Regulation that merely touting the quality of, and providing information about, one's own advisory or management services would not be a covered recommendation (as defined in paragraph (f)(10) of the Regulation) that could lead to fiduciary status. However, to the extent a covered recommendation is made as part of hiring communications, it would be evaluated under all the parts of the Regulation.

A few commenters on the Proposed Amendment expressed concern that if providing a covered recommendation in the context of an RFP could lead to fiduciary status, they might need to comply with PTE 2020-02 merely to get hired, which they believed was unduly burdensome.

In this regard, if a covered recommendation is made as part of an RFP process and all parts of the Regulation are satisfied, including the receipt of a "fee or other compensation, direct or indirect," as a result of the fiduciary investment advice provided in the context of the RFP, a prohibited transaction would occur.

In response to these comments, the Department added a new section II(f) to the Final Amendment. The provision states that to the extent a Financial Institution or Investment Professional provides fiduciary investment advice to a Retirement Investor as part of its response to an RFP to provide investment management services as an ERISA section 3(38) investment manager and subsequently is hired to act as an investment manager to the Retirement Investor, it may receive compensation as a result of the advice under this exemption if it complies solely with the Impartial Conduct Standards set forth in Section II(a).

ERISA Section 3(38) investment managers are fiduciaries because by definition they must have the power to manage, acquire, or dispose of a plan's assets, and they are required by statute to acknowledge their fiduciary status. To respond to the concern expressed by the commenters, the Department has determined that parties that are ultimately hired to provide investment management services pursuant to an RFP should be able to rely on this exemption for the provision of investment advice in the hiring process as long as they comply with the Impartial Conduct Standards. The Department notes that ERISA 3(38) investment managers have discretion with respect to the investment of plan assets; therefore, they could not rely on PTE 2020-02 for the ongoing provision of investment management services after they are hired. Section II(f) is limited to the prohibited transaction associated with providing fiduciary investment advice in connection with the hiring process and does not relieve the investment manager from its obligation to refrain from engaging in any non-exempt prohibited transactions in the ongoing performance of its activities as an investment manager.

Eligibility

The Department proposed to modify the eligibility provisions in Section III, which identify circumstances under which an Investment Professional or Financial Institution will become ineligible to rely on the exemption for a 10-year period. The Department proposed expanding ineligibility to include Financial Institutions that are Affiliates, rather than members of the more limited "Controlled Group" as defined in PTE 2020-02, and the Proposed Amendment also enumerated specific crimes (including foreign crimes) that could cause ineligibility in Section III(a). The Department also proposed to broaden the scope of the crimes that would have caused ineligibility by providing that a Financial Institution or Investment Professional becomes ineligible upon conviction of any of the specific enumerated crimes including foreign crimes, regardless of the underlying conduct, as opposed to only "crimes arising out of such person's provision of investment advice to Retirement Investors" as provided in PTE 2020-02.

In the Proposed Amendment, the Department also proposed to add new ineligibility triggers that would make a Financial Institution or Investment Professional ineligible to rely on the exemption due to a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330 and pay the resulting excise taxes imposed by Code section 4975 in connection with non-exempt prohibited transactions involving investment advice under Code section 4975(e)(3)(B).

The Department also proposed making clarifying changes to the timing of the ineligibility provision that is set forth in Section III(b). The Department proposed that all entities would have become ineligible six months after the conviction date, the date the Department issued a written determination regarding a foreign conviction, or the date the Department issued a written ineligibility notice regarding other misconduct. As proposed, this six-month period would have replaced the one-year winding down period (referred to as the Transition Period in this Final Amendment). Furthermore, the Department clarified in the Proposed Amendment that ineligibility remains in effect until the occurrence of the earliest of the following events: (A) a subsequent judgment reversing a person's conviction, (B) 10 years after the person became ineligible or is released from imprisonment, if later, or (C) the Department grants an individual exemption permitting reliance on this exemption, notwithstanding the conviction.

The Department also proposed changes to Section III(c), which provided an opportunity to be heard. These proposed changes would have removed the separate opportunity to be heard by the Department that would have been granted following conviction by a U.S. Federal or State court and proposed providing an opportunity to be heard when the conviction is by a foreign court pursuant to proposed Section III(c)(1).

Section III(c)(2) of the Proposed Amendment provided that the Department would have issued a written warning letter regarding the conduct and thereafter would have allowed Financial Institutions and Investment Professionals that have engaged in conduct described in proposed Section III(a)(2) to have had the opportunity to cure the behavior and to be heard in an evidentiary hearing by the Department. Following the proposed hearing, the Department would have decided whether to issue a written ineligibility notice for conduct described in proposed Section III(a)(2).

Lastly, the Department proposed adding the heading "Alternative exemptions" in Section III(d), which is now Section III(c) in this Final Amendment, that would have described how a

Financial Institution may continue business after becoming ineligible. The Final Amendment specifies that a Financial Institution or Investment Professional that is ineligible to rely on this exemption may rely on an existing statutory or separate class prohibited transaction exemption if one is available or may request an individual prohibited transaction exemption from the Department. Several commenters asserted that the proposed changes to the eligibility provisions of the exemption would have: greatly altered the ability of fiduciaries to reasonably rely on PTE 2020-02; substantially broadened the conditions under which a fiduciary would be ineligible for reliance on PTE 2020-02; resulted in reduced choice and access for Retirement Investors; caused market disruption; been punitive; and provided the Department with the sole ability, for which it lacks the authority, to make Financial Institutions and Investment Professionals ineligible from providing fiduciary investment advice. A few commenters pointed to the Department's experience with ineligibility under PTE 84-14 Section I(g), though some argued that the Department did not sufficiently analyze the difference between the parties affected by PTE 84-14 and retail investors receiving investment advice. A few commenters argued the ineligibility provisions exceeded the Department's authority. One commenter claimed that Congress did not intend for the Department to have this degree of power. Another claimed the Department was granting to itself the ability to impose a "death penalty" on Financial Institutions. Generally, commenters requested that the Department not finalize the proposed amendments to the ineligibility provision; alternatively, they requested that the Department apply the changes only prospectively if the Department moves forward with them.

As explained further below, the Department continues to believe these eligibility provisions ensure that Financial Institutions provide strong oversight of Investment Professionals and that both the Financial Institution and the Investment Professional can be expected to ensure compliance with the exemption. Because of its supervisory responsibilities, and its control over the design and implementation of the policies and procedures, the Financial Institution's commitment to compliance is critical to the success of this exemption. While an occasional violation of the exemption will not result in disqualification for 10 years, Section III helps ensure that the Financial Institutions and Investment Professionals are willing and able to comply with the conditions of this exemption and protect investors from misconduct.

As required by ERISA section 408(a) and Code section 4975(c)(2), the Department may only grant exemptions that are protective of and in the interests of plan participants and beneficiaries. As the Department explained when it originally granted PTE 2020-02, "[t]he Department has determined that limiting eligibility in this manner serves as an important safeguard in connection with this very broad grant of relief from the self-dealing prohibitions of ERISA and the Code in this exemption."[55] Therefore, after consideration of the comments the Department has determined to retain the eligibility provision of Section III with several important modifications discussed below.

Scope of Ineligibility

Several commenters claimed the Proposed Amendment's expansion of the conditions for ineligibility to encompass not only the fiduciary but also any affiliate regardless of that affiliate's relationship with the fiduciary or its activity is regulatory overreach by the Department that unnecessarily exposes every fiduciary to an additional compliance risk. Some commenters argued that the exemption's definition of the term "Affiliate" is overly broad and creates an unreasonably large network of persons, most of whom will have absolutely no connection to the

[55] 85 FR 82841

recommendations provided to Retirement Investors. These commenters were concerned that the actions of these Affiliates can cause ineligibility and drive financial services workers and companies out of business to the detriment of the Retirement Investors relying on their investment advice services. Other commenters stated that the proposed expansion of the scope of the ineligibility provisions is problematic and would have led to unintended consequences.

Some commenters additionally stated the ineligibility provisions lack a proper nexus between the circumstances of the offense and the fiduciary services performed for the affected plans and requested the Department to concentrate the determination for ineligibility exclusively on the activities of the fiduciary itself and on any entity that is controlled by the fiduciary. Some commenters requested that the Department use the term "Control Group" in the ineligibility provisions of the Final Amendment, because it is less confusing and more well-defined than the term "Affiliate." Another commenter recommended that the eligibility provisions focus on criminal conduct that involves the investment management of retirement assets and which exclusively involves (i) the fiduciary and (ii) any affiliate that the fiduciary controls or over which the fiduciary exercises a controlling influence. One commenter provided specific examples of how broadly "Affiliate" could be interpreted.

One commenter claimed that the Department has not expressed any justification for imposing ineligibility when an investment advice entity's affiliate is convicted of a crime unrelated to the transactions covered by the exemption. This commenter stated that ERISA section 411 does not impute convictions to affiliates or relatives and only provides for the disqualification of persons convicted of specified crimes from serving as a "fiduciary" or as a "consultant or adviser to an employee benefit plan, including but not limited to any entity whose activities are in whole or substantial part devoted to providing goods or services to any employee benefit plan."

After consideration of these comments, the Department has determined to return to the use of the term "Controlled Group" in the Final Amendment for purposes of determining ineligibility under the exemption and has revised Section III(a) accordingly. The Final Amendment also adds Section III(a)(3) to the exemption, which defines Controlled Group by stating that an entity is in the same Controlled Group as a Financial Institution if the entity (including any predecessor or successor to the entity) would be considered to be in the same "controlled group of corporations" as the Financial Institution or "under common control" with the Financial Institution as those terms are defined in Code section 414(b) and (c) (and any regulations issued thereunder).

However, the Department is retaining in the Final Amendment the proposed broader definition of crimes that cause ineligibility, because the Department remains concerned that the limitation of "arising out of . . . provision of investment advice" is too narrow. The crimes listed as disqualifying are extraordinarily serious. Implicit in some of the comments is the notion that the Department and Retirement Investors need not be concerned about serious crimes if they involved non-plan assets or non-advisory financial activities, such as asset management. In the Department's view, however, the commission of a serious crime, such as a felony involving embezzlement, price fixing, or criminal fraud, calls into question the parties' commitment to compliance with the law, loyalty to their customers, and insistence on appropriate oversight structures. In such circumstances, it would be imprudent for the Department to disregard the previous felonies on the basis that the crimes were aimed at another class of customers or parties. When Financial Institutions and Investment Professionals engage in such crimes, there is ample cause for concern, and little reason for either the Department or the Retirement Investor to be sanguine about future compliance with the terms of the exemption. In such circumstances, it is appropriate to insist that the parties seek an individual exemption at that point, which permits the Department to consider the specific facts of the crime, the possible need for additional exemption conditions, or the loss of the exemption, without grant of a new individual exemption.

Foreign Convictions

Several commenters claimed that the Department has no basis for expanding the ineligibility provisions to include conduct by foreign affiliates and that including foreign affiliates is overbroad and will create unintended consequences, especially because the conduct that could lead to ineligibility does not need to relate directly to the provision of investment advice. These commenters claimed that disqualification would occur even where the only connection between the investment advice entity and the entity convicted of a foreign crime is a small, indirect ownership interest. The commenters stated that ineligibility will occur for conduct that is completely unrelated to the provision of fiduciary investment advice and for conduct in which the fiduciary has not participated and about which it has no knowledge. One commenter asserted that a Financial Institution should not be disqualified for foreign activities unless such activities are convictions for disqualifying crimes under ERISA section 411.

Several commenters focused on the inclusion of foreign crimes and stated that the proposed changes to the ineligibility provisions raise serious questions of fairness, national security, and U.S. sovereignty. These commenters claimed that ineligibility could result from the conviction of an affiliate in a foreign court for violation of foreign law without due process protections or the same level of due process afforded in the United States. Some commenters expressed concern that the proposed change sets up a false equivalence between and among foreign jurisdictions and that it is not credible to assume that the judicial systems of certain countries will be impartial and have criminal procedures and due process safeguards as afforded in U.S. Federal and State courts. Some commenters stated that it is not clear that the Department is equipped to make the "substantially equivalent" determination and could result in inconsistency and unfairness as well as, in some cases, a lack of due process. One commenter agreed that investment transactions that include retirement assets are increasingly likely to involve entities that may reside or operate in jurisdictions outside the U.S. and that reliance on PTE 2020-02 therefore must appropriately be tailored to address criminal activity, whether occurring in the U.S. or in a foreign jurisdiction but this commenter nonetheless had concerns with the potential lack of due process in foreign jurisdictions.

Other commenters were concerned that some foreign courts could become vehicles for hostile governments to achieve political ends as opposed to dispensing justice and potentially hostile foreign governments could interfere in the retirement marketplace for supposed wrongdoing that is wholly unrelated to managing retirement assets and these governments could potentially assert political influence over fiduciary advice providers that want to avoid a criminal conviction. One commenter recommended that the Proposed Amendment's foreign crime "substantially equivalent" standard be amended so that ineligibility for a foreign criminal conviction applies only when the factual record of such conviction, when applied to United States Federal criminal law, would highly likely lead also to a criminal conviction in the U.S., as determined under appropriate regulatory authority by the Department's Office of the Solicitor.

The Department notes these commenters' concerns, and as noted above, has reduced the scope of any possible disqualification by limiting the provision to the Controlled Group. However, the Department is retaining the inclusion of foreign convictions in the Final

Amendment. Financial Institutions increasingly have a global reach, in their affiliations and in their investment transactions. Retirement assets are often involved in transactions that take place in entities that operate in foreign jurisdictions therefore making the criminal conduct of foreign entities relevant to eligibility under PTE 2020-02. An ineligibility provision that is limited to U.S. Federal and State convictions would ignore these realities and provide insufficient protection for Retirement Investors. Moreover, foreign crimes of the type enumerated in the exemption call into question a firm's culture of compliance just as much as domestic crimes and are signs of potential serious compliance and integrity failures, whether prosecuted domestically or in foreign jurisdictions.

The Department does not expect that questions regarding "substantially equivalent" will arise frequently, and even less so with the Final Amendment's use of the term "Controlled Group" instead of "Affiliate," as discussed above. But, when these questions do arise, impacted entities may contact the Office of Exemption Determinations for guidance, as they have done for many years in connection with the eligibility provisions under the QPAM Exemption, PTE 84-14.[56] As discussed in more detail below, the one-year Transition Period that has been added to the exemption and the ability to apply for an individual exemption provide affected parties with both the time and the opportunity to address with the Department any issues about the relevance of any specific foreign conviction and its applicability to ongoing relief pursuant to PTE 2020-

[56] PTE 84-14 contains a similar eligibility provision which has long been understood to include foreign convictions. Impacted parties have successfully sought OED guidance regarding this eligibility provision whenever individualized questions or concerns arise. *See*, *e.g.,* Prohibited Transaction Exemption (PTE) 2023-15, 88 FR 42953 (July 5, 2023); 2023-14, 88 FR 36337 (June 2, 2023); 2023-13, 88 FR 26336 (Apr. 28, 2023); 2023-02, 88 FR 4023 (Jan. 23, 2023); 2023-01, 88 FR 1418 (Jan. 10, 2023); 2022-01, 87 FR 23249 (Apr. 19, 2022); 2021-01, 86 FR 20410 (Apr. 19, 2021); 2020–01, 85 FR 8020 (Feb. 12, 2020); PTE 2019–01, 84 FR 6163 (Feb. 26, 2019); PTE 2016–11, 81 FR 75150 (Oct. 28, 2016); PTE 2016–10, 81 FR 75147 (Oct. 28, 2016); PTE 2012–08, 77 FR 19344 (March 30, 2012); PTE 2004–13, 69 FR 54812 (Sept. 10, 2004).

02. Financial Institutions and Investment Professionals should interpret the scope of the eligibility provision broadly with respect to foreign convictions and consistent with the Department's statutorily mandated focus on the protection of Plans in ERISA section 408(a) and Code section 4975(c)(2). In situations where a crime raises particularly unique issues related to the substantial equivalence of the foreign Criminal Conviction, the Financial Institutions and Investment Professionals may seek the Department's views regarding whether the foreign crime, conviction, or misconduct is substantially equivalent to a U.S. Federal or State crime. However, any Financial Institution and Investment Professional submitting a request for review should do so promptly, and whenever possible, before a judgment is entered in a foreign conviction.

In the context of the PTE 84-14 Qualified Professional Asset Manager (QPAM) exemption, which has similar disqualification provisions, the Department is not aware of any potentially disqualifying foreign convictions having occurred in foreign nations that are intended to harm U.S.-based Financial Institutions and believes the likelihood of such an occurrence is rare. Further, the types of foreign crimes of which the Department is aware from recent PTE 84-14 QPAM individual exemption requests for relief from convictions have consistently related to the subject Financial Institution's management of financial transactions and/or culture of compliance. The underlying foreign crimes in those individual exemption requests have included: aiding and abetting tax fraud in France (PTE 2016-10, 81 FR 75147 (October 28, 2016) corrected at 88 FR 85931 (December 11, 2023), and PTE 2016-11, 81 FR 75150 (October 28, 2016) corrected at 89 FR 23612 (April 4, 2024)); attempting to peg, fix, or stabilize the price of an equity in anticipation of a block offering in Japan (PTE 2023-13, 88 FR 26336 (April 28, 2023)); illicit solicitation and money laundering for the purposes of aiding tax evasion in France

(PTE 2019-01, 84 FR 6163 (February 26, 2019)); and spot/futures-linked market price manipulation in South Korea (PTE 2015-15, 80 FR 53574 (September 4, 2015)).[57]

However, to address the concern expressed in the public comments that convictions have occurred in foreign nations that are intended to harm U.S.-based Financial Institutions, the Department has revised Section III(a)(1)(B) in the Final Amendment to exclude foreign convictions that occur within foreign jurisdictions that are included on the Department of Commerce's list of "foreign adversaries."[58] Therefore, the Department will not consider foreign convictions that occur under the jurisdiction of the listed "foreign adversaries" as an ineligibility event. To reflect this change, the Department has added the phrase "excluding convictions and imprisonment that occur within foreign countries that are included on the Department of Commerce's list of 'foreign adversaries' that is codified in 15 CFR 7.4" to Section III(a)(1)(B).

Due Process

The Department received several comments regarding the conduct described in Section III(a)(2) as involving "engaging in a systematic pattern or practice" that can cause ineligibility and the ineligibility notice process. Generally, the comments argued that the Department had

[57] On December 12, 2018, Korea's Seoul High Court for the 7th Criminal Division (the Seoul High Court) reversed the Korean Court's decision and declared the defendants not guilty; subsequently, Korean prosecutors appealed the Seoul High Court's decision to the Supreme Court of Korea., On December 21, 2023, the Supreme Court of Korea affirmed the reversal of the Korean Conviction, and it dismissed all judicial proceedings against DSK.
[58] 15 CFR 7.4. The list of foreign adversaries currently includes the following foreign governments and non-government persons: The People's Republic of China, including the Hong Kong Special Administrative Region (China); the Republic of Cuba (Cuba); the Islamic Republic of Iran (Iran); the Democratic People's Republic of Korea (North Korea); the Russian Federation (Russia); and Venezuelan politician Nicolás Maduro (Maduro Regime). The Secretary of Commerce's determination is based on multiple sources, including the National Security Strategy of the United States, the Office of the Director of National Intelligence's 2016–2019 Worldwide Threat Assessments of the U.S. Intelligence Community, and the 2018 National Cyber Strategy of the United States of America, as well as other reports and assessments from the U.S. Intelligence Community, the U.S. Departments of Justice, State and Homeland Security, and other relevant sources. The Secretary of Commerce periodically reviews this list in consultation with appropriate agency heads and may add to, subtract from, supplement, or otherwise amend the list. Section III(a)(1)(B) of the Final Amendment will automatically adjust to reflect amendments the Secretary of Commerce makes to the list.

given itself too much authority to disqualify parties based on its own factual determinations without affording them sufficient due process protections and had also reserved for itself the sole authority to determine ineligibility without external review and without ensuring due process.

A few commenters claimed that the Proposed Amendment has a procedural due process flaw that renders it unconstitutional under Article III of the Constitution, the Due Process Clause of the Fifth Amendment, and the Seventh Amendment. These commenters assert that courts have found that the sanction of depriving an entity of its ability to engage in its business is analogous to a criminal penalty and that only after sufficient due process can an individual be barred from engaging in an otherwise legal practice. These commenters express doubts about the ability of an administrative agency, like the Department, to assert this power without substantial additional procedural protections. Other commenters contended that the proposed process would have resulted in disqualification without any judicial recourse and that, by leaving too much discretion to the Department, would create uncertainty and adversely affect the availability of Retirement Investors to get sound advice. Some commenters asserted that the Department's ineligibility process was insufficient because it did not provide a chance for a hearing before an impartial administrative judge or Article III judge, no express right of appeal, and no formal procedures to present evidence, and provided the Department the sole discretion to prohibit the Investment Professional or Financial Institution from relying on PTE 2020-02.

Some commenters also stated that while the six-month notice period provided in the Proposed Amendment may be adequate time to send a notice to Retirement Investors, it is insufficient time for a Financial Institution to determine an alternative means of complying with ERISA in order to continue to provide advice to Retirement Investors. These commenters requested that the Department modify the Proposed Amendment to provide for at least 12 months to wind-down advice or to find an alternative means of complying with ERISA following a finding of ineligibility. One commenter additionally claimed that it was problematic that the opportunity to be heard and to challenge a disqualification based upon a domestic conviction had been eliminated. Another commenter urged the Department to eliminate the opportunity to cure misconduct from the exemption. This commenter claimed that this provision undermines compliance and accountability by reassuring Investment Professionals and firms that, even if they engage in a "systemic pattern or practice" of violating the conditions of the exemption, or even provide materially misleading information to the Department related to their conduct under the exemption, they will have the opportunity to cure and continue to rely on the exemption. The commenter asserted that Investment Professionals and firms who have engaged in these types of conduct will not desist from such misconduct during the lengthy cure period and, as a result, this provision threatens to expose Retirement Investors to continued harm. The commenter also requested that the Department eliminate any provision allowing Investment Professionals who are found ineligible to rely on PTE 2020-02 to nevertheless rely on other prohibited transaction exemptions or seek an individual transaction exemption from the Department. The commenter claimed that these provisions conflict with a proper regulatory approach that should seek to protect the public and deter misconduct by foreclosing exemptive relief to those Investment Professionals and firms who are demonstrably unfit to enjoy it.

After consideration of the comments and to address commenters' due process concerns, the Department has determined to modify Section III(a)(2) of the ineligibility provisions. As amended, Section III(a)(2) of the Final Amendment describes disqualifying conduct, which will be subject to a one-year Transition Period, instead of the six-month period originally proposed. The changes to the disqualifying conduct provisions of the exemption will remove the discretion of the Department from the ineligibility determination process regarding the occurrence of the Prohibited Misconduct under Section III(a)(2) while adding protections to the exemption by conditioning disqualification on determinations in court proceedings. Ineligibility under amended Section III(a)(2) will result from a Financial Institution or an Investment Professional being found in a final judgment or court-approved settlement in a Federal or State criminal or civil court proceeding brought by the Department, the Department of the Treasury, the IRS, the SEC, the Department of Justice, the Federal Reserve, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Commodity Futures Trading Commission, a State insurance or securities regulator, or State attorney general to have participated in one or more of the following categories of conduct irrespective of whether the court specifically considers this exemption or its terms: (A) engaging in a systematic pattern or practice of conduct that violates the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; (B) intentionally engaging in conduct that violates the conditions of this exemption in connection with otherwise non-exempt prohibited transactions; (C) engaging in a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330 or pay the resulting excise taxes imposed by Code section 4975 in connection with non-exempt prohibited transactions involving investment advice as defined under Code section 4975(e)(3)(B); or (D) providing materially misleading information to the Department, the Department of the Treasury, the Internal Revenue Service, the Securities and Exchange Commission, the Department of Justice, the Federal Reserve, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Commodity Futures Trading Commission, a State insurance or securities regulator, or State attorney general in connection with the conditions of this exemption.

In making this change to the Final Amendment, the Department has kept the same four triggers that it proposed in Section III(a)(2) of the Proposed Amendment. Rather than relying solely on the Department to determine whether a covered entity had engaged in one of these four triggers, however, the Department has determined that it is appropriate to limit eligibility to instances where a court has determined that a Financial Institution or Investment Professional has engaged in certain identified conduct. This underlying conduct is unchanged from the proposal. The Department agrees that relying on a determination from a court more appropriately balances the due process concerns raised by some comments. The Department also agrees with other commenters who emphasized that this identified conduct is a significant cause for concern, and that it is appropriate to condition ineligibility on a determination the Financial Institution or Investment Professional have engaged in this behavior.

Under this Final Amendment, ineligibility under Section III(a)(2) will operate in a similar manner to ineligibility for a criminal conviction defined in Section III(a)(1), as ineligibility will be immediate, subject to the timing and scope of the ineligibility provisions in Section III(b), including the One-Year Transition Period. Specifically, a Financial Institution or an Investment Professional will only become ineligible after it has been determined in a final judgment or a court-approved settlement that the conduct set forth in Section III(a)(2) has occurred. By removing the Opportunity to be Heard and Ineligibility Notice process and providing that ineligibility is triggered only after a conviction, a court's final judgment, or a court-approved settlement, the Financial Institution, an entity in the same Controlled Group as the Financial Institution, or an Investment Professional will have the due process that is afforded in formal legal proceedings. Additionally, having ineligibility occur only after a conviction, court's final judgment, or court-approved settlement provides those entities and persons confronting ineligibility with ample notice and time to prepare for their ineligibility and operations during the ensuing One-Year Transition Period discussed below. An ineligible Financial Institution or Investment Professional would again become eligible to rely on this exemption if there is a subsequent judgment reversing the conviction or final judgment.

Timing of Ineligibility and One-Year Transition Period

Several commenters expressed concern that the ineligibility provisions would apply retrospectively and urged the Department to confirm that ineligibility under the exemption would occur only on a prospective basis after finalization of the amended exemption. Additionally, some commenters asserted that the six-month period provided in the Proposed Amendment following ineligibility would be insufficient for Financial Institutions and Investment Professionals to prepare for any inability to provide retirement investment advice for a fee, determine an alternative means of complying with ERISA, and to prepare and submit an individual exemption application. One commenter argued that the change in the Proposed Amendment from a one-year transition period to six months was unduly punitive and contended that shortening the period would only mean that Retirement Investors would lose access to a trusted adviser sooner rather than later, generally for reasons entirely unrelated to the services provided to the Retirement Investor. Another commenter stated that providing a longer 12-month period would enable Financial Institutions to find alternative compliant means to help Retirement Investors and would enable Retirement Investors to continue to receive investment recommendations in their best interest.

One commenter claimed that the sudden real or impending loss of significant numbers of providers, or even a handful of the largest among them, as the result of their disqualification would cause chaos among plans, which would have no more than six months to find suitable replacements and impose harm on the Retirement Investors who had hired a disqualified firm. Another commenter argued that reducing the timing of ineligibility from one year to six months after a finding of ineligibility would make it more unlikely that the disqualified person could timely obtain an individual prohibited transaction exemption. The commenter stated that the result was especially significant because the Department was simultaneously proposing to eliminate alternative paths for exemptive relief for providing fiduciary investment advice under other class exemptions, making PTE 2020-02 the only available class exemption.

In response to these comments, the Department confirms that ineligibility under Section III will be prospective and only convictions, final judgments, or court-approved settlements occurring after the Applicability Date of the Final Amendment exemption will cause ineligibility. The proposed six-month period before ineligibility begins has been removed from the amended exemption and amended Section III(b) requires ineligibility for the Financial Institution or Investment Professional to begin immediately upon the date of conviction, final judgment, or court-approved settlement that occurs on or after the Applicability Date of the exemption. The Department has replaced the six-month lag period for beginning of ineligibility with a One-Year Transition Period in Section III(b)(2) to provide Financial Institutions and Investment Professionals ample time to prepare for loss of the exemptive relief of PTE 2020-02, determine alternative means for compliance, prepare and protect Retirement Investors, and apply to the Department for an individual exemption.

The Final Amendment provides that relief under the exemption during the One-Year Transition Period is available for a maximum period of one year after the Ineligibility Date if the Financial Institution and the Investment Professional provides notice to the Department at IIAWR@dol.gov within 30 days after ineligibility begins under Section III(b)(1). No relief will be available for any transactions (including past transactions) affected during the One-Year Transition Period unless the Financial Institution and the Investment Professional complies with all the conditions of the exemption during such one-year period. The Department notes that it included the One-Year Transition Period in the Final Amendment to reduce the costs and burdens associated with the possibility of ineligibility, and to give Financial Institutions and Investment Professionals ample opportunity to apply for individual exemptions with appropriate protective conditions.

Financial Institutions and Investment Professionals may continue to rely on the exemption, as long as they comply with all of the exemption's conditions during that year. The One-Year Transition Period begins on the date of the conviction, the final judgment (regardless of whether that judgment remains under appeal), or court approved settlement. Financial Institutions or Investment Professionals that become ineligible to rely on this exemption may rely on a statutory prohibited transaction exemption if one is available or may seek an individual prohibited transaction exemption from the Department. In circumstances where the Financial Institution or Investment Professional becomes ineligible, the Department believes the interests of Retirement Investors are best protected by the procedural protections, public record, and notice and comment process associated with individual exemption applications. Through the process of an individual exemption application, the Department has unique authority to efficiently gather evidence, consider the issues, and craft protective conditions that meet the statutory standard. If the Department concludes, consistent with the statutory standards set forth in ERISA section 408(a) and Code section 4975(c)(2), that an individual exemption is appropriate, Retirement Investors remain free to make their own independent determinations whether to engage in transactions with the Financial Institution or Investment Professional.

As provided under Section III(c), a Financial Institution or Investment Professional that is ineligible to rely on this exemption may request an individual prohibited transaction exemption from the Department. The Department encourages any Financial Institution or Investment Professional facing allegations that could result in ineligibility to begin the individual exemption application process as soon as possible. If the applicant becomes ineligible and the Department has not granted a final individual exemption, the Department will consider granting retroactive relief, consistent with its policy as set forth in 29 CFR 2570.35(d), which may require retroactive exemptions to include additional prospective conditions.

Form 5330

The Department received several comments arguing that the imposition of ineligibility under Section III(a)(2)(C) based on the Financial Institution's failure to timely report any non-exempt prohibited transaction on IRS Form 5330 filing requirements and paying the associated excise tax payment is unworkable. These commenters generally stated that the provision constituted overreach by the Department because it has no statutory or regulatory enforcement authority to base ineligibility on the IRS' Form 5330 filing requirements. Other commenters claimed that Congress did not intend to give this kind of authority to the Department when it gave the Department the authority to grant prohibited transaction exemptions. The commenters stated that the Department has no legitimate need for this information and if Congress intended to give the Department this authority, it would have done so directly. One commenter questioned whether it would be a violation of the exemption if a Financial Institution or Investment Professional did not file a Form 5330 based on advice of an accountant or attorney.

After considering these comments, the Department is retaining Section III(a)(2)(C)'s provisions for ineligibility based on the Financial Institution's or Investment Professional's engaging in a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330 or pay the resulting excise taxes imposed by Code section 4975 in connection with non-exempt prohibited transactions involving investment advice as defined under Code section 4975(e)(3)(B). The excise tax is the Congressionally imposed sanction for engaging in non-exempt prohibited transaction and provides a powerful incentive for compliance with the participant-protective terms of this exemption. Insisting on compliance with the statutory obligation to pay the excise tax provides an important safeguard for compliance with the tax obligation when violations occur and focuses the Institution's attention on instances where the conditions of this exemption have been violated, resulting in a non-exempt prohibited transaction. Moreover, the failure to satisfy this condition calls into question the Financial Institution's or Investment Professional's commitment to regulatory compliance, as is critical to ensuring adherence to the conditions of this exemption including the Impartial Conduct Standards.

By including this provision in the Final Amendment, the Department does not claim authority to impose taxes under the Code, and leaves responsibility for collecting the excise tax and managing related filings to the IRS. The Department merely asserts its clear authority to grant conditional or unconditional exemptions under ERISA section 408(a) and Code section 4975(c). Since an obligation already exists to file the Form 5330 when parties engage in non-exempt prohibited transactions, the Department is merely conditioning relief in the exemption on their compliance with existing law. The condition provides important protections to Retirement Investors by enhancing the existing protections of PTE 2020–02.

As discussed above, this Final Amendment provides that ineligibility under Section III(a)(2)(C) occurs following a court's finding or determination that Financial Institutions or

Investment Professionals engaged in a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330 or pay the resulting excise taxes imposed by Code section 4975. Triggering a Financial Institution or an Investment Professional's ineligibility only after a court has found the conduct occurred removes the Department from the determination process and provides the Financial Institution and Investment Professional with the due process protections inherent in the judicial process. Ineligibility grounded on failures under this condition call into question the Financial Institution or an Investment Professional's ability to provide advice for a fee that complies with the obligations of this exemption, including the Care Obligation and the Loyalty Obligation.

Alternative Exemptions

A Financial Institution or Investment Professional that is ineligible to rely on this exemption may rely on a statutory or separate administrative prohibited transaction exemption if one is available or may request an individual prohibited transaction exemption from the Department. To the extent an applicant requests retroactive relief in connection with an individual exemption application, the Department will consider the application in accordance with its retroactive exemption policy as set forth in 29 CFR 2570.35(d). The Department may require additional prospective compliance conditions as a condition of providing retroactive relief. A few commenters expressed concern that the Alternative Exemptions process was not sufficient. One commenter in particular expressed concern with the length and expense of seeking to obtain an individual exemption, claiming this would result in harm to Plans.

As discussed above, the violations that would trigger ineligibility are serious, call into question the parties' willingness or ability to comply with the obligations of the exemption, and have been determined in court supervised proceedings. In such circumstances, it is important that the parties seek individual relief from the Department if they would like to continue to have the benefit of an exemption that permits them to engage in conduct that would otherwise be illegal. As part of such an on the record process, they can present evidence and arguments on the scope of the compliance issues, the additional conditions necessary to safeguard Retirement Investor interests, and their ability and commitment to comply with protective conditions designed to ensure prudent advice and avoid the harmful impact of dangerous conflicts of interest.

Recordkeeping

Section IV provides that the Financial Institution must maintain for a period of six years following the covered transaction records demonstrating compliance with this exemption and make such records available to the extent permitted by law, including 12 U.S.C. 484, to any authorized employee of the Department or the Department of the Treasury, which includes the Internal Revenue Service.

While the Department proposed a broader recordkeeping condition in the Proposed Amendment, the Department has determined to maintain the recordkeeping condition as it is currently in PTE 2020-02. The Department is clarifying the language to confirm that records must be made available to authorized employees of the Internal Revenue Service as part of the Department of the Treasury. This clarification was in the preamble to the December 2020 grant of PTE 2020-02, and the Department is now adding it to the operative text.

Although the proposed broader recordkeeping condition is consistent with other exemptions, the Department understands commenters' concerns that broader access to the documents could have a counterproductive impact on the formulation and documentation of appropriate firm oversight and control of recommendations by Investment Professionals. Although the Final Amendment narrows the recordkeeping obligation, uses this narrower recordkeeping, the Department intends to monitor Financial Institutions' compliance with the exemption closely and may revisit this to expand the recordkeeping requirement as appropriate. Future amendments would be preceded by notice and an opportunity for public comment.

Executive Order 12866 and 13563 Statement

Executive Orders 12866[59] and 13563[60] direct agencies to assess all costs and benefits of available regulatory alternatives. If regulation is necessary, agencies must choose a regulatory approach that maximizes net benefits, including potential economic, environmental, public health and safety effects; distributive impacts; and equity. Executive Order 13563 emphasizes the importance of quantifying costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

Under Executive Order 12866, "significant" regulatory actions are subject to review by the Office of Management and Budget (OMB). As amended by Executive Order 14094,[61] entitled "Modernizing Regulatory Review," section 3(f) of Executive Order 12866 defines a "significant regulatory action" as any regulatory action that is likely to result in a rule that may: (1) have an annual effect on the economy of $200 million or more (adjusted every three years by the Administrator of the Office of Information and Regulatory Affairs (OIRA) for changes in gross domestic product); or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, Territorial, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations

[59] 58 FR 51735 (Oct. 4, 1993).
[60] 76 FR 3821 (Jan. 21, 2011).
[61] 88 FR 21879 (Apr. 6, 2023).

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

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

Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)), the Department solicited comments concerning the information collection requirements (ICRs) included in the proposed rulemaking. The Department received comments that addressed the burden estimates used in the analysis of the proposed rulemaking. The Department reviewed these public comments in developing the paperwork burden analysis and subsequently revised the burden estimates in the amendments to the PTEs discussed below.

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

By mail	James Butikofer Office of Research and Analysis Employee Benefits Security Administration U.S. Department of Labor 200 Constitution Avenue NW Room N-5718 Washington, DC 20210
By email	ebsa.opr@dol.gov

The Department is amending PTE 2020-02 to revise the required disclosures to Retirement Investors receiving advice and to provide more guidance for Financial Institutions and Investment Professionals complying with the Impartial Conduct Standards and implementing the policies and procedures. This rulemaking is intended to align with other regulators' rules and standards of conduct. These requirements are ICRs subject to the PRA. Readers should note that the burden discussed below conforms to the requirements of the PRA and is not the incremental burden of the changes.[62]

1.1 Preliminary Assumptions

In the analysis discussed below, a combination of personnel would perform the tasks associated with the ICRs at an hourly wage rate of $65.99 for clerical personnel, $165.71 for a legal professional, and $228.00 for a financial advisor.[63]

In the proposal, the Department received several comments on the Department's labor cost estimate, particularly the cost for legal support, remarking that it was too low. The Department assumes that tasks involving legal professionals will be completed by a combination of legal professionals, likely consisting of attorneys, legal support staff, and other professionals and in-house and out-sourced individuals. The labor cost associated with these tasks is estimated to be $165.71, which is the Department's estimated labor cost for an in-house attorney. The Department understands that some may feel this estimate is comparatively low to their experience, especially when hiring an outside ERISA legal expert. However, the Department has chosen this cost estimate understanding that it is meant to be an average, blended, or typical rate from a verifiable and repeatable source.

[62] For a more detailed discussion of the marginal costs associated with the amendments to PTE 2020-02, refer to the Regulatory Impact Analysis (RIA) in the Notice of Final Rulemaking published elsewhere in today's edition of the *Federal Register*.

[63] Internal Department calculation based on 2023 labor cost data and adjusted for inflation to reflect 2024 wages. For a description of the Department's methodology for calculating wage rates, see https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/technical-appendices/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-june-2019.pdf.

For the purposes of this analysis, the Department assumes that the percent of Retirement Investors who are in employer-sponsored plans receiving electronic disclosures would be similar to the percent of plan participants receiving electronic disclosures under the Department's 2002 and 2020 electronic disclosure safe harbors.[64] Accordingly, the Department estimates that 96.1 percent of the disclosures sent to Retirement Investors will be sent electronically, and the remaining 3.9 percent will be sent by mail.[65]

One commenter suggested that this assumption overstates the use of electronic disclosures for IRA owners and that 60 percent would be more appropriate. The Department is not able to substantiate that suggestion but understands that IRA owners could be different than plan participants in regard to electronic delivery of documents. In response, the Department reevaluated its estimate. In this analysis, the Department assumes that approximately 71.8 percent of IRA owners will receive disclosures electronically, and the remaining 28.2 percent sent by mail.[66]

Furthermore, the Department estimates that communications between businesses (such as disclosures sent from one Financial Institution to another) will be 100 percent electronic.

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[64] 67 FR 17263 (Apr. 9, 2002); 85 FR 31884 (May 27, 2020).

[65] The Department estimates that 58.3 percent of Retirement Investors receive electronic disclosures under the 2002 electronic disclosure safe harbor and that an additional 37.8 percent of Retirement Investors receive electronic disclosures under the 2020 electronic disclosure safe harbor. In total, the Department estimates 96.1 percent (58.3 percent + 37.8 percent) of Retirement Investors receive disclosures electronically.

[66] The Department used information from a Greenwald & Associates survey which reported that 84 percent of retirement plan participants find electronic delivery acceptable, and data from the National Telecommunications and Information Administration Internet Use Survey which indicated that 85.5 percent of adults 65 and over use e-mail on a regular basis, which is used as a proxy for internet fluency and usage. Therefore, the assumption is calculated as: (84% find electronic delivery acceptable) x (85.5% are internet fluent) = 71.8% are internet fluent and find electronic delivery acceptable.

For disclosures sent by mail, the Department estimates that entities will incur a cost of $0.68[67] for postage and $0.05 per page for material and printing costs.

1.2 Affected Entities

The Department expects the same 18,632 entities that are affected by the existing PTE 2020-02 will be affected by the amendments to the PTE. The number of entities by type and size are summarized in the table below.[68]

Table 1: Affected Entities by Type and Size

	Small	Large	Total
Broker-Dealer	431	1,489	1,920
Retail	302	1,018	1,319
Non-Retail	129	471	600
Registered Investment Adviser	2,989	13,409	16,398
SEC	228	7,806	8,035
Retail	85	4,859	4,944
Non-Retail	144	2,947	3,091
State	2,760	5,603	8,363
Retail	2,192	4,450	6,642
Non-Retail	568	1,153	1,721
Insurer	71	13	84
Robo-Adviser	10	190	200
Non-Bank Trustee	31	0	31
Total	3,531	15,101	18,632

Note: Values displayed are rounded to whole numbers; therefore, parts may not sum.

In addition, the amendments may affect banks and credit unions selling non-deposit investment products. There are 4,614 federally insured depository institutions in the United States, consisting of 4,049 commercial banks and 565 savings institutions.[69] Additionally, there

[67] United States Postal Service, *First-Class Mail*, United States Postal Service (2023), https://www.usps.com/ship/first-class-mail.htm.

[68] For more information on how the number of each type and size of entity is estimated, refer to the Affected Entity section of the RIA in the Notice of Final Rulemaking published elsewhere in today's edition of the *Federal Register*.

[69] Federal Deposit Insurance Corporation, *Statistics at a Glance- as of September 30, 2023*, https://www.fdic.gov/analysis/quarterly-banking-profile/statistics-at-a-glance/2023mar/industry.pdf.

are 4,645 federally insured credit unions.[70] In 2017, the GAO estimated that approximately two percent of credit unions have private deposit insurance.[71] Based on this estimate, the Department estimates that there are approximately 95 credit unions with private deposit insurance and 4,740 credit unions in total.[72]

In the proposal, the Department estimated that no banks or credit unions would be impacted by the amendments to PTE 2020-02. The Department requested comment on what other types of activities banks or credit unions may engage in that would require reliance on PTE 2020-02. The Department did not receive any comments on this topic. However, the Department revisited a comment it received on PTE 2020-02 in 2020. This comment suggested that banks may be providing investment advice outside of networking arrangements, such as recommendations to roll over assets from a plan or IRA or advice to invest in deposit products.[73] The Department agrees that, if the recommendation meets the facts and circumstances test for individualized best interest advice, or the adviser acknowledges fiduciary status, such transactions will require banks to comply with PTE 2020-02. The Department notes that some banks may need to comply with PTE 2020-02. However, the Department believes that in such cases, the banks, or their separately identifiable department or division, would be registered investment advisers and already included in the estimate of affected entities.[74]

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[70] National Credit Union Administration, *Quarterly Credit Union Data Summary 2023 Q3,* https://ncua.gov/files/publications/analysis/quarterly-data-summary-2023-Q3.pdf.

[71] GAO, *Private Deposit Insurance: Credit Unions Largely Complied with Disclosure Rules, But Rules Should be Clarified,* (March 29, 2017), https://www.gao.gov/products/gao-17-259.

[72] The total number of credit unions is calculated as: 4,645 federally insured credit unions / (100%-2% of credit unions that are privately insured) = 4,740 total credit unions. The number of private credit unions is estimated as: 4,740 total credit unions – 4,645 federally insured credit unions = 95 credit unions with private deposit insurance.

[73] Comment letter received from the American Bankers Association on the *Notification of Proposed Class Exemption: Improving Advice for Workers & Retirees,* (August 2020).

[74] For more information on the Department's consideration of banks and credit unions, refer to the Affected Entity section of the RIA in the Notice of Final Rulemaking published elsewhere in today's edition of the *Federal Register*.

The Department recognizes that the rulemaking may change the number of Financial Institutions who choose to rely on PTE 2020-02. Consistent with its initial analysis in 2020, the proposal assumed that all entities eligible to rely on the existing PTE 2020-02 were relying on it. However, one commenter indicated that some entities eligible to use PTE 2020-02 had determined that their business practices did not trigger fiduciary status or modified their business practices to avoid relying upon it. The definitional changes in this rulemaking may now require these entities to now rely on PTE 2020-02. These entities will incur the full compliance costs of PTE 2020-02. In response to this concern, this analysis assumes that 30 percent of currently eligible entities would begin to rely on PTE 2020-02 in response to the rulemaking.[75]

1.3 Costs Associated with Disclosures for Investors, Production and Distribution

1.3.1 Costs Associated with Drafting and Modifying Relationship and Conflict of Interest Disclosure

Section II(b) currently requires Financial Institutions to provide certain disclosures to Retirement Investors before engaging in a transaction pursuant to the exemption. These disclosures include:

- a written acknowledgment that the Financial Institution and its Investment Professionals are fiduciaries;
- a written description of the services to be provided and any material conflicts of interest of the Investment Professional and Financial Institution; and

[75] The Department is not aware of any source to determine the percent of firms currently eligible, but not using PTE 2020-02, but which now need to use the exemption. In response to the lack of information the Department selected a meaningful percent of firms that would be in this category, in order to provide an estimate of the cost to comply with PTE 2020-02. As a point of reference, each percentage point change to this assumption results in a 0.28 percentage point change in the estimated total cost of compliance for PTE 2020-02.

- documentation of the Financial Institution and its Investment Professional's conclusions as to whether a rollover is in the Retirement Investor's best interest, before engaging in a rollover or offering recommendations on post-rollover investments.

The Department is finalizing the disclosure conditions from the proposal with some modifications. In the proposal, the Department proposed requiring a written statement informing the investor of their right to obtain a written description of the Financial Institution's written policies and procedures and information regarding costs, fees, and compensation. The Department received several comments regarding its estimate of the number of annual requests per firm, and the cost burdens associated with the Provision of Disclosures. After reviewing the comments and existing disclosures associated with the rulemaking, the Department has removed this requirement. The modifications to the disclosure requirements included in the final rulemaking are described below.

The following estimates reflect the ongoing paperwork burdens of the affected entities. Broker-dealers, registered investment advisers, and insurance companies that relied on the existing exemption were required to prepare certain disclosures under the existing PTE 2020-02. The estimates below reflect the paperwork burden these entities would incur to modify the current disclosures. This analysis does not include the transition costs already incurred for the existing PTE 2020-02 exemption.

Written Acknowledgement of Fiduciary Status

Of the 70 percent of the broker-dealers, registered investment advisers, and insurance companies assumed to be currently reliant on the existing exemption, the Department assumes that 10 percent will need to update their disclosures and that it will take a legal professional at a Financial Institution, on average, 10 minutes to update existing disclosures.

Robo-advisers, non-bank trustees, and newly reliant broker-dealers, registered investment advisers, and insurance companies will need to draft the acknowledgement. The Department estimates that it will take a legal professional at these entities, on average, 30 minutes to draft the acknowledgement. Updating and drafting the acknowledgement is estimated to result in an estimated hour burden of 3,090 hours with an equivalent cost of $512,106.[76]

Table 2: Hour Burden and Equivalent Cost Associated with the Fiduciary Acknowledgement				
	Year 1		Subsequent Years	
Activity	**Burden Hours**	**Equivalent Burden Cost**	**Burden Hours**	**Equivalent Burden Cost**
Create Disclosure (Legal)	2,876	$476,531	0	$0
Update Disclosure (Legal)	215	$35,575	0	$0
Total	**3,090**	**$512,106**	**0**	**$0**

Written Statement of the Care Obligation and Loyalty Obligation

As amended, PTE 2020-02 requires Financial Institutions to provide investors with a Written Statement of the Care Obligation and Loyalty Obligation disclosure. As presented in

[76] The number of Financial Institutions needing to update their written acknowledgement is estimated as: (1,920 broker-dealers x 10% x (100% - 30%)) + (8,035 SEC-registered investment advisers x 10% x (100% - 30%)) + (8,363 State-registered investment advisers x 10% x (100% - 30%)) + (84 insurers x 10% x (100% - 30%)) = 1,288 Financial Institutions updating existing disclosures. The number of Financial Institutions needing to draft their written acknowledgement is estimated as: 200 robo-advisers + 31 non-bank trustees + (1,920 broker-dealers x 30%) + (8,035 SEC-registered investment advisers x 30%) + (8,363 State-registered investment advisers x 30%) + (84 insurers x 30%) = 5,751 Financial Institutions drafting new disclosures. The burden is estimated as: (1,288 Financial Institutions x (10 minutes ÷ 60 minutes hours)) + (5,751 Financial Institutions x (30 minutes ÷ 60 minutes hours) = 3,090 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: 3,090 burden hours x $165.71 = $512,106. Note: Due to rounding, values may not sum.

more detail in the preamble, this disclosure defines the Care Obligation and Loyalty Obligation as related to the investor's relationship with the Investment Professional.

Most registered investment advisers and broker-dealers with retail investors already provide disclosures that the Department expects will satisfy these requirements.[77]

The Department expects that the written statement of Care Obligation and Loyalty Obligation will not take a significant amount of time to prepare and will be uniform across clients. The Department assumes that a legal professional employed by a broker-dealer or registered investment adviser, on average, will take 30 minutes to modify existing disclosures and that it will take insurers, robo-advisers, and non-bank trustees, on average, one hour to prepare the statement. This results in an hour burden of 9,474 hours with an equivalent cost of $1,569,868.[78]

Table 3: Hour Burden and Equivalent Cost Associated with the Statement of the Care and Loyalty Obligation

	Year 1		Subsequent Years	
Activity	**Burden Hours**	**Equivalent Burden Cost**	**Burden Hours**	**Equivalent Burden Cost**
Legal	9,474	$1,569,868	0	$0
Total	**9,474**	**$1,569,868**	**0**	**$0**

Relationship and Conflict of Interest Disclosure

The rulemaking also revises on the existing requirement for a written description of the services provided to also require a statement on whether the Retirement Investor would pay for such services, directly or indirectly, including through third-party payments. This disclosure is

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

[78] The burden is estimated as: [(1,920 broker-dealers + 16,398 registered investment advisers) x (30 minutes ÷ 60 minutes hours)] + [(84 insurers + 200 robo-advisers + 31 non-bank trustees) x 1 hour] = 9,474 hours. A labor rate of $165.71 is used for a legal professional. The labor rate is applied in the following calculation: 9,474 burden hours x $165.71 = $1,569,868. Due to rounding values may not sum.

consistent with the disclosure requirements under Regulation Best Interest. Accordingly, the Department expects that retail broker-dealers will not incur a cost to satisfy this requirement.

For all other Financial Institutions which relied on the existing exemption (i.e. 70 percent of non-retail broker-dealers, registered investment advisers, and insurance companies), the Department assumes it will take a legal professional 30 minutes to update existing disclosures to include this information. Robo-advisers, non-bank trustees, and newly reliant non-retail broker-dealers, registered investment advisers, and insurance companies will need to draft the Relationship and Conflict of Interest disclosure, which the Department estimates will take a legal professional at a large institution five hours and a legal professional at a small institution one hour, on average, to prepare such a draft.[79] This results in an estimated hour burden of 28,738 hours with an equivalent cost of $4,762,239.[80]

Table 4: Hour Burden and Equivalent Cost Associated with the Relationship and Conflict of Interest **Disclosure**				
	Year 1		**Subsequent Years**	
Activity	**Burden Hours**	**Equivalent Burden Cost**	**Burden Hours**	**Equivalent Burden Cost**
Legal	28,738	$4,762,239	0	$0
Total	**28,738**	**$4,762,239**	**0**	**$0**

1.3.2 Costs Associated with the Provision of Relationship and Conflict of Interest Disclosures

[79] The Department estimates that 10 robo-advisers and 31 non-bank trustees are considered small entities.

[80] The number of Financial Institutions needing to update their written description of services to comply with the Relationship and Conflict of Interest disclosure is estimated as: 84 insurers + ((16,398 registered investment advisers + 600 non-retail broker-dealers) x (100%-30%)) = 11,983 Financial Institutions updating existing disclosures. The number of Financial Institutions needing to draft their Relationship and Conflict of Interest disclosure is estimated as: (200 robo-advisers + 31 non-bank trustees) + ((600 non-retail broker-dealers + 16,398 registered investment advisers) x 30%) = 5,330 Financial Institutions drafting new disclosures. Of these entities, there are 976 small entities and 4,354 large entities. The hours burden is calculated as: ((11,563 entities updating x 30 minutes) + ((976small entities drafting x 1 hour) + (4,354 large entities drafting x 5 hours)) = 28,738 burden hours. The labor rate is applied as: 28,738 burden hours x $165.71 = $4,762,239. Due to rounding values may not sum.

As discussed above, the Department estimates that 96.1 percent of the disclosures sent to Retirement Investors will be sent electronically and that approximately 72 percent of IRA owners will receive disclosures electronically.

The Department estimates that approximately 44.6 million Plan participants and 67.8 million IRA owners will receive disclosures annually, of which, 20.9 million (1.7 million Retirement Investors and 19.1 million IRA owners) will receive paper disclosures.[81] The Department estimates that preparing and sending each disclosure would take a clerical worker, on average, five minutes, resulting in an hour burden of 1,737,781 hours with an equivalent cost of $114,676,201.[82]

Table 5: Hour Burden and Equivalent Cost Associated Preparing and Sending Disclosures				
	Year 1		**Subsequent Years**	
Activity	**Burden Hours**	**Equivalent Burden Cost**	**Burden Hours**	**Equivalent Burden Cost**
Clerical	1,737,781	$114,676,201	1,737,781	$114,676,201
Total	**1,737,781**	**$114,676,201**	**1,737,781**	**$114,676,201**

The Department assumes that the disclosures would require four pages in total, resulting in a material and postage cost of $18,350,973.[83]

Table 6: Material and Postage Cost Associated with Sending Disclosures				
	Year 1		**Subsequent Years**	
Activity	**Pages**	**Cost**	**Pages**	**Cost**
Material Cost	4	$18,350,973	4	$18,350,973
Total	**4**	**$18,350,973**	**4**	**$18,350,973**

[81] This is estimated as (44,593,228 x 3.9%) + (67,781,000 x 28.2%) = 20,853,378 paper disclosures. Due to rounding values may not sum.
[82] This burden is estimated as: [(20,853,378 disclosures x (5 minutes ÷ 60 minutes hours)] = 1,737,781 hours. The labor cost is estimated as: [(20,853,378 disclosures x (5 minutes ÷ 60 minutes hours)] x $65.99 = $114,676,201. Due to rounding values may not sum.
[83] The material and postage cost is estimated as: (20,853,378 disclosures x 4 pages x $0.05) + (20,853,378 disclosures x $0.68 postage) = $18,350,973. Due to rounding values may not sum.

1.3.3 Costs Associated with the Rollover Disclosures

The proposal proposed requiring disclosures for all rollovers, including those from plans to IRAs, from IRAs to other IRAs and from plans to plans. In the Final Amendment, the rollover disclosure will only be required for rollovers from a Plan that is covered by Title I, or recommendation to a Plan participant or beneficiary as to the post-rollover investment of assets currently held in a Plan that is covered by Title I. According to Cerulli Associates, in 2022, almost 4.5 million defined contribution (DC) plan accounts with $779 billion in assets were rolled over to an IRA.[84]

As a best practice, the SEC already encourages firms to record the basis for significant investment decisions, such as rollovers, although doing so is not required under Regulation Best Interest or the Advisers Act. In addition, some firms may voluntarily document significant investment decisions to demonstrate compliance with applicable law, even if not required. SIFMA commissioned Deloitte to conduct a survey of its member firms to learn how they expected to implement Regulation Best Interest. The survey was conducted by December 31, 2019, prior to Regulation Best Interest's effective date of June 30, 2020. Just over half (52 percent) of the broker-dealers surveyed indicated they will require their financial advisers to provide the rationale documentation for rollover recommendations.[85]

The Department estimates that documenting each rollover recommendation will require 30 minutes for a personal financial adviser whose firms currently do not require rollover

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[84] According to Cerulli, in 2022, there were 4,485,059 DC plan-to-IRA rollovers and 707,104 DC plan-to-DC plan rollovers. (*See* Cerulli Associates, *U.S. Retirement End-Investor 2023: Personalizing the 401(k) Investor Experience*, Exhibit 6.02. The Cerulli Report.) These account estimates may include health savings accounts, Archer medical savings accounts, or Coverdell education savings accounts.

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

documentations and five minutes for financial advisers whose firms already require them to do so. This results in a labor cost estimate of $142.0 million.[86]

Table 7: Hour Burden and Equivalent Cost Associated with the Rollover Documentation				
	Year 1		Subsequent Years	
Activity	**Burden Hours**	**Equivalent Burden Cost**	**Burden Hours**	**Equivalent Burden Cost**
Financial Adviser	622,676	$141,970,058	622,676	$141,970,058
Total	**622,676**	**$141,970,058**	**622,676**	**$141,970,058**

These rollover disclosures are expected to be two pages in length and accompany other documentation associated with the transactions at no additional postage cost. The materials cost is estimated as $0.05 per page, totaling $8,571 annually.[87]

Table 8: Material and Postage Cost Associated with the Rollover Disclosure				
	Year 1		Subsequent Years	
Activity	**Pages**	**Cost**	**Pages**	**Cost**
Material Cost	2	$8,571	2	$8,571
Total	**2**	**$8,571**	**2**	**$8,571**

1.4 Costs Associated with Annual Report of Retrospective Review

PTE 2020-02 currently requires Financial Institutions to conduct a retrospective review at least annually that is reasonably designed to prevent violations of, and achieve compliance with,

[86] The burden is estimated as: (4,485,059 rollovers x 48% x 49% x (30 minutes ÷ 60 minutes hours)) + (4,485,059 rollovers x 52% x 49% x (5 minutes ÷ 60 minutes hours)) = 622,676 hours. A labor rate of $228.00 is used for a personal financial adviser. The labor rate is applied in the following calculation: 622,676 burden hours x $228.00 = $141,970,058. Due to rounding values may not sum.
[87] The material and postage cost is estimated as: (4,485,059 rollovers x 49% involving advice x 3.9% disclosures mailed x $0.05 per page x 2 pages = $8,571. Note, the total values may not equal the sum of the parts due to rounding.

the conditions of this exemption, the Impartial Conduct Standards, and the policies and procedures governing compliance with the exemption. The retrospective review must include a discussion of any self-corrections of violations.

Many of the entities affected by PTE 2020-02 likely already have retrospective review requirements. Broker-dealers are subject to similar annual review and certification requirements under FINRA Rule 3110,[88] FINRA Rule 3120,[89] and FINRA Rule 3130;[90] SEC-registered investment advisers are already subject to retrospective review requirements under SEC Rule 206(4)-7; and insurance companies in many states are already subject to state insurance law based on the NAIC Model Regulation.[91] Accordingly, in this analysis, the Department assumes that these entities will incur minimal costs to meet this requirement.

In 2018, the Investment Adviser Association estimated that 92 percent of SEC-registered investment advisers voluntarily provide an annual compliance program review report to senior management.[92] The Department assumes that State-registered investment advisers exhibit similar retrospective review patterns as SEC-registered investment advisers. Accordingly, the Department estimates that eight percent, or 1,312 investment advisers advising retirement plans will incur costs associated with producing a retrospective review report.

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

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

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

[91] NAIC Model Regulation, Section 6.C.(2)(i) (The same requirement is found in the NAIC Suitability in Annuity Transactions Model Regulation (2010), Section 6.F.(1)(f).)

[92] *2018 Investment Management Compliance Testing Survey,* Investment Adviser Association (Jun. 14, 2018), https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/publications/2018-Investment-Management_Compliance-Testing-Survey-Results-Webcast_pptx.pdf.

The Department assumes that only 0.8 percent of registered investment advisers and ten percent of all other Financial Institutions will incur the total costs of producing the retrospective review report. This is estimated to take a legal professional five hours for small firms and 10 hours for large firms. This results in an annual hour burden of 3,156 hours and an equivalent cost burden of $522,907.[93]

Financial Institutions that already produce retrospective review reports voluntarily or in accordance with other regulators' rules likely will spend additional time to fully comply with this exemption condition such as revising their current retrospective review reports. This is estimated to take a financial professional one hour for small firms and two hours for large firms. This results in an annual hour burden of 33,103 hours and an equivalent cost burden of $5,485,436.[94]

In addition to conducting the audit and producing a report, Financial Institutions also will need to review the report and certify the exemption. This is estimated to take the certifying officer two hours for small firms and four hours for large firms. This results in an hour burden of 67,467 and an equivalent cost burden of $13,375,426.[95]

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[93] The burden is estimated as: [(431 small broker-dealers + (2,989 small registered-investment advisers x 8%) + 71 small insurers + 10 small robo-advisers + 30 small non-bank trustees) x 10% x 5 hours] + [(1,489 large broker-dealers + (13,409 large registered-investment advisers x 8%) + 13 large insurers + 190 large robo-advisers + 1 large non-bank trustee) x 10% x 10 hours] = 3,156 hours. The equivalent cost is estimated as: {[(431 small broker-dealers + (2,989 small registered-investment advisers x 8%) + 71 small insurers + 10 small robo-advisers + 30 small non-bank trustees) x 10% x 5 hours] + [(1,489 large broker-dealers + (13,409 large registered-investment advisers x 8%) + 13 large insurers + 190 large robo-advisers + 1 large non-bank trustee) x 10% x 10 hours]} x $165.71 = $522,907.

[94] The burden is estimated as: [(431 small broker-dealers + (2,989 small registered-investment advisers x 8%) + 71 small insurers + 10 small robo-advisers + 30 small non-bank trustees) x 90% x 2 hours] + [(1,489 large broker-dealers + (13,409 large registered-investment advisers x 8%) + 13 large insurers + 190 large robo-advisers + 1 large non-bank trustee)) x 90% x 4 hours] = 33,103 hours. The equivalent cost is estimated as: {[(431 small broker-dealers + (2,989 small registered-investment advisers x 8%) + 71 small insurers + 10 small robo-advisers + 30 small non-bank trustees) x 90% x 2 hours] + [(1,489 large broker-dealers + (13,409 large registered-investment advisers x 8%) + 13 large insurers + 190 large robo-advisers + 1 large non-bank trustee)) x 90% x 4 hours]} x $165.71 = $5,485,436.

[95] The burden is estimated as: [(431 small broker-dealers + (2,989 small registered-investment advisers x 8%) + 71 small insurers + 10 small robo-advisers + 30 small non-bank trustees) x 2 hours] + [(1,488 large broker-dealers + (13,409 large registered-investment advisers x 8%) + 13 large insurers + 190 large robo-advisers + 1 large non-bank

Table 10: Hour Burden and Equivalent Cost Associated with the Retrospective Review				
	Year 1		Subsequent Years	
Activity	**Burden Hours**	**Equivalent Burden Cost**	**Burden Hours**	**Equivalent Burden Cost**
Legal	36,258	$6,008,343	36,258	$6,008,343
Senior Executive Staff	67,467	$13,375,426	67,467	$13,375,426
Total	**103,726**	**$19,383,769**	**103,726**	**$19,383,769**

1.5 Costs Associated with Written Policies and Procedures

Under the original exemption, Financial Institutions were already required to maintain their policies and procedures. Financial Institutions who are not covered under the existing exemption may need to develop policies and procedures. The Department estimates that, for entities newly reliant upon PTE 2020-02 due to this rulemaking, this requirement will take legal professionals 40 hours at a large firm and 20 hours at a small firm in the first year.[96] Retail broker-dealers and all registered investment advisors should have policies and procedures in place to satisfy other regulators that can be amended to comply with this rulemaking. The Department estimates it will take 10 hours for small firms and 20 hours for large firms to amend their policies and procedures. The Department estimates the requirement to result in an hour burden of 111,864 with an equivalent cost of $18,536,977 in the first year.[97]

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trustee)) x 4 hours] = 67,467 hours. The equivalent cost is estimated as: {[(431 small broker-dealers + (2,989 small registered-investment advisers x 8%) + 71 small insurers + 10 small robo-advisers + 30 small non-bank trustees) x 2 hours] + [(1,489 large broker-dealers + (13,409 large registered-investment advisers x 8%) + 13 large insurers + 190 large robo-advisers + 1 large non-bank trustee)) x 4 hours]} x $198.25 = $13,375,426.

[96] The Department estimates that 3,531 entities, consisting of 302 retail broker-dealers, 129 non-Retail broker-dealers, 85 SEC-registered Retail registered investment advisers, 144 SEC-registered non-Retail registered investment advisers, 2,192 state registered Retail registered investment advisers, 568 state registered Non-Retail registered investment advisers, 71 insurers and insurance agents, 10 robo-advisers, and 31 non-bank trustees, are considered small entities.

[97] The burden is estimated as follows: [(302 small retail broker-dealers + 85 small SEC-registered retail registered investment advisers + 144 small SEC-registered non-retail registered investment advisers + 2,192 small state registered retail registered investment advisers + 568 small state registered non-retail registered investment advisers)

Table 11: Hour Burden and Equivalent Cost Associated with Developing Policies and Procedures				
	Year 1		Subsequent Years	
Activity	Burden Hours	Equivalent Burden Cost	Burden Hours	Equivalent Burden Cost
Legal	111,864	$18,536,977	0	$0
Total	**111,864**	**$18,536,977**	**0**	**$0**

The Final Amendment requires Financial Institutions to review policies and procedures at least annually and to update them as needed to ensure they remain prudently designed, effective, and current. This includes a requirement to update and modify the policies and procedures, as appropriate, after considering the findings in the retrospective review report. For entities currently covered by PTE 2020-02, the Department estimates that it will take a legal professional an additional five hours for all entities covered under the existing and amended exemption. The Department expects that in the first year, only entities already reliant on PTE 2020-02 will satisfy this requirement but all entities will be required to satisfy it in subsequent years. The Department estimates this will result an estimated first year hour burden of 65,559 with an equivalent cost of $10,863,864. In subsequent years, this will result in an annual hour burden of 93,161 hours with an equivalent cost of $15,437,780 in subsequent years.[98]

x 30% newly reliant on the PTE x 10 hours] + {[(1,018 large retail broker-dealers + 129 small non-retail broker-dealers + 4,859 large SEC-registered retail registered investment advisers + 2,947 large SEC-registered non-retail registered investment advisers + 4,450 large state registered retail registered investment advisers + 1,153 large state registered non-retail registered investment advisers + 71 insurers) x 30% newly reliant on the PTE] + (10 small robo-advisers + 30 small non-bank trustees) × 20 hours} + {[(471 large non-retail broker-dealers + 13 large insurers) x 30% newly reliant on the PTE] + 190 large robo-advisers + 1 large non-bank trustee) × 40 hours]} = 111,864 hours. The labor rate is applied in the following calculation: 111,864 burden hours x $165.71 = $18,536,977. Note, the total values may not equal the sum of the parts due to rounding.

[98] The burden is estimated as follows: The first-year cost of updating policies and procedures for plans that currently have policies & procedures: [(302 small Retail broker-dealers + 85 small SEC-registered Retail registered investment advisers + 144 small SEC-registered non-retail registered investment advisers + 2,192 small state registered retail registered investment advisers + 568 small state registered non-retail registered investment advisers) x 30% newly reliant on the PTE x 10 hours] + {[(1,018 large Retail broker-dealers + 129 small Non-Retail broker-dealers + 4,859 large SEC-registered Retail registered investment advisers + 2,947 large SEC-registered Non-Retail

Table 12: Hour Burden and Equivalent Cost Associated with Reviewing and Updating Policies and Procedures				
	Year 1		Subsequent Years	
Activity	**Burden Hours**	**Equivalent Burden Cost**	**Burden Hours**	**Equivalent Burden Cost**
Legal	65,559	$10,863,864	93,161	$15,437,780
Total	**65,559**	**$10,863,864**	**93,161**	**$15,437,780**

The amendments will require Financial Institutions to provide their complete policies and procedures to the Department upon request. Based on the number of cases in the past and current open cases that would merit such a request, the Department estimates that the Department would request 165 policies and procedures in the first year and 50 policies and procedures in subsequent years. The Department estimates that it will take a clerical worker 15 minutes to prepare and send their complete policies and procedures to the Department resulting in an hourly burden of approximately 41 hours in the first year, with an equivalent cost of $2,722.[99] In subsequent years, the Department estimates that the requirement would result in an hour burden of approximately 13 hours with an equivalent cost of $825.[100] The Department assumes Financial Institutions would send the documents electronically and thus would not incur costs for postage or materials.

Table 13: Hour Burden and Equivalent Cost Associated with Providing Policies and Procedures to the Department				
	Year 1		Subsequent Years	
Activity	**Burden Hours**	**Equivalent Burden Cost**	**Burden Hours**	**Equivalent Burden Cost**
Clerical	41	$2,722	13	$825
Total	**41**	**$2,722**	**13**	**$825**

1.6 Overall Summary

registered investment advisers + 4,450 large state registered Retail registered investment advisers + 1,153 large state registered non-retail registered investment advisers + 71 insurers) x 30% newly reliant on the PTE] + (10 small robo-adviser) × 20 hours} + {[(471 large Non-Retail broker-dealers + 13 large insurers) x 70% already reliant on the PTE] + 190 large robo-advisers) = 14,143 entities x 5 hours = 65,559 hours. The labor rate is applied in the following calculation: 65,559 hours x $165.71 = $10,863,864. In subsequent years the cost of updating is calculated as: (All 18,632 affected entities x 5 hours) = 93,161 burden hours. The labor rate is applied in the following calculation: 93,161 burden hours x $165.71 burden hours = $15,437,780. Note, the total values may not equal the sum of the parts due to rounding.

99 The burden is estimated as: (165 x (15 minutes ÷ 60 minutes hours)) = 41 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: (165 x (15 minutes ÷ 60 minutes hours)) x $65.99 = $2,722. Note, the total values may not equal the sum of the parts due to rounding.

100 The burden is estimated as: (50 x (15 minutes ÷ 60 minutes hours)) = 13 hours. A labor rate of $65.99 is used for a clerical worker. The labor rate is applied in the following calculation: (50 x (15 minutes ÷ 60 minutes hours)) x $65.99 = $825. Note, the total values may not equal the sum of the parts due to rounding.

The paperwork burden estimates are summarized as follows:

Type of Review: Revision of an existing collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Fiduciary Transaction Exemption

OMB Control Number: 1210–0163.

Affected Public: Business or other for-profit institution.

Estimated Number of Respondents: 18,632.

Estimated Number of Annual Responses: 114,609,171.

Frequency of Response: Initially, Annually, and when engaging in exempted transaction.

Estimated Total Annual Burden Hours: 2,599,221.

Estimated Total Annual Burden Cost: $18,359,543.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)[101] imposes certain requirements on rules subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act or any other law.[102] Under section 604 of the RFA, agencies must submit a final regulatory flexibility analysis (FRFA) of a final rulemaking that is likely to have a significant economic impact on a substantial number of small entities, such as small businesses, organizations, and governmental jurisdictions. This amended exemption, along with related amended exemptions and a rule amendment published elsewhere in this issue of the *Federal Register*, is part of a rulemaking regarding the definition of fiduciary investment advice, which the Department has determined likely will have a significant economic impact on a substantial number of small

[101] 5 U.S.C. 601 *et seq.*
[102] 5 U.S.C. 601(2), 603(a); *see* 5 U.S.C. 551.

entities. The impact of this amendment on small entities is included in the FRFA for the entire project, which can be found in the related notice of rulemaking found elsewhere in this edition of the *Federal Register*.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995[103] requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a final rule that may result in an expenditure of $100 million or more (adjusted annually for inflation with the base year 1995) in any 1 year by state, local, and tribal governments, in the aggregate, or by the private sector.

For purposes of the Unfunded Mandates Reform Act, this exemption is expected to have an impact on the private sector. For the purposes of the exemption the regulatory impact analysis published with the final rule shall meet the UMRA obligations.

Federalism Statement

Executive Order 13132 outlines fundamental principles of federalism. It also requires Federal agencies to adhere to specific criteria in formulating and implementing policies that have ‘‘substantial direct effects’’ on the states, the relationship between the national government and states, or on the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that have these federalism implications must consult with State and local officials and describe the extent of their consultation and the nature of the concerns of State and local officials in the preamble to the final Regulation. Notwithstanding this, Section 514 of ERISA provides, with certain exceptions specifically

[103] Pub. L. 104-4, 109 Stat. 48 (Mar. 22, 1995).

enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA.

The Department has carefully considered the regulatory landscape in the states and worked to ensure that its regulations would not impose obligations on impacted industries that are inconsistent with their responsibilities under state law, including the obligations imposed in states that based their laws on the NAIC Model Regulation. Nor would these regulations impose obligations or costs on the state regulators. As discussed more fully in the final Regulation and in the preamble to PTE 84-24, there is a long history of shared regulation of insurance between the States and the Federal government. The Supreme Court addressed this issue and held that "ERISA leaves room for complementary or dual federal or state regulation" of insurance.[104] The Department designed the final Regulation and exemptions to complement State insurance laws.[105]

The Department does not intend this exemption to change the scope or effect of ERISA section 514, including the savings clause in ERISA section 514(b)(2)(A) for State regulation of securities, banking, or insurance laws. Ultimately, the Department does not believe this class exemption has federalism implications because it has no substantial direct effect on the States, on the relationship between the National government and the States, or on the distribution of power and responsibilities among the various levels of government.

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[104] *See John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank,* 510 U.S. 86, 98 (1993).
[105] *See BancOklahoma Mortg. Corp.* v. *Capital Title Co., Inc.,* 194 F.3d 1089 (10th Cir. 1999) (stating that McCarran-Ferguson Act bars the application of a Federal statute only if (1) the Federal statute does not specifically relate to the business of insurance; (2) a State statute has been enacted for the purpose of regulating the business of insurance; and (3) the Federal statute would invalidate, impair, or supersede the State statute); *Prescott Architects, Inc.* v. *Lexington Ins. Co.,* 638 F. Supp. 2d 1317 (N.D. Fla. 2009); *see also U.S.* v. *Rhode Island Insurers' Insolvency Fund,* 80 F.3d 616 (1st Cir. 1996). The Supreme Court has held that to "impair" a State law is to hinder its operation or "frustrate [a] goal of that law." *Humana Inc. V. Forsyth*, 525 U.S. 299, 308 (1999).

General Information

The attention of interested persons is directed to the following:

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

(2) In accordance with ERISA section 408(a) and Code section 4975(c)(2), and based on the entire record, the Department finds that this exemption is administratively feasible, in the interests of Plans, their participants and beneficiaries, and IRA owners, and protective of the rights of participants and beneficiaries of the Plan and IRA owners;

(3) The Final Amendment is applicable to a particular transaction only if the transaction satisfies the conditions specified in the exemption; and

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

The Department is granting the following amendment on its own motion, pursuant to its authority under ERISA section 408(a) and Code section 4975(c)(2) and in accordance with procedures set forth in 29 CFR part 2570, Subpart B (76 FR 66637 (October 27, 2011)).[106]

Prohibited Transaction Exemption 2020-02, Improving Investment Advice for Workers & Retirees

Section I—Transactions

(a) In General.

ERISA Title I (Title I) and the Internal Revenue Code (the Code) prohibit fiduciaries, as defined therein, that provide investment advice to Plans and individual retirement accounts (IRAs) from receiving compensation that varies based on their investment advice and compensation that is paid from third parties. Title I and the Code also prohibit fiduciaries from engaging in purchases and sales with Plans or IRAs on behalf of their own accounts (principal transactions). This exemption permits Financial Institutions and Investment Professionals who comply with the exemption's conditions to receive otherwise prohibited compensation when providing fiduciary investment advice to Retirement Investors and engaging in principal transactions with Retirement Investors, as described below.

Specifically, this exemption provides relief from the prohibitions of ERISA section 406(a)(1)(A), (D), and 406(b), and the sanctions imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(A), (D), (E), and (F), to Financial Institutions and Investment Professionals that provide fiduciary investment advice and engage in the conditions described in

[106] Reorganization Plan No. 4 of 1978 (5 U.S.C. App. 1 (2018)) generally transferred the authority of the Secretary of the Treasury to grant administrative exemptions under Code section 4975 to the Secretary of Labor. Procedures Governing the Filing and Processing of Prohibited Transaction Exemption Applications were amended effective April 8, 2024 (29 CFR part 2570, Subpart B (89 FR 4662 (January 24, 2024)).

Section I, in accordance with the conditions set forth in Section II and are eligible pursuant to Section III, subject to the definitional terms and recordkeeping requirements in Sections IV and V. This exemption is available to allow Financial Institutions and Investment Professionals to receive reasonable compensation for recommending a broad range of investment products to Retirement Investors, including insurance and annuity products.

(b) Covered transactions.

This exemption permits Financial Institutions and Investment Professionals, and their Affiliates and Related Entities, to engage in the following transactions, including as part of a rollover, as a result of the provision of investment advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) and regulations thereunder:

(1) The receipt, directly or indirectly, of reasonable compensation; and

(2) The purchase or sale of an investment product to or from a Retirement Investor, and the receipt of payment, including a mark-up or mark-down.

(c) Exclusions

This exemption is not available if:

(1) The Plan is covered by Title I of ERISA and the Investment Professional, Financial Institution, or any Affiliate is:

(A) the employer of employees covered by the Plan, or

(B) the Plan's named fiduciary or administrator; provided, however, that a named fiduciary or administrator or their Affiliate, including a Pooled Plan Provider (PPP) registered with the Department of Labor under 29 CFR 2510.3-44, may rely on the exemption if it is selected to provide investment advice by a fiduciary who is Independent of the Financial Institution, Investment Professional, and their Affiliates; or

(2) The transaction involves the Investment Professional or Financial Institution acting in a fiduciary capacity other than as an investment advice fiduciary within the meaning of ERISA section 3(21)(A)(ii)) and Code section 4975(e)(3)(B) and regulations thereunder.

Section II—Investment Advice Arrangement

Section II(a) requires Investment Professionals and Financial Institutions to comply with Impartial Conduct Standards, including a Care Obligation and Loyalty Obligation, when providing fiduciary investment advice to Retirement Investors. Section II(b) requires Financial Institutions to acknowledge fiduciary status under Title I and/or the Code, and provide Retirement Investors with a written statement of the Care Obligation and Loyalty Obligation, a written description of the services they will provide and all material facts relating to Conflicts of Interest that are associated with their recommendations, and a rollover disclosure (if applicable). Section II(c) requires Financial Institutions to adopt policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards and other conditions of this exemption. Section II(d) requires the Financial Institution to conduct a retrospective review, at least annually, that is reasonably designed to detect and prevent violations of, and achieve compliance with, the Impartial Conduct Standards and the terms of this exemption. Section II(e) allows Financial Institutions to correct certain violations of the exemption conditions and continue to rely on the exemption for relief.

(a) Impartial Conduct Standards.

The Financial Institution and Investment Professional must comply with the following "Impartial Conduct Standards":

(1) Investment advice must, at the time it is provided, satisfy the Care Obligation and Loyalty Obligation. As defined in Section V(b), to meet the Care Obligation, advice must reflect

the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor. As defined in Section V(h), to meet the Loyalty Obligation, the advice must not place the financial or other interests of the Investment Professional, Financial Institution or any Affiliate, Related Entity, or other party ahead of the interests of the Retirement Investor or subordinate the Retirement Investor's interests to their own. For example, in choosing between two commission-based investments offered and available to the Retirement Investor on a Financial Institution's product menu, it would be impermissible for the Investment Professional to recommend the investment that is worse for the Retirement Investor but better or more profitable for the Investment Professional or the Financial Institution. Similarly, in recommending whether a Retirement Investor should pursue a particular investment strategy through a brokerage or advisory account, the Investment Professional must base the recommendation on the Retirement Investor's financial interests, rather than any competing financial interests of the Investment Professional. For example, an Investment Professional generally could not recommend that the Retirement Investor enter into an arrangement requiring the Retirement Investor to pay an ongoing advisory fee to the Investment Professional, if the Retirement Investor's interests were better served by the payment of a one-time commission to buy and hold a long-term investment. In making recommendations as to account type, it is important for the Investment Professional to ensure that the recommendation carefully considers the reasonably expected total costs over time to the Retirement Investor, and that the Investment Professional base its recommendations on the financial interests of the Retirement Investor and avoid subordinating those interests to the

Investment Professional's competing financial interests.

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

(3) The Financial Institution's and its Investment Professionals' statements to the Retirement Investor (whether written or oral) about the recommended transaction and other relevant matters must not be materially misleading at the time statements are made. For purposes of this paragraph, the term "materially misleading" includes omitting information that is needed to prevent the statement from being misleading to the Retirement Investor under the circumstances.

(b) Disclosure

At or before the time a covered transaction occurs, as described in Section I(b) of this exemption, the Financial Institution must provide, in writing, the disclosures set forth in paragraphs (1)-(4) below to the Retirement Investor. For purposes of the disclosures required by Section II(b)(1)-(4), the Financial Institution or Investment Professional is deemed to engage in a covered transaction on the later of (A) the date the recommendation is made or (B) the date the Financial Institution or Investment Professional becomes entitled to compensation (whether now or in the future) by reason of making the recommendation.

(1) A written acknowledgment that the Financial Institution and its Investment Professionals are providing fiduciary investment advice to the Retirement Investor and are

fiduciaries under Title I of ERISA, Title II of ERISA, or both with respect to the recommendation;

(2) A written statement of the Care Obligation and Loyalty Obligation, described in Section II(a), that is owed by the Investment Professional and Financial Institution to the Retirement Investor;

(3) All material facts relating to the scope and terms of the relationship with the Retirement Investor, including:

(A) The material fees and costs that apply to the Retirement Investor's transactions, holdings, and accounts; and

(B) The type and scope of services provided to the Retirement Investor, including any material limitations on the recommendations that may be made to them; and

(4) All material facts relating to Conflicts of Interest that are associated with the recommendation.

(5) *Rollover disclosure.* Before engaging in or recommending that a Retirement Investor engage in a rollover from a Plan that is covered by Title I of ERISA, or making a recommendation to a Plan participant or beneficiary as to the post-rollover investment of assets currently held in a Plan that is covered by Title I of ERISA, the Financial Institution and Investment Professional must consider and document the bases for their recommendation to engage in the rollover, and must provide that documentation to the Retirement Investor. Relevant factors to consider must include, to the extent applicable, but in any event are not limited to:

(A) the alternatives to a rollover, including leaving the money in the Plan, if applicable;

(B) the fees and expenses associated with the Plan and the recommended investment or account;

(C) whether an employer or other party pays for some or all of the Plan's administrative expenses; and

(D) the different levels of services and investments available under the Plan and the recommended investment or account.

(6) The Financial Institution will not fail to satisfy the conditions in Section II(b) solely because it, acting in good faith and with reasonable diligence, makes an error or omission in disclosing the required information, provided that the Financial Institution discloses the correct information as soon as practicable, but not later than 30 days after the date on which it discovers or reasonably should have discovered the error or omission.

(7) Investment Professionals and Financial Institutions may rely in good faith on information and assurances from the other entities that are not Affiliates as long as they do not know or have reason to know that such information is incomplete or inaccurate.

(8) The Financial Institution is not required to disclose information pursuant to this Section II(b) if such disclosure is otherwise prohibited by law.

(c) Policies and Procedures

(1) The Financial Institution establishes, maintains, and enforces written policies and procedures prudently designed to ensure that the Financial Institution and its Investment Professionals comply with the Impartial Conduct Standards and other exemption conditions.

(2) The Financial Institution's policies and procedures must mitigate Conflicts of Interest to the extent that a reasonable person reviewing the policies and procedures and incentive practices as a whole would conclude that they do not create an incentive for the Financial Institution or Investment Professional to place their interests, or those of any Affiliate or Related

Entity, ahead of the interests of the Retirement Investor. Financial Institutions may not use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives in a manner that is intended, or that a reasonable person would conclude are likely, to result in recommendations that do not meet the Care Obligation or Loyalty Obligation.

(3) Financial Institutions must provide their complete policies and procedures to the Department upon request within 30 days of request.

(d) Retrospective Review

(1) The Financial Institution conducts a retrospective review, at least annually, that is reasonably designed to detect and prevent violations of, and achieve compliance with the conditions of this exemption, including the Impartial Conduct Standards and the policies and procedures governing compliance with the exemption. The Financial Institution must update the policies and procedures as business, regulatory, and legislative changes and events dictate, to ensure that the policies and procedures remain prudently designed, effective, and compliant with Section II(c).

(2) The methodology and results of the retrospective review must be reduced to a written report that is provided to a Senior Executive Officer of the Financial Institution.

(3) The Senior Executive Officer must certify, annually, that:

(A) The Senior Executive Officer has reviewed the retrospective review report;

(B) The Financial Institution has filed (or will file timely, including extensions) Form 5330 reporting any non-exempt prohibited transactions discovered by the Financial Institution in connection with investment advice covered under Code section 4975(e)(3)(B), corrected those transactions, and paid any resulting excise taxes owed under Code section

4975(a) or (b);

(C) The Financial Institution has written policies and procedures that meet the requirements set forth in Section II(c); and

(D) The Financial Institution has a prudent process to modify such policies and procedures as required by Section II(d)(1).

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

(5) The Financial Institution must retain the report, certification, and supporting data for a period of six years and make the report, certification, and supporting data available to the Department within 30 days of request to the extent permitted by law (including 12 U.S.C. 484 regarding limitations on visitorial powers for national banks).

(e) Self-Correction

A non-exempt prohibited transaction will not occur due to a violation of this exemption's conditions with respect to a covered transaction, provided:

(1) Either the violation did not result in investment losses to the Retirement Investor or the Financial Institution made the Retirement Investor whole for any resulting losses;

(2) The Financial Institution corrects the violation;

(3) The correction occurs no later than 90 days after the Financial Institution learned of the violation or reasonably should have learned of the violation; and

(4) The Financial Institution notifies the person(s) responsible for conducting the retrospective review during the applicable review cycle and the violation and correction is specifically set forth in the written report of the retrospective review required under subsection II(d)(2).

(f) ERISA section 3(38) Investment Managers.

To the extent a Financial Institution or Investment Professional provides fiduciary investment advice to a Retirement Investor as part of its response to a request for proposal to provide investment management services under section 3(38) of ERISA, and is subsequently hired to act as investment manager to the Retirement Investor, it may receive compensation as a result of the advice under this exemption, provided that it complies with the Impartial Conduct Standards as set forth in Section II(a). This paragraph does not relieve the Investment Manager, however, from its obligation to refrain from engaging in any non-exempt prohibited transactions in the ongoing performance of its activities as an Investment Manager.

Section III—Eligibility

(a) General

Subject to the timing and scope of ineligibility provisions set forth in subsection (b), an Investment Professional or Financial Institution will become ineligible to rely on this exemption with respect to any covered transaction, if on or after [INSERT DATE THAT IS 150 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER], the Financial Institution, an entity in the same Controlled Group as the Financial Institution, or an Investment Professional has been:

(1) Convicted by either:

(A) a U.S. Federal or State court as a result of any felony involving abuse or misuse of such person's employee benefit plan position or employment, or position or employment with a labor organization; any felony arising out of the conduct of the business of a broker, dealer, investment adviser, bank, insurance company or fiduciary; income tax evasion; any felony involving larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; conspiracy or attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element; or a crime that is identified or described in ERISA section 411; or

(B) a foreign court of competent jurisdiction as a result of any crime, however denominated by the laws of the relevant foreign or state government, that is substantially equivalent to an offense described in (A) above (excluding convictions that occur within a foreign country that is included on the Department of Commerce's list of "foreign adversaries" that is codified in 15 CFR 7.4 as amended); or

(2) Found or determined in a final judgment or court-approved settlement in a Federal or State criminal or civil court proceeding brought by the Department, the Department of the Treasury, the Internal Revenue Service, the Securities and Exchange Commission, the Department of Justice, the Federal Reserve, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Commodity Futures Trading Commission, a State insurance or securities regulator, or State attorney general to have participated in one or more of the following categories of conduct irrespective of whether the court specifically considers this exemption or its terms:

(A) engaging in a systematic pattern or practice of conduct that violates the conditions of this exemption in connection with otherwise non-exempt prohibited transactions;

(B) intentionally engaging in conduct that violates the conditions of this exemption in connection with otherwise non-exempt prohibited transactions;

(C) engaged in a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330 or pay the resulting excise taxes imposed by Code section 4975 in connection with non-exempt prohibited transactions involving investment advice as defined under Code section 4975(e)(3)(B); or

(D) provided materially misleading information to the Department, the Department of the Treasury, the Internal Revenue Service, the Securities and Exchange Commission, the Department of Justice, the Federal Reserve, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the Commodity Futures Trading Commission, a State insurance or securities regulator, or State attorney general in connection with the conditions of this exemption.

(3) Controlled Group. An entity is in the same Controlled Group as a Financial Institution if the entity (including any predecessor or successor to the entity) would be considered to be in the same "controlled group of corporations" as the Financial Institution or "under common control" with the Financial Institution as those terms are defined in Code section 414(b) and (c) (and any regulations issued thereunder),

(b) Timing and Scope of Ineligibility.

(1) Ineligibility shall begin upon either:

(A) the date of a conviction, which shall be the date of conviction by a U.S. Federal or State trial court described in Section III(a)(1) (or the date of the conviction of any trial court in a foreign jurisdiction that is the equivalent of a U.S. Federal or State trial court) that occurs on or after [INSERT DATE THAT IS 150 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER], regardless of whether that conviction remains under appeal; or

(B) the date of a final judgment (regardless of whether the judgment remains under appeal) or a court-approved settlement described in Section III(a)(2) that occurs on or after [INSERT DATE THAT IS 150 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

(2) One-Year Transition Period. A Financial Institution or Investment Professional that

becomes ineligible under Section III(a) may continue to rely on this exemption for up to 12 months after its ineligibility begins as determined under subsection (1) if the Financial Institution or Investment Professional provides notice to the Department at IIAWR@dol.gov within 30 days after ineligibility begins.

(3) A person will become eligible to rely on this exemption again only upon the earliest occurrence of the following:

(A) the date of a subsequent judgment reversing such person's conviction or other court decision described in Section III(a);

(B) 10 years after the person became ineligible under Section III(b)(1) or, if later, 10 years after the person was released from imprisonment as a result of a crime described in Section III(a)(1); or

(C) the effective date of an individual prohibited transaction exemption (under which the Department may impose additional conditions) permitting the person to continue to rely on this exemption.

(c) Alternative Exemptions

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

Section IV—Recordkeeping

The Financial Institution must maintain for a period of six years following the covered transaction records demonstrating compliance with this exemption and make such records available to the extent permitted by law, including 12 U.S.C. 484, to any authorized employee of the Department or the Department of the Treasury, which includes the Internal Revenue Service.

Section V—Definitions

(a) "**Affiliate**" means:

(1) Any person directly or indirectly through one or more intermediaries, controlling, controlled by, or under common control with the Investment Professional or Financial Institution. (For this purpose, "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual);

(2) Any officer, director, partner, employee, or relative (as defined in ERISA section 3(15)), of the Investment Professional or Financial Institution; and

(3) Any corporation or partnership of which the Investment Professional or Financial Institution is an officer, director, or partner.

(b) Advice meets the "**Care Obligation**" if, with respect to the Retirement Investor, such advice reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor.

(c) A "**Conflict of Interest**" is an interest that might incline a Financial Institution or Investment Professional—consciously or unconsciously—to make a recommendation that is not distinterested.

(d) "**Financial Institution**" means an entity that is not suspended, barred or otherwise prohibited (including under Section III of this exemption) from making investment recommendations by any insurance, banking, or securities law or regulatory authority (including any self-regulatory organization), that employs the Investment Professional or otherwise retains such individual as an independent contractor, agent or registered representative, and that is:

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

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

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

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

(5) A non-bank trustee or non-bank custodian approved under Treasury Regulation 26 CFR §1.408-2(e) (as amended), but only to the extent they are serving in these capacities with

respect to Health Savings Accounts (HSAs), or

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

(e) For purposes of subsection I(c)(1), a fiduciary is "**Independent**" of the Financial Institution and Investment Professional if:

(1) the fiduciary is not the Financial Institution, Investment Professional, or an Affiliate;

(2) the fiduciary does not have a relationship to or an interest in the Financial Institution, Investment Professional, or any Affiliate that might affect the exercise of the fiduciary's best judgment in connection with transactions covered by this exemption; and

(3) the fiduciary does not receive and is not projected to receive within its current Federal income tax year, compensation or other consideration for its own account from the Financial Institution, Investment Professional, or an Affiliate, in excess of two (2) percent of the fiduciary's annual revenues based upon its prior income tax year.

(f) "**Individual Retirement Account**" or "**IRA**" means any plan that is an account or annuity described in Code section 4975(e)(1)(B) through (F).

(g) "**Investment Professional**" means an individual who:

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

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

Institution; and

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

(h) Advice meets the "**Loyalty Obligation**" if, with respect to the Retirement Investor, such advice does not place the financial or other interests of the Investment Professional, Financial Institution or any Affiliate, Related Entity, or other party ahead of the interests of the Retirement Investor, or subordinate the Retirement Investor's interests to those of the Investment Professional, Financial Institution or any Affiliate, Related Entity, or other party.

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

(j) A "**Pooled Plan Provider**" or "**PPP**" means a pooled plan provider described in ERISA section 3(44).

(k) A "**Related Entity**" means any party that is not an Affiliate and (i) has an interest in an Investment Professional or Financial Institution that may affect the exercise of the fiduciary's best judgment as a fiduciary, or (ii) in which the Investment Professional or Financial Institution has an interest that may affect the exercise of the fiduciary's best judgment as a fiduciary.

(l) "**Retirement Investor**" means a Plan, Plan participant or beneficiary, IRA, IRA owner or beneficiary, Plan fiduciary within the meaning of ERISA section (3)(21)(A)(i) or (iii) and Code section 4975(e)(3)(A) or (C) with respect to the Plan, or IRA fiduciary within the meaning of Code section 4975(e)(3)(A) or (C) with respect to the IRA.

(m) A “**Senior Executive Officer**” is any of the following: the chief compliance officer, the chief executive officer, president, chief financial officer, or one of the three most senior officers of the Financial Institution.

Section VI—Phase-In Period

During the one-year period beginning [INSERT DATE THAT IS 150 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER], Financial Institutions and Investment Professionals may receive compensation under Section I of this exemption if the Financial Institution and Investment Professional comply with the Impartial Conduct Standards set forth in Section II(a) and the fiduciary acknowledgment requirement set forth in Section II(b)(1).

Signed at Washington, DC, this 10th day of April, 2024.

Lisa M. Gomez,

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