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DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2510

RIN 1210–AC02

Retirement Security Rule: Definition of an Investment Advice Fiduciary

AGENCY: Employee Benefits Security Administration, Department of Labor

ACTION: Proposed rule

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

DATES: *Public Comments.* Comments are due on or before [INSERT DATE THAT IS 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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

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

- *Federal eRulemaking Portal*: http://www.regulations.gov. Follow the instructions for sending comments.
- *Mail:* Office of Regulations and Interpretations, Employee Benefits Security Administration, Room N-5655, U.S. Department of Labor, 200 Constitution Ave. NW, Washington, DC 20210, Attention: Definition of Fiduciary – RIN 1210-AC02

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

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

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

FOR FURTHER INFORMATION CONTACT:

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

- For questions regarding the prohibited transaction exemptions: contact Susan Wilker, Office of Exemption Determinations, EBSA, 202–693–8540. (Not a toll-free number).
- For questions regarding the Regulatory Impact Analysis: contact James Butikofer, Office of Research and Analysis, EBSA, 202–693–8434. (Not a toll-free number).

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

SUPPLEMENTARY INFORMATION:

A. Executive Summary

The Department of Labor is proposing a new regulatory definition of an investment advice fiduciary for purposes of Title 1 and Title II of the Employee Retirement Income Security Act (ERISA). As compared to the existing regulatory definition, which dates to 1975, the proposal better reflects the text and the purposes of the statute and better protects the interests of retirement investors, consistent with the mission of the Department's Employee Benefits Security Administration to ensure the security of the retirement, health, and other workplace-related benefits of America's workers and their families.

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

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

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

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

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

Together with proposed amendments to administrative exemptions from the prohibited transaction rules applicable to fiduciaries under Title I and Title II of ERISA published elsewhere in this issue of the *Federal Register*, the proposal is intended to protect the interests of retirement investors by requiring investment advice providers to adhere to stringent conduct standards and mitigate their conflicts of interest. The proposals' compliance obligations are generally consistent with the best interest obligations set forth in the Securities and Exchange Commission's (SEC's) Regulation Best Interest and its Commission Interpretation Regarding Standard of Conduct for Investment Advisers (SEC Investment Adviser Interpretation), each released in 2019.

The Department anticipates that the most significant benefits of the proposals will stem from the uniform application of the ERISA fiduciary standard and exemption conditions to investment advice to retirement investors. Under the proposals, advice providers would be subject to a common fiduciary standard that would reduce retirement investor exposure to conflicted advice that erodes investment returns and would be obligated to adhere to protective

conflict-mitigation requirements.[1] Requiring advice providers to compete under a common fiduciary standard will be especially beneficial with respect to those transactions that currently are not uniformly covered by fiduciary protections consistent with ERISA's high standards, including recommendations to roll over assets from a workplace retirement plan to an IRA (*e.g.,* in those cases in which the advice provider is not subject to Federal securities law standards and, as is often the case, does not have an ongoing and preexisting relationship with the customer); investment recommendations with respect to many commonly purchased retirement annuities, such as fixed index annuities; and investment recommendations to plan fiduciaries.

B. Background

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

ERISA[2] is a "comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans."[3] Under the statutory framework, Title I of ERISA imposes duties and restrictions on individuals who are "fiduciaries" with respect to employee benefit plans. In particular, fiduciaries to Title I plans must adhere to duties of prudence and loyalty. ERISA section 404 provides that Title I plan fiduciaries must act with the "care, skill, prudence, and diligence under the circumstances then prevailing that a prudent [person] acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims," and they also must discharge their duties with respect to a plan "solely in the interest of the participants and beneficiaries."[4]

These fiduciary duties, which are rooted in the common law of trusts, are reinforced by prohibitions against transactions involving conflicts of interest because of the dangers such transactions pose to plans and their participants. The prohibited transaction provisions of ERISA, including Title II of ERISA which is codified in the Internal Revenue Code (Code),

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[1] The references in this document to a "fiduciary" are intended to mean an ERISA fiduciary unless otherwise stated.
[2] 29 U.S.C. 1001, *et seq*.
[3] *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983).
[4] ERISA section 404, 29 U.S.C. 1104.

"categorically bar[]" plan fiduciaries from engaging in transactions deemed "likely to injure the pension plan."[5] These prohibitions broadly forbid a fiduciary from "deal[ing] with the assets of the plan in his own interest or for his own account," and "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."[6] Congress also gave the Department authority to grant conditional administrative exemptions from the prohibited transaction provisions, but only if the Department finds that the exemption is (1) administratively feasible for the Department, (2) in the interests of the plan and of its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries of such plan.[7]

Title II of ERISA, codified in the Code,[8] governs the conduct of fiduciaries to plans defined in Code section 4975(e)(1), which includes IRAs.[9] Some plans defined in Code section 4975(e)(1) are also covered by Title I of ERISA, but the definitions of such plans are not identical. Although Title II, as codified in the Code, does not directly impose specific duties of prudence and loyalty on fiduciaries as in ERISA section 404(a), it prohibits fiduciaries from engaging in conflicted transactions on many of the same terms as Title I.[10] Under the

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

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

[7] ERISA section 408(a), 29 U.S.C. 1108(a).

[8] This proposal includes some references to the Code in the context of discussions of Title II of ERISA involving specific provisions codified in the Code. The Department understands that references to the Code are useful but emphasizes that both Title I and Title II are covered by the same definition of fiduciary and the same general framework of prohibited transactions, and that, under both Title I and Title II, fiduciaries must comply with the conditions of an available prohibited transaction exemption in order to engage in an otherwise prohibited transaction.

[9] For purposes of the proposed 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. However, for purposes of any rollover of assets between a Title I Plan and an IRA described in this preamble, the term "IRA" includes only an account or annuity described in Code section 4975(e)(1)(B) or (C). Additionally, while the Department uses the term "*retirement* investor" throughout this document to describe advice recipients, that is not intended to suggest that the fiduciary definition would apply only with respect to employee pension benefit plans and IRAs that are retirement savings vehicles. As discussed herein, the rule would apply with respect to plans as defined in Title I and Title II of ERISA that make investments. In this regard, see also proposed paragraph (f)(11) that provides that the term "investment property" "does not include health insurance policies, disability insurance policies, term life insurance policies, or other property to the extent the policies or property do not contain an investment component."

[10] 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."

Reorganization Plan No. 4 of 1978, which Congress subsequently ratified in 1984,[11] the Department was generally granted authority to interpret the fiduciary definition and issue administrative exemptions from the prohibited transaction provisions in Code section 4975.[12]

Many of the protections, duties, and liabilities in both Title I and Title II of ERISA hinge on fiduciary status; therefore, the determination of who is a "fiduciary" is of central importance. ERISA includes a statutory definition of a fiduciary at section 3(21)(A), which provides that a person is a fiduciary with respect to a plan to the extent the person (i) exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) has any discretionary authority or discretionary responsibility in the administration of such plan.[13] The same definition of a fiduciary is in Code section 4975(e)(3).[14]

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

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[11] Sec. 1, Pub. L. 98-532, 98 Stat. 2705 (Oct. 19, 1984).
[12] 5 U.S.C. App. (2018).
[13] ERISA section 3(21)(A), 29 U.S.C. 1002(21)(A).
[14] 26 U.S.C. 4975(e)(3).

reflect Congress' recognition in 1974, when it passed ERISA, of the fundamental importance of investment advice to protect the interests of retirement savers.

In 1975, shortly after ERISA was enacted, the Department issued a regulation at 29 CFR 2510.3–21(c)(1) that defined the circumstances under which a person renders "investment advice" to an employee benefit plan within the meaning of section 3(21)(A)(ii) of ERISA, such that said person would be a fiduciary under ERISA.[15] The regulation narrowed the plain and expansive language of section 3(21)(A)(ii), creating a five-part test that must be satisfied in order for a person to be treated as a fiduciary by reason of rendering investment advice. Under the five-part test, a person is a fiduciary only if they: (1) render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing, or selling securities or other property (2) on a regular basis (3) pursuant to a mutual agreement, arrangement, or understanding with the plan or a plan fiduciary that (4) the advice will serve as a primary basis for investment decisions with respect to plan assets, and that (5) the advice will be individualized based on the particular needs of the plan. The Department of the Treasury issued a virtually identical regulation under Code section 4975(e)(3), at 26 CFR 54.4975–9(c)(1), which applies to plans defined in Code section 4975.[16]

Since 1975, the retirement plan landscape has changed significantly, with a shift from defined benefit plans (in which decisions regarding investment of plan assets are primarily made by professional asset managers) to defined contribution/individual account plans such as 401(k) plans (in which decisions regarding investment of plan assets are often made by plan participants themselves). In 1975, IRAs had only recently been created (by ERISA itself), and 401(k) plans did not yet exist. Retirement assets were principally held in pension funds controlled by large employers and professional money managers. Now, IRAs and participant-directed plans, such as

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[15] 40 FR 50842 (Oct. 31, 1975).

[16] 40 FR 50840 (Oct. 31, 1975). The issuance of this regulation pre-dated The Reorganization Plan No. 4 of 1978, and thus authority to issue this regulatory definition under Title II of ERISA was still with the Department of the Treasury.

401(k) plans, have become more common retirement vehicles as opposed to traditional pension plans, and rollovers of employee benefit plan assets to IRAs are commonplace. Individuals, regardless of their financial literacy, have thus become increasingly responsible for their own retirement savings.

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

Recently, other regulators have recognized the need for change in the regulation of investment recommendations and have imposed enhanced conduct standards on financial professionals that make investment recommendations, including broker-dealers and insurance agents. As a result, the regulatory landscape today is very different than it was even five years ago. In 2019, the SEC adopted Regulation Best Interest, which established an enhanced best interest standard of conduct applicable to broker-dealers when making a recommendation of any

securities transaction or investment strategy involving securities to retail customers.[17] The SEC also issued its SEC Investment Adviser Interpretation, which addressed the conduct standards applicable to investment advisers under the Investment Advisers Act of 1940 (Advisers Act).[18] As the SEC has repeatedly stated, "key elements of the standard of conduct that applies to broker-dealers under Regulation Best Interest will be substantially similar to key elements of the standard of conduct that applies to investment advisers pursuant to their fiduciary duty under the Advisers Act."[19] In this connection, the SEC has also stressed that Regulation Best Interest "aligns the standard of conduct with retail customers' reasonable expectations[.]"[20]

In 2020, the National Association of Insurance Commissioners (NAIC) also revised its Suitability In Annuity Transactions Model Regulation to provide that insurance agents must act in the consumer's best interest, as defined by the Model Regulation, when making a recommendation of an annuity. Under the Model Regulation, insurers would also be expected to establish and maintain a system to supervise recommendations so that the insurance needs and financial objectives of consumers at the time of the transaction are effectively addressed.[21] The goal of the NAIC working group was "to seek clear, enhanced standards for annuity sales so consumers understand the products they purchase, are made aware of any material conflicts of interest, and are assured those selling the products do not place their financial interests above consumers' interests."[22] According to the NAIC, as of August 23, 2023, 43 jurisdictions have implemented the revisions to the model regulation.[23]

These regulatory efforts reflect the understanding that broker-dealers and insurance agents commonly make recommendations to their customers for which they are compensated as

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[17] Regulation Best Interest: The Broker-Dealer Standard of Conduct, 84 FR 33318 (July 12, 2019).
[18] Commission Interpretation Regarding Standard of Conduct for Investment Advisers, 84 FR 33669 (July 12, 2019).
[19] Regulation Best Interest release, 84 FR 33318, 33330 (July 12, 2019).
[20] *Id*. at 33318.
[21] Available at www.naic.org/store/free/MDL-275.pdf.
[22] *See* https://content.naic.org/cipr-topics/annuity-suitability-best-interest-standard.
[23] NAIC Annuity Suitability & Best Interest Standard webpage, https://content.naic.org/cipr-topics/annuity-suitability-best-interest-standard.

a regular part of their business; that investors rely upon these recommendations; and that regulatory protections are important to ensure that the advice is in the best interest of the retail customer, in the case of broker-dealers, or consumers, in the case of insurance agents.[24] After careful review of the existing regulatory landscape, the Department too has concluded that existing regulations should be revised to reflect current realities in light of the text and purposes of Title I of ERISA and the Code.

In the current landscape, the existing 1975 regulation no longer serves ERISA's purpose to protect the interests of retirement investors, especially given the growth of participant-directed investment arrangements and IRAs, the conflicts of interest associated with investment recommendations, and the pressing need for plan participants, IRA owners, and their beneficiaries to receive sound advice from sophisticated financial advisers when making critical investment decisions in an increasingly complex financial marketplace. As the SEC and NAIC recognized, many different types of financial professionals, including insurance agents, broker-dealers, advisers subject to the Advisers Act, and others, make recommendations to investors for which they are compensated, and investors rightly rely upon these recommendations with an expectation that they are receiving advice that is in their interest. Like these other regulators, the Department has concluded that it is appropriate to revisit the existing regulatory structure to ensure that it properly and uniformly protects the financial interests of retirement investors as Congress intended. As reflected in this regulatory package, after evaluation of the types of investment advisory relationships that should give rise to ERISA fiduciary status, the

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[24] The SEC stated in the Regulation Best Interest release that "there is broad acknowledgment of the benefits of, and support for, the continuing existence of the broker-dealer business model, including a commission or other transaction-based compensation structure, as an option for retail customers seeking investment recommendations." 84 FR 33318, 33319 (July 12, 2019). The NAIC Model Regulation, section 6.5.M defines a recommendation as "advice provided by a producer to an individual consumer that was intended to result or does result in a purchase, an exchange or a replacement of an annuity in accordance with that advice." Section 5.B., defines "cash compensation" as "any discount, concession, fee, service fee, commission, sales charge, loan, override, or cash benefit received by a producer *in connection with the recommendation* or sale of an annuity from an insurer, intermediary, or directly from the consumer." (Emphasis added).

Department has concluded that it is appropriate to revise the regulatory definition of an investment advice fiduciary under Title I and Title II of ERISA in the manner set forth herein.

2. Prior Rulemakings

The Department began the process of reexamining the regulatory definition of an investment advice fiduciary under Title I and Title II of ERISA in 2010. After issuing two notices of proposed rules, conducting multiple days of public hearings, and over six years of deliberations, on April 8, 2016, the Department replaced the 1975 regulation with a new regulatory definition (the "2016 Final Rule"), which applied under Title I and Title II of ERISA.[25] In the preamble to the 2016 Final Rule, the Department noted that the 1975 five-part test had been created in a very different context and investment advice marketplace. The Department expressed concern that specific elements of the five-part test—which are not found in the text of Title I or Title II of ERISA—worked to defeat retirement investors' legitimate expectations when they received investment advice from trusted advice providers in the modern marketplace for financial advice.

The Department identified the "regular basis" element[26] in the five-part test as a particularly important example of the 1975 regulation's shortcomings. The Department stated

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[25] *Definition of the Term "Fiduciary"; Conflict of Interest Rule—Retirement Investment Advice*, 81 FR 20946 (Apr. 8, 2016). The Department issued its first proposal to amend the regulatory definition of an investment advice fiduciary in 2010. 75 FR 65263 (Oct. 22, 2010). The first proposed rulemaking provided for a 90-day comment period, from October 22, 2010, through January 20, 2011. The comment period was extended for 14 days. The Department held a public hearing in Washington, DC, on March 1-2, 2011, after which the Department welcomed public comment for 15 days in order for commenters to supplement hearing testimony or otherwise provide additional comments. That proposal was withdrawn, and the Department issued a second proposal in 2015 along with related proposed prohibited transaction exemptions and proposed amendments to existing exemptions. 80 FR 21928 (Apr. 20, 2015). The 2015 proposal and proposed related exemptions initially provided for 75-day comment periods, ending on July 6, 2015, but the Department extended the comment periods to July 21, 2015. Before finalizing the 2015 proposals, the Department held a public hearing in Washington, DC on August 10–13, 2015, at which over 75 speakers testified. The transcript of the hearing was made available on September 8, 2015, and the Department provided additional opportunity for interested persons to submit comments on the proposal and proposed related exemptions or on the transcript until September 24, 2015. A total of over 3,000 comment letters were received on the 2015 proposals. There were also over 300,000 submissions made as part of 30 separate petitions submitted on the proposals. These comments and petitions, which came from consumer groups, plan sponsors, financial services companies, academics, elected government officials, trade and industry associations, and others, were both in support of and in opposition to the 2015 proposals.

[26] This refers to the requirement in the 1975 regulation that, in order for fiduciary status to attach, investment advice must be provided by the person "on a regular basis." 29 CFR 2510.3-21(c)(1)(ii)(B).

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

The Department likewise expressed concern that the requirements in the 1975 regulation of a "mutual agreement, arrangement, or understanding" that advice would serve as "a primary basis for investment decisions" had encouraged investment advice providers in the current marketplace to use fine print disclaimers as potential means of avoiding ERISA fiduciary status, even as they marketed themselves as providing tailored or individualized advice based on the retirement investor's best interest. Additionally, the Department noted that the "primary basis" element of the five-part test appeared in tension with the statutory text and purposes of Title I and Title II of ERISA. If, for example, a prudent plan fiduciary hires multiple specialized advisers for an especially complex transaction, it should be able to rely upon any or all of the consultants that it hired to render advice regardless of arguments about whether one could characterize the advice, in some sense, as primary, secondary, or tertiary.

In adopting the 2016 Final Rule, the Department presented an economic analysis demonstrating that investment advice providers are compensated in ways that create conflicts of interest, which can bias investment advice and erode plan and IRA investment results.[27] The Department noted that many of the consultants and advisers who provide investment-related

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[27] U.S. Department of Labor, Fiduciary Investment Advice Regulatory Impact Analysis (2016), available at https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.

advice and recommendations received compensation from the financial institutions whose investment products they recommend, and that this can give the consultants and advisers a strong bias, conscious or unconscious, to favor investments that provide them greater compensation rather than those that may be most appropriate for the retirement investors. The Department also found that consolidation of the financial services industry and developments in compensation arrangements multiplied the opportunities for self-dealing and reduced the transparency of fees. Most significantly, the Department explained in its analysis that, in the absence of the 2016 Final Rule, the underperformance associated with conflicts of interest in the mutual funds segment alone could have cost IRA investors between $95 billion and $189 billion over the following 10 years and between $202 billion and $404 billion over the following 20 years. While these projected losses were substantial, they represented only a portion of what IRA investors stood to lose as a result of conflicted investment advice.

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

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

specific retirement investor or investors regarding the advisability of a particular investment or management decision with respect to securities or other investment property of the plan or IRA.

One main issue highlighted in the 2016 Final Rule involved the protection of retirement investors in the context of recommendations to roll over assets from workplace retirement plans to IRAs.[28] As the Department noted, decisions to take a benefit distribution or engage in rollover transactions are among the most, if not the most, important financial decisions that plan participants and beneficiaries and IRA owners and beneficiaries are called upon to make. The Department explained that when an individual is a participant in a workplace retirement plan, their employer or other plan sponsor has both the incentive and the fiduciary duty to facilitate sound investment choices, while in an IRA, both good and bad investment choices are more numerous, and investment advice providers often operate under conflicts of interest. The Department illustrated the consequence of these rollovers to both individuals and investment advice providers, by pointing out that rollovers from employee benefit plans to IRAs were expected to approach $2.4 trillion cumulatively from 2016 through 2020.[29] Investment advice providers have a strong economic incentive to recommend that investors roll over assets into one of their institutions' IRAs, whether from a plan or from an IRA account at another financial institution, or even between different account types. The 2016 Final Rule also specifically superseded a 2005 Advisory Opinion, 2005-23A (commonly known as the Deseret Letter) which had opined that it is not fiduciary investment advice under Title I of ERISA to make a recommendation as to distribution options from an employee benefit plan, even if accompanied by a recommendation as to where the distribution would be invested.[30]

On the same date it published the 2016 Final Rule, the Department also published two new administrative class exemptions from the prohibited transaction provisions of Title I and

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[28] *See* 81 FR 20946, 20964 (Apr. 8, 2016).
[29] *Id.* at 20949 fn. 7 (citing Cerulli Associates, "U.S. Retirement Markets 2015").
[30] *Id*.

Title II of ERISA: the Best Interest Contract Exemption (BIC Exemption)[31] and the Class Exemption for Principal Transactions in Certain Assets Between Investment Advice Fiduciaries and Employee Benefit Plans and IRAs (Principal Transactions Exemption).[32] The Department granted the new exemptions with the objective of promoting the provision of investment advice that is in the best interest of retail investors such as plan participants and beneficiaries, IRA owners and beneficiaries, and certain plan fiduciaries, including small plan sponsors.

The new exemptions included conditions designed to protect the interests of the retirement investors receiving advice. The exemptions required investment advice fiduciaries to adhere to the following "Impartial Conduct Standards": providing advice in retirement investors' best interest; charging no more than reasonable compensation; and making no misleading statements about investment transactions and other important matters. In the case of IRAs and non-Title I plans, the exemption required these standards to be set forth in an enforceable contract with the retirement investor, which also was required to include certain warranties and disclosures. The exemption further provided that parties could not rely on the exemption if they included provisions in their contracts disclaiming liability for compensatory remedies or waiving or qualifying retirement investors' right to pursue a class action or other representative action in court. In conjunction with the new exemptions, the Department also made amendments to pre-existing exemptions, namely PTEs 75–1, 77–4, 80–83, 83–1, 84–24 and 86–128, to require compliance with the Impartial Conduct Standards and to make certain other changes.[33]

3. Litigation Over the 2016 Rulemaking

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

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[31] 81 FR 21002 (Apr. 8, 2016).
[32] 81 FR 21089 (Apr. 8, 2016).
[33] 81 FR 21139 (Apr. 8, 2016); 81 FR 21147 (Apr. 8, 2016); 81 FR 21181 (Apr. 8, 2016); 81 FR 21208 (Apr. 8, 2016).

broad challenge on multiple grounds.[34] Among other things, the court found that the 2016 Final Rule comports with both the text and the purpose of ERISA, and it noted "if anything, it is the five-part test—and not the current rule—that is difficult to reconcile with the statutory text. Nothing in the phrase 'renders investment advice' suggests that the statute applies only to advice provided 'on a regular basis.'"[35] Relatedly, in *Market Synergy v. United States Department of Labor*, the U.S. Court of Appeals for the Tenth Circuit affirmed a district court's decision similarly upholding the 2016 Rulemaking as it applied to fixed indexed annuities.[36]

On March 15, 2018, however, the U.S. Court of Appeals for the Fifth Circuit (Fifth Circuit) overturned a district court's decision upholding the validity of the 2016 Final Rule[37] and vacated the 2016 Rulemaking *in toto,* in *Chamber of Commerce v. United States Department of Labor* (*Chamber*).[38] The Fifth Circuit held that the 2016 Final Rule conflicted with ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B). Specifically, the Fifth Circuit found that the 2016 Final Rule swept too broadly and extended to relationships that lacked "trust and confidence," which the court stated were hallmarks of the common law fiduciary relationship that Congress intended to incorporate into the statutory definitions. The court concluded that "all relevant sources indicate that Congress codified the touchstone of common law fiduciary

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[34] *Nat'l Assoc. for Fixed Annuities v. Perez*, 217 F.Supp.3d 1 (D.D.C. 2016) [hereinafter *NAFA*]. On December 15, 2016, the U.S. Court of Appeals for the District of Columbia denied an emergency request to stay application of the definition or the exemptions pending an appeal of the district court's ruling. *Nat'l Assoc. for Fixed Annuities v. Perez*, No. 16-5345, 2016 BL 452075 (D.C. Cir. 2016).

[35] *NAFA*, 217 F. Supp. 3d at 23, 27-28.

[36] 885 F.3d 676 (10th Cir. 2018); *see Thrivent Financial for Lutherans v. Acosta*, No. 16–CV–03289, 2017 WL 5135552 (D. Minn. Nov. 3, 2017) (granting the Department's motion for a stay and the plaintiff's motion for a preliminary injunction, with respect to Thrivent's suit challenging the BIC Exemption's bar on class action waivers as exceeding the Department's authority and as unenforceable under the Federal Arbitration Act).

[37] *Chamber of Commerce v. Hugler*, 231 F. Supp. 3d 152 (N.D. Tex. Feb. 8, 2017) (finding, among other things, that in the 2016 Final Rule, the Department reasonably removed the "regular basis" requirement; and noting, "if anything, however, the five-part test is the more difficult interpretation to reconcile with who is a fiduciary under ERISA.").

[38] *See Chamber,* 885 F.3d 360 (5th Cir. 2018). *But see id*. at 391 ("Noting in the phrase 'renders investment advice for a fee or other compensation' suggests that the statute applies only in the limited context accepted by the panel majority.") (Stewart, C.J., dissenting).

status—the parties' underlying relationship of trust and confidence—and nothing in the statute 'requires' departing from the touchstone."[39]

In addition to holding that the 2016 Final Rule conflicted with the statutory definitions in Title I and Title II of ERISA, the Fifth Circuit in *Chamber* also determined that the 2016 Rulemaking failed to honor the difference in the Department's authority over employee benefit plans under Title I of ERISA and IRAs under Title II, by imposing "novel and extensive duties and liabilities on parties otherwise subject only to the prohibited transactions penalties."[40] These included the conditions of the BIC Exemption and Principal Transactions Exemption that required financial institutions and individual fiduciary advisers to enter into contracts with their customers with specific duties, warranties, and disclosures, and forbade damages limitations and class action waivers.[41] Under the Code, IRA investors do not have a private right of action.[42] Instead, the primary remedy for a violation of the prohibited transaction provisions under the Code is the assessment of an excise tax.[43] In the Fifth Circuit's view, the Department had effectively exceeded its authority by giving IRA investors the ability to bring a private cause of action that Congress had not authorized.[44]

4. Field Assistance Bulletin No. 2018-02

In response to the Fifth Circuit's vacatur of the 2016 Rulemaking, on May 7, 2018, the Department issued Field Assistance Bulletin 2018-02, Temporary Enforcement Policy on

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[39] *Id.* at 369 (citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992)); *see id*. at 376 ("In short, whether one looks at DOL's original regulation, the SEC, Federal and state legislation governing investment adviser fiduciary status vis-à-vis broker-dealers, or case law tying investment advice for a fee to ongoing relationships between adviser and client, the answer is the same: 'investment advice for a fee' was widely interpreted hand in hand with the relationship of trust and confidence that characterizes fiduciary status."). *But see id*. at 392 ("One area in which Congress has departed from the common law of trusts is with the statutory definition of 'fiduciary.' ERISA does not define 'fiduciary' 'in terms of formal trusteeship, but in *functional* terms of *control and authority over the plan*, . . . thus expanding the universe of persons subject to fiduciary duties . . .") (Stewart, C.J., dissenting) (quoting *Mertens v. Hewitt Assocs*., 508 U.S. 248, 262 (1993)). As discussed herein, in the period since the Fifth Circuit decision, the SEC and the National Association of Insurance Commissioners (NAIC) have moved forward with strengthened standards for recommendations provided by broker-dealers and insurance agents, respectively.

[40] *Id*. at 384.

[41] *Id.*

[42] *See id.*

[43] Code section 4975(a), (b).

[44] *Chamber*, 885 F.3d 360, 384-85 (5th Cir. 2018); *see* Code section 4975.

Prohibited Transactions Rules Applicable to Investment Advice Fiduciaries (FAB 2018-02).[45] FAB 2018-02 announced that, pending further guidance, the Department would not pursue prohibited transaction claims against fiduciaries who were working diligently and in good faith to comply with the Impartial Conduct Standards for transactions that would have been exempted in the BIC Exemption and Principal Transactions Exemption, or treat such fiduciaries as violating the applicable prohibited transaction rules. In adopting the temporary enforcement policy, the Department cited uncertainty about fiduciary obligations and the scope of exemptive relief following the court's opinion that could disrupt existing investment advice arrangements to the detriment of retirement plans, retirement investors, and financial institutions, as well as the significant resources some financial institutions had devoted towards compliance with the BIC Exemption and the Principal Transactions Exemption.

5. Subsequent Actions by the Department

On July 7, 2020, the Department proposed a new prohibited transaction class exemption under Title I and Title II of ERISA for investment advice fiduciaries with respect to employee benefit plans and IRAs, called "Improving Investment Advice for Workers & Retirees."[46] The proposal stated it was in response to informal industry feedback seeking a permanent administrative class exemption based on FAB 2018-02.[47] On the same day, the Department issued a technical amendment to the Code of Federal Regulations (CFR) reinserting the 1975 regulation, reflecting the Fifth Circuit's vacatur of the 2016 Final Rule.[48] The technical amendment also reinserted into the CFR Interpretive Bulletin 96-1 (IB 96-1) relating to participant investment education, which had been removed and largely incorporated into the text of the 2016 Final Rule. Additionally, the Department updated its website to reflect the fact that the pre-existing prohibited transaction exemptions that had been amended in the 2016

[45] Available at https://www.dol.gov/agencies/ebsa/employers-and-advisers/guidance/field-assistance-bulletins/2018-02.
[46] 85 FR 40834 (July 7, 2020).
[47] *Id*. at 40835.
[48] 85 FR 40589 (July 7, 2020).

Rulemaking had been restored to their pre-amendment form, and also to reflect that the Department had withdrawn the Deseret Letter.

On December 18, 2020, the Department adopted the Improving Investment Advice for Workers & Retirees exemption as PTE 2020-02.[49] The exemption provides relief that is similar in scope to the BIC Exemption and the Principal Transactions Exemption, but it does not include contract or warranty provisions. The exemption expressly covers prohibited transactions resulting from both rollover advice and advice on how to invest assets within a plan or IRA, and imposes new conditions on investment advice fiduciaries providing such advice. In particular, PTE 2020-02 mirrors the core of the BIC and Principal Transaction exemptions' requirements of best interest standards of conduct and policies and procedures to ensure the advice is provided consistent with those standards.

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

The preamble interpretation confirmed the Department's continued view that the Deseret Letter was incorrect, and that a recommendation to roll assets out of a Title I Plan is advice with respect to moneys or other property of the plan and, if provided by a person who satisfies all of the requirements of the regulatory test, constitutes fiduciary investment advice. The preamble interpretation also discussed when a recommendation to roll over assets from an employee

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[49] 85 FR 82798 (Dec. 18, 2020).

benefit plan to an IRA would satisfy the "regular basis" requirement. Additionally, the preamble set forth the Department's interpretation of the 1975 regulation's requirement of "a mutual agreement, arrangement, or understanding" that the investment advice will serve as "a primary basis for investment decisions." In April 2021, the Department issued Frequently Asked Questions (FAQs) that, among other things, summarized aspects of the preamble interpretation.[50]

The Department's preamble interpretation and certain FAQs were challenged in two lawsuits filed after the issuance of PTE 2020-02.[51] On February 13, 2023, the U.S. District Court for the Middle District of Florida issued an opinion vacating the policy referenced in FAQ 7 (entitled "When is advice to roll over assets from an employee benefit plan to an IRA considered to be on a 'regular basis'?") and remanded it to the Department for future proceedings.[52] On June 30, 2023, a magistrate judge in the Northern District of Texas filed a report with the judge's findings, conclusions, and recommendations, including that the court should vacate portions of PTE 2020-02 that permit consideration of actual or expected Title II investment advice relationships when determining Title I fiduciary status.[53]

6. Other Regulatory Developments

U.S. Securities and Exchange Commission

Since the vacatur of the Department's 2016 Rulemaking, other regulators have considered and adopted enhanced standards of conduct for investment professionals as a method of addressing, among other things, conflicts of interest. At the Federal level, on June 5, 2019, the SEC finalized a regulatory package relating to conduct standards for broker-dealers and

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[50] New Fiduciary Advice Exemption: PTE 2020-02 Improving Investment Advice for Workers & Retirees Frequently Asked Questions, https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/new-fiduciary-advice-exemption.

[51] Compl., *Am. Sec. Ass'n. v. U.S. Dep't of Labor*, No. 8:22-CV-330VMC-CPT, 2023 WL 1967573 (M.D. Fla. Feb. 13, 2023); Compl., *Fed'n of Ams. for Consumer Choice v. U.S. Dep't of Labor*, No. 3:22-CV-00243-K-BT (N.D. Tex. Feb. 2, 2022).

[52] *Am. Sec. Ass'n. v. U.S. Dep't of Labor*, 2023 WL 1967573, at *22-23.

[53] *See* Findings, Conclusions, and Recommendations of the United States Magistrate Judge, *Fed'n of Ams. for Consumer Choice v. U.S. Dep't of Labor*, No. 3:22-CV-00243-K-BT, 2023 WL 5682411, at *27-29 (N.D. Tex. June 30, 2023) [hereinafter *FACC*]. As of the date of this proposal, the district court judge has not yet taken action regarding the magistrate judge's report and recommendations.

investment advisers. The package included Regulation Best Interest, which established a best interest standard applicable to broker-dealers when making a recommendation of any securities transaction or investment strategy involving securities to retail customers.[54] The SEC also issued its SEC Investment Adviser Interpretation regarding the conduct standards applicable to investment advisers under the Advisers Act.[55] As part of the package, the SEC adopted new Form CRS, which requires registered investment advisers under the Advisers Act and registered broker-dealers to provide retail investors with a short relationship summary with specified information (SEC Form CRS).[56]

According to the SEC, these actions were designed to enhance and clarify the standards of conduct applicable to broker-dealers and investment advisers, help retail investors better understand and compare the services offered and make an informed choice of the relationship best suited to their needs and circumstances, and foster greater consistency in the level of protections provided by each regime, particularly at the point in time that a recommendation is made.[57]

The SEC's Regulation Best Interest enhanced the broker-dealer standard of conduct "beyond existing suitability obligations."[58] According to the SEC, this

> [A]lign[ed] the standard of conduct with retail customers' reasonable expectations by requiring broker-dealers, among other things, to: Act in the best interest of the retail customer at the time the recommendation is made, without placing the financial or other interest of the broker-dealer ahead of the interests of the retail customer; and address conflicts of interest by establishing, maintaining, and enforcing policies and procedures reasonably designed to identify and fully and fairly disclose material facts about conflicts of interest, and in instances where [the SEC has] determined that disclosure is insufficient to reasonably address the conflict, to mitigate or, in certain instances, eliminate the conflict.[59]

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[54] 84 FR 33318 (July 12, 2019).
[55] 84 FR 33669 (July 12, 2019).
[56] Form CRS Relationship Summary; Amendments to Form ADV, 84 FR 33492 (July 12, 2019).
[57] Regulation Best Interest release, 84 FR 33318, 33321 (July 12, 2019).
[58] *Id.* at 33318.
[59] *Id.*

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

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

- Have a reasonable basis to believe that the recommendation is in the best interest of a particular retail customer based on that retail customer's investment profile and the potential risks, rewards, and costs associated with the recommendation and does not place the financial or other interest of the broker, dealer, or such natural person ahead of the interest of the retail customer; and

- Have a reasonable basis to believe that a series of recommended transactions, even if in the retail customer's best interest when viewed in isolation, is not excessive and is in the retail customer's best interest when taken together in light of the retail customer's investment profile and does not place the financial or other interest of the broker, dealer, or such natural person making the series of recommendations ahead of the interest of the retail customer.[60]

The Conflict of Interest Obligation requires the broker-dealer to establish, maintain and enforce written policies and procedures reasonably designed to:

- Identify and at a minimum disclose, or eliminate, all conflicts of interest associated with such recommendations;

- Identify and mitigate any conflicts of interest associated with such recommendations that create an incentive for a natural person who is an associated person of a broker or dealer to place the interest of the broker, dealer, or such natural person ahead of the interest of the retail customer;

- Identify and disclose any material limitations placed on the securities or investment strategies involving securities that may be recommended to a retail customer and any conflicts of interest associated with such limitations, and prevent such limitations and associated conflicts of interest from causing the broker, dealer, or a natural person who is an associated person of the broker or dealer to make recommendations that place the interest of the broker, dealer, or such natural person ahead of the interest of the retail customer; and

- Identify and eliminate any sales contests, sales quotas, bonuses, and non-cash compensation that are based on the sales of specific securities or specific types of securities within a limited period of time.[61]

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[60] *Id.* at 33372.
[61] *Id*. at 33476.

A conflict of interest is defined as "an interest that might incline a broker, dealer, or a natural person who is an associated person of a broker or dealer —consciously or unconsciously—to make a recommendation that is not disinterested."[62]

The SEC stated that "[t]he Commission has crafted Regulation Best Interest to draw on key principles underlying fiduciary obligations, including those that apply to investment advisers under the Advisers Act, while providing specific requirements to address certain aspects of the relationships between broker-dealers and their retail customers."[63] The SEC emphasized that, "[i]mportantly, regardless of whether a retail investor chooses a broker-dealer or an investment adviser (or both), the retail investor will be entitled to a recommendation (from a broker-dealer) or advice (from an investment adviser) that is in the best interest of the retail investor and that does not place the interests of the firm or the financial professional ahead of the interests of the retail investor."[64] The SEC also noted that the standard of conduct cannot be satisfied through disclosure alone.[65]

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

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[62] 17 CFR 240.15l-1.
[63] Regulation Best Interest release, 84 FR 33318, 33320 (July 12, 2019).
[64] *Id.* at 33321.
[65] *Id.* at 33390.
[66] *Id*. at 33337.
[67] *Id*. at 33343-44.

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

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

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

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

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[68] 84 FR 33669 (July 12, 2019).
[69] *Id*. at 33671 (footnote omitted).
[70] *Id*. at 33670.
[71] *Id.* at 33671.
[72] *Id*. (footnote omitted).
[73] *Id* at 33670. See also *id*. n 17 citing authorities where the Commission previously recognized the broad scope of section 206 of the Advisers Act in a variety of contexts.
[74] 84 FR 33492, 33493 (July 12, 2019).

investor education website, Investor.gov, which offers educational information about broker-dealers and investment advisers, and other materials.[75]

State Legislative and Regulatory Developments

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

The NAIC Model Regulation, updated in 2020, provides that insurance agents must act in the consumer's "best interest," as defined by the Model Regulation, when making a recommendation of an annuity, and insurers must establish and maintain a system to supervise recommendations so that the insurance needs and financial objectives of consumers at the time of the transaction are effectively addressed.[77] According to the NAIC, as of August 23, 2023, 43 jurisdictions have implemented the revisions to the model regulation.[78]

The NAIC Model Regulation includes a best interest obligation comprised of a care obligation, a disclosure obligation, a conflict of interest obligation, and a documentation obligation, applicable to an insurance producer.[79] If these specific obligations are met, the producer is treated as satisfying the overarching best interest standard as expressed in the NAIC

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[75] *Id*. SEC staff has since issued guidance on Regulation Best Interest, Form CRS, and related interpretations, including staff bulletins on care obligations, conflicts of interest, and account recommendations for retail investors, which are available at https://www.sec.gov/regulation-best-interest.

[76] 950 Mass. Code Regs. 12.204 & 12.207 as amended effective March 6, 2020; *see* Consent Order, *In the Matter of Scottrade, Inc*., No. E-2017-0045 (June 30, 2020); *see also Enf't Section of Massachusetts Sec. Div. of Office of Sec'y of Commonwealth v. Scottrade, Inc*., 327 F. Supp. 3d 345, 352 (D. Mass. 2018) (discussing enforcement actions under Massachusetts securities and other consumer protection laws). A challenge to the regulation was rejected by the Massachusetts Supreme Judicial Court. *See Robinhood Fin. LLC v. Sec'y of Commonwealth of Mass,* No. SJC-13381, 2023 WL 5490571 (Mass. Aug. 25, 2023).

[77] Available at www.naic.org/store/free/MDL-275.pdf.

[78] NAIC Annuity Suitability & Best Interest Standard webpage, https://content.naic.org/cipr-topics/annuity-suitability-best-interest-standard.

[79] A producer is defined in section 5.L. of the Model Regulation as "a person or entity required to be licensed under the laws of this state to sell, solicit or negotiate insurance, including annuities." Section 5.L. further provides that the term producer includes an insurer where no producer is involved.

Model Regulation. The care obligation states that the producer, in making a recommendation, must exercise reasonable diligence, care and skill to:

- Know the consumer's financial situation, insurance needs and financial objectives;
- Understand the available recommendation options after making a reasonable inquiry into options available to the producer;
- Have a reasonable basis to believe the recommended option effectively addresses the consumer's financial situation, insurance needs and financial objectives over the life of the product, as evaluated in light of the consumer profile information; and
- Communicate the basis or bases of the recommendation.[80]

The conflict of interest obligation requires the producer to "identify and avoid or reasonably manage and disclose material conflicts of interest, including material conflicts of interest related to an ownership interest."[81] "Material conflict of interest" is defined as "a financial interest of the producer in the sale of an annuity that a reasonable person would expect to influence the impartiality of a recommendation," but the definition expressly carves out "cash compensation or non-cash compensation" from treatment as sources of conflicts of interest.[82] The NAIC Model Regulation also provides that it does not apply to transactions involving contracts used to fund an employee pension or welfare plan covered by ERISA.[83]

The NAIC expressly disclaimed that its standard creates fiduciary obligations, and the obligations in the Model Regulation differ in significant respects from those applicable to broker-dealers in the SEC's Regulation Best Interest.[84] For example, in addition to disregarding

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[80] NAIC Model Regulation, at section 6(A)(1)(a).
[81] *Id.* at section 6(A)(3).
[82] *Id.* at section 5(I).
[83] *Id.* at section 4(B)(1).
[84] Section 6(d) of the Model Regulation provides, "[t]he requirements under this subsection do not create a fiduciary obligation or relationship and only create a regulatory obligation as established in this regulation." In recent insurance industry litigation against the Department, plaintiff Federation of Americans for Consumer Choice, Inc., stated that "[t]here is a world of difference" between the NAIC Model Regulation and ERISA's fiduciary regime. *See* Pls.' (1) Br. In Opp'n to Defs.' Cross-Motion to Dismiss for Lack of Jurisdiction or, in the Alternative, for

compensation as a source of conflicts of interest, the specific care, disclosure, conflict of interest, and documentation requirements do not expressly incorporate the obligation not to put the producer's or insurer's interests before the customer's interests, even though compliance with their terms is treated as meeting the "best interest" standard. Similarly, the Model Regulation's care obligation does not repeat the "best interest" requirement but instead includes a requirement to "have a reasonable basis to believe the recommended option effectively addresses the consumer's financial situation, insurance needs and financial objectives . . . ."[85] Additionally, the obligation to comply with the "best interest" standard is limited to the individual producer, as opposed to the insurer responsible for supervising the producer.

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

Summ. J., and (2) Reply Br. in Supp. of Pls. Mot. for Summ. J, 40, *Fed'n of Ams. for Consumer Choice v. U.S. Dep't of Labor*, No. 3:22-CV-00243-K-BT (Nov. 7, 2022) (comparing ERISA's best interest requirement to NAIC Model Regulation 275, Sections 2.B and 6.A.(1)(d)).

[85] *Id.* at section 6(A)(1)(a)(iii).

[86] Regulation Best Interest release, 84 FR 33318, 33343-44 (July 12, 2019). Regulation Best Interest would apply, however, to retail customers receiving recommendations for their own retirement accounts. *Id.*

[87] NAIC Model Regulation, at section 4(B)(1).

7. Coordination with Other Agencies

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

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

As the SEC has adopted regulatory standards for broker-dealers that are based on fiduciary principles of care and loyalty also applicable to investment advisers under the Advisers Act, and the NAIC has adopted a model law that includes a best interest standard, the Department believes that it is possible to honor the unique regulatory structure imposed by the law governing tax-preferred retirement investments, adopt a regulatory approach that provides a broadly uniform standard for all retirement investors, as contemplated by Title I and Title II of ERISA, and avoid the imposition of obligations that conflict with investment professionals'

obligations under other applicable laws. In particular, in the Department's view, PTE 2020-02 is consistent with the requirements of the SEC's Regulation Best Interest and the fiduciary obligations of investment advisers under the Advisers Act. Therefore, broker-dealers and investment advisers that have already adopted meaningful compliance mechanisms for Regulation Best Interest and the Advisers Act fiduciary duty, respectively, should be able to adapt easily to comply with the PTE.

Nevertheless, to better understand whether the proposed rule and exemptions would subject investment advice providers to requirements that conflict with or add to their obligations under other Federal laws, the Department has continued consulting and coordinating with the SEC; other securities, banking, and insurance regulators; the Department of the Treasury, including the Federal Insurance Office; and the Financial Industry Regulatory Authority (FINRA), the independent regulatory authority of the broker-dealer industry.

The Department has also continued consulting and coordinating with the Department of the Treasury and the Internal Revenue Service (IRS), particularly on the subject of IRAs, and will continue to do so through the rulemaking process. Although the Department has responsibility for issuing regulations and prohibited transaction exemptions under section 4975 of the Code, which applies to IRAs, the IRS maintains general responsibility for enforcing the excise tax applicable to prohibited transactions. The IRS's responsibilities extend to the imposition of excise taxes on fiduciaries who participate in prohibited transactions. As a result, the Department and the IRS share responsibility for addressing self-dealing by investment advice fiduciaries to tax-qualified plans and IRAs.

C. Purpose of the Proposed Rule and Summary of the Major Provisions

1. Purpose of the Proposed Rule

Since the 1975 rule was adopted, developments in retirement savings vehicles and in the investment advice marketplace have altered the way retirement investors interact with investment advice providers. In 1975, retirement plans were primarily defined benefit plans,

which were typically managed by sophisticated investment professionals. IRAs were not major market participants and 401(k) plans were not yet in existence. Today, however, plan participants, IRA owners, and their beneficiaries exercise direct authority over their investments, and depend upon a wide range of investment professionals, including broker-dealers, advisers subject to the Advisers Act, insurance agents, and others on how to make complex decisions about the management of retirement assets.

These individual investors have far greater responsibility for decisions about their retirement savings than was true in 1975, when investment professionals directly managed plan investments. Individual investors routinely depend on the quality of the advice they receive from financial professionals who commonly hold themselves out as trusted advice providers. Because these professionals have inherent conflicts of interest, however, there is an ever-present danger that the investment advice the retirement investor receives will be driven, not by the best interest of the investor, but by the financial interests of the investment professional or firm whom they depend upon for advice that is in their interest.

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

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

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

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

retirement savings. In this context, an appropriately constructed regulatory definition of an investment advice fiduciary under Title I and Title II of ERISA is essential.

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

For example, the Department's proposal fills an important gap regarding advice to plans and plan fiduciaries. Advice from broker-dealers to plans and plan fiduciaries is not protected by

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[88] *Donovan v. Bierwirth*, 680 F.2d 263, 272 n. 8 (2d. Cir. 1982), *cert denied,* 459 U.S. 1069 (1982).

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

The proposal also takes on special importance in creating uniform standards for investment transactions that are not covered by the Federal securities laws. Some types of plan and IRA investments, such as real estate, fixed indexed annuities, certificates of deposit, and other bank products, may not be subject to the SEC's Regulation Best Interest, and there are a number of persons who provide investment advice services that are neither subject to the SEC's Regulation Best Interest nor to the fiduciary obligations in the Advisers Act. An update to the regulatory definition of an investment advice fiduciary, for purposes of Title I and Title II of ERISA, will enhance protections of retirement investors. This approach reflects both the statutory text, which adopts a uniform approach to all assets held in tax-advantaged retirement plans, as well as sound public policy. When investment professionals hold themselves out to retirement investors as making recommendations based on the retirement investors' best interests, their recommendations should be driven by a uniform fiduciary obligation, and not by perceptions that one category of investment product is subject to lower regulatory standards than another.

Since ERISA's enactment, the Department has been expressly given the authority under Title I of ERISA to issue regulations defining terms in Title I and to grant administrative exemptions from the prohibited transactions provisions. Pursuant to the President's

Reorganization Plan No. 4 of 1978,[89] which Congress ratified in 1984,[90] the Department's authority was expanded to include authority to issue regulations, rulings, and opinions on the definition of a fiduciary with respect to Title II plans under the Code (including IRAs) and to grant administrative prohibited transaction exemptions applicable to them.[91] Thus, the Department has clear authority to promulgate the regulatory definition of a fiduciary under both Title I and Title II of ERISA, and the Department has taken care in this proposal to honor the text and purposes of Title I and Title II of ERISA.

2. Summary of the Major Provisions of the Proposed Rule

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

- The person either directly or indirectly (e.g., through or together with any affiliate) has discretionary authority or control, whether or not pursuant to an agreement, arrangement, or understanding, with respect to purchasing or selling securities or other investment property for the retirement investor;
- The person either directly or indirectly (e.g., through or together with any affiliate) makes investment recommendations to investors on a regular basis as part of their business and the recommendation is provided under circumstances indicating that the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest; or
- The person making the recommendation represents or acknowledges that they are acting as a fiduciary when making investment recommendations.[92]

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[89] 5 U.S.C. App. 1 (2018).
[90] Sec. 1, Pub. L. 98-532, 98 Stat. 2705 (Oct. 19, 1984).
[91] Sec. 102, 5 U.S.C. App. 1.
[92] This proposed rule is accompanied by proposals (published elsewhere in the *Federal Register*) related to prohibited transaction exemptive relief. The proposals would amend existing PTEs, including PTE 2020-02, that allow, subject to protective conditions, investment advice fiduciaries to receive compensation and engage in transactions that otherwise would be prohibited. Unlike the PTEs that were a part of the 2016 Rulemaking, these PTEs do not, and the amendments would not, include required contracts or warranties that the Fifth Circuit objected to. These prohibited transaction exemptions also do not exempt a party from *status as a fiduciary*, and therefore, the

It is important to note that each required component of the new proposed regulatory definition would have to be satisfied with respect to any particular recommendation for the recommendation to constitute fiduciary investment advice. In accordance with the statute, fiduciary status is determined on a transactional basis. Under the statutory text, a person is a fiduciary with respect to advice "to the extent … [they] render[] investment advice for a fee or other compensation, direct or indirect." The proposed rule, like the statute, applies fiduciary status on a transaction-by-transaction basis. One is only a fiduciary "to the extent" the person making the recommendation meets the rule's requirements with respect to the particular advice transaction at issue.

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

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

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proposals do not affect the scope of the regulatory definition of an investment advice fiduciary. Rather, the exemption proposals involve an exercise of the statutory authority afforded to the Department by Congress to grant administrative relief from the strict prohibited transaction provisions in Title I and Title II of ERISA for beneficial transactions involving plans and IRAs. *See* section 408(a) of ERISA (requiring the Department to make findings before granting an exemption that the exemption is administratively feasible, in the interests of the plan or IRA and of its participants and beneficiaries, and protective of the rights of participants and beneficiaries of such plan or IRA); section 4975(c)(2) of the Code (same).

proposal is consistent with the statutory definition that applies fiduciary status on a functional (and therefore, transactional) basis.[93]

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

3. Covered Advice and Recommendations.

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

[93] *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993). In this regard, the Department notes that the SEC's Regulation Best Interest also applies on a transactional basis. As stated by the SEC, "the provision of recommendations in a broker-dealer relationship is generally transactional and episodic, and therefore the final rule requires that broker-dealers act in the best interest of their retail customers at the time a recommendation is made and imposes no duty to monitor a customer's account following a recommendation." 84 FR 33318, 33331 (July 12, 2019).

Department's longstanding position that advice to a plan participant or beneficiary is advice to the plan.[94]

Paragraph (c)(1)(i)

In the first context, which is set forth in proposed paragraph (c)(1)(i), a person renders fiduciary "investment advice" within the meaning of ERISA section 3(21) if the person rendering advice either directly or indirectly (*e.g.*, through or together with any affiliate) has discretionary authority or control, whether or not pursuant to an agreement, arrangement or understanding, with respect to purchasing or selling securities or other investment property for the retirement investor.

This proposed provision is similar to a provision in the 1975 rule that provides for investment advice fiduciary status if a covered recommendation is made and the person making the recommendation either directly or indirectly has "discretionary authority or control, whether or not pursuant to an agreement, arrangement, or understanding, with respect to purchasing or selling securities or property *for the plan*."[95] The proposal would broaden this provision by referencing securities or other investment property of the retirement investor, not just an investment through a plan or IRA.

Persons that have discretionary authority or control over the investment of a retirement investor's assets necessarily are in a relationship of trust and confidence with respect to the retirement investor.[96] Further, like the 1975 provision, the proposal would extend to circumstances in which the person making the recommendation "indirectly (*e.g.*, through or

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[94] IB 96-1, 29 CFR 2509.96-1. For purposes of this definition, a participant or beneficiary of the plan is not a "plan fiduciary" with respect to the plan.

[95] *See* 29 CFR 2510.3-21(c)(1)(ii)(A) and 26 CFR 54.4975-9(c)(1)(ii)(A) (emphasis added). *See also* paragraph (d) of the proposal, which provides that a person is not a fiduciary merely because they have certain specific discretion in connection with the execution of securities transactions.

[96] As discussed below, the proposed rule would not impose on a fiduciary an automatic fiduciary obligation to continue to monitor an investment or a retirement investor's activities to ensure the recommendations remain prudent and appropriate for the plan or IRA. The extent of a monitoring obligation would depend on whether the facts and circumstances indicate that the fiduciary has undertaken that responsibility. A fiduciary that assumes discretion over plan or IRA assets, however, would generally be viewed as assuming a monitoring obligation.

together with any affiliate)" has discretionary authority or control over securities or other investment property; in this context, the use of "indirectly" generally refers to an arrangement in which an affiliate has discretionary authority or control.

Paragraph (c)(1)(ii)

The second context, in proposed paragraph (c)(1)(ii), sets forth that a person provides fiduciary "investment advice" if the person making the recommendation directly or indirectly (*e.g.*, through or together with an affiliate) makes investment recommendations to investors on a regular basis as part of their business and the recommendation is provided under circumstances indicating the recommendation is based on the particular needs or individual circumstances of the retirement investor and may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest.

The proposed provision applies only to advice rendered by a person who makes investment recommendations to investors "on a regular basis as part of their business." As compared to the "regular basis" prong of the 1975 regulation, which the Department believes can work to undermine the current reasonable expectations of retirement investors, this proposed provision is properly focused on whether the advice provider is in the business of providing investment recommendations. The proposal's updated regular basis requirement avoids concerns that the rule could sweep so broadly as to cover, for example, the car dealer who suggests that a consumer finance a purchase by tapping into retirement funds. Retirement investors would not typically view such persons as making investment recommendations based on the retirement investors' individual financial interests, and the rule would not treat them as fiduciaries. Similarly, the human resources employees of a plan sponsor would not be considered investment

advice fiduciaries under the proposed regulatory definition, because they do not regularly make investment recommendations to investors as part of their business.[97]

However, the proposal's regular basis requirement would not defeat legitimate investor expectations by automatically excluding one-time advice from treatment as fiduciary investment advice.[98] For example, the proposed rule would treat an insurance agent's recommendation to invest a retiree's retirement savings in an annuity as fiduciary advice if the agent regularly makes investment recommendations to investors, and the circumstances indicate that the recommendation is based on the retiree's particular needs and circumstances and may be relied upon for making an investment decision that is in the investor's best interest. Similarly, if the agent told the retiree that they were rendering fiduciary advice, the proposal would treat the recommendation as fiduciary advice even if was one-time advice. Over time, the Department has become concerned that 1975 regulation's regular basis test served to defeat objective understandings of the nature of the professional relationship and the reliability of the advice as based on the investor's best interest.

By limiting the scope of those who may be an investment advice fiduciary to those who make investment recommendations as a regular part of their business, the Department believes that the proposed definition is appropriately tailored to those advice providers in whom retirement investors may reasonably place their trust and confidence. Whether someone gives

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[97] The Department also would not consider salaries of human resources employees of the plan sponsor to be a fee or other compensation in connection with or as a result of the educational services and materials that they provide to plan participants and beneficiaries. Further, the proposed rule does not alter the principles articulated in ERISA Interpretive Bulletin 75-8, D-2 (29 CFR 2509.75-8) (IB 75-8). IB 75-8 provides that persons who perform purely administrative functions for an employee benefit plan, within a framework of policies, interpretations, rules, practices and procedures made by other persons, but who have no power to make decisions as to plan policy, interpretations, practices or procedures, are not fiduciaries with respect to the plan by virtue of those purely ministerial functions.

[98] As noted by the magistrate judge in *Federation of Americans for Consumer Choice v. United States Dept. of Labor*, the Fifth Circuit's opinion "did not foreclose that Title I duties may reach those fiduciaries who, as aligned with Title I's text, render advice, even for the first time, '*for* a fee or other compensation.'" Findings, Conclusions, and Recommendations of the United States Magistrate Judge, *FACC*, No. 3:22-CV-00243-K-BT, 2023 WL 5682411, at *22 (N.D. Tex. June 30, 2023) (quoting ERISA section 3(21)(A)(ii), 29 U.S.C. 1002(21)(A)(ii)) (emphasis in original).

investment recommendations on a regular basis as part of their business is an objective test based on the totality of facts and circumstances.[99] The Department invites comment on this approach, including the extent to which the Department should consider the investor's understandings as to whether the adviser regularly makes investment recommendations as part of their business. The Department seeks comment regarding examples of financial professionals who may be reasonably viewed by investors as giving investment advice but would not in fact meet the requirements laid out in this provision.

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

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

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[99] The reference to "investment recommendations" here and elsewhere in the proposal does not indicate that the proposal is limited to broker-dealers, or parties who regularly provide advice or make recommendations in the securities or banking industries. The scope of the regulation would extend to recommendations involving securities *or other investment property*. Therefore, for example, insurance agents who regularly make recommendations to customers with respect to the purchase of annuity contracts would be considered to make investment recommendations to investors on a regular basis as part of their business. Proposed paragraph (f)(11) provides that the term "investment property" does not include health insurance policies, disability insurance policies, term life insurance policies, or other property to the extent the policies or property do not contain an investment component.

disclaimers, while properly focusing on a reasonable understanding of the nature of their relationship.

Further, the proposal does not include the 1975 regulation's "primary basis" requirement, which has proved difficult to interpret and untethered from the extent to which the recommendation was presented as advice upon which the investor could rely in making a decision.[100] Instead, the proposal has a requirement that the circumstances indicate that the recommendation "may be relied upon by the retirement investor as a basis for investment decisions that are in the retirement investor's best interest." Recommendations that meet this test can be outcome-determinative for the investor and are appropriately treated as fiduciary advice when the elements of the proposed rule are satisfied.

In determining whether proposed paragraph (c)(1)(ii) is satisfied, the Department intends to examine the ways investment advice providers market themselves and describe their services. For example, some stakeholders have previously expressed concern that investment advice providers that adopt titles such as financial consultant, financial planner, and wealth manager, are holding themselves out as acting in positions of trust and confidence while simultaneously disclaiming status as an ERISA fiduciary.[101] In the Department's view, an investment advice provider's use of such titles routinely involves holding themselves out as making investment recommendations that will be based on the particular needs or individual circumstances of the retirement investor and may be relied upon as a basis for investment decisions that are in the retirement investor's best interest.

Of course, whether a recommendation is provided under circumstances indicating that it is based on the particular needs or individual circumstances of the retirement investor and that it may be relied upon as a basis for investment decisions that are in the retirement investor's best

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[100] *See* Preamble to Prohibited Transaction Exemption 2020-02, Improving Investment Advice for Workers & Retirees, 85 FR 82798, 82808 (Dec. 18, 2020) (discussing comments on whether the test focuses on "a" primary basis or "the" primary basis).
[101] *See id*. at 82803.

interest is only part of the consideration. Even if a recommendation satisfies a portion of the definition, it is not fiduciary investment advice unless each aspect is satisfied (*e.g.,* to satisfy paragraph (c)(1)(ii), the person must also (directly or indirectly) make investment recommendations on a regular basis as part of their business).

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

Paragraph (c)(1)(iii)

The third context identified in the proposal, in proposed paragraph (c)(1)(iii), is if the person making recommendations represents or acknowledges that they are acting as a fiduciary when making investment recommendations. An investment advice provider that acknowledges fiduciary status has expressly agreed that the customer may place trust and confidence in them. Furthermore, as discussed in the Fifth Circuit's opinion, honesty is a general premise of a common law fiduciary relationship.[102] This provision of the proposal would ensure that parties making a fiduciary representation or acknowledgment cannot subsequently deny their fiduciary status if a dispute arises, but rather must honor their words.

For purposes of the proposal, paragraph (c)(1)(iii) is not limited to the circumstances in which the person specifically represents that they are a fiduciary for purposes of Title I or Title II of ERISA, or specifically cites any particular statutory provisions. It is enough that the investment advice provider told the retirement investor that the investment advice or investment recommendations were or will be made in a fiduciary capacity. As with the other contexts

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

identified in proposed paragraph (c)(1), this is intended to align fiduciary status with the retirement investor's reasonable expectations. A retirement investor who is told by a person that the person will be acting as a fiduciary reasonably and appropriately places their trust and confidence in such a person.

In the retirement context, the Department has stressed the importance of clarity regarding the nature of an advice relationship and has encouraged retirement investors to ask advice providers about their status as an ERISA fiduciary with respect to retirement accounts and seek a written statement of the advice provider's fiduciary status. The Department's FAQs entitled *Choosing the Right Person to Give You Investment Advice: Information for Investors in Retirement Plans and Individual Retirement Accounts* state "A written statement helps ensure that the fiduciary nature of the relationship is clear to both you and the investment advice provider at the time of the transaction, and limits the possibility of miscommunication."[103]

Many retirement investors may receive a written fiduciary acknowledgment due to compliance obligations of an investment advice provider. For example, retirement investors that are plan fiduciaries entering into an investment advice services arrangement on behalf of the plan are likely to receive an acknowledgment of fiduciary status from the provider as part of the disclosure obligations under ERISA section 408(b)(2) and the regulations thereunder.[104] Further, an upfront written acknowledgment of fiduciary status is a requirement of several prohibited transaction exemptions available to investment advice fiduciaries, including the statutory exemption added by Congress at ERISA section 408(b)(14)[105] and the Department's broad administrative exemption, PTE 2020-02.[106]

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[103] Available at https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/choosing-the-right-person-to-give-you-investment-advice.
[104] 29 CFR 2550.408b-2(c)(1)(iv)(B).
[105] *See* ERISA section 408(g)(6)(A)(vii), 29 U.S.C. 1108(g)(6)(A)(vii) ("[T]he fiduciary adviser [must] provide[] to a participant or a beneficiary before the initial provision of the investment advice with regard to any security or other property offered as an investment option, a written notification (which may consist of notification by means of electronic communication) . . . that the adviser is acting as a fiduciary of the plan in connection with the provision of the advice . . . .").
[106] Section II(b)(1).

As discussed in the preamble to PTE 2020-02, the Department believes that parties seeking to provide investment advice to retirement investors and relying on the exemption should, at a minimum, make a conscious up-front determination of whether they are acting as fiduciaries; tell their retirement investor customers that they are rendering advice as fiduciaries; and, based on their conscious decision to act as fiduciaries, implement and follow the exemption's conditions.[107]

Disclaimers

Paragraph (c)(1)(v) of the proposal addresses the impact of disclaimers on parties' status as investment advice fiduciaries. The proposed paragraph provides that written statements by a person disclaiming status as a fiduciary under the Act, the Code, or this regulation, or disclaiming any of the conditions set forth in paragraph (c)(1)(ii), will not control to the extent they are inconsistent with the person's oral communications, marketing materials, applicable State or Federal law, or other interactions with the retirement investor. The Department's intent in including this paragraph in the proposal is to permit parties to define the nature of their relationship, but also to ensure that any disclaimer be consistent with oral communications or actions, marketing material, State and Federal law, and other interactions based on all relevant facts and circumstances. When the disclaimer is at odds with the investment advice provider's oral communications, marketing material, State or Federal law, or other interactions, the disclaimer is insufficient to defeat the retirement investor's legitimate expectations.[108]

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[107] 85 FR 82798, 82827 (Dec. 18, 2020).

[108] This discussion of disclaimers applies to the regulation proposed herein, defining an investment advice fiduciary, and would not extend to a circumstance in which a financial professional has investment discretion over a retirement investor's assets.

4. Recommendations Regarding Securities Transactions or Other Investment Transactions or Investment Strategies

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

Recommendation

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

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

In evaluating whether a recommendation has been made under the proposal, the Department intends to take an approach similar to that taken by the SEC and FINRA in the broker-dealer context. In the SEC's Regulation Best Interest, the SEC stated that it would apply the term as currently interpreted with respect to broker-dealer regulation for purposes of the suitability obligations, to achieve efficiencies for broker-dealers.[109] The Department likewise believes that efficiencies will apply if it adopts a similar approach.

In the Regulation Best Interest release, the SEC stated,

> [T]he determination of whether a broker-dealer has made a recommendation that triggers application of Regulation Best Interest should turn on the facts and circumstances of the particular situation and therefore, whether a recommendation has taken place is not susceptible to a bright line definition. Factors considered in determining whether a recommendation has taken place include whether the communication "reasonably could be viewed as a 'call to action'" and "reasonably would influence an investor to trade a particular security or group of securities." The more individually tailored the communication to a specific customer or a targeted group of customers about a security or group of securities, the greater the likelihood that the communication may be viewed as a "recommendation."[110]

The SEC did not include a formal definition of a recommendation in Regulation Best Interest, based on its view that the concept of a recommendation is fact-specific and not conducive to an express definition.[111] In drafting this proposal, the Department has worked to ensure alignment with the regulatory regimes of the SEC and other regulatory agencies, and is proposing a similar approach.

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

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[109] Regulation Best Interest release, 84 FR 33318, 33335 (July 12, 2019); *see id*. at fn. 161 (providing citations to relevant FINRA guidance, including on the definition and contours of the term "recommendation").
[110] *Id.*
[111] *Id*.

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

Proposed paragraph (f)(10) defines the phrase "recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property." This phrase largely parallels the language in the SEC's Regulation Best Interest, which applies to broker-dealers' "recommendation of any securities transaction or investment strategy involving securities (including account recommendations)."[112] The phrase's broader reference to "other investment property" reflects the differences in jurisdiction between the SEC and the Department.

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

- As to the advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property, as to investment strategy, or as to how securities or other investment property should be invested after the securities or other investment property are rolled over, transferred, or distributed from the plan or IRA;

- As to the management of securities or other investment property, including, among other things, recommendations on investment policies or strategies, portfolio composition, selection of other persons to provide investment advice or investment management services, selection of investment account arrangements (*e.g.,* account types such as brokerage versus advisory) or voting of proxies appurtenant to securities; and

- As to rolling over, transferring, or distributing assets from an employee benefit plan or IRA, including recommendations as to whether to engage in the transaction, and the amount, the form, and the destination of such a rollover, transfer, or distribution.

Components of these proposed covered recommendations are discussed below.

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[112] 17 CFR 240.15l–1(a)(1).

Recommendations Involving Securities, Other Investment Property, and Investment Strategy

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

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

The Department proposes that the term investment property, however, not include health insurance policies, disability insurance policies, term life insurance policies, and other property to the extent the policies or property do not contain an investment component. This is confirmed in a proposed definition of "investment property" in paragraph (f)(11). Although there can be situations in which a person recommending group health or disability insurance, for example, effectively exercises such control over the decision that the person is functionally exercising discretionary control over the management or administration of the plan as described in ERISA

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[113] Regulation Best Interest release, 84 FR 33318, 33339 (July 12, 2019) (citing FINRA Rule 2111.03 and FINRA Regulatory Notice 12-25, available at https://www.finra.org/rules-guidance/notices/12-2).

section 3(21)(A)(i) or section 3(21)(A)(iii), the Department does not believe that the definition of investment advice in ERISA's statutory text is properly interpreted or understood to cover a recommendation to purchase group health, disability, term life insurance, or similar insurance policies that do not have an investment component.

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

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

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

approach will appropriately protect the interests of plan participants and beneficiaries, or whether another approach would be more protective.

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

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

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

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[114] 17 CFR 240.15l-1(a)(1) ("A broker, dealer, or a natural person who is an associated person of a broker or dealer, when making a recommendation of any securities transaction or investment strategy involving securities (*including account recommendations*) to a retail customer, shall act in the best interest of the retail customer at the time the recommendation is made, without placing the financial or other interest of the broker, dealer, or natural person who is an associated person of a broker or dealer making the recommendation ahead of the interest of the retail customer.") (emphasis added); SEC Investment Adviser Interpretation, 84 FR at 33674 ("An adviser's fiduciary duty applies to all investment advice the investment adviser provides to clients, including advice about investment strategy, engaging a sub-adviser, and account type.").

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

Proposed paragraph (f)(10)(ii) extends to recommendations as to "selection of other persons to provide investment advice or investment management services." Consistent with the Department's longstanding position, the proposed regulation would cover the recommendation of another person to be entrusted with investment advice or investment management authority over retirement assets. Such recommendations are often critical to the proper management and investment of those assets and are fiduciary in nature if the other conditions of the proposed definition are satisfied. Recommendations of investment advisers or managers are no different than recommendations of investments that the plan or IRA may acquire and are often, by virtue of the track record or information surrounding the capabilities and strategies that are employed by the recommended fiduciary, inseparable from recommendations as to the types of investments that the plan or IRA will acquire. For example, the assessment of an investment fund manager or management is often a critical part of the analysis of which fund to pick for investing plan or IRA assets.

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

However, this discussion should not be read to exempt a person from being a fiduciary with respect to any of the investment recommendations covered by proposed paragraphs (c)(1) and defined in proposed paragraph (f)(10). There is a line between an investment advice provider

making claims as to the value of its own advisory or investment management services in marketing materials, on the one hand, and making recommendations to retirement investors on how to invest or manage their savings, on the other. An investment advice provider can recommend that a retirement investor enter into an advisory relationship with the provider without acting as a fiduciary. But when the investment advice provider recommends, for example, that the investor pull money out of a plan or invest in a particular fund, that advice may be given in a fiduciary capacity even if part of a presentation in which the provider is also recommending that the person enter into an advisory relationship. As proposed, the complete facts and circumstances surrounding each piece of advice would be considered. The Department believes that this is consistent with the functional fiduciary test laid out in the statute in which an entity is an investment advice fiduciary to the extent that they satisfy the definition. Just because one piece of advice is not fiduciary investment advice (here, the "hire me" recommendation) does not mean that the rest of the advice is necessarily excluded from the definition (here, the advice to pull money out of the plan and invest in a particular fund). The investment advice fiduciary could not prudently recommend that a plan participant roll money out of a plan into investments that generate a fee for the fiduciary but leave the participant in a worse position than if the participant had left the money in the plan. Thus, when a recommendation to "hire me" effectively includes a recommendation on how to invest or manage plan or IRA assets (*e.g.*, whether to roll assets into an IRA or plan or how to invest assets if rolled over), that recommendation would need to be evaluated separately under the provisions in the proposed regulation.[115]

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[115] The Department believes this approach is consistent with the SEC's approach in Regulation Best Interest. In FAQs, the SEC described a scenario involving broker-dealer communications with a prospective retail customer that would not rise to the level of a recommendation. However, the SEC cautioned that a recommendation made in the context of a "hire me" conversation or otherwise would be subject to Regulation Best Interest. *See* Questions on Regulation Best Interest, available at https://www.sec.gov/tm/faq-regulation-best-interest.

Proxy Voting Appurtenant to Ownership of Shares of Corporate Stock

Proposed paragraph (f)(10)(ii) also extends to recommendations as to the "voting of proxies appurtenant to securities." The Department has long viewed the exercise of ownership rights as a fiduciary responsibility; consequently, advice or recommendations on the exercise of proxy or other ownership rights are appropriately treated as fiduciary in nature if the other conditions of the regulation are satisfied.[116]

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

Recommendations on Rollovers, Benefit Distributions, or Transfers from Plan or IRA.

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

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[116] *See* Fiduciary Duties Regarding Proxy Voting and Shareholder Rights, 85 FR 81658 (Dec. 16, 2020) ("In connection with proxy voting, the Department's longstanding position is that the fiduciary act of managing plan assets includes the management of voting rights (as well as other shareholder rights) appurtenant to shares of stock.").

investors in the context of a recommendation to roll over employee benefit plan assets to an IRA, as well as other recommendations to roll over, transfer, or distribute assets from a plan or IRA.

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

Thus, recommendations on distributions (including rollovers or transfers into another plan or IRA) or recommendations to entrust plan assets to a particular IRA provider would fall within the scope of investment advice in this proposed regulation, and would be covered by Title I of ERISA, including the enforcement provisions of section 502(a). Further, in the Department's view, the evaluation of whether a recommendation constitutes fiduciary investment advice should be the same regardless of whether it is a recommendation to take a distribution or make a rollover to an IRA or a recommendation not to take a distribution or to keep assets in a plan.

The proposal's approach also aligns with the SEC's Regulation Best Interest and Advisers Act fiduciary obligations, which extend to account recommendations generally as well as recommendations to roll over or transfer assets from one type of account to another.[117]

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[117] Regulation Best Interest release, 84 FR 33318, 33339 (July 12, 2019); SEC Investment Adviser Interpretation, 84 FR 33669, 33674 (July 12, 2019).

5. Application of paragraph (c)(1)

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

Sophisticated Retirement Investors

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

The Department acknowledges that some commenters in previous rulemakings have asserted that a specific "counterparty" provision is necessary to avoid limiting plan and IRA investors' choices in investment transactions. [118] Commenters have suggested that the Department should adopt certain metrics, such as wealth or income, as conclusively establishing that the retirement investor has sufficient expertise and sophistication to foreclose fiduciary status of an advice provider. The Department is unaware, however, of compelling evidence that wealth and income are strong proxies for financial sophistication or inconsistent with a relationship of trust and confidence.[119] Moreover, and independently, nothing in the statute's text suggests that Congress intended to categorically deny fiduciary protection to "sophisticated

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[118] The 2016 Final Rule provided that, subject to specified conditions, certain transactions with independent fiduciaries with financial expertise would not constitute fiduciary investment advice. 81 FR 20946, 20980 (Apr. 8, 2016).

[119] High net worth investors and sophisticated investors are not carved out of protections under the SEC's Regulation Best Interest or the Advisers Act fiduciary duty.

investors." Instead of a specific "counterparty" provision or a provision for sophisticated plan- and IRA-level fiduciaries, proposed paragraph (c)(1)(ii) generally states an appropriate test for fiduciary status to apply to a covered recommendation, even if made to a plan or IRA fiduciary. To the extent counterparties wish to avoid fiduciary status, they can avoid structuring their relationships to fall within the circumstances described in that subparagraph.

In the context of "wholesaling" activity, which involves communications by product manufacturers or other financial service providers to financial intermediaries who then directly advise plans, participants, beneficiaries, and IRA owners and beneficiaries, the Department believes that communications to financial intermediaries would typically fall outside the scope of proposed paragraph (c)(1)(ii) because they would not involve recommendations based on the particular needs or individual circumstances of the plan or IRA serviced by the intermediary. There may also be other circumstances in which application of proposed paragraph (c)(1)(ii) would not result in a covered recommendation being treated as fiduciary investment advice. In general, however, the Department envisions that proposed paragraph (c)(1)(ii) would apply broadly to recommendations to plan and IRA fiduciaries acting on behalf of plans and IRAs.

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

In the Department's view, the updated conduct standards adopted by the SEC and the NAIC also reflect an acknowledgment of the fact that broker-dealers and insurance agents commonly provide paid investment and annuity recommendations to their customers. The SEC stated in the Regulation Best Interest release that "there is broad acknowledgment of the benefits of, and support for, the continuing existence of the broker-dealer business model, including a

commission or other transaction-based compensation structure, as an option for retail customers seeking investment recommendations."[120] The NAIC Model Regulation, section 6.5.M defines a recommendation as "advice provided by a producer to an individual consumer that was intended to result or does result in a purchase, an exchange or a replacement of an annuity in accordance with that advice." Further, "cash compensation" is defined as "any discount, concession, fee, service fee, commission, sales charge, loan, override, or cash benefit received by a producer *in connection with the recommendation* or sale of an annuity from an insurer, intermediary, or directly from the consumer."[121] When retirement investors talk to investment advice providers about the investments they should make, they commonly pay for, and receive, advice within the meaning of the statutory definition.

Platform Providers and Pooled Employer Plans

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

In the case of a platform provider, application of the proposed regulation may often focus on whether the communications fall within the threshold definition of a "recommendation." As discussed in section 4, whether a recommendation exists under the proposal will turn on the degree to which a communication is "individually tailored" to the retirement investor or investors, and providing a selective list of securities to a particular retirement investor as appropriate for the investor would be a recommendation as to the advisability of acquiring securities even if no recommendation is made with respect to any one security. Therefore, the

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[120] 84 FR 33318, 33319 (July 12, 2019).
[121] NAIC Model Rule section 5.B. (emphasis added).

inquiry may turn on whether the provider presents the investments on the platform as having been selected for and appropriate for the investor (i.e., the plan and its participants and beneficiaries). In this regard, platform providers who merely identify investment alternatives using objective third-party criteria (*e.g.*, expense ratios, fund size, or asset type specified by the plan fiduciary) to assist in selecting and monitoring investment alternatives, without additional screening or recommendations based on the interests of plan or IRA investors, would not be considered under the proposal to be making a recommendation.

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

Swaps and Security-Based Swaps

Swaps and security-based swaps are a broad class of financial transactions defined and regulated under amendments to the Commodity Exchange Act and the Securities Exchange Act of 1934 (Securities Exchange Act) by the Dodd-Frank Act. Section 4s(h) of the Commodity Exchange Act[124] and section 15F of the Securities Exchange Act[125] establish similar business

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[122] ERISA section 3(43), 29 U.S.C. 1002(43).
[123] ERISA Section 3(43)(B), 29 U.S.C. 1002(43)(B).
[124] 7 U.S.C. 6s(h).
[125] 15 U.S.C. 78o-10(h).

conduct standards for dealers and major participants in swaps or security-based swaps. Special rules apply for swap and security-based swap transactions involving "special entities," a term that includes employee benefit plans covered under ERISA. Under the business conduct standards in the Commodity Exchange Act as added by the Dodd-Frank Act, swap dealers or major swap participants that act as counterparties to ERISA plans must, among other conditions, have a reasonable basis to believe that the plans have independent representatives who are fiduciaries under ERISA.[126] Similar requirements apply for security-based swap transactions.[127] The CFTC and the SEC have issued final rules to implement these requirements.[128]

In the Department's view, when Congress enacted the swap and security-based swap provisions in the Dodd-Frank Act, including those expressly applicable to ERISA-covered plans, it did not intend to broadly impose ERISA fiduciary status on the plan's counterparty as it engaged in regulated conduct as part of the swap or security-based swap transaction with the employee benefit plan. The Department conferred with both the CFTC and the SEC at the time of those agencies' rulemakings, and assured harmonization of any change in the ERISA fiduciary advice regulation so as to avoid unintended consequences.

The Department makes the same assurance with respect to this proposed regulation. The disclosures required of plans' counterparties under the business conduct standards would not generally constitute a "recommendation" as defined in the proposal, or otherwise compel the dealers or major participants to act as fiduciaries in swap and security-based swap transactions conducted pursuant to section 4s of the Commodity Exchange Act and section 15F of the Securities Exchange Act. This includes disclosures regarding material risks, characteristics, incentives and conflicts of interest; disclosures regarding the daily mark of a swap or security-based swap and a counterparty's clearing rights; disclosures necessary to ensure fair and

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[126] 7 U.S.C. 6s(h)(5); 17 CFR 23.450.
[127] 15 U.S.C 78o-10(h)(4), (5).
[128] *See* 17 CFR 23.400-451; Business Conduct Standards for Swap Dealers and Major Swap Participants With Counterparties, 77 FR 9734 (Feb. 17, 2012); 17 CFR 240.15Fh-3-h-6; Business Conduct Standards for Security-Based Swap Dealers and Major Security-Based Swap Participants, 81 FR 29960 (May 13, 2016).

balanced communications; and disclosures regarding the capacity in which a swap or security-based swap dealer or major swap participant is acting when a counterparty to a special entity, as required by the business conduct standards.

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

Valuation of Securities and Other Investment Property

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

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[129] The business conduct standards do not preclude a swap dealer from giving advice if it chooses to do so. *See*, *e.g.,* 17 CFR 23.434 (imposing requirements on swap dealers that recommend a swap or trading strategy involving a swap to a counterparty); *see also* 17 CFR 240.15Fh-3(f) (similar provision applicable to security-based swap dealers).

6. For a fee or other compensation, direct or indirect

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

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

This proposed definition is consistent with the preamble of the 1975 regulation, which states that "a fee or other compensation, direct or indirect" includes all fees or other compensation "incident to the transaction in which the investment advice to the plan has been rendered or will be rendered," including, for example, brokerage commissions, mutual fund sales commissions, and insurance sales commissions.[130]

As the Department explained in the preamble when it proposed the exemption now at PTE 77-9[131]:

> [T]he Department and the [IRS] stated in the preamble sections of the notices announcing the adoption of the [1975 fiduciary definition] regulations that, until a more definitive statement is issued, the phrase "fee or other compensation, direct or indirect" for the rendering of investment advice for purposes of section 3(21) (A) (ii) of the Act and section 4975(e) (3) (B) of the Code should be deemed to include all fees or other compensation incidental to the transaction in which the investment advice to the plan has been rendered or will be rendered, and may therefore include insurance and mutual fund sales commissions. The Department and the [IRS] have not modified or revised this position, notwithstanding the contrary views expressed in several of the applications for class exemption.

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[130] 40 FR 50842 (Oct. 31, 1975); 41 FR 56760, 56762 (Dec. 29, 1976).
[131] 41 FR 56760, 56762 (Dec. 29, 1976).

This proposed definition is also consistent with, for example, guidance the Department provided just eight years after the 1975 regulation was finalized. Specifically, an association that represented broker-dealers asked the Department to "clarify the status of broker-dealers under ERISA."[132] The association posited that fiduciary status under ERISA section 3(21)(A)(ii) (the "fee or other compensation, direct or indirect" provision) would not attach to broker-dealers "unless the broker-dealer provides investment advice for distinct, non-transactional compensation."[133] The Department rejected this interpretation of ERISA section 3(21)(A)(ii). The Department stated that, based on the facts and circumstances presented by each case,

> if . . . the services provided by the broker-dealer include the provision of "investment advice", as defined in regulation 2510.3-21(c), it may be reasonably expected that, even in the absence of a distinct and identifiable fee for such advice, a portion of the commissions paid to the broker-dealer would represent compensation for the provision of such investment advice.[134]

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

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

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[132] U.S. Department of Labor, Adv. Op. 83-60A (Nov. 21, 1983), available at https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/1983-60a.
[133] *Id.*
[134] *Id.*; *see* Letter from the Department of Labor to the Securities Industry Association (Mar. 1, 1984) (declining to modify this position); *see also* IB 96-1, 61 FR 29586, 29589 at fn. 3 (June 11, 1996) ("The Department has expressed the view that, for purposes of section 3(21)(A)(ii), such fees or other compensation need not come from the plan and should be deemed to include all fees or other compensation incident to the transaction in which the investment advise [sic] has been or will be rendered." (citations omitted)).

A fee or other compensation received in connection with an investment transaction also would fall within the proposed definition of "for a fee or other compensation, direct or indirect." This treatment of investment compensation is in accord with the actions of other State and Federal regulators, and with the modern marketplace for investment advice in which brokers and insurance agents can do far more than merely execute transactions or close sales. Investment professionals are commonly compensated for their advice through the payment of transaction-based fees, such as commissions, which are contingent on the investor's decision to engage in the recommended transaction.

The SEC acknowledged this in the Regulation Best Interest release, noting that "there is broad acknowledgment of the benefits of, and support for, the continuing existence of the broker-dealer business model, including a commission or other transaction-based compensation structure, as an option for retail customers seeking investment recommendations."[135] The SEC discussion further contemplated that commissions compensate broker-dealers for their recommendations, and may be the preferred method of investment advice compensation with respect to certain transactions. As an example, the SEC stated that retail customers seeking a long-term investment may determine that "paying a one-time commission to a broker-dealer recommending such an investment is more cost effective than paying an ongoing advisory fee to an investment adviser merely to hold the same investment."[136] The Department agrees that there are benefits to ensuring a wide range of compensation structures remain available to retirement investors.

Likewise, the NAIC Model Regulation acknowledged that insurance agents make recommendations and might be compensated for their recommendations through commissions. The NAIC Model Regulation defines a recommendation as "advice provided by a producer to an individual consumer that was intended to result or does result in a purchase, an exchange or a

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[135] Regulation Best Interest release, 84 FR 33318, 33319 (July 12, 2019).
[136] *Id*.

replacement of an annuity in accordance with that advice."[137] The definition of "cash compensation" in the model regulation is: "any discount, concession, fee, service fee, commission, sales charge, loan, override, or cash benefit received by a producer in connection with the recommendation or sale of an annuity from an insurer, intermediary, or directly from the consumer."[138]

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

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

As has been true since the Department first proposed regulations under this section in 1975 and as discussed above, the Department understands the phrase "for a fee or other compensation, direct or indirect" to encompass a broad array of compensation incident to the

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[137] NAIC Model Regulation, at Section 6, 5. M.
[138] *Id*. at Section 5. B.
[139] *E.g.*, U.S. Department of Labor, Adv. Op. 83-60A (Nov. 21, 1983), available at https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/1983-60a.
[140] 29 U.S.C. 1108(b)(14). *See* Code section 4975(d)(17) (parallel statutory exemption)
[141] 29 U.S.C. 1108(b)(14)(emphasis added).

transaction.[142] The Department requests comments on this portion of the proposal, including whether additional examples would be helpful.

7. Other Definitions in the Proposed Rule

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

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[142] *See* Findings, Conclusions, and Recommendations of the United States Magistrate Judge*, Federation of Americans for Consumer Choice v. U.S. Dep't of Labor*, No. 3:22-CV-00243-K-BT, 2023 WL 5682411, at *21 (N.D. Tex. June 30, 2023) ("The expansive choice of investment advice 'for other compensation' indicates an intent to cover any transaction where the financial professional may receive conflicted income if they are acting as a trusted adviser.")

[143] The definition of an IRA would also include an individual retirement annuity described in Code section 408(b), an Archer MSA described in Code section 220(d), and a Coverdell education savings account described in Code section 530. However, for purposes of any rollover of assets between a Title I Plan and an IRA described in this preamble, the term "IRA" includes only an account or annuity described in Code section 4975(e)(1)(B) or (C).

8. Scope of Investment Advice Fiduciary Duty

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

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

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

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[144] U.S. Department of Labor, Adv. Op. 97-15A (May 22, 1997).

investment advice fiduciary with respect to a Title I plan would still be required to comply with the statutory duties including prudence and loyalty.

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

9. Interpretive Bulletin 96-1

The proposed regulation does not include a specific provision addressing investment education. Investment education is addressed in the Department's IB 96-1, which was reinstated in 2020.[145] IB 96-1 provides examples of four categories of information and materials regarding participant-directed individual account plans – plan information, general financial and investment information, asset allocation models, and interactive investment materials − that do not constitute investment advice. This is the case irrespective of who provides the information (*e.g.*, plan sponsor, fiduciary, or service provider), the frequency with which the information is shared, the form in which the information and materials are provided (*e.g.,* on an individual or group basis, in writing or orally, or via video or computer software), or whether an identified category of information and materials is furnished alone or in combination with other identified categories of information and materials. The IB states that there may be many other examples of information, materials, and educational services, which, if furnished to participants and beneficiaries, would not constitute "investment advice."

[145] 85 FR 40589 (July 7, 2020).

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

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

In the 2016 Final Rule, the Department incorporated the provisions of IB 96-1 into the regulatory text; as a result, certain provisions were specifically applicable to transactions involving IRAs. In addition, the Department made a few changes to the provisions. The Department clarified and expanded the category in IB 96-1 from "General Financial and Investment Information" to "General financial, investment, and retirement information." The revised category included information on "[g]eneral methods and strategies for managing assets in retirement (*e.g.*, systemic withdrawal payments, annuitization, guaranteed minimum withdrawal benefits)." This change was intended to improve retirement security by facilitating the provision of information and education relating to retirement needs that extend beyond a participant's or beneficiary's date of retirement. Such information would be considered non-

fiduciary education as long as the provider did not recommend a specific investment or investment strategy.[146]

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

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

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[146] 81 FR 20946, 20977 (Apr. 8, 2016).
[147] *See* IB 96-1, Section (e) "Selection and Monitoring of Educators and Advisors."

individualized, and whether the service provider received a fee or compensation (directly or indirectly) in connection with the advice.

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

10. Application to Code Section 4975

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

To rationalize the administration and interpretation of the parallel provisions in Title I and Title II of ERISA, Reorganization Plan No. 4 of 1978 divided the interpretive and rulemaking authority for these provisions between the Secretaries of Labor and of the

Treasury.[148] Under the Reorganization Plan, which was prepared by the President and transmitted to Congress pursuant to the provisions of Chapter 9 of Title 5 of the United States Code, the Department of Labor has authority to interpret the prohibited transaction provisions and the definition of a fiduciary in the Code. ERISA's prohibited transaction rules, sections 406 to 408,[149] apply to Title I plans, and the Code's corresponding prohibited transaction rules, 26 U.S.C. 4975(c), apply to tax-qualified pension plans, as well as other tax-advantaged arrangements, such as IRAs, that are not subject to the fiduciary responsibility and prohibited transaction rules in Title I of ERISA.[150] In accordance with the above discussion, paragraph (g) of the proposal, entitled "Applicability" provides that the regulation defines a "fiduciary" both for purposes of ERISA section 3(21)(A)(ii) and for the parallel provision in Code section 4975(e)(3)(B).

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

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[148] 5 U.S.C. App. (2018).
[149] 29 U.S.C. 1106–1108.
[150] Reorganization Plan No. 4 of 1978 also transferred to the Secretary of Labor the authority to grant administrative exemptions from the prohibited transaction provisions in section 4975 of the Code. *See* section 4975(c)(2) of the Code.

11. State law

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

D. Severability

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

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

E. Effective Date

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

F. Regulatory Impact Analysis

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

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

Title I of ERISA imposes duties and restrictions on fiduciaries with respect to employee benefit plans. ERISA section 404 requires Title I plan fiduciaries to act with the "care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a

like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." Further, fiduciaries must carry out their duties "solely in the interest of the participants and beneficiaries" of the plan. Title I of ERISA also includes prohibited transaction provisions that forbid fiduciaries from, among other things, self-dealing.[151] The aim of the prohibited transaction provisions is to protect plans, their participants, and beneficiaries from dangerous conflicts of interest that threaten the safety and security of plan benefits.[152]

Title II of ERISA, codified in the Internal Revenue Code, governs the conduct of fiduciaries to tax-qualified plans and IRAs. Although Title II does not directly impose specific duties of prudence and loyalty on fiduciaries as ERISA section 404(a) does, it prohibits fiduciaries from engaging in conflicted transactions on many of the same terms as Title I.[153]

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

(i) The person either directly or indirectly (e.g., through or together with any affiliate) has discretionary authority or control, whether or not pursuant to an agreement, arrangement or

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[151] ERISA section 406, 29 U.S.C. 1106.
[152] *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996); *Comm'r v. Keystone Consol. Indus,, Inc.*, 508 U.S. 152 (1993).
[153] *Cf.* 26 U.S.C. § 4975(c)(1), Code section 4975(f)(5) defining "correction" with respect to prohibited transactions as placing a plan or an IRA in a financial position not worse than it would have been in if the person had acted "under the highest fiduciary standards."

understanding, with respect to purchasing or selling securities or other investment property for the retirement investor;

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

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

The proposed amendments to PTE 2020-02 expand the scope of the exemption to cover certain transactions involving PEPs and transactions involving "pure" robo-advice providers. The amendments would provide greater specificity as to what information must be disclosed to retirement investors under the exemption and clarify that fiduciary acknowledgements must clearly indicate whether the entity is a fiduciary with respect to investment recommendations and advice. Additionally, the amendments would require financial institutions to notify retirement investors of their right to obtain additional information upon request, free of charge. The proposed amendments would also provide more guidance for financial institutions and investment professionals complying with PTE 2020-02's requirements related to financial institutions' policies and procedures. The amendments would also expand on which parties can request and receive records under the exemption's recordkeeping provisions.

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

eliminate relief for transactions resulting from fiduciary investment advice, as defined under ERISA.

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

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

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

compliance obligations imposed under the Investment Advisers Act and the SEC's Regulation Best Interest on investment advisers and broker-dealers, respectively, and simply expands them to larger portions of the retirement market.

The Department of Labor has examined the effect of the proposal as required by Executive Order 13563,[154] Executive Order 12866,[155] the Regulatory Flexibility Act,[156] section 202 of the Unfunded Mandates Reform Act,[157] and Executive Order 13132.[158]

1. Executive Orders

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

Under Executive Order 12866, "significant" regulatory actions are subject to review by the Office of Management and Budget (OMB). As amended by Executive Order 14094,[159] 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

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[154] 76 FR 3821 (Jan. 21, 2011).
[155] 58 FR 51735 (Oct. 4, 1993).
[156] Pub. L. 96–354, 94 Stat. 1164 (Sept. 19, 1980).
[157] Pub. L. 104–4, 109 Stat. 48 (Mar. 22, 1995).
[158] 64 FR 43255 (Aug. 9, 1999).
[159] 88 FR 21879 (Apr. 6, 2023).

environment, public health or safety, or State, local, territorial, or tribal governments or communities;

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

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

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

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

2. Need for Regulatory Action

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

Why Being a Fiduciary Matters

As described above, fiduciaries under ERISA are subject to specific requirements. ERISA section 404 requires Title I plan fiduciaries to act with the "care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity

and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." Further, fiduciaries must carry out their duties "solely in the interest of the participants and beneficiaries" of the plan. Title II of ERISA, codified in the Internal Revenue Code, governs the conduct of fiduciaries to tax-qualified plans and IRAs. Under both Title I and Title II, fiduciaries are subject to prohibited transactions that forbid them from, among other things, self-dealing.[160] The aim of the prohibited transaction provisions is to protect plans, their participants, and beneficiaries from dangerous conflicts of interest that threaten the safety and security of plan benefits.[161]

This combination of a high standard of conduct and personal liability for violations of the standard of conduct for Title I fiduciaries, and restrictions on behavior for Title I and Title II fiduciaries functions to protect plans, participants, and beneficiaries from fiduciary misdeeds. Previously, the Department conducted an economic analysis[162] (2016 Regulatory Impact Analysis (RIA)) of then-current market conditions and the likely effects of expanding the definition of fiduciary to include more individuals. It reviewed evidence that included:

- statistical comparisons finding poorer risk-adjusted investment performance in more conflicted settings;
- experimental and audit studies revealing questionable investment advice provider conduct, including recommendations to withdraw from low-cost, well diversified portfolios and invest in higher-cost alternatives likely to deliver inferior results;
- studies detailing gaps in consumers' financial literacy, errors in their financial decision-making, and the inadequacy of disclosure as a consumer protection;
- federal agency reports documenting abuse and investors' vulnerability;

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[160] ERISA section 406, 29 U.S.C. § 1106.
[161] *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996); *Commissioner v. Keystone Consol. Industries, Inc.*, 508 U.S. 152 (1993).
[162] Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest - Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, (April 2016), https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.

- a study by the President's Council of Economic Advisers that attributed $17 billion in annual IRA investor losses to advisory conflicts;
- economic theory, which predicts that when expert investment advice providers have conflicts of interest, non-expert investors will be harmed; and
- international experience with harmful advisory conflicts and responsive reforms.

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

Changes in Retirement Savings Since the 1975 Regulation

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

Since then, much of the responsibility for investment decisions in employment-based plans has shifted from these large private pension fund managers to individual retirement account participants, many with low levels of financial literacy. Over time, the share of participants covered by defined contribution plans, in which benefits are based on contributions

and earnings within an individual account, grew substantially, from just 26 percent in 1975 to 78 percent in 2020.[163] By 2020, 94 percent of active participants in defined contribution plans had responsibility for directing the investment of some or all of their account balances.[164] The Department could not have foreseen such a dramatic shift when it issued the existing fiduciary investment advice regulation in 1975. The passage of ERISA authorized IRAs in 1974, and IRAs remained in their infancy when the 1975 rule was issued. The vast majority of consumers were not managing their own retirement savings, nor retaining investment advisers to do so, because 401(k) plans did not even exist in 1975.

Though workers have assumed more of the responsibility for their investment decisions, they at least still receive some fiduciary oversight and protections provided by ERISA while participating in employer-sponsored plans. However, often workers who change jobs or retire roll over their retirement savings to an IRA, where they assume full responsibility for investing the assets in the larger marketplace without those protections. Not only is it very common for defined contribution plan participants to roll over their retirement savings to an IRA, but it is also increasingly common among defined benefit plan participants. Defined benefit plan participants have the option to perform a rollover if their plan allows them to take a lump-sum payment when they separate from service. About 36 percent of private industry workers in traditional defined benefit plans have a lump-sum payment available at normal retirement, as do virtually all private industry workers in non-traditional defined benefit plans, such as cash balance plans.[165]

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[163] Employee Benefits Security Administration, *Private Pension Plan Bulletin Historical Tables and Graphs 1975-2020*, (November 2022), Table E4, (November 2022), https://www.dol.gov/sites/dolgov/files/ebsa/researchers/statistics/retirement-bulletins/private-pension-plan-bulletin-historical-tables-and-graphs.pdf.

[164] Employee Benefits Security Administration, *Private Pension Plan Bulletin: Abstract of 2020 Form 5500 Annual Reports*, Table D5, (November 2022), https://www.dol.gov/sites/dolgov/files/EBSA/researchers/statistics/retirement-bulletins/private-pension-plan-bulletins-abstract-2020.pdf.

[165] U.S. Bureau of Labor Statistics, *National Compensation Survey: Retirement Plan Provisions For Private Industry Workers in the United States, 2022*, Table 6, (April 2023), https://www.bls.gov/ebs/publications/retirement-plan-provisions-for-private-industry-workers-2022.htm.

In 1981, private defined benefit plans held more than twice the assets in private defined contribution plans, and roughly 10 times more than IRA assets. By the first quarter of 2022, the order had reversed: IRAs held $13.2 trillion in assets, private defined contribution plans held $9.2 trillion, and private defined benefit plans held $3.7 trillion in assets.[166] This trend is expected to continue as retirement investors are projected to move $4.5 trillion from defined contribution plans to IRAs from 2022 through 2027.[167]

Moreover, workers have become more reliant on their retirement savings as Social Security benefits have eroded in recent decades. The age to receive full retirement benefits is gradually increasing from 65 to 67 between 2003 and 2027. Those who claim Social Security before reaching full retirement age — which in 2021 was approximately 60 percent of new retired-worker beneficiaries — receive reduced benefits.[168] For a hypothetical medium wage earner who first claims benefits at age 65, their Social Security benefit, as a share of average career earnings, was more than 40 percent in 2005 but is projected to be only about 35 percent in 2025.[169]

Investment Advice and the 1975 Regulation

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

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[166] Board of Governors of the Federal Reserve System, *Financial Accounts of the United States: Flow of Funds, Balance Sheets, and Integrated Macroeconomic Accounts: Second Quarter 2022*, Tables L.117 & L.118, (Sept. 9, 2022), https://www.federalreserve.gov/releases/z1/20220909/z1.pdf; *Historical Series Z1/Z1/FL572000075.Q, Z1/Z1/FL574090055.Q & Z1/Z1/LM893131573.Q.* https://www.federalreserve.gov/datadownload/Build.aspx?rel=z1.

[167] Cerulli Associates, *U.S. Retirement Markets 2022: The Role of Workplace Retirement Plans in the War for Talent*, Exhibit 8.06, (2023).

[168] Congressional Research Services, *The Social Security Retirement Age*, (July 6, 2022), https://sgp.fas.org/crs/misc/R44670.pdf.

[169] Social Security Administration, Office of the Chief Actuary, *Replacement Rates for Hypothetical Retired Workers*, Actuarial Note, 2021.9, Tables B & D, (August 2021), https://www.ssa.gov/oact/NOTES/ran9/an2021-9.pdf.

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

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

For example, under the 1975 rule, if the advice is not given on a "regular basis," it makes no difference if the person making the recommendation claims to make the recommendation based on the investor's best interest and knows that the investor is relying on that recommendation. Thus, if a plan participant seeks advice on whether to roll over all their retirement savings, representing a lifetime of work, out of an ERISA-covered plan overseen by professional ERISA fiduciaries, to purchase an annuity, the person making the recommendation with respect to the purchase of the annuity has no obligation to adhere to a best interest standard unless they meet all prongs of the 1975 rule, including regularly giving advice to the plan participant. This is true even if the person giving the advice holds themselves out as an investment expert whose recommendation is based solely on a careful and individualized assessment of the investor's needs, the plan participant has no investment expertise whatsoever, and both parties understand that the participant is relying upon the advice for the most important financial decision of their life. Because the advice was not rendered on a "regular basis," the

adviser has no obligation under ERISA to adhere to fiduciary standards, and thus would not be subject to ERISA's prohibitions on disregarding the participants' financial interests, recommending an annuity that is imprudent and ill-suited to the participant's circumstances, and favoring the adviser's own financial interests at the expense of the participant.[170] An adviser who regularly had rendered trivial advice about small plan investments, and met the other prongs of the multi-part test, would appropriately be treated as a fiduciary if they met the other requirements of the 1975 rule, but not the person who on one occasion purported to give individualized advice to roll a lifetime of savings out of an ERISA-covered plan and place it in a fixed indexed annuity. This is not a sensible way to e draw distinctions in fiduciary status, and finds no support in the text of ERISA, which makes no mention of a "regular basis" requirement.

When the Department issued PTE 2020-02, it sought to ameliorate some of the effects of the regular basis requirement by suggesting that rollover advice could be treated as falling within the 1975 rule, if it was rendered at the beginning of an ongoing advisory relationship. Accordingly, in an April 2021 FAQ, in the context of advice to roll over assets from an employee benefit plan to an IRA, the Department acknowledged that a single instance of advice would not satisfy the regular basis prong of the 1975 test[171] but explained that "advice to roll over plan assets can also occur as part of an ongoing relationship or as the beginning of an

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[170] Investors have suffered significant losses when an investment professional does not act in the investor's best interest. For example, in 2021, the SEC settled with Teachers Insurance and Annuity Association of America (TIAA) for $97 million, citing disclosure violations and failure to implement policies and procedures. *See* https://www.sec.gov/litigation/admin/2021/33-10954.pdf. While the SEC was able to settle, the Southern District of New York recently dismissed a complaint by plaintiffs in this same TIAA plan who argued that TIAA acted as an ERISA fiduciary when advising plan participants to roll over assets from their employer-sponsored plan to a TIAA managed account product. Although TIAA represented in market materials that it "[met] a fiduciary standard" when providing investment recommendations, the court found that it did not provide this advice on a regular basis and therefore did not satisfy the five-part test to be considered an ERISA fiduciary. *See Carfora v TIAA,* 631 F. Supp. 3d 125, 138 (S. D. N. Y. 2022).

[171] Employee Benefits Security Administration, *New Fiduciary Advice Exemption: PTE 2020-02 Improving Investment Advice for Workers & Retirees Frequently Asked Questions*, (April 2021), https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/new-fiduciary-advice-exemption; Notably, although the Department does not think that a single instance of advice would satisfy the regular basis prong of the 1975 regulation, a single piece of advice can be sufficient to satisfy the language of the statute. See Findings, Conclusions, and Recommendations of the United States Magistrate Judge, *Federation of Ams. for Consumer Choice v. U.S. Dep't of Labor*, 2023 WL 5682411, at *18, No. 3:22-CV-00243-K-BT, at 43 (N.D. Tex. June 30, 2023) ("First-time advice may be sufficient to confer fiduciary status and is consistent *with ERISA*.") (emphasis added).

intended future ongoing relationship that an individual has with an investment advice provider."[172] In other words, "when the investment advice provider has not previously provided advice but expects to regularly make investment recommendations regarding the IRA as part of an ongoing relationship, the advice to roll assets out of an employee benefit plan into an IRA would be the start of an advice relationship that satisfies the regular basis requirement."[173]

Ultimately, however, that policy interpretation was struck down as inconsistent with the text of the 1975 rule.[174] In *American Securities Association v. United States Department of Labor,* the court found that "the scope of the regular basis inquiry is limited to the provision of advice pertaining to a particular plan."[175] Further, the court held that, "[b]efore a rollover occurs, a professional who gives rollover advice does so with respect to an ERISA-governed plan. However, after the rollover, any future advice will be with respect to a new non-ERISA plan, such as an IRA that contains new assets from the rollover. The professional's one-time rollover advice is thus the last advice that he or she makes to the specific plan."[176] Based on the court's ruling, the only way for the Department to remedy the shortcomings of the "regular basis" test is through new rulemaking.

Inexpert Customers

Researchers have consistently found that many Americans demonstrate low levels of financial knowledge and lack basic understanding of investment strategies. In particular,

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[172] Employee Benefits Security Administration, *New Fiduciary Advice Exemption: PTE 2020-02 Improving Investment Advice for Workers & Retirees Frequently Asked Questions*, (April 2021), https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/new-fiduciary-advice-exemption.
[173] *Id.*
[174] *ASA v. U.S. Dep't of Labor*, No. 8:22-CV-330VMC-CPT, 2023 WL 1967573, at *14-*19 (M.D. Fla. Feb. 13, 2023).
[175] *Id.* at *16 (emphasis added).
[176] *Id.* at *17; *id.* ("Because assets cease to be assets of an ERISA plan after the rollover is complete, any future provision of advice is, by nature, no longer to that ERISA plan."); Findings, Conclusions, and Recommendations of the United States Magistrate Judge, *Federation of Americans for Consumer Choice v. U.S. Dep't of Labor*, No. 3:22-CV-00243-K-BT, 2023 WL 5682411, at *18 (N.D. Tex. June 30, 2023) ("ERISA's text defines Title I and Title II 'plans' distinctly. By utilizing these separate definitions, Congress indicated how each Title's plans should be treated differently due to the nature of the relationship between financial professionals and retirement investors in Title I and Title II plans. As the New Interpretation purports to consider recommendations as to Title II plans when determining Title I fiduciary status, it conflicts with ERISA.") (internal citation omitted).

households age 50 and older and nearing retirement, "fail to grasp essential aspects of risk diversification, asset valuation, portfolio choice, and investment fees."[177] Such customers appear to be particularly vulnerable to receiving harmful advice. Egan et al. (2019) found that misconduct among investment advice professionals was higher in counties with populations that were less financially sophisticated, including those who are less educated and older.[178] Retirement investors are in a poor position to assess the quality of the advice they receive, and the advisers' incentives are often misaligned with the investors' interests.[179] The dependence of inexpert clients on advisers with significant conflicts of interest creates a large risk of investment advice and investment decisions that are not in the best interest of retirement investors.

The Department's 2016 RIA[180] demonstrated that the balance of research and evidence indicates that the aggregate harm from cases in which consumers received bad advice due to investment advice providers' conflicts of interest is significant. The complex nature of financial markets alone, particularly for insurance products, creates information asymmetry that makes it difficult for inexpert investors to navigate savings for retirement. Multiple studies cited found that retirement investors often lack a basic understanding of investment fundamentals.[181] A subsequent 2018 FINRA study of non-retired individuals age 25-65 found that those investors that only had retirement accounts through their employers routinely scored lower on financial literacy questions than active investors and that these workplace-only investors scored only two percentage points higher than the general population (32 percent versus 30 percent) on a

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[177] Annamaria Lusardi, Olivia Mitchell, & Vilsa Curto, *Financial Literacy and Financial Sophistication in the Older Population*, 13(4) Journal of Pension Economics and Finance 347-366, (October 2014).
[178] Mark Egan, Gregor Matvos, & Amit Seru, *The Market for Financial Adviser Misconduct*, 127(1) Journal of Political Economy, (2019).
[179] Mark Egan, *Brokers vs. Retail Investors: Conflicting Interests and Dominated Products*, 74(3) Journal of Finance 1217-1260, (June 2019).
[180] 2016 RIA in this document refers to Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest - Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, (April 2016), https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.
[181] Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest - Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, pp. 108-109 & 136-137, (April 2016), https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.

composite question regarding interest, inflation and risk diversification.[182] In addition to lacking rudimentary financial knowledge, many retirement investors do not understand the roles of different players in the investment industry and what those players are obligated to do.

The SEC has commissioned several studies on whether investors can differentiate between different types of investment service providers. A 2005 study considered four focus groups in different geographic locations and found that investors were generally unclear about distinctions between broker-dealers, financial advisers, investment advisers, and financial planners and often used the terms indistinguishably.[183] A 2008 household survey found that while most of the survey respondents had "a general sense of the difference in services offered by brokers and by investment advisers but that they are not clear about their specific legal duties."[184] A 2018 study also evaluated four focus groups and found that participant understanding of the distinction between broker-dealers and investment advisers was low, even among those who were provided information describing the classifications of the two categories.[185] If investors are unable to distinguish between types of advisers, they cannot be expected to understand legal distinctions of the standard to which that advice is held.

Confusion regarding the different types of advice providers and the different standards of conduct to which they must adhere is often made worse by industry marketing and other practices.[186] To attempt to address this, the SEC adopted as part of its 2019 Rulemaking a new required disclosure of a "Form CRS Relationship Summary," under which registered investment

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[182] Jill E. Fisch, Andrea Hasler, Annamaria Lusardi, & Gary Mottolo, *New Evidence on the Financial Knowledge and Characteristics of Investors* (October 2019), https://gflec.org/wp-content/uploads/2019/10/FINRA_GFLEC_Investor_FinancialIlliteracy_Report_FINAL.pdf?x20348.
[183] Siegel & Gale, LLC, & Gelb Consulting Group, Inc, *Results of Investor Focus Group Interviews About Proposed Brokerage Account Disclosures: Report to the Securities and Exchange Commission*, (March 2005).
[184] Angela Hung, Noreen Clancy, Jeff Dominitz, Eric Talley, Claude Berrebi, & Farrukh Suvankulov, *Investor and Industry Perspectives on Investment Advisers and Broker-Dealers*, RAND Institute for Civil Justice, (October 2008), https://www.sec.gov/news/press/2008/2008-1_randiabdreport.pdf.
[185] Brian Scholl, & Angela A. Hung, *The Retail Market for Investment Advice*, (October 2018), https://bit.ly/3hGGNj4.
[186] Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest - Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, pp. 108, (April 2016), https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.

advisers and broker-dealers must provide retail investors with certain information about the nature of their relationship with the firm and its financial professionals in plain English.[187] One of the purposes of the Form CRS is to help retail investors better understand and compare the services and relationships that investment advisers and broker-dealers offer in a way that is distinct from other required disclosures under the securities laws.

In order for disclosures to be effective, however, investors must both review and understand them. Many disclosures, however, suffer from complexity, so investors overlook or misunderstand them and gloss over the information presented to them. A 2017 survey of private-sector workers with retirement plans found only one-third had read any investment fee disclosure in the past year and only 25 percent of all respondents had both read and understood the information.[188]

Many investors also cannot effectively assess the quality of investment advice they receive. Research suggests that, in general, consumers often fail to fully comprehend the quality of professional services they receive, including services from doctors, lawyers, and banks in addition to investment advice providers.[189] The 2016 RIA cited evidence that advice from providers often encouraged investors' cognitive biases, such as return chasing, rather than correcting such biases. It cited research showing that payments made to broker-dealers influenced the advice provided to clients and that funds distributed through more conflicted broker channels tend to perform worse.[190] Research also suggests that investors' opinions of adviser quality can be manipulated. For instance, Agnew et al. (2014) found that if an adviser

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[187] Securities and Exchange Commission*, Form CRS Relationship Summary: Amendments to Form ADV,* (September 19, 2019). https://www.sec.gov/info/smallbus/secg/form-crs-relationship-summary

[188] Pew Charitable Trusts, *Many Workers have Limited Understanding of Retirement Plan Fees*, (November 2017), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2017/11/many-workers-have-limited-understanding-of-retirement-plan-fees.

[189] William Rogerson, *Reputation and Product Quality*, 14(2) The Bell Journal of Economics 508-516 (1983).

[190] Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest - Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, pp. 145-158, (April 2016), https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.

first provides good advice on a financial decision that is easy to understand, the client will subsequently trust bad advice on a more difficult or complicated topic.[191] Investors who are unable to discern when they are receiving bad advice are at risk of being persuaded to make investment decisions that are not in their best interest.

Overall, evidence demonstrates that the combination of inexpert customers and conflicted advisers results in investment underperformance and negative outcomes for investors. According to a 2015 report by the Council of Economic Advisers, approximately $1.7 trillion of IRA assets were invested in products with a payment structure that generates conflicts of interests.[192] A substantial body of research has shown that IRA holders receiving conflicted investment advice can expect their investments to underperform by approximately 50 to 100 basis points per year.[193]

As discussed in the 2016 RIA, the Department estimated that a 50 to 100 basis point performance gap of broker-sold funds would result in retirees losing $9 to $17 billion each year (or between 0.5 and 1 percentage point of return each year for $1.7 trillion in assets), $95 to $189 billion over 10 years, and $202 and $404 billion over 20 years. That means a retiree spending their savings down over 30 years would have 6 to 12 percent less to spend.[194] If a retiree encounters conflicts of interest and experiences a 100-basis point reduction in performance, but

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[191] Julie Agnew, Hazel Bateman, Christine Eckert, Fedor Iskhakov, Jordan Louviere, & Susan Thorp, *Individual Judgment and Trust Formation: An Experimental Investigation of Online Financial Advice*, Australian School of Business Research Paper No. 2013 ACTL21, (2014).

[192] Council of Economic Advisors, *The Effects of Conflicted Investment Advice on Retirement Savings,* (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_coi_report_final.pdf.

[193] *Ibid.*

[194] For example, an ERISA plan investor who rolls $200,000 into an IRA, earns a 6 percent nominal rate of return with 2.3 percent inflation, and aims to spend down her savings in 30 years, would be able to consume $11,034 per year for the 30-year period. A similar investor whose assets underperform by 0.5, 1, or 2 percentage points per year would only be able to consume $10,359, $9,705, or $8,466, respectively, in each of the 30 years. The 0.5 and 1 percentage point figures represent estimates of the underperformance of retail mutual funds sold by potentially conflicted brokers. These figures are based on a large body of literature cited in the 2015 NPRM RIA, comments on the 2015 NPRM RIA, and testimony at the Department's hearing on conflicts of interest in investment advice in August 2015. The 2 percentage point figure illustrates a scenario for an individual where the impact of conflicts of interest is more severe than average. *See* Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest - Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, p. 4, (April 2016), https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.

still spends as though they were not encountering conflicts of interest, they would run out of retirement savings more than five years early.[195]

Pervasiveness of Conflicts of Interest in Investment Advice

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

Conflicts of Interest After the SEC's Regulation Best Interest

Regulation Best Interest under the Securities Exchange Act of 1934 created a "best

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[195] Council of Economic Advisors, *The Effects of Conflicted Investment Advice on Retirement Savings*, (2015), https://obamawhitehouse.archives.gov/sites/default/files/docs/cea_coi_report_final.pdf.
[196] Vivek Bhattacharya, Gaston Illanes, & Manisha Padi, *Fiduciary Duty and the Market for Financial Advice*, Working Paper 25861 National Bureau of Economic Research (2020), https://www.nber.org/papers/w25861.
[197] Colleen Honigsberg, Edwin Hu, & Robert J. Jackson, Jr., 74 *Regulatory Arbitrage and the Persistence of Financial Misconduct, Stanford Law Review* 797, (2022).
[198] Ben Charoenwong, Alan Kwan, & Tarik Umar, *Does Regulatory Jurisdiction Affect the Quality of Investment-Adviser Regulation*, 109(10) *American Economic Review* (October 2019), https://www.aeaweb.org/articles?id=10.1257/aer.20180412.

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

The SEC began conducting limited scope broker-dealer examinations and risk-based inspections in June 2020 to assess whether firms established written policies and procedures to comply with Regulation Best Interest and had made reasonable progress in implementing those policies and procedures. In their reviews, staff identified instances of deficient disclosure obligations, care obligations, periodic review and testing, and conflict of interest obligations.[199] FINRA has identified similar deficiencies in its Report on Examination and Risk Monitoring Program.[200] The SEC's Division of Examination notes that in response to deficiency letters identifying these issues, many broker-dealers modified their practices, policies and

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[199] Securities and Exchange Commission, *Risk Alert: Observations from Broker-Dealer Examinations Related to Regulation Best Interest*, (Jan. 30, 2023), https://www.sec.gov/file/exams-reg-bi-alert-13023.pdf.
[200] FINRA, *2023 Report on FINRA's Examination and Risk Monitoring Program*, (Jan. 2023), https://www.finra.org/sites/default/files/2023-01/2023-report-finras-examination-risk-monitoring-program.pdf.

procedures.[201] In addition, the SEC released additional guidance in April 2023 focused on the Care Obligation to continue to improve compliance with Regulation Best Interest.[202]

In the first year after the SEC's compliance deadline for Regulation Best Interest, the North American Securities Administrators Association (NASAA) conducted a survey of 443 FINRA firms.[203] The survey found that many broker-dealer firms were still utilizing the compliance programs they had in place prior to Regulation Best Interest, when the standard for retail advice was to recommend investments that were "suitable" for the client.[204] In addition, the percentage of broker-dealer firms surveyed that were offering complex, costly, and risky products *increased* by 11 percent after Regulation Best Interest took effect. About 65 percent of broker-dealer firms did not discuss lower-cost or lower-risk products with their customers when they recommended complex, costly, and risky products. The survey also found that 24 to 30 percent of broker-dealer firms were still using conflicted forms of compensation, including sales contests, differential or variable compensation, and other extra forms of compensation.[205] In the first year after Regulation Best Interest took effect, only 35 percent of those broker-dealer firms recommending complex, costly, and risky products had "reduced the financial reward associated with these products by capping agent sales credits."[206] In other words, the majority of broker-dealer firms that offered complex, costly and risky products had not restructured their financial reward structure in response to conflict mitigation requirements in SEC's Regulation Best Interest.

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[201] Securities and Exchange Commission, *Risk Alert: Observations from Broker-Dealer Examinations Related to Regulation Best Interest*, (Jan. 30, 2023), https://www.sec.gov/file/exams-reg-bi-alert-13023.pdf.
[202] Securities and Exchange Commission, *Staff Bulletin: Standards of Conduct for Broker Dealers and Investment Advisers Care Obligation*, (Apr. 20, 2023), https://www.sec.gov/tm/standards-conduct-broker-dealers-and-investment-advisers.
[203] North American Securities Administrators' Association, *Report and Findings of NASAA's Regulation Best Interest Implementation Committee: National Examination Initiative Phase II (A)*, (Nov. 2021).
[204] Kenneth Corbin, *Reg BI Isn't Working So Far. Exams Are Coming, Says NASAA*, Barron's (Nov. 5, 2021).
[205] James Langton, *New Conduct Rules, Same Old Conflicts: NASAA*, Advisor's Edge (Nov. 4, 2021).
[206] Melanie Waddell, *Reg BI Report Zooms in BDs' Lack of Compliance*, Think Advisor, (Nov. 5, 2021).

NASAA's Broker-Dealer Section Committee concluded a subsequent review of over 200 examinations evaluating broker-dealers' compliance of Regulation Best Interest by state examiners in 25 states, under its second and third year of implementation.[207] This review revealed steady implementation progress, including that firms had been updating investor profile forms and policies and procedures; that firms recommending complex, costly or risky products were imposing restrictions based on ages, income/net worth and risk profiles; and that firms were utilizing cost-comparison tools to better consider reasonable investment alternatives. The report noted, however, that firms still struggle with considering reasonably available alternatives and conflict mitigation; ignoring lower cost and risk products when recommending complex, costly risk products and relying on financial incentives to sell them; and that firms have not enhanced point of sale disclosures.

The SEC and FINRA have subsequently released additional guidance designed to clarify and strengthen compliance with Regulation Best Interest's Consumer Protective conditions.[208] The SEC announced in January 2023 that it intends to incorporate compliance with Regulation Best Interest into retail-focused examinations of broker-dealers[209] and both the SEC and FINRA have begun enforcement actions related to Regulation Best Interest. [210] In June 2022, the SEC charged a firm and five brokers for violating Regulation Best Interest and selling high-risk bonds

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[207] North American Securities Administrators' Association, *Report and Findings of NASAA's Broker-Dealer Section Committee: National Examination Initiative Phase II (B)*, (Sept. 2023).

[208] See Securities and Exchange Commission, *Regulation Best Interest: A Small Entity Compliance Guide*, (September 23, 2019), https://www.sec.gov/info/smallbus/secg/regulation-best-interest#Disclosure_Obligation; Securities and Exchange Commission, *Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Account Recommendations for Retail Investors,* (Mar. 20, 2022), https://www.sec.gov/tm/iabd-staff-bulletin; Securities and Exchange Commission, *Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Conflict of Interest,* (Aug. 2, 2022), https://www.sec.gov/tm/iabd-staff-bulletin-conflicts-interest; Securities and Exchange Commission, *Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Care Obligation,* (Apr. 20, 2023), https://www.sec.gov/tm/standards-conduct-broker-dealers-and-investment-advisers.

[209] Securities and Exchange Commission, *Risk Alert: Observations from Broker-Dealer Examinations Related to Regulation Best Interest*, p. 1, (Jan. 30, 2023), https://www.sec.gov/file/exams-reg-bi-alert-13023.pdf.

[210] See Securities and Exchange Commission, *Press Release: SEC Charges Broker-Dealer with Violations of Regulation Best Interest and Fraud for Excessive Trading in Customer Accounts*, (Sept. 28, 2023), https://www.sec.gov/enforce/34-98619-s; *SEC Charges Broker-Dealers with Violations of Regulation Best Interest and Form CRS Rules for Failing to Effect Delivery of Required Disclosures*, (Sept. 28, 2023), https://www.sec.gov/enforce/34-98609-s; and *SEC Charges Wisconsin Broker-Dealer with Violations of Regulation Best Interest*, (Sept. 22, 2023), https://www.sec.gov/enforce/34-98478-s.

to retirees and other retail investors.[211] Meanwhile, FINRA levied its first Regulation Best Interest-related fine in October 2022 and suspended two New York-based brokers in February 2023.[212]

Conflicts of Interest in Advice Given to Plan Fiduciaries

Concerns regarding investment advice extend to that received by ERISA plan fiduciaries. Pool et al. (2016) found that while mutual fund companies involved in plan management for 401(k) plans included both funds from their own family as well as unaffiliated funds in the menu of investment options, poor performing funds were less likely to be removed and more likely to be added to the menu if they were affiliated with the plan trustee.[213] In 2005, the SEC found evidence that some pension consultants do not adequately disclose their conflicts and may steer plan fiduciaries to hire money managers based partly on the consultants' own financial interests.[214] The U.S. Government Accountability Office (GAO) found these inadequately disclosed conflicts were associated with substantial financial losses. GAO's study found that between 2000 and 2004, plans associated with pension consultants without adequate disclosure of their conflicts of interest saw annual rates of return 1.2 to 1.3 percentage points lower than plans associated with pension consultants with adequate disclosure of conflicts of interest.[215] In another study, GAO found that ERISA plan sponsors often are confused as to whether the advice they receive is fiduciary advice, and small plans in particular may suffer as a result.[216] This confusion leaves plan participants vulnerable to lower returns due to conflicted advice.

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[211] Securities and Exchange Commission, *Press Release: SEC Charges Firm and Five Brokers with Violations of Reg BI,* (June 16, 2022), https://www.sec.gov/news/press-release/2022-110.
[212] Melanie Waddell, *FINRA Fines Long Island BD Over Reg BI*, Think Advisor, (Feb. 13, 2023), https://www.thinkadvisor.com/2023/02/13/finra-fines-long-island-bd-over-reg-bi/.
[213] Veronika K. Pool, Clemens Sialm, & Irina Stefanescu, *It Pays to Set the Menu: Mutual Fund Investment Options in 401(k) Plans*, 71(4) Journal of Finance 1779–1812, (2016).
[214] The report's findings were based on a 2002 to 2003 examination of 24 pension consultants. *See* SEC, *SEC Staff Report Concerning Examination of Select Pension Consultants*, (May 16, 2005), http://www.sec.gov/news/studies/pensionexamstudy.pdf.
[215] GAO Publication No.GAO-09-503T, *Private Pensions: Conflicts of Interest Can Affect Defined Benefit and Defined Contribution Plans*, (2009), https://www.gao.gov/assets/gao-09-503t.pdf.
[216] GAO Publication No. GAO-11-119, *401(K) Plans: Improved Regulation Could Better Protect Participants from Conflicts of Interest*, (2011), http://www.gao.gov/products/GAO-11-119.

Conflicts of Interest in Rollover Recommendations or Advice

The treatment of rollover recommendations or advice under the 1975 rule has been a central concern in the Department's regulation of fiduciary investment advice. The decision to roll over assets from a plan to an IRA is often the single most important financial decision a plan participant makes, involving a lifetime of retirement savings.

Most IRA assets are attributable to rollover contributions, and the amount of assets rolled over to IRAs is large and expected to increase substantially. In 2021, IRA rollovers from defined contribution plans increased by 4.9 percent. Cerulli Associates estimates that aggregate rollover contributions to IRAs from 2022 to 2027 will surpass $4.5 trillion.[217]

The decision to roll over one's retirement savings from an ERISA-covered employer-based plan into an IRA or other plan has significant consequences, and for many investors is the single most consequential advice they will receive and affects a lifetime of savings. About 57 percent of traditional IRA-owning households indicated that their IRAs contained rollovers from employer-sponsored retirement plans and of those households, 85 percent indicated they had rolled over their entire account balance in their most recent rollover.[218] In 2020 more than 95 percent of the dollars flowing into IRAs came from rollovers, while the rest came from regular contributions.[219]

Retiring workers must decide how best to invest a career's worth of 401(k) savings, and many look to an investment advice provider for guidance. Financial institutions face an innate conflict of interest, in that a financial institution that provides a recommendation or advice concerning a rollover to a retirement investor may expect to earn transaction-based compensation such as commissions and/or receive an ongoing advisory fee that it likely would not receive if

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[217] Cerulli Associates, *U.S. Retirement Markets 2022: The Role of Workplace Retirement Plans in the War for Talent*, Exhibit 8.06, (2023). Note that these numbers include public sector plans.
[218] Investment Company Institute, *The Role of IRAs in US Households' Savings for Retirement, 2021*, 28(1) ICI Research Perspective, (Jan. 2022), https://www.ici.org/system/files/2022-01/per28-01.pdf.
[219] Internal Revenue Service, *SOI Tax Stats – Accumulation and Distribution of Individual Retirement Arrangement (IRA)*, Table 1: Taxpayers with Individual Retirement Arrangement (IRA) Plans, By Type of Plan, Tax Year 2020, (2023).

the assets were to remain in an ERISA-covered plan. Further, under the 1975 rule, if an investment advice provider makes a one-time recommendation that the worker move the entire balance of their retirement plan into an IRA and invest it in a particular annuity, then the advice provider has no fiduciary obligation under ERISA to honor the worker's best interest unless this recommendation is part of an "ongoing" advice relationship. The resulting compensation represents a significant revenue source for investment advice providers.

In the preamble to PTE 2020-02, the Department provided an interpretation of when advice or a recommendation to roll over assets from an employee benefit plan to an IRA would constitute fiduciary investment advice under the 1975 regulation's five-part test. The preamble interpretation confirmed the Department's view that advice or a recommendation to roll assets out of a Title I Plan is advice with respect to moneys or other property of the plan and, if provided by a person who satisfies all of the requirements of the five-part test, constitutes fiduciary investment advice. The preamble interpretation also discussed when a recommendation to roll over employee benefit plans to an IRA would satisfy the "regular basis" requirement and the Department's interpretation of the requirement of "a mutual agreement, arrangement, or understanding" that the investment advice will serve as "a primary basis for investment decisions."

Regarding the regular basis prong, the Department explained that "advice to roll assets out of a Title I Plan into an IRA where the investment advice provider has not previously provided advice but will be regularly giving advice regarding the IRA in the course of a lengthier financial relationship would be the start of an advice relationship that satisfies the regular basis prong."[220] As discussed above, however, this interpretation of the 1975 rule was rejected by the court in *American Securities Association v. United States Department of Labor*,[221] and in the

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[220] 85 FR 82798, 82805, (Dec. 18, 2020).
[221] *American Securities Association v. U.S. Dep't of Labor*, No. 8:22-CV-330-VMC-CPT, 2023 WL 1967573, at *14-*19, (M.D. Fla. Feb. 13, 2023) [hereinafter *ASA*].

case of *Federation of Americans for Consumer Choice v. United States Department of Labor*,[222] the magistrate judge has recommended that the district court also reject this interpretation. In their view, the 1975 rule does not permit the Department to treat one-time rollover recommendations as "regular basis" advice based on the expectation of future advice on the management of the assets rolled out of the ERISA plan and into the IRA. Any change to the "regular basis" requirement requires a new rule.[223]

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

Uniformity Across Markets and Product Types

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

- Regulation Best Interest only applies to recommendations made by broker-dealers to retail customers. As a result of this limitation, broker-dealers'

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[222] Conclusions, and Recommendations of the United States Magistrate Judge, *FACC v. U.S. Dep't of Labor*, No. 3:22-CV-00243-K-BT, 2023 WL 5682411, at *18-*19 (N.D. Tex. June 30, 2023)
[223] See *id.* at *22-23.
[224] For more information on the different regulatory regimes, Refer to the Regulatory Baseline section in this analysis.

recommendations of securities transactions, investment strategies, plan design, and plan investment options to plan fiduciaries, fall outside its scope. This may be particularly confusing for small plan fiduciaries.

- Securities laws (i.e., the Investment Advisers Act and Regulation Best Interest) may not apply to advice on investments such as real estate, fixed indexed annuities, commodities, certificates of deposit, and other bank products.
- Variable annuities and some indexed annuities are considered securities and are subject to securities laws, while fixed annuities, including fixed indexed annuities, are subject to state law. As discussed in the Regulatory Baseline section, these laws vary significantly from state to state.

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

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

The risk posed by non-uniform regulatory environments is exemplified by the annuity market. A recent survey of insurers reported that 58 percent of insurers thought the SEC's

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[225] Colleen Honigsberg, Edwin Hu, & Robert J. Jackson, Jr., 74 *Regulatory Arbitrage and the Persistence of Financial Misconduct, Stanford Law Review* 797, (2022).

Regulation Best Interest had improved protections for consumers.[226] However, as discussed above, generally only annuities considered securities are under the jurisdiction of the SEC. The remaining annuities are covered by state regulations that potentially hold those selling such insurance products to a lower standard. In crafting this proposal, the Department strove to craft a definition that hews to both the text and purpose of ERISA.

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

Need for Uniformity Concerning Rollovers

The difference between types of products, such as securities subject to regulation by the SEC and non-securities annuities subject to regulation by state insurance departments, creates problematic incentives for financial professionals to recommend certain products.

Under the Investment Advisers Act and Regulation Best Interest, investment advisers and broker-dealers must have a reasonable basis to believe both the rollover itself and the account being recommended are in the retail investor's best interest.[227] SEC staff guidance recognizes that it would be difficult to have such a reasonable basis if, "you do not consider the alternative

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[226] Cerulli Associates, *U.S. Annuity Markets 2021: Acclimating to Industry Trends and Changing Demand*, Exhibit 1.06, The Cerulli Report, (2022).

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

of leaving the retail investor's investments in their employer's plan, where that is an option."[228] Moreover, broker-dealers and investment advisers are instructed to generally consider certain factors when making rollover recommendations to retail investors, specifically and without limitation, "costs; level of services available; features of the existing account, including costs; available investment options; ability to take penalty-free withdrawals; application of required minimum distributions; protection from creditors and legal judgments; and holdings of employer stock."[229] As such, the SEC's regulatory framework is likely to mitigate some of the aforementioned harms to retirement investors, but only in markets where it applies.

In contrast, the NAIC Model Regulation #275, which is the basis for much of the state regulation on insurers,[230] makes no direct reference to rollovers, and imposes a less stringent obligation on annuity recommendations than the best interest standard imposed on securities recommendations and investment advice by the SEC. Given the average rollover contribution to a traditional IRA in 2019 was $112,000,[231] the variation in regulatory standards regarding rollover advice can result in widely disparate outcomes among similarly situated retirement investors based solely on who they sought for advice and whether that adviser was required to put the investor's interests above their own.

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

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[228] SEC, *Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Account Recommendations for Retail Investors*, (March 30, 2022), https://www.sec.gov/tm/iabd-staff-bulletin.
[229] *Ibid.*
[230] For more information, refer to the discussion in the Regulatory Baseline section on state legislation and regulation.
[231] Matched file of Forms 1040, 1099-R, and 5498 for Tax Year 2019. IRS, Statistics of Income Division, Individual Retirement Arrangements Study, February 2022.

How the Proposed Rule Addresses the Need for Regulatory Action

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

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

In addition, the proposed exemptions also give inexpert investors important information on the scope, severity, and magnitude of conflicts of interest. Moreover, by imposing a uniform fiduciary standard on conflicted advisers in the retirement marketplace, the proposed rule and exemptions reduce investor confusion about the standards governing advice. Retail investors who rely on expert advice are unlikely to have a sound understanding of differences in standards across various categories of investments and investment professionals.[232] The SEC Investor Advisory Committee, when considering a uniform adoption of a standard of duty for investment advisers and broker-dealers in 2013, found that "investors do not distinguish between broker-dealers and investment advisers, do not know that broker-dealers and investment advisers are subject to different legal standards, do not understand the difference between a suitability standard and a fiduciary duty, and expect broker-dealers and investment advisers alike to act in their best interest when giving advice and making recommendation."[233]

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

Although the proposal will enhance disclosures of conflicts of interest, the Department stresses that disclosure alone is limited in its effectiveness at protecting investors from the dangers posed by conflicts of interest, as detailed in the RIA for the fiduciary rule the

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[232] Angela A. Hung, Noreen Clancy, Jeff Emmett Dominitz, Eric Talley, Claude Berrebi, & Farrukh Suvankulov, *Investor and Industry Perspectives on Investment Advisers and Broker-Dealers*, RAND Corporation, (2008), https://www.rand.org/pubs/technical_reports/TR556.html.

[233] Securities and Exchange Commission. "Recommendation of the Investor as Purchaser Subcommittee Broker-Dealer Fiduciary Duty," November 1, 2013. https://www.sec.gov/spotlight/investor-advisory-committee-2012/fiduciary-duty-recommendation.pdf.

Department promulgated in 2016.[234] As that document explained, there are myriad reasons to doubt that disclosure alone could effectively mitigate conflicts of interest, and available data support a finding that disclosure is not a reliable corrective for conflicts of interest:

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

While disclosure of conflicts could, in some cases, change the adviser's behavior for the better,[235] mitigating or removing conflicts and requiring the adviser to adhere to a strong conduct standard with a mechanism for overseeing and enforcing compliance, when necessary, provides stronger incentives for advisers to provide investment advice that is in the best interest of the investor. These are the key components of the Department's proposals, and the primary ways the Department expects the rule to address the problems posed by conflicted advice.

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[234] Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest - Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, pp.268-271, (April 2016), https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.

[235] Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest - Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, pp. 268-271, (April 2016), https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.

While the SEC has addressed many of the Department's concerns about conflicted advice, the impact is limited to advice in the SEC's regulatory jurisdiction. This situation would be alleviated by the introduction of a uniform fiduciary standard for the broad range of retirement investment transactions in all regulatory spheres. Additional regulatory action is warranted due to the pervasiveness of conflicts of interest in this marketplace and the complexity of investing assets for retirement. The growing body of evidence underscores that best interest fiduciary standards play an important role in protecting retirement investors.[236] One of the Department's objectives in issuing this proposal is to abate these and similar harms in areas outside of SEC jurisdiction, to ensure that retirement investors' assets outside the securities space are also protected from conflicted advice. This proposal would extend the fiduciary best interest standard to additional markets and investment product, including annuities and other non-securities. This proposal would apply to advice given to plan fiduciaries as well as plan participants.

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

3. Baseline

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

Regulatory Baseline

The problems of conflicted advice and supervisory structures for advice have received increased regulatory attention, resulting in action from the Department, the SEC, individual

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

states, and the National Association of Insurance Commissioners (NAIC). The major actions are summarized below.

Regulatory Baseline, the Department of Labor

Many financial institutions undertook efforts to adapt to the Department's 2016 Final Rule. As such, the intended improvements in retirement investor outcomes appear to have been on track prior to the Fifth Circuit's vacatur of the 2016 Final Rule.[237] Research suggests that the Department's prior efforts produced positive changes in advice markets, even without fully taking effect, which were reinforced by the SEC's actions. For instance, several studies found that the Department's 2016 Final Rule had a positive effect on conflicts of interest and that some categories of conflicts, such as bundled share classes of mutual funds and high-expense variable annuities, were reduced even after the DOL rule was struck down.[238] The nature of the conflicts associated with bundled share classes and high-expense variable annuities are discussed later in this document.

In 2020, the Department issued a technical amendment to the CFR to reinsert the 1975 rule and published PTE 2020-02. The exemption is available to registered investment advisers, broker dealers, banks, and insurance companies and their individual employees, agents, and representatives that provide fiduciary investment advice to retirement investors. However, the exemption explicitly excluded investment advice solely generated by an interactive website, referred to as "pure robo-advice."[239] Under the exemption, financial institutions and investment professionals can receive a wide variety of payments that would otherwise violate the prohibited

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[237] *See Chamber*, 885 F.3d 360 (5th Cir. 2018).
[238] Aron Szapiro & Paul Ellenbogen, *Early Evidence on the Department of Labor Conflict of Interest Rule: New Share Classes Should Reduce Conflicted Advice, Likely Improving Outcomes for Investors*, Morningstar, (April 2017); Jasmin Sethi, Jake Spiegel, & Aron Szapiro, *Conflicts of Interest in Mutual Fund Sales: What Do the Data Tell Us?*, 6(3) The Journal of Retirement 46-59, (2019); Lia Mitchell, Jasmin Sethi, & Aron Szapiro, *Regulation Best Interest Meets Opaque Practices: It's Time to Dive Past Superficial Conflicts of Interest*, Morningstar, (November 2019), https://ccl.yale.edu/sites/default/files/files/wp_Conflicts_Of_Interest_111319%20FINAL.pdf; Mark Egan, Shan Ge, & Johnny Tang, *Conflicting Interests and the Effect of Fiduciary Duty—Evidence from Variable Annuities*, 35(12) Review of Financial Studies 5334-5386 (December 2022).
[239] "Hybrid robo-advice," or advice that combines combine features of robo-advice and traditional investment advice, is included under the existing PTE 2020-02. 85 FR 82798, 82830 (Dec. 18, 2020).

transaction rules. The exemption's relief extends to prohibited transactions arising as a result of investment advice to roll over assets from a plan to an IRA, under certain conditions.

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

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

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

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

Regulatory Baseline, the Securities and Exchange Commission

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

> An investment adviser's fiduciary duty under the Advisers Act comprises a duty of care and a duty of loyalty. This fiduciary duty requires an adviser "to adopt the principal's goals, objectives, or ends." This means the adviser must, at all times, serve the best interest of its client and not subordinate its client's interest to its own.[242]

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

Regulation Best Interest establishes a standard of conduct for broker-dealers and associated persons (unless otherwise indicated, together referred to as "broker-dealers") when

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[241] Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest - Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, pp. 30, (April 2016), https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.

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

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

they make a recommendation to a retail customer of any securities transaction or investment strategy involving securities.[244] In adopting Regulation Best Interest, the SEC made findings consistent with the underlying premise of DOL's recent rulemakings: that financial services firms' conflicts of interest are harmful to investors. Specifically, in the Regulation Best Interest preamble, the SEC stated that:

> [l]ike many principal-agent relationships—including the investment adviser-client relationship—the relationship between a broker-dealer and a customer has inherent conflicts of interest, including those resulting from a transaction-based (e.g., commission) compensation structure and other broker-dealer compensation.[245] These and other conflicts of interest may provide an incentive to a broker-dealer to seek to increase its own compensation or other financial interests at the expense of the customer to whom it is making investment recommendations.[246]
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> Notwithstanding these inherent conflicts of interest in the broker-dealer-customer relationship, there is broad acknowledgment of the benefits of, and support for, the continuing existence of the broker-dealer business model, including a commission or other transaction-based compensation structure, as an option for retail customers seeking investment recommendations….Nevertheless, concerns exist regarding (1) the potential harm to retail customers resulting from broker-dealer recommendations provided where conflicts of interest exist and (2) the insufficiency of existing broker-dealer regulatory requirements to address these conflicts when broker-dealers make recommendations to retail customers. More specifically, there are concerns that existing requirements do not require a broker-dealer's recommendations to be in the retail customer's best interest.[247]

Accordingly, the SEC stated that Regulation Best Interest enhances the broker-dealer standard of conduct beyond existing "suitability" obligations[248] and aligns the standard of conduct with customers' reasonable expectations by requiring broker-dealers to act in the best

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

[245] The SEC also stated that "[t]he investment adviser-client relationship also has inherent conflicts of interest, including those resulting from an asset-based compensation structure that may provide an incentive for an investment adviser to encourage its client to invest more money through an adviser in order increase its AUM at the expense of the client."

[246] 84 FR 33319 (July 12, 2019).

[247] *Id.at 33319* (internal citation omitted).

[248] FINRA Rule 2111(a).

interest of the retail customer at the time the recommendation is made, without placing the financial or other interest of the broker-dealer ahead of the retail customer's interest; and, among other things, address conflicts of interest by disclosing and mitigating, or even eliminating, conflicts of interest.[249]

In particular, the best interest obligation for Regulation Best Interest is only satisfied if the broker-dealer complies with four component obligations: a Disclosure Obligation, which requires a broker-dealer to provide all material facts related to the scope and terms of the relationship with the retail customer and the conflicts of interests associated with the recommendation prior to or at the time of the recommendation; a Care Obligation, which requires a broker-dealer to exercise reasonable diligence, care, and skill when making recommendations to a retail customer; a Conflict of Interest Obligation, which requires the broker-dealer to establish, maintain and enforce written policies and procedures reasonably designed to address conflicts of interest associated with its recommendations to retail customers; and a Compliance Obligation, which requires broker-dealers to establish, maintain and enforce written policies and procedures reasonably designed to achieve compliance with Regulation Best Interest as a whole.[250]

Significantly, Regulation Best Interest applies to recommendations by broker-dealers to roll over or transfer assets in a workplace retirement plan accounts to an IRA and recommendations to take a plan distribution. The SEC has also issued staff guidance that under Regulation Best Interest and the Advisers Act's fiduciary duty, when making a rollover recommendation, broker-dealers and investment advisers must consider costs, the level of services available, and features of existing accounts. The guidance notes that, "it would be difficult to form a reasonable basis to believe that a rollover recommendation is in the retail

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[249] 84 FR 33318 (July 12, 2019).
[250] SEC's Office of Compliance Inspections and Examinations, *Examinations that Focus on Compliance with Regulation Best Interest*, (April 7, 2020), https://www.sec.gov/files/Risk%20Alert-%20Regulation%20Best%20Interest%20Exams.pdf.

investor's best interest and does not place your or your firm's interests ahead of the retail investor's interest, if you do not consider the alternative of leaving the retail investor's investments in their employer's plan, where that is an option."[251]

The standard of conduct in SEC's Regulation Best Interest draws from key principles of fiduciary obligations, including those that apply to investment advisers under the Investment Advisers Act. As reiterated in Staff Bulletins[252] and speeches,[253, 254] Regulation Best Interest, as adopted, incorporates Care and Conflict of Interest Obligations substantially similar to the fiduciary duties under the Advisers Act of loyalty (to not subordinate their client's interest to their own) and care (to ensure that advice is suitable and in the best interest of the client), to recommendations made by broker-dealers to their retail clients. Importantly, regardless of whether a retail investor chooses a broker-dealer or an investment adviser (or both), the retail investor will be entitled to a recommendation (from a broker-dealer) or advice (from an investment adviser) that is in the best interest of the retail investor and does not place the interests of the firm or the financial professional ahead of the interests of the retail investor.

The SEC's Regulation Best Interest covers advice that SEC-registered broker-dealers render to retail investors. Therefore, the affected firms and professionals include those making recommendations to the individual IRA and ERISA plan investors covered by this proposal. With respect to this area of overlap, the potential costs of this proposal are relatively limited, because the SEC actions and this proposal share many similarities and many firms have already built compliance structures based on SEC actions, the Department's 2016 Final Rule, and PTE 2020-02.

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[251] SEC, *Staff Bulletin: Standards of Conduct for Broker-Dealers and Investment Advisers Account Recommendations for Retail Investors*, (March 30, 2022), https://www.sec.gov/tm/iabd-staff-bulletin.
[252] *Ibid*.
[253] Chairman Jay Clayton, *Statement at the Open Meeting on Commission Actions to Enhance and Clarify the Obligations Financial Professionals Owe to our Main Street Investors*, (June 5, 2019), https://www.sec.gov/news/public-statement/statement-clayton-060519-iabd.
[254] Chairman Jay Clayton, *Regulation Best Interest and the Investment Advisory Fiduciary Duty: Two Strong Standards that Protect and Provide Choice for Main Street Investors,* SEC (July 8, 2019), https://www.sec.gov/news/speech/clayton-regulation-best-interest-investment-adviser-fiduciary-duty.

The SEC also covers robo-advice, subjecting robo-advisers that meet the definition of "investment adviser" to regulation under the Investment Advisers Act of 1940. It states that robo-advisers have a fiduciary duty to provide advice in the best interest of their clients. In addition, if robo-advisers also hold customer assets, they must register with the SEC and FINRA as broker-dealers. In 2017, the SEC's Division of Investment Management released regulatory compliance guidance for robo-advisers that included the need for adequate disclosure about the robo-adviser and the services it provides, the need to ensure that the robo-adviser is providing appropriate advice to its customers, and the need to adopt and implement appropriate compliance programs tailored to the automated nature of the robo-adviser's services.[255] This SEC guidance confirms that robo-advisers registered as investment advisers with the SEC are subject to the Investment Adviser Act's legal requirements and fiduciary obligations.

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

The Department is especially concerned about the proper regulation of fixed index

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[255] Jill E. Fisch, Marion Labouré, & John A. Turner, *The Disruptive Impact of FinTech on Retirement Systems: Chapter 2: The Emergence of the Robo-Advisor,* Oxford University Press 13 (2019).

annuities, as they comprised 67 percent of the retail annuity market in 2022, an increase of 42 percent from 2021, as investors hedged against rising interest rates.[256] This growth in fixed annuity investments has increased the share of retirement savings residing in a less secure environment with fewer protections against conflicted advice compared to direct investors in mutual funds and securities. The Department anticipates the benefits to investors of extending fiduciary law principles to entities providing investment advice in currently less stringent regulatory regimes to be substantial.

Regulatory Baseline, State Legislative and Regulatory Developments

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

Summary of State Legislative and Regulatory Developments

In a list compiled in July 2023, the Department identified 43 states that have enacted legislation, finalized regulation, or both that impose conduct standards and disclosure requirements on various financial institutions. [257] The table below summarizes the enacted legislation and finalized regulation in each state, as well as the type of financial institution each regulation pertains to. This list includes states that have adopted the NAIC Model Regulation #275,[258] in addition to states that have adopted conduct standards and disclosure requirements outside of NAIC Model Regulation #275.

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[256] LIMRA, *Record Annuity Sales in 2022 Expected Continue into First Quarter 2023*, (March 8, 2023), https://www.limra.com/en/newsroom/news-releases/2023/limra-record-annuity-sales-in-2022-expected-to-continue-into-first-quarter-2023/.

[257] States that have enacted legislation include Arizona, Connecticut, Florida, Hawaii, Idaho, Louisiana, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, North Dakota, Oregon, Pennsylvania, South Dakota, Texas, Washington, and Wisconsin. States that have finalized regulation include Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Georgia, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Montana, New Mexico, New York, North Carolina, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee, Virginia, West Virginia, and Wyoming.

[258] For more information on the NAIC's Suitability in Annuity Transactions Model Regulation, or Model Regulation #275, refer to the section entitled "NAIC Annuity Transactions Model Regulation #275" in this RIA.

Table 1: States that Have Enacted Legislation or Finalized Regulation			
State	***Legislation or Regulation***	***Title of Legislation or Regulation***	***Affected Entities***
Alabama	Regulation	Suitability in Annuity Transactions	Insurers, Broker-Dealers, and Independent Producers
Alaska	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers
Arizona	Legislation	An Act Relating to Annuity Transactions	Insurers and Independent Producers
	Regulation	Article 2 – Transaction of Insurance	Insurers and Independent Producers
Arkansas	Regulation	Stability in Annuity Transactions	Insurers and Independent Producers
Colorado	Regulation	Colorado Securities Act: Dishonest and Unethical Conduct	Investment Advisers, Investment Adviser Representatives, and Federal Covered Advisers
	Regulation	Concerning Best Interest Obligations and Supervision in Annuity Transactions	Insurers and Independent Producers
Connecticut	Legislation	Consumers Doing Business with Financial Planners	Financial Planners
	Legislation	An Act Requiring Administrators of Certain Retirement Plans to Disclose Conflicts of Interest	Administrators to Municipal 403(b) Plans
	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers
Delaware	Regulation	Stability in Annuity Transactions	Insurers and Independent Producers
Florida	Legislation	Consumer Protection	Insurers and Insurance Agents
Georgia	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers
Hawaii	Legislation	An Act Relating to Insurance	Insurers and Independent Producers
Idaho	Legislation	Annuity Consumer Protections Act	Insurers and Independent Producers
Illinois	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers
Iowa	Regulation	Rulemaking Related to Best Interest Standard for Insurance Professionals	Insurers and Independent Producers
Kansas	Regulation	Policy and Procedure on Suitability in Annuity Transactions	Insurers and Independent Producers
Kentucky	Regulation	Stability in Annuity Transactions	Insurers and Independent Producers
Louisiana	Legislation	Provides Relative to Venue for Direct Actions by Third Parties Against Insurers	Insurance Commissioner
Maine	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers
Maryland	Legislation	Financial Consumer Protection Act of 2018	N/A

Table 1: States that Have Enacted Legislation or Finalized Regulation			
State	***Legislation or Regulation***	***Title of Legislation or Regulation***	***Affected Entities***
	Regulation	Suitability in Annuity Transaction	Insurers and Independent Producers
Massachusetts[259]	Regulation	Suitability in Annuity Transactions	Investment Advisers, Financial Planners, Broker-Dealers, Insurers, and Independent Producers
	Regulation	Amendments to Fiduciary Conduct Standards	Broker-Dealers and Agents
	Regulation	Amendments to Investment Adviser Disclosure Regulations	Investment Advisers
Michigan	Legislation	Amendments to An Act to Revise, Consolidate, and Classify the Law Relating to the Insurance and Surety Business	Insurers and Independent Producers
Minnesota	Legislation	Annuity Suitability Regulation Modification	Insurers and Independent Producers
	Regulation	Insurance Industry Trade Practices	Insurers and Independent Producers
Mississippi	Regulation	Annuity Transactions Model	Insurers and Independent Producers
Montana	Legislation	An Act to Revise Insurance Laws Related to Annuities	Insurers and Independent Producers
	Regulation	Securities Regulation	Investment Advisers, Investment Adviser Representatives, and Federal Covered Advisers
Nebraska	Legislation	An Act relating to the Nebraska Protections in Annuity Transactions Act	Insurers and Independent Producers
Nevada	Legislation	An Act Relating to Financial Planners; Imposing a Fiduciary Duty on Broker-Dealers, Sales Representatives and Investment Advisers Who for Compensation Advise Other Persons Concerning the Investment of Money	Broker-Dealers, Sales Representatives, Investment Advisers, and Investment Adviser Representatives
New Mexico	Regulation	Suitability and Annuity Transactions	Insurers and Independent Producers
New York	Regulation	Suitability and Best Interests in Life Insurance and Annuity Transactions	Insurers and Independent Producers
North Carolina	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers

[259] The Massachusetts Supreme Judicial Court recently upheld the validity of the state's fiduciary duty rule, holding that the Secretary of the Commonwealth had authority to promulgate it, that the Secretary's authority was not an impermissible delegation of legislative power, that the rule did not override the common-law protections available to investors, and that the rule was not preempted by the SEC's imposition of the Regulation Best Interest. *Robinhood Fin. LLC v. Sec'y of Commonwealth*, No. SJC-13381, 2023 WL 5490571, at *1, *6-15 (Mass. Aug. 25, 2023).

Table 1: States that Have Enacted Legislation or Finalized Regulation			
State	***Legislation or Regulation***	***Title of Legislation or Regulation***	***Affected Entities***
North Dakota	Legislation	An Act Relating to Annuity Transaction Practices	Insurers and Independent Producers
Ohio	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers
Oklahoma	Regulation	Standards of Ethical Practices	Investment Advisers and Investment Adviser Representatives
	Regulation	Standards of Ethical Practices for Broker-Dealers and Their Agents	Broker-Dealers and Agents
Oregon	Legislation	An Act Relating to Annuities	Insurers and Independent Producers
Pennsylvania	Legislation	An Act amending the Insurance company Law of 1921	Insurers and Independent Producers
Rhode Island	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers
South Carolina	Regulation	Suitability in Annuity Transactions	Independent Producers, Broker-Dealers, Agents, and Plan Fiduciaries
South Dakota	Legislation	An Act to Revise Annuity Sales Standards	Broker-Dealers, Investment Advisers, Insurers, and Independent Producers
Tennessee	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers
Texas	Legislation	Relating to Disclosures and Standards Required for Certain Annuity Transactions and Benefits Under Certain Annuity Contracts	Insurers and Agents
Virginia	Regulation	Rules Governing Suitability in Annuity Transactions	Insurers and Independent Producers
Washington	Legislation	Concerning the Best Interest Standard for Annuity Transactions	Insurers and Independent Producers
West Virginia	Regulation	Suitability in Annuity Transactions	Insurers and Independent Producers
Wisconsin	Legislation	An Act Relating to Best Interest in Annuity Transactions	Insurers, Independent Producers, Investment Advisers, and Broker-Dealers
Wyoming	Regulation	Regulation Governing Suitability in Annuity Transactions	Insurers and Independent Producers

In addition, three states, that have not yet enacted legislation or finalized regulations have introduced legislation or proposed regulations that would impose conduct standards and disclosure requirements on various financial institutions.[260]

NAIC Annuity Transactions Model Regulation #275

As shown in the table above, much of the legislative and regulatory action among states focuses on insurers and independent producers. In February 2020, the NAIC membership approved revisions to its Suitability in Annuity Transactions Model Regulation to include a "best interest" standard of conduct. When the Department conducted its analysis of states in July of 2023, 39 states had adopted the NAIC Model Regulation #275.[261] Since then, additional states may have adopted the Model Regulation. In August 2023, the NAIC reported that 43 states had adopted it.[262]

The revisions were in response to both the SEC and the Department's work in the regulatory space and reflected some movement in the direction of greater uniformity, although significant differences remain, as partially discussed below.[263] The NAIC Model Regulation includes a best interest obligation comprised of a care obligation, a disclosure obligation, a conflict of interest obligation, and a documentation obligation, applicable to an insurance producer.[264] If these obligations are met, the producer is treated as satisfying the best interest standard. The care obligation states that the producer, in making a recommendation, must exercise reasonable diligence, care and skill to:

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[260] California, New Hampshire, and New Jersey have introduced legislation and/or regulation.
[261] Based on internal Department analysis, the modified Model Regulation #275, including a best interest standard, was adopted by Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.
[262] NAIC, *Annuity Suitability & Best Interest Standard,* (August 2023), https://content.naic.org/cipr-topics/annuity-suitability-best-interest-standard.
[263] NAIC, *Suitability in Annuity Transactions Model Regulation (#275) Best Interest Standard of Conduct Revisions Frequently Asked Questions*, (May 10, 2021), https://content.naic.org/sites/default/files/inline-files/Final%20FAQ%20July%202021.pdf .
[264] A producer is defined in section 5.L. of the model regulation as "a person or entity required to be licensed under the laws of this state to sell, solicit or negotiate insurance, including annuities." Section 5.L. further provides that the term producer includes an insurer where no producer is involved.

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

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

The NAIC expressly disclaimed that its standard creates fiduciary obligations and the obligations in the Model Regulation differ in significant respects from those in Regulation Best Interest. For example, in addition to disregarding compensation as a source of conflicts of interest, the specific care, disclosure, conflict of interest, and documentation requirements, do not expressly incorporate the obligation not to put the producer's interests before the customer's interests, even though compliance with their terms is treated as meeting the "best interest" standard. The care obligation in the Model Regulation only requires that the adviser "[h]ave a reasonable basis to believe the recommended option *effectively addresses the consumer's*

financial situation."[265] In contrast, Regulation Best Interest requires that, when making a recommendation, the broker-dealer "exercises reasonable diligence, care, and skill to . . . [h]ave a reasonable basis to believe that the *recommendation is in the best interest of a particular retail customer,*"[266] and the exemptions proposed here, consistent with ERISA's text, require that advice reflect the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor.

In recent insurance industry litigation against the Department, the plaintiffs described the differences between "the requirements of an ERISA fiduciary and an insurance agent operating under the NAIC model regulation [as] extensive."[267] Among the numerous differences they identified is the fact that, "the NAIC model regulation does not define conflicts of interest or the requirements pertaining to such conflicts as broadly as ERISA."[268] Additionally, they asserted that "the NAIC model regulation does not contain a 'prudence' standard"[269] and characterized "these best interest requirements…[as] a far cry from the obligations imposed on an ERISA fiduciary."[270]

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

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[265] *Id*. at § 6(A)(1)(a)(iii). Members of the insurance industry have noted that "[t]here is a world of difference" between the NAIC model rule and ERISA's fiduciary regime. *See* Brief of Plaintiffs at 39-40, *FACC*, No. 3:22-cv-00243-K-BN (Nov. 7, 2022), ECF No.48 (comparing ERISA's best interest requirement to NAIC Model Regulation 275, Sections 2.B and 6.A.(1)(d)).
[266] 84 FR 33318, 33458, 33491 (July 12, 2019).
[267] Brief of Plaintiffs at 40, *FACC*, No. 3:22-CV-00243-K-BT (Nov. 7, 2022), ECF No. 48.
[268] *Id*. at 40-41 n.15.
[269] *Id*.
[270] *Id*. at 40.

regulated community are best served by a consistent, protective, and understandable fiduciary standard.

Market Conditions and Impacts of Conflicts of Interest

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

Market Developments, Mutual Fund Share Classes

The 2016 Final Rule and recent SEC actions highlighted inherent conflicts of interest in how broker-dealers or investment advisers are compensated for recommending certain share classes of mutual funds. Since then, share classes without traditional conflicts of interest have increased in popularity. For instance, data published by the Investment Company Institute (ICI) in 2021 show that no-load mutual funds, or mutual funds without commissions, accounted for 46 percent of long-term mutual fund gross sales in 2000, 79 percent in 2015, and 89 percent in 2021. The ICI attributed the increase in no-load funds to two growing trends: investors paying intermediaries for advice through direct fees rather than indirectly through funds and the popularity of retirement accounts that invest in institutional, no-load share classes.[271]

Sethi, Spiegel, and Szapiro (2019) found that the Department's 2016 Final Rule reduced flows into funds with excess loads or loads that were higher than would otherwise be expected based on the fund's characteristics.[272] Mitchell, Sethi, and Szapiro (2019) found while mutual funds with excess loads have historically received greater inflows, since 2010 the correlation

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[271] Investment Company Institute, *Trends in the Expenses and Fees of Funds, 2021*, 28(2) ICI Research Perspective (March 2022).

[272] This study updated the analysis performed by Christoffersen, Evans, and Musto (2013) and examined the period from 1993 to 2017 in order to look at the impact of the Department's Final Rule, taking into consideration preexisting marketplace trends, anticipatory effects, the April 2015 Proposal, and the April 2016 Final Rule. The study calculates the excess load as "the difference between loads predicted by a regression and actual load, given a number of other control variables." *See* Jasmin Sethi, Jake Spiegel, & Aron Szapiro, *Conflicts of Interest in Mutual Fund Sales: What Do the Data Tell Us?*, 6(3) The Journal of Retirement 46-59 (Winter 2019).

between excess loads and inflows has been lower. The authors attribute this change to an "increased focus on broker practices" and "a culture of accountability."[273]

Meanwhile, other types of share classes have emerged and grown more prevalent, including unbundled and semi-bundled share classes. In a traditional, bundled share class, the investor pays the mutual fund a load or 12b-1 fee, and the mutual fund pays a portion back to an intermediary, such as the intermediary that sold the fund to the investor. Alternatively, in an unbundled or "clean" share class, the investor pays any intermediaries directly, while in a semi-bundled share class, the fund pays sub-accounting fees for recordkeeping services and uses revenue sharing for other services, such as distribution.[274] The different compensation arrangement for each of the types of share classes create different types and magnitudes of conflicts for financial professionals.

Adoption of these new share classes has spread quickly. Mitchell, Sethi, and Szapiro (2019) found that between July 2018 to August 2019, relatively few bundled share classes were launched into the market and that more bundled share classes closed in that time frame than semi-bundled and unbundled combined. Additionally, they found that unbundled share classes received almost five times as much new money as semi-bundled share classes. While flows to semi-bundled share classes fluctuated, they received net positive flows overall during this period.[275]

Market Developments, the Insurance Market

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

- In a **variable annuity**, an insurance company invests in an investment option chosen

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[273] Lia Mitchell, Jasmin Sethi, & Aron Szapiro, *Regulation Best Interest Meets Opaque Practices: It's Time to Dive Past Superficial Conflicts of Interest*, Morningstar (November 2019).
[274] *Ibid.*
[275] *Ibid.*

by the investor, which is often a mutual fund.[276] The return of the variable annuity reflects the return on the underlying investments. Variable annuities have often been referred to as "mutual funds in an insurance wrapper.[277]"

- In a **fixed annuity**, an insurance company agrees to pay the investor no less than a specified rate of interest during the asset accumulation phase and to pay a specified amount per dollar in the decumulation phase.[278,279]
- In an **indexed annuity**, an insurance company agrees to pay the investor returns linked to the performance of a market index. However, unlike a variable annuity, the terms in the contract and the method used to calculate gains and losses may result in actualized gains or losses that differ from the gains and losses experienced by the index.[280]

Annuity regulators also vary by type. While all annuity products are subject to state regulation, variable annuities and some indexed annuities are considered securities, and therefore are also subject to SEC and FINRA regulations.[281] As the financial structure of each type of annuity varies, so does the risk of conflicted advice. Variable and fixed-indexed annuity commissions tend to be similar, while fixed rate income and immediate annuity commissions are generally lower.[282]

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[276] SEC, *Annuities*, (2021), https://www.investor.gov/introduction-investing/investing-basics/glossary/annuities.
[277] Frank Fabozzi, *The Handbook of Financial Instruments,* 596-599 (2002).
[278] SEC, *Annuities*, (2021), https://www.investor.gov/introduction-investing/investing-basics/glossary/annuities.
[279] The initial contract of a fixed annuity establishes an initial credited rate, a minimum guaranteed rate, and a bailout rate. The invested premiums grow at the specified credited rate and are added to the cash value of the annuity. The credited rate may be changed by the insurance company at a specified frequency. However, the interest rate is guaranteed to be no lower than the specified minimum guaranteed rate. If the credited rate falls below the bailout rate, the investor is able to withdraw all the funds without paying a surrender charge. *See* Frank Fabozzi, *The Handbook of Financial Instruments,* 599-601 (2002).
[280] SEC, *Updated Investor Bulletin: Indexed Annuities*, (July 2020), https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-bulletins/updated-13. See also FINRA Rule 2330.
[281] SEC, *Annuities*, (2021), https://www.investor.gov/introduction-investing/investing-basics/glossary/annuities.
[282] Constantijn Panis & Kathik Padmanabhan, *Literature Review of Conflicted Advice in Annuities Markets*, Internal Report for Department of Labor (February 2023).

Similar to mutual funds, insurance agents and brokers are often compensated through load fees for selling variable annuities. [283] The commission paid varies significantly, from as little as 0 percent to as much as 10 percent of the investment with the most common amount being 7 percent.[284] The 2016 Final Rule discouraged sales of the typical load funds. Between 2016 and 2018, the sale of fee-based variable annuities, or I-share class variable annuities, increased by 43 percent.[285] Following the vacatur of the 2016 Final Rule in 2018, fee-based variable annuity sales decreased, falling by 28 percent between 2018 and 2020. More recently, sales have rebounded, increasing 76 percent between 2020 and 2021.[286] The significant increases in I-share class variable annuities have been driven by demand for fee-based products among fee-based advisers. They have been the second most popular variable annuity contract type since 2016, though they still only comprised 9.5 percent of retail variable annuity sales in 2021.[287] The Department does not have similar trend data on sales of fee-based fixed annuities.

Summary

The recent regulatory and market developments, combined with the judicial vacatur of the 2016 Final Rule, provide for a different baseline than the pre-2016 Final Rule baseline. While some reforms and improvements in the delivery of advice have endured despite the vacatur, without new regulatory action, gains made to some products and markets that are not covered by recent regulatory actions by the Department, SEC, or states, could be derailed. Other regulatory agencies have worked to reduce conflicts of interest, but this has resulted in a

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[283] Frank Fabozzi, *The Handbook of Financial Instruments* 596-599 (2002).
[284] Mark Egan, Shan Ge, & Johnny Tang, *Conflicting Interests and the Effect of Fiduciary Duty—Evidence from Variable Annuities*, 35(12) The Review of Financial Studies 5334-5486 (December 2022).
[285] Cerulli Associates, *U.S. Annuity Markets 2022: Acclimating to Industry Trends and Changing Demand*, Exhibit 4.09. The Cerulli Report.
[286] *Ibid*.
[287] Cerulli Associates, *U.S. Annuity Markets 2022: Acclimating to Industry Trends and Changing Demand*, Exhibit 2.07. The Cerulli Report.

"patchwork" approach to regulating advice arrangements of retirement investments,[288] which has already resulted in the most conflicted advisers moving to markets with the least oversight.[289]

This proposal would extend important and effective protections broadly to retirement investors. Specifically, the proposal would replace the 1975 regulation's five-part test with a new fiduciary status test, which would capture more financial investment transactions in which the investor is reasonably relying on the advice individualized to the investor's financial needs and best interest. This proposal would also increase the number of rollover recommendations being considered as fiduciary advice, which would enhance protections to retirement investors, particularly in regard to recommendations regarding annuities.

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

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

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[288] Eversheds Sutherland. "Getting the Full Picture: The Emerging Best Interest and Fiduciary Duty Patchwork." (August 2020), https://www.jdsupra.com/legalnews/the-emerging-patchwork-of-fiduciary-54761/.
[289] Colleen Honigsberg, Edwin Hu, & Robert J. Jackson, Jr., *Regulatory Arbitrage and the Persistence of Financial Misconduct*, 74 Stanford Law Review 797 (2022).

Table 2: Accounting Statement

Benefits:

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

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

Costs	Estimate	Year dollar	Discount Rate	Period Covered
Annualized	$221.1	2023	7 percent	2024-2033
Monetized ($million/Year)	$220.4	2023	3 percent	2024-2033

Quantified Costs:

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

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

Transfers:

Non-Quantified:

The Benefits section provides a qualitative description of the expected gains to investors; however, the available data do not allow the Department to break down those gains into component social welfare "benefits" and "transfers." Transfers identified in this analysis include:

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

4. Affected Entities

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

Table 3: Affected Financial Entities							
		Prohibited Transaction Exemptions					
		2020-02	*75-1*	*77-4*	*80-83*	*86-128*	*84-24*
Retirement Plans		765,124	765,124	277,390	6,886	1,000	1,722
Individual Retirement Accounts		3,119,832				210	52,449
Pooled Employer Plans		382					
Pooled Plan Providers		134					
Broker-Dealers		1,894	1,894				
Discretionary Fiduciaries						1,894	
Registered Investment Advisers		15,982					
Pure Robo-Advisers		200					
Insurance Companies		183					215
Captive Insurance Agents and Brokers		1,577					1,577
Insurance Producers							4,000
Banks			2,048		25		
Mutual Fund Companies				812			
Investment Company Principal Underwriters		20					20
Pension Consultants		1,011					1,011

Plans and Participants

The proposed amendments to the rule and related PTEs would affect plans that receive investment advice from a financial institution. Participants may be affected by advice they receive directly and by advice that is received by their plan's administrators and fiduciaries. As of 2021, there were approximately 765,000 private sector retirement plans with 146 million participants and $13.2 trillion in assets that would be affected by these proposals. Approximately 46,000 of these plans were defined benefit plans, with 31 million participants and $3.7 trillion in assets, and approximately 719,000 are defined contribution plans with 115 million participants

and $9.5 trillion in assets.[290] The Department recognizes that some plans, such as simplified employee pension (SEP) plans and Savings Incentive Match Plan for Employees IRA (SIMPLE IRA) plans, are exempt from filing and are not included in these estimates but would typically be affected by the proposal. The Department expects that participants in general would benefit from the stronger, uniform standards imposed by the proposed amendments to the rule and PTEs.

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

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

The proposed amendments to PTE 86-128 would limit the scope of the amendment to transactions in which a fiduciary uses its fiduciary authority to cause the plan or IRA to pay a fee to such trustee for effectuating or executing securities transactions as an agent for the plan. Using 2021 Form 5500 data, the Department estimates that 1,257 unique plans hired service providers that denoted on the Schedule C that they were a discretionary trustee. Further, among these plans, 801 plans also reported that the discretionary trustee provided investment management services or received investment management fees paid directly or indirectly by the plan.[291] Based

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[290] Private Pension Plan Bulletin: Abstract of 2021 Form 5500 Annual Reports, Employee Benefits Security Administration (2023; forthcoming), Table A1. Table A1 reports that there were 765,124 pension plans, consisting of 46,388 defined benefit plans and 718,736 defined contribution plans. Due to a rounding discrepancy, the sum of defined benefit and defined contribution plans does not equal the aggregate of the plans. Additionally, some individuals participate in two or more plans, so the number of individuals covered is lower than the number of gross participants.

[291] Estimates based on 2021 Form 5500 data.

on the range of values (801 and 1,257), the Department estimates on average, 1,000 plans have discretionary fiduciaries with full discretionary control. As small plans do not file the Schedule C, this estimate may be an underestimate. The Department requests comment on how many plans have discretionary fiduciaries with full discretionary control and how many would continue to rely on PTE 86-128 under the proposed amendments.

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

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

To estimate the number of plans affected by the proposed amendments to PTE 77-4, the Department estimated the number of plans relying on a mutual fund company. The Department does not have data on what percentage of plans receive fiduciary advice through mutual fund companies. A 2013 Deloitte/ICI survey found that 37 percent of 401(k) plans have a mutual fund company as their service provider.[297] Based upon ICI analyses and Form 5500 data that

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[292] EBSA identified 57,575 new plans in its 2021 Form 5500 filings, or 7.5 percent of all Form 5500 pension plan filings.

[293] The number of new plans is estimated as: 1,000 plans x 7.5 percent of plans are new = 75 new plans. The number of new IRAs is estimated as: 10,000 IRAs x 2.1 percent of IRAs are new = 210 new IRAs.

[294] EBSA identified 57,575 new plans in its 2021 Form 5500 filings, or 7.5 percent of all Form 5500 pension plan filings.

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

[296] 765,124 plans x 7.5 percent of plans are new x 3 percent of plans with relationships with insurance agents or pension consultants = 1,722 plans.

[297] The Department uses this estimate as a proxy for the percent of defined contribution plans that have service provider relationships with mutual fund companies. *See* Deloitte & Investment Company Institute, *Defined Contribution/401(k) Fee Study*, (August 2014).

examines the percentage of plans that are invested in registered investment companies, the Department estimates that 24.7 percent of defined benefit plans have mutual fund companies as money managers.[298] Applying these percentages to the universe of pension plans that filed a Form 5500 in 2021 yields a total of approximately 277,390 plans with service provider relationships with mutual fund companies.[299] Thus, the Department estimates that 277,390 plans would be affected by the proposed amendments to PTE 77-4. The Department acknowledges that this estimate likely overestimates the number of plans affected by the proposed amendments.

Individual Retirement Account (IRA) Owners

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

The proposed amendments to the rule and PTE 2020-02 would affect retirement investors who roll over money from a plan or IRA into another plan or IRA. A 2020 survey found that 46

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[298] Based on Form 5500 Data 2000-2010, defined benefit plans are approximately 33 percent less likely than defined contribution plans to be invested in a registered investment company. *See* Sarah Holden, *The Economics of Providing 401(k) Plans: Services, Fees, and Expenses*, Investment Company Institute (September 2010).
[299] Private Pension Plan Bulletin: Abstract of 2021 Form 5500 Annual Reports, Employee Benefits Security Administration (2023; forthcoming), Table A1. There are 765,124 pension plans, of which 718,736 are defined contribution plans and 46,388 are defined benefit plans. The number of plans with service provider relationships with mutual fund companies is estimated as: 718,736 defined contribution plans x 37% = 265,932; 46,388 defined benefit plans x 24.7% = 11,458.
[300] Cerulli Associates, *U.S. Retirement End-Investor 2023: Personalizing the 401(k) Investor Experience*, Exhibits 5.03 and 5.12. The Cerulli Report.
[301] *Ibid*. Exhibits 5.03 and 5.04.
[302] The EBRI database has data on 11.3 million IRA accounts owned by 9.2 million individuals. *See* Craig Copeland, *EBRI IRA Database: IRA Balances, Contributions, Rollovers, Withdrawals, and Asset Allocation, 2017 Update*, EBRI Issue Brief, no. 513 (2020). The Department uses this ratio as a proxy for the ratio for total IRA accounts to IRA owners in the following estimate: (11.3 million IRA accounts / 9.2 million IRA owners) x 67,781,000 IRA owners = 83,252,750 IRA accounts.

percent of recent retirees who had at least $30,000 in retirement savings had rolled at least some of their savings into an IRA.[303] According to Cerulli Associates, in 2022, almost 4.5 million DC plan accounts with $779 billion in assets were rolled over into an IRA. Additionally, 0.7 million DC plan accounts with $66 billion in assets were rolled over to other employer-sponsored plans.[304] It is challenging to obtain detailed data on other types of rollovers such as IRA-to-IRA and DB plan-to-IRA. The Department used IRS data from 2020 to estimate overall rollovers into IRAs, which is 5.7 million taxpayers and $618 billion.[305] Adding in the figures for plan-to-plan rollovers, the Department estimates the total number of rollovers at 6.4 million accounts with $684 billion in assets.[306] The Department requests comment on these estimates.

Only rollovers overseen by an ERISA fiduciary would be affected by the proposed amendments to PTE 2020-02. The Department does not have compelling data on the percentage of rollovers that will be overseen by an ERISA fiduciary under the amended rule. In 2022, 49 percent of DC plan-to-IRA rollovers with 63 percent of DC plan rollover assets were intermediated by a financial adviser.[307] Because the Department assumes that advisers intermediating rollovers are ERISA fiduciaries, this estimate is an upper bound. The Department then applies the estimate of DC plan-to-IRA rollovers to all types of rollovers. Accordingly, the Department estimates that 3.1 million rollovers and $431 billion in rollover assets would be

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[303] Pew Charitable Trusts. "Pew Survey Explores Consumer Trend to Roll Over workplace Savings Into IRA Plans." Issue Brief. (October 2021), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2021/09/pew-survey-explores-consumer-trend-to-roll-over-workplace-savings-into-ira-plans.

[304] 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 6.05. The Cerulli Report.

[305] Internal Revenue Service, *SOI Tax Stats – Accumulation and Distribution of Individual Retirement Arrangement (IRA)*, Table 1: Taxpayers with Individual Retirement Arrangement (IRA) Plans, By Type of Plan, Tax Year 2020, (2023).

[306] Estimates for the number of IRAs may include some non-retirement accounts such as Health Savings Accounts, Archer medical savings accounts, and Coverdell education savings accounts. See the discussion on Code section 4975 in the Background section of the preamble for more details.

[307] According to Cerulli, 49 percent of rollovers were mediated by an adviser, while 37 percent were self-directed. The remaining 14 percent were plan-to-plan rollovers. *See* Cerulli Associates, *U.S. Retirement-End Investor 2023: Personalizing the 401(k) Investor Experience Fostering Comprehensive Relationships*, Exhibit 6.04. The Cerulli Report.

affected by the proposed amendments to PTE 2020-02.[308] The Department requests comments on these estimates.

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

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

The proposed amendments to PTE 86-128 would limit the scope of the amendment to transactions in which a fiduciary uses its fiduciary authority to cause the plan or IRA to pay a fee to such trustee for effectuating or executing securities transactions as an agent for the plan,

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[308] The number of affected rollovers is estimated as: (6,367,005 x 49%) = 3,119,832.

[309] Cerulli Associates, *U.S. Retirement End-Investor 2023: Fostering Comprehensive Relationships*, The Cerulli Report.

[310] The Department lacks data on the number of IRA owners that own multiple IRAs. To provide scope of magnitude, one source reported that in 2019, 19 percent of IRA owners contributed to both a traditional IRA and Roth IRA. *See* Investment Company Institute, *The Role of IRAs in US Households' Saving for Retirement, 2020*, 27(1) ICI Research Perspective (2021), https://www.ici.org/system/files/attachments/pdf/per27-01.pdf. This statistic does not account for individuals who own multiple of each type of IRA or those who did not contribute in 2019, but it provides a lower bound.

[311] In 2020, 7 percent of traditional IRAs were held by insurance companies. *See* Investment Company Institute, *The Role of IRAs in US Households' Saving for Retirement, 2020,* 27(1) *ICI Research Perspective* (2021), https://www.ici.org/system/files/attachments/pdf/per27-01.pdf. This number has been adjusted downward to 3 percent to reflect the removal of transactions not covered by this exemption.). The number of IRAs affected is estimated as: (83,252,750 IRAs x 2.1% IRAs assumed to be new IRAs x 3% of IRAs held by insurance companies) = 52,449 IRAs.

without providing investment advice. The Department lacks reliable data on the number of managed IRAs that would experience such a transaction in a given year. For the purpose of this analysis, the Department assumes that there are 10,000 managed IRAs. To err on the side of caution, the Department assumes that all managed IRAs would have a relationship with a discretionary fiduciary. As discussed above for PTE 84-24, the Department assumes 2.1 percent of IRA accounts are new each year. This results in an estimate of 210 managed IRAs that are new accounts or new financial advice relationships.[312] The Department requests comment on these estimates, particularly on the number of IRAs that are managed accounts.

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

Pooled Plan Providers and Pooled Employer Plans

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

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[312] (10,000 managed IRAs x 2.1 percent of IRAs are new) = 210 IRAs.

[313] Department of Labor, *Form PR*, https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/reporting-and-filing/form-pr.

[314] The inaugural filing deadline for Form 5500 filings for PEPs with plan years beginning after January 1, 2021, was July 31, 2022. The Department based its estimates on those filings it had received by August 22, 2023. The Department anticipates that this understates the true number of PEPs.

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

Summary of Affected Financial Entities

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

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

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

Registered Investment Advisers

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

Investment advisers registered with the SEC are generally larger than state-registered investment advisers, both in staff and in regulatory assets under management.[316] For example, according to one report, 64 percent of state-registered investment advisers manage assets under $30 million while investment advisers must register with the SEC if they manage assets of $110 million or more.[317] In addition, according to one survey of SEC-registered investment advisers, about 47 percent of SEC-registered investment advisers reported 11 to 50 employees.[318] In contrast, an examination of state-registered investment advisers reveals about 80 percent reported less than two employees.[319]

As of December 2021, there were 14,714 SEC-registered investment advisers, of which 9,254 provided advice to retail investors while 5,460 provided advice to non-retail investors. Of the 14,714 SEC-registered investment advisers, 325 were dual-registered as broker-dealers.[320] To

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[315] Generally, a person that meets the definition of "investment adviser" under the Investment Advisers Act (and is not eligible to rely on an enumerated exclusion) must register with the SEC, unless they are prohibited from registering under Section 203A of the Investment Advisers Act or qualify for an exemption from the Act's registration requirement. An adviser precluded from registering with the SEC may be required to register with one or more state securities authorities.

[316] After the Dodd-Frank Wall Street Reform and Consumer Protection Act, an investment adviser with $110 million or more in regulatory assets under management generally registers with the SEC, while an investment adviser with less than $110 million registers with the state in which it has its principal office, subject to certain exceptions. For more details about the registration of investment advisers. *See* Securities and Exchange Commission, *General Information on the Regulation of Investment Advisers*, (March 11, 2011), https://www.sec.gov/investment/divisionsinvestmentiaregulationmemoiahtm; North American Securities Administrators Association, *A Brief Overview: The Investment Adviser Industry*, (2019), www.nasaa.org/industry-resources/investment-advisers/investment-adviser-guide/.

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

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

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

[320] Estimates are based on the SEC's FOCUS filings and Form ADV filings.

avoid double counting when estimating compliance costs, the Department counted dually registered firms as broker-dealers and excluded them from the count of registered investment advisers.[321] Therefore, the Department estimates there to be 14,389 SEC-registered investment advisers.

Additionally, as of December 2021, there were 15,987 state-registered investment advisers, of which 283 are dually registered as a broker-dealer.[322] In 2018, 125 state-registered investment advisers were also registered with the SEC.[323] To avoid double counting, the Department counted dually registered firms as broker-dealers and excluded them from the count of state-registered investment advisers. Similarly, the Department counted investment advisers registered with the SEC and a state as SEC-registered investment advisers. Accordingly, for the purposes of this analysis, the Department considers 15,579 state-registered investment advisers.

In 2021, 54 percent of registered investment advisers provided employer-sponsored retirement benefits consulting.[324] Based on this statistic, the Department estimates that 16,182 registered investment advisers, including 7,770 SEC-registered investment advisers and 8,412 state-registered investment advisers state, would be affected by the proposed amendments.[325]

As discussed in the Baseline section, PTE 2020-02 excludes investment advisers providing pure robo-advice. The proposed amendments would include these entities; however, pure robo-advisers would have a different baseline from registered investment advisers currently under PTE 2020-02. As discussed below, the Department estimates that there are 200 pure robo-

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[321] The Department applied this exclusion rule across all types of investment advisers, regardless of registration (SEC-registered versus state only) and retail status (retail versus nonretail).
[322] Estimates are based on the SEC's FOCUS filings and Form ADV filings.
[323] In December 2018, 125 of the state-registered investment advisers were also registered with the SEC and 204 were dually registered as broker-dealers. *See Form CRS Relationship Summary; Amendments to Form ADV,* 84 FR 33492 (Jul. 12, 2019).
[324] Cerulli Associates, *U.S. RIA Marketplace 2022: Expanding Opportunities to Support Independence*, Exhibit 5.10. The Cerulli Report.
[325] The number of registered investment advisers is estimated as: [(14,389 SEC-registered investment advisers + 15,579 state-registered investment advisers) x 54%] = 16,182 registered investment advisers.

advisers.[326] Accordingly, the Department estimates that 15,982 registered investment advisers who do not provide pure robo-advice are currently eligible for relief under PTE 2020-02. [327]

The Department does not have data on how many of these firms provide advice only to retirement investors that are plan participants, plan beneficiaries, or IRA owners, rather than the workplace retirement plans themselves. These firms are fiduciaries under the Investment Advisers Act and already operate under standards broadly similar to those required by PTE 2020-02.[328]

Robo Advisers

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

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[326] For more information on this estimate, refer to the Robo-Advisers discussion in the Affected Entities section.
[327] As discussed below, the Department estimates that there are 200 pure robo-advisers. Accordingly, the Department estimates that 15,982 registered investment advisers would be affected by the proposed amendments and are not pure robo-advisers. The number of registered investment advisers is estimated as: [(14,389 SEC-registered investment advisers + 15,579 state-registered investment advisers) x 54%] – 200 robo-advisers = 15,982 registered investment advisers.
[328] Investment Adviser Association, *SEC Standards of Conduct Rulemaking: What It Means for RIAs*, IAA Legal Staff Analysis (July 2019), https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/resources/IAA-Staff-Analysis-Standards-of-Conduct-Rulemaking2.pdf.
[329] Deloitte. "The Expansion of Robo-Advisory in Wealth Management." (2016).
[330] Jill E. Fisch, Marion Laboure, & John A. Turner, *The Emergence of the Robo-advisor*, Wharton Pension Research Council Working Papers (2018).
[331] Cerulli Associates, *U.S. Retail Investor Advice Relationships 2022: Rethinking the Advice Continuum*, Exhibit 3.02. The Cerulli Report.

market,[332] many by acquiring existing pure robo-advice platforms.[333]

Robo-advisers offer varying services and different degrees of hands-on assistance.[334] The most basic models use computer algorithms to offer investments deemed appropriate in terms of asset allocation and diversification based on the information supplied by the client on opening an account. These investments typically include low-cost mutual funds and exchange traded funds (ETFs), and automatically invest and rebalance funds based on a specified objective or risk tolerance. Most robo-advisers offer advice concerning taxable accounts and IRA accounts. The nature of robo-advice appeals to different investors than traditional investment advice does. While traditional advisers often target older investors with high net worth, robo-advice providers or other low-cost investment firms tend to attract young, technology-savvy investors with low balances.[335]

According to one source, there were 200 robo-advisers in the United States in 2017.[336] Robo-advisers are typically required to register with the SEC or state authorities. For the purposes of this analysis, the Department estimates that there are 200 pure robo-advisers that would be subject to the amended PTE 2020-02 that are not subject to the current PTE 2020-02. The Department requests comment on how the number of robo-advisers in the market has evolved since 2017, what proportion of robo-advisers provide pure versus hybrid robo-advice, and what proportion of pure robo-advisers are likely to rely on the amended PTE 2020-02. The Department also requests comment on whether robo-advisers operate as registered investment advisers, or if they can also operate as broker-dealers.

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[332] Jill E. Fisch, Marion Laboure, & John A. Turner, *The Emergence of the Robo-Advisor*, Wharton Pension Research Council Working Papers (2018).
[333] Andrew Welsch, *Robo-Advisors Changed Investing. But Can They Survive Independently,* Barron's (February 2022), https://www.barrons.com/articles/robo-advisors-changed-investing-but-can-they-survive-independently-51645172100.
[334] SEC, *Investor Bulletin: Robo-Advisers*, (February 23, 2017), https://www.sec.gov/oiea/investor-alerts-bulletins/ib_robo-advisers.
[335] Jonathan W. Lam, *Robo-Advisors: A Portfolio Management Perspective*, (April 2016). https://economics.yale.edu/sites/default/files/2023-01/Jonathan_Lam_Senior%20Essay%20Revised.pdf.
[336] Facundo Abraham, Sergio L. Schmukler, & Jose Tessada, *Robo-advisors: Investing Through Machines*, World Bank Research and Policy Briefs 134881 (2019).

Broker-Dealers

The proposed amendments would modify PTE 75-1 such that broker-dealers would no longer be able to rely on the exemption for investment advice. The Department does not have information about how many of these firms provide investment advice to plan fiduciaries, plan participants and beneficiaries, and IRA owners.

Under PTE 75-1, broker-dealers would still be able to receive reasonable compensation for extending credit to a plan or IRA to avoid a failed purchase or sale of securities involving the plan or IRA if (1) the potential failure of the purchase or sale of the securities is not caused by such fiduciary or an affiliate, and (2) the terms of the extension of credit are at least as favorable to the plan or IRA as the terms available in an arm's length transaction between unaffiliated parties. Any broker-dealers seeking relief for investment advice, however, would be required to rely on the amended PTE 2020-02.

According to data provided by the SEC, there were 3,508 registered broker-dealers as of December 2021. Of those, approximately 70 percent, or 2,447 broker-dealers, reported retail customer activities, while approximately 30 percent, or 1,061 broker-dealers, were estimated to have no retail customers.[337]

Not all broker-dealers perform services for employee benefit plans. In 2021, 54 percent of registered investment advisers provided employer-sponsored retirement benefits consulting.[338] Assuming the percentage of broker-dealers provide advice to retirement plans is the same as the percent of investment advisers providing services to plans, the Department assumes 54 percent, or 1,894 broker-dealers, would be affected by the proposed amendments.[339] The Department requests comment on this estimate.

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[337] Estimates are based on the SEC's FOCUS filings and Form ADV filings.
[338] Cerulli Associates, *U.S. RIA Marketplace 2022: Expanding Opportunities to Support Independence*, Exhibit 5.10. The Cerulli Report.
[339] The estimated of retail broker-dealers affected by this exemption is estimated as: (2,447 retail broker-dealers x 54%) = 1,321 retail broker dealers. The estimated number of non-retail broker-dealers affected by this exemption is estimated as: (1,061 non-retail broker-dealers x 54%) = 573 non-retail broker dealers. The estimated number of total broker-dealers is 1,894 (1,321 + 573).

Discretionary Fiduciaries

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

The Department lacks reliable data on the number of investment advice providers who are discretionary fiduciaries that would rely on the amended exemption. For the purposes of this analysis, the Department assumes that the number of discretionary fiduciaries relying on the exemption is no larger than the estimated number of broker-dealers estimated to be affected by the amendments to PTE 2020-02, or 1,894 investment advice providers while acknowledging the number is likely significantly smaller.[340]

The Department requests comment on this assumption, particularly with regard to what types of entities would be likely to rely on the amended exemption, as well as any underlying data.

Insurance Companies

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

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[340] SEC Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion From the Definition of Investment Adviser, 84 FR 33681, 33685-86 (July 12, 2019).

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

Insurance companies are primarily regulated by states and no single regulator records a nationwide count of insurance companies. Although state regulators track insurance companies, the total number of insurance companies cannot be calculated by aggregating individual state totals, because individual insurance companies often operate in multiple states. In the Department's 2016 RIA, it estimated that 398 insurance companies wrote annuities.[341] The Department continues to use this estimate although the number may have changed during the intervening years. Furthermore, this may be an overestimate because some of these insurance companies may not sell annuity contracts in the IRA or Title I retirement plan markets. The Department requests information on the number of insurance companies underwriting annuities that would be affected by this proposal.

Annuity sales reached record highs in 2022. Total annuity sales in 2022 amounted to $312.8 billion, while indexed annuity sales amounted to $79.8 billion, or approximately 26% of

[341] This estimate is based on 2014 data from SNL Financial on life insurance companies reported receiving either individual or group annuity considerations. *See* Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest - Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, (April 2016), https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.

total annuity sales. During the first two quarters of 2023, indexed annuity sales accounted for 27% of total annuity sales.[342]

Recent legislative developments may lead to an expansion in this market. A 2021 survey asked insurers what impacts they expected to see from the Setting Every Community Up for Retirement Enhancement Act of 2019 (the SECURE Act). It found that 58 percent of insurers thought the SECURE Act would result in a significant increase in the number of plan sponsors offering in-plan annuities, and 63 percent of insurers thought the SECURE Act would lead to a significant increase in the number of plan participants allocating a portion of their plan balances to an annuity option.[343] With increasing usage of annuities in plans, the future impact on plans, participants, assets, and insurance companies will be greater. It also increases the need for plan fiduciaries to receive advice that is subject to a best interest standard.

Insurance companies sell insurance products through (1) their employees or "captive insurance agents" that work directly for an insurance company or as independent contractors and exclusively sell the insurance company's products, and/or (2) independent agents that sell multiple insurance companies' products. In recent years, the market has seen a shift away from captive distribution towards independent distribution.[344]

The Department does not have strong data on the number of insurance companies using captive agents or independent producers. Based on data on the sales of individual annuities by distribution channel, the Department estimates that, of annuities distributed through either a captive or independent distribution channel, approximately 46 percent of sales are done through

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[342] LIMRA, *Preliminary U.S. Annuity Second Quarter 2023 Sales Estimates*, (2023), https://www.limra.com/siteassets/newsroom/fact-tank/sales-data/2023/q2/2q-2023-prelim-annuity-sales-estimates-_final.pdf.

[343] Cerulli Associates, *U.S. Annuity Markets 2021: Acclimating to Industry Trends and Changing Demand*, Exhibit 1.06. The Cerulli Report.

[344] *See* Ramnath Balasubramanian, Rajiv Dattani, Asheet Mehta, & Andrew Reich, *Unbundling Value: How Leading Insurers Identify Competitive Advantage*, McKinsey & Company (June 2022), https://www.mckinsey.com/industries/financial-services/our-insights/unbundling-value-how-leading-insurers-identify-competitive-advantage; Sheryl Moore, *The Annuity Model Is Broken*, Wink Intel (June 2022), https://www.winkintel.com/2022/06/the-annuity-model-is-broken-reprint/.

captive distribution channels and 54 percent of sales are done through independent distribution channels.[345] For the purpose of this analysis, the Department assumes that the number of companies selling annuities through captive distribution channels and independent distribution channels is proportionate to the sales completed by each distribution channel. The Department recognizes that the distribution of sales by distribution channel is likely different from the distribution of insurance companies by distribution channel. The Department requests comment on how many insurance companies sell annuities through captive and independent distribution channels. The Department also requests comment on whether how many insurance companies may rely on both methods of distribution.

Following from this assumption, the Department estimates that 183 insurance companies distribute annuities through captive channels and would rely on PTE 2020-02 for transactions involving investment advice. Further, the Department estimates that 215 insurance companies distribute annuities through independent channels and would rely on PTE 84-24 for transactions involving investment advice.[346]

The Department estimates that 70 of the 398 insurance companies are large entities.[347] In the absence of data relating to the distribution channel differences by firm size, the Department uses the aggregate rate in its estimates. That is, the Department assumes that 46 percent of large insurance companies (32 insurance companies) sell annuities through captive distribution

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[345] According to the Insurance Information Institute, in 2022, independent broker dealers accounted for 20 percent of individual annuities sales, independent agents accounted for 18 percent of sales, career agents accounted for 15 percent of sales, banks accounted for 24 of sales, full-service national broker-dealers accounted for 17 percent of sales, direct response accounted for 3 percent of sales, and other methods accounted for 2 percent of sales. For the purposes of this analysis, the Department considers those sales made by career agents and full-service national broker-dealers to be "captive," and those made by independent broker-dealers and independent agents to be "independent." To estimate the proportion of sales completed through "captive" and "independent" channels, the Department excludes the 6% of sales associated with direct response and "other methods" from the calculation. The Department assumes that 46 percent of sales by banks are captive, while 54% of sales by banks are independent. *See* Insurance Information Institute, *Facts + Statistics: Distribution Channels*, (2023), https://www.iii.org/fact-statistic/facts-statistics-distribution-channels.

[346] The number of insurance companies using captive distribution channels is estimated as 398 x 46% = 183 insurance companies. The number of insurance companies using independent distribution channels is estimated as 398-183 = 215 insurance companies.

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

channels, while the remaining 151 insurance companies distributing annuities through captive channels are assumed to be small.[348] Additionally, 54 percent of large insurance companies (38 insurance companies) sell annuities through independent distribution channels, while the remaining 177 insurance companies selling annuities through independent distribution channels are assumed to be small.[349] The Department requests comment on this assumption.

Independent Producers

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

The Department estimates that the independent agent distribution channel has sales of about $56 billion since this channel is 18 percent of individual annuity sales and total U.S. annuity sales reached $312.8 billion in 2022.[350]

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[348] The number of large insurance companies using a captive distribution channel is estimate as: 70 large insurance companies x 46% = 32 insurance companies. The number of small insurance companies using a captive distribution channel is estimated as: 183 insurance companies – 32 large insurance companies = 151 small insurance companies.
[349] The number of large insurance companies using an independent distribution channel is estimate as: 70 large insurance companies x 54% = 38 insurance companies. The number of small insurance companies using a captive distribution channel is estimated as: 215 insurance companies – 38 large insurance companies = 177 small insurance companies.
[350] Insurance Information Institute, *Facts + Statistics: Distribution Channels – Sales of Individual Annuities By Distribution Channels, 2018 and 2022*, https://www.iii.org/fact-statistic/facts-statistics-distribution-channels. *LIMRA: Record Annuity Sales in 2022 Expected to Continue Into First Quarter 2023*, (March 8, 2023). https://www.limra.com/en/newsroom/news-releases/2023/limra-record-annuity-sales-in-2022-expected-to-continue-into-first-quarter-2023/#:~:text=LIMRA%20data%20show%20there%20was,117%25)%20to%20%2421.8%20billion.

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

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

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[351] Annemarie McPherson Spears, *7 Findings From the 2022 Agency Universe Study*, (October 13, 2022), https://www.iamagazine.com/news/7-findings-from-the-2022-agency-universe-study?__hstc=79369803.5fd6a87d75ca95f942e9dc33fed281b9.1691447156981.1691447156981.1691447156981.1&__hssc=79369803.3.1691447156981&__hsfp=2180945085.

Pension Consultants

The Department expects that pension consultants would continue to rely on the existing PTE 84-24. Based on 2021 Form 5500 data, the Department estimates that 1,011 pension consultants serve the retirement market.[352]

The proposed amendment would exclude pension consultants for plans and IRAs currently relying on the existing PTE 84-24 for investment advice. As such, any pension consultants relying on the existing exemption for investment advice would be required to comply with PTE 2020-02 for relief. In this analysis, the Department includes pension consultants in the affected entities for continued relief for the existing provisions of PTE 84-24 as well as the amended PTE 2020-02. The Department acknowledges that this approach likely overestimates the entities and related costs to complying with the exemptions. The Department requests comment on whether pension consultants would continue to rely on the existing provisions of 84-24 or would rely on the amended 2020-02.

Principal Company Underwriter

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

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[352] Internal Department of Labor calculations based on the number of unique service providers listed as pension consultants on the 2021 Form 5500 Schedule C. This could be an underestimate as only plans with one hundred or more participants need to file a Schedule C and then only for service providers paid more than $5,000 during the plan year. To the extent small plans use different pension consultants the number would be underestimated.

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

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

Banks and Credit Unions

The proposed amendments to PTE 75-1, PTE 80-83, and PTE 2020-02 would affect banks and credit unions. There are 4,672 federally insured depository institutions in the United States, consisting of 4,096 commercial banks and 576 savings institutions.[353] Additionally, there are 4,686 federally insured credit unions.[354] In 2017, the GAO estimated that approximately two percent of credit unions have private deposit insurance.[355] Based on this estimate, the Department estimates that there are approximately 96 credit unions with private deposit insurance and 4,782 credit unions in total.[356] The Department requests comment on what proportion of credit unions offer IRAs and what proportion sell share certificate products. The Department also requests comment on how many banks and credit unions currently rely on PTE 2020-02, PTE 75-1, and PTE 80-83 for investment advice.

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[353] Federal Insurance Deposit Corporation, *Statistics at a Glance- as of March 31, 2023*, https://www.fdic.gov/analysis/quarterly-banking-profile/statistics-at-a-glance/2023mar/industry.pdf.
[354] National Credit Union Administration, *Quarterly Credit Union Data Summary 2023 Q2,* https://ncua.gov/files/publications/analysis/quarterly-data-summary-2023-Q2.pdf.
[355] 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.
[356] The total number of credit unions is calculated as: 4,686 federally insured credit unions / (100%-2% of credit unions that are privately insured) = 4,782 total credit unions. The number of private credit unions is estimated as: 4,782 total credit unions – 4,686 federally insured credit unions = 96 credit unions with private deposit insurance.

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

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

The Department understands that banks most commonly use "networking arrangements" to sell retail non-deposit investment products, including equities, fixed-income securities, exchange-traded funds, and variable annuities.[357] Under such arrangements, bank employees are limited to performing only clerical or ministerial functions in connection with brokerage transactions. However, bank employees may forward customer funds or securities and may describe, in general terms, the types of investment vehicles available from the bank and broker-dealer under the arrangement. Similar restrictions on bank employees' referrals of insurance

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[357] For more details about "networking arrangements," see Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest - Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, (April 2016), https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf. Financial institutions that are broker-dealers, investment advisers, or insurance companies that participate in networking arrangements and provide fiduciary investment advice would be included in the counts in their respective sections.

products and state-registered investment advisers exist. The Department believes that, in most cases, such referrals would not constitute fiduciary investment advice within the meaning of the proposal. The Department, however, also requests comment on what other types of activities banks or credit unions may engage in that would require reliance on PTE 2020-02.

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

Mutual Fund Companies

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

According to the ICI, in 2022, there were 812 mutual fund companies.[358] The Department assumes that all of these companies are service providers to pension plans, providing investment management services.

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[358] Investment Company Institute, *2023 Investment Company Fact Book*: *A Review of Trends and Activities in the Investment Company Industry*, (2023), https://www.ici.org/system/files/2023-05/2023-factbook.pdf.

Mortgage Pool Sponsors

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

5. Benefits and Transfers

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

- increasing uniformity in the regulation of financial advice for retirement investors, across different market segments and market participants,
- protecting consumers from losses that can result from advisory conflicts of interest (without unduly limiting consumer choice or adviser flexibility),
- giving retirement investors increased trust and confidence in their advisers and in the reliability of their advice, and
- facilitating more efficient capital allocation.

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

welfare "benefits" and "transfers." These transfers represent a beneficial gain to retirement investors and are a primary objective of the proposed rule and PTE.

If some transactions have increased net returns for certain parties and decreased returns of equal magnitude for other parties, that would represent a transfer. If the increase in net returns for the first group is larger than the corresponding decrease for the second group, then only the equivalent portion would be transfers and the amount of the additional net returns would represent benefits. For example, non-retirement investors may have previously experienced lower prices and higher returns resulting from timing errors of retirement investors due to conflicted advice. As those conflicts are removed, those transactions may not occur, leading to a transfer from non-retirement investors to retirement investors. Moreover, it is possible that the financial industry would forego profits (e.g., as a result of conflicted advisers charging retirement investors lower fees), resulting in a transfer from investment advisers and associated service providers to retirement investors.

As detailed later in this RIA, the magnitude of the gains to retirement investors, through benefits or transfers, is uncertain. As noted earlier, advisory conflicts – which this proposal, in harmony with federal securities laws, would mitigate – are very costly for retirement investors. The cost is high both on aggregate and for individual retirement investors, such as when a new retiree adheres to conflicted advice to transfer a career's-worth of 401(k) savings into an over-priced annuity or a high-risk investment.

Both the Department's 2016 RIA and the SEC's Regulation Best Interest analyses show that investors stand to gain much from the mitigation of advisory conflicts. This RIA provides a mainly qualitative discussion of the benefits of this proposal. The Department invites comments and data related to how it might quantify these benefits as part of the RIA of any final rule.

Regulatory Uniformity

This proposal would make the rules that govern fiduciary advice to plan and IRA investors more consistent with federal securities laws, and thereby promote clarity and

efficiency. Under the current regulatory regime, bad actors are drawn to those markets with the least regulated products, where they are not required to prioritize retirement investors interest over their own when they make investment recommendations. By harmonizing advice regulations across all markets that are used by retirement investors, the Department can ensure that advisers all face the same regulatory standard. It would also remove incentives for investment advisers to steer recommendations in ways that customers cannot monitor and that run counter to the customers' best interest.

When contemplating a potential "Financial Adviser Reform Act" that would "be uniform in its application of the fiduciary duties of loyalty and care across all financial advisers," Smith (2017) noted that, "this uniformity would eliminate the 'false distinction' between investment service providers by recognizing the overlapping services they offer."[359] Smith argued that creating a uniform standard "would both reduce consumer confusion as to what constitutes advice or recommendations and ensure that the uniform fiduciary duty is consistently applied in the investor's favor by taking a broad approach to what constitutes investment advice and recommendations."[360] Simply put, requiring that only some investment advisers advising retirement investors adhere to an ERISA fiduciary standard promotes recommendations that are driven by differences in the regulatory regime rather than by the products or investors' interests.

Research suggests that the problems resulting from differing regulatory regimes are not unique to the United States. For instance, Anagol et al. (2017) found that when agents selling life insurance in India were required to disclose commissions for one particular product, they were much less likely to recommend it to clients. Instead, the agents recommended products that did not have this requirement, but which had higher and opaque commissions.[361] The authors

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[359] Alec Smith, *Advisers, Brokers, and Online Platforms: How a Uniform Fiduciary Duty Will Better Serve Investors*, 2017(3) Colum. Bus. L. Rev. 1200-1243 (2017), https://doi.org/10.7916/cblr.v2017i3.1730.
[360] *Ibid.*
[361] Santosh Anagol, Shawn Cole & Shayak Sarkar, *Understanding the Advice of Commissions-Motivated Agents: Evidence from the Indian Life Insurance Market*, 99(1) The Review of Economics and Statistics 1-15, (2015), https://doi.org/10.1162/REST_a_00625.

conclude, "These results suggest that the disclosure requirements for financial products need to be consistent across the menu of substitutable products." This underscores that regulatory regimes that are not uniform allow advisers to engage in regulatory arbitrage, leaving their clients vulnerable to conflicts of interest.

This proposed rule would help create a uniform standard, as it would apply to all retirement investment advice. This would address concerns the Department has about lower standards for advice related to insurance products and other investments that are not securities, advice that broker-dealers render to ERISA plan fiduciaries, and robo-advice.[362] The proposed rule's broad application to all retirement investment advice would help different market participants and different financial products compete on similar terms for IRA and plan business. This would reduce the risk to retirement investors. Uniform, well-designed rules can make markets fairer for competitors and friendlier for customers, leading to more efficient market outcomes. They can also promote efficiency by allowing firms that offer multiple products or make recommendations in both the retail and non-retail market to utilize a common compliance structure.

Financial services firms are already moving toward new approaches in how they offer advice, including more fee-based advice models, flatter compensation models, and integrating technology. The proposed amendments to the rule and exemptions would help ensure that these new approaches evolve toward less conflicted and more innately impartial business models. These types of technology-enhanced models – whether pure robo-adviser or hybrid models – will contain the overall costs associated with providing investment advice and strategies and will help low-balance account holders obtain investment advice at an affordable cost.

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[362] The Department identifies these areas as areas of concern because non-security investments and investment advice from broker-dealers to ERISA plan fiduciaries are not covered by recent SEC actions and pure robo-advice, while included in the SEC's actions was excluded from the current PTE 2020-02. For more information, refer to the Baseline discussion.

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

Protections Concerning Rollover Investment Advice

The proposal would generate benefits for, and transfers to, savers by reducing conflicts related to one-time advice concerning rollovers. Frequently, participants are better off leaving their 401(k) account in the retirement plan rather than rolling it over to an IRA, particularly if the 401(k) plan has low fees and high-quality investment options. Large 401(k) plans often have lower fees than IRAs, though smaller 401(k) plans sometimes find it difficult to keep fees low.[363] IRAs often utilize retail shares in mutual funds with substantially higher fees than the institutional share classes that employer-sponsored plans typically utilize. A 2022 Pew Charitable Trusts study analyzed the difference between median institutional and retail share class expense ratios across all mutual funds that offered at least one institutional share and one retail share in 2019. They found that the median retail shares of equity funds had annual expenses that were 37 percent higher than institutional shares. Over the course of saving for retirement, the impact of even small differences in fees was significant.[364]

The investment fiduciaries of 401(k) plans also have responsibilities under ERISA to act in the best interests of, and solely for the benefit of, the plan participants, whereas IRA providers do not have such responsibilities.[365] Turner and Klein (2014) suggested that the services and

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[363] BrightScope and Washington, DC: Investment Company Institute. *The BrightScope /ICI Defined Contribution Plan Profile: A Close Look at 401(k) Plans, 2019* (San Diego, CA: 2022). Available at www.ici.org/files/2022/22-ppr-dcplan-profile-401k.pdf.
[364] Pew Charitable Trusts, *Small Differences in Mutual Fund Fees Can Cut Billions from Americans' Retirement Savings*, Pew Charitable Trusts Issue Brief, (June 2022), https://www.pewtrusts.org/-/media/assets/2022/05/smalldifferenceinmutualfunds_brief_v1.pdf.
[365] *Ibid.*

investment performance associated with higher fees paid in an IRA are not necessarily justified,[366] meaning a plan participant would be able to obtain similar investment performance and services in a lower cost 401(k) plan. For instance, Turner, Klein, and Stein (2015) found that most financial advisers told federal workers about the benefits of rolling over into an IRA, such as having a larger number of investment options and more lenient withdrawal options, without mentioning the higher costs that would be incurred relative to keeping their savings in the Thrift Savings Plan, which has extremely low fees.[367]

If fewer participants roll over their 401(k) plan account balances into IRAs, and instead keep their account balances in plans sponsored by former or new employers, this would result in transfers between different segments of the market. To consider one example, there may be a transfer from service providers who specialize in serving IRAs to service providers who specialize in serving defined contribution plans. As a second example, retirement investors often pay lower fees in plans where they can access institutional share classes than they do in IRAs where they use retail share classes. This represents a transfer from actors in the financial industry to retirement investors.

Protections Concerning Annuity Investment Advice

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

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[366] John Turner & Bruce W. Klein, *Retirement Savings Flows and Financial Advice: Should You Roll Over Your 401(k) Plan?*, 30(4) Benefits Quarterly 42-54 (2014), https://www.iscebs.org/Documents/PDF/bqpublic/bq414f.pdf.
[367] John A. Turner, Bruce W. Klein & Norman P. Stein, *Financial Illiteracy Meets Conflicted Advice: The Case of Thrift Savings Plan Rollovers*, 3(4) The Journal of Retirement 47-65 (2015), https://doi.org/10.3905/jor.2016.3.4.047.

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

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

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

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[368] Financial Industry Regulatory Authority, *Annuities*, Financial Industry Regulatory Authority, https://www.finra.org/investors/investing/investment-products/annuities.
[369] Frank Fabozzi, *The Handbook of Financial Instruments* 579, (2002), https://seekingworldlywisdom.files.wordpress.com/2011/08/the-handbook-of-financial-instruments-fabozzi.pdf.
[370] Securities and Exchange Commission, *Annuities,* Securities and Exchange Commission, https://www.investor.gov/introduction-investing/investing-basics/glossary/annuities.
[371] Office of Senator Elizabeth Warren, *Villas, Castles, and Vacations: Americans' New Protections from Financial Adviser Kickbacks, High Fees, & Commissions are at Risk* (2017), https://www.warren.senate.gov/files/documents/2017-2-3_Warren_DOL_Rule_Report.pdf.
[372] Frank Fabozzi, *The Handbook of Financial Instruments* 576-599, (2002), https://seekingworldlywisdom.files.wordpress.com/2011/08/the-handbook-of-financial-instruments-fabozzi.pdf.
[373] Susan Christoffersen, Richard Evans & David Musto, *What Do Consumers' Fund Flows Maximize? Evidence from Their Broker's Incentives*, 68(1) Journal of Finance 201-235 (February 2013), https://doi.org/10.1111/j.1540-6261.2012.01798.x.

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

- Participation rates explicitly set the percentage of index returns that are credited to the annuity;
- Spread, margin, or asset fees are subtracted from the index returns; and
- Interest caps limit the returns if the underlying index sees large returns.[376]

FINRA also warns that indexed annuities may be able to change these contractual limitations, depending on the terms of the contract.[377]

In a 2020 investor alert, the SEC warned, "*You can lose money buying an indexed annuity.* Read your contract carefully to understand how your annuity works."[378] The SEC listed several ways that investors in these products can lose money, including through surrender charges and withdrawals during a specified time period. The SEC further cautioned:

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[374] Financial Industry Regulatory Authority, *The Complicated Risks and Rewards of Indexed Annuities*, Financial Industry Regulatory Authority, (July 2022), https://www.finra.org/investors/insights/complicated-risks-and-rewards-indexed-annuities.
[375] Coryanne Hicks & Phillip Moeller, *17 Things You Need to Know About Annuities*, U.S. News and World Report, (May 3, 2021), https://money.usnews.com/investing/investing-101/articles/things-you-need-to-know-now-about-annuities.
[376] Financial Industry Regulatory Authority, *The Complicated Risks and Rewards of Indexed Annuities*, Financial Industry Regulatory Authority, (July 2022), https://www.finra.org/investors/insights/complicated-risks-and-rewards-indexed-annuities.
[377] *Id*
[378] Securities and Exchange Commission, *Updated Investor Bulletin: Indexed Annuities*, Securities and Exchange Commission, (July 2020), https://www.investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-bulletins/updated-13.

- "Indexed annuity contracts describe both how the amount of return is calculated and what indexing method they use. Based on the contract terms and features, an insurance company may credit your indexed annuity with a lower return than the actual index's gain."
- "Indexed annuity contracts commonly allow the insurance company to change some of these features periodically, such as the rate cap. Changes can affect your return. Read your contract carefully to determine what changes the insurance company may make to your annuity."[379]

The Department also has concerns about sales tactics of insurance agents, brokers, and independent producers for annuity products. A number of state regulators have issued website alerts regarding deceptive sales practices to sell annuities to seniors, including "high-pressure sales pitch[es]" and "quick-change tactics" in which an agent tries to convince an investor to change coverage quickly without time for adequate research. State regulators also warned that a licensed agent will be more than willing to show credentials and to question an agent's "[unwillingness or inability] to prove credibility" to prospective customers.[380] One regulator noted, "With billions of dollars in sales to be made, insurance companies may offer commissions as high as 10 percent to agents to sell products like long-term deferred annuities to senior

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[379] *Id.*

[380] *See e.g.,* California Department of Insurance*, Deceptive Sales Practices When Purchasing Annuities*, California Department of Insurance, http://www.insurance.ca.gov/0150-seniors/0100alerts/DeceptiveSales.cfm; North Carolina Department of Insurance*, Annuities and Senior Citizens*, North Carolina Department of Insurance, https://www.ncdoi.gov/consumers/annuities/annuities-and-senior-citizens; Mississippi Insurance Department*, Annuities and Senior Citizens: Senior Citizens Should Be Aware Of Deceptive Sales Practices When Purchasing Annuities,* Mississippi Insurance Department*,* https://www.mid.ms.gov/consumers/annuities-senior-citizens.aspx; Kentucky Department of Insurance*, Annuities and Senior Citizens Consumer Alert: Senior Citizens Should Be Aware of Deceptive Sales Practices When Purchasing Annuities*, Kentucky Department of Insurance, https://insurance.ky.gov/ppc/Documents/AnnuitiesandSenior.pdf; Massachusetts Division of Insurance*, Annuities and Senior Citizens: Senior Citizens Should Be Aware Of Deceptive Sales Practices When Purchasing Annuities*, Massachusetts Division of Insurance, https://www.mass.gov/service-details/annuities-and-senior-citizens; Georgia Office of the Commissioner of Insurance and Safety Fire*, Annuity Tips*, Georgia Office of the Commissioner of Insurance and Safety Fire, https://oci.georgia.gov/insurance-resources/annuity/annuity-tips; South Dakota Division of Insurance, *Consumer Alert: Annuities and Senior Citizens: Senior Citizens Should Be Aware Of Deceptive Sales Practices When Purchasing Annuities*, South Dakota Division of Insurance, https://dlr.sd.gov/insurance/publications/alerts/documents/annuities_senior_citizens.pdf.

citizens."[381] As described by the regulator:

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

Supporting this call for caution, Egan et al. (2019) found substantial amounts of misconduct disputes in the sales of annuities between 2005 and 2015.[383]

Research shows that fiduciary protections in the annuity markets lead to better outcomes for investors. By analyzing deferred annuity sales at a large financial services provider during 2013 to 2015, Bhattacharya et al. (2020) found that fiduciary duty increases risk-adjusted returns by 25 basis points.[384] This results from a compositional shift in the set of products purchased by investors. Fiduciary duty protections tend to shift sales towards fixed indexed annuities and away from variable annuities. Within variable annuities, sales shifted towards products with more and higher quality investment options. The authors obtained these findings by exploiting the variation in fiduciary duties between broker-dealers and registered investment advisers as well as the variation between states as to whether broker-dealers are subject to a common law fiduciary duty.

Bhattacharya et al. (2020) also found that fiduciary duty led to a 16 percent reduction in the number of broker-dealers, which they described as a "potentially small" effect. There was no change in total annuity sales. Furthermore, the reduction in broker-dealers did not result in poor quality products being sold. The authors developed a model that shows that the benefits of improved advice under a fiduciary standard, offset by the reduction in the number of broker-

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[381] Minnesota Attorney General, *Annuities: Unsuitable Investments for Seniors*, Minnesota Attorney General, https://www.ag.state.mn.us/consumer/Publications/AnnuitiesUnsuitableInvforSeniors.asp.
[382] *Ibid.*
[383] Mark Egan, Gregor Matvos, & Amit Seru, *The Market for Financial Adviser Misconduct*, 127(1) Journal of Political Economy (February 2019), https://www.journals.uchicago.edu/doi/10.1086/700735.
[384] Vivek Bhattacharya, Gaston Illanes, & Manisha Padi, *Fiduciary Duty and the Market for Financial Advice*, Working Paper 25861 National Bureau of Economic Research (2020), https://www.nber.org/papers/w25861.

dealers and the advice they provide, yields an overall effect of increasing average returns by 20 basis points. On the whole, these results indicate that this proposal would improve the quality of advice in the investment market and protect the welfare of investors and retirees.[385]

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

Approximately $3.8 trillion in pension entitlements are held in annuities at life insurance companies, including those within IRAs.[386] The recommendation of many of these assets are already subject to a best interest standard; for example, they were sold by a registered investment adviser or sold in a state with a fiduciary standard. It is difficult to know exactly how many assets fall into this category, but for illustrative purposes, let us assume that 50 percent of the market is not currently subject to a best interest standard and would be under the proposal and would therefore expect an increase in average returns of 20 basis points as suggested by Bhattacharya et al. In this scenario, the expansion of fiduciary duty would lead to gains for investors (a mix of societal benefits and transfers) of $3.6 billion, assuming a 20 basis point increase in returns.[387]

Good regulation may also improve the overall investment advice market. According to Egan, Ge, and Tang (2022), after the Department issued its 2016 Final Rule, total variable

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[385] *Ibid.*
[386] Board of Governors of the Federal Reserve System, *Financial Accounts of the United States: Flow of Funds, Balance Sheets, and Integrated Macroeconomic Accounts: First Quarter 2023*, Table L.227 Federal Reserve Statistical Release Z.1. (June 8, 2023), https://www.federalreserve.gov/releases/z1/.
[387] 0.20% x $3.6 trillion x 50% = $3.6 billion.

annuity sales fell significantly – primarily driven by a 52 percent decrease in annuities with expenses in the highest quartile, suggesting that broker-dealers responded to the 2016 Final Rule by placing greater weight on investor interests. These impacts persisted even after the rule was vacated by the Fifth Circuit. Critics of the Department's 2016 Final Rule often refer to a decline in variable annuity sales as evidence of the 2016 Final Rule having negative effects. Egan, Ge, and Tang (2002) conclude, however, that investors on average experienced a net benefit from the Rule, even taking into account the fact that some investors were no longer participating in the annuity market.[388] Other commenters observed that even if the 2016 Final Rule could have reduced investors' access to certain services or products, the impact would have been on services and products that were not in the investors' best interest.[389]

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

Protections Concerning Advice Given to Plan Fiduciaries

This proposal would also yield economic benefits by extending protections to advice given to ERISA plan fiduciaries. Accordingly, the proposal would ensure that investors and the Secretary could enforce the fiduciary protections by pursuing claims for fiduciary misconduct involving ERISA-covered plans. When a broker-dealer currently provides advice to plan fiduciaries, the advice is not covered by Regulation Best Interest because the plan fiduciaries are not retail customers.[390] Pool et al. (2016) offered evidence that mutual fund companies acting as

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[388] Mark Egan, Shan Ge, & Johnny Tang, *Conflicting Interests and the Effect of Fiduciary Duty—Evidence from Variable Annuities*, 35(12) The Review of Financial Studies 5334-5486 (December 2022), https://academic.oup.com/rfs/article-abstract/35/12/5334/6674521.

[389] Ashley C. Vicere, *Defining Fiduciary: Aligning Obligations with Expectations*. 82(4) Brooklyn Law Review 1783 (2016), https://brooklynworks.brooklaw.edu/blr/vol82/iss4/8/.

[390] Advice provided by an investment adviser to a plan fiduciary is subject to the Advisers Act fiduciary duty.

service providers to 401(k) plans display favoritism toward their own affiliated funds, even when their performance is worse, generating "significant subsequent negative abnormal returns for participants investing in those funds."[391] This proposal aims to reduce or eliminate such harmful favoritism.

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

Plan fiduciaries receive advice on many important topics. For defined contribution plans, these topics can include plan design provisions such as investment alternatives, whether the plan should have automatic enrollment, default contribution rates, and default investments. For defined benefit plans, it can include selection of investments and investment strategies as well as

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[391] Veronika K. Pool, Clemens Sialm, & Irina Stefanescu*, It Pays to Set the Menu: Mutual Fund Investment Options In 401(K) Plans*, 71(4) The Journal of Finance 1779-1812 (August 2016), https://onlinelibrary.wiley.com/doi/abs/10.1111/jofi.12411.
[392] Veronika K. Pool, Clemens Sialm, & Irina Stefanescu, *Mutual Fund Revenue Sharing in 401(k) Plans*, Vanderbilt Owen Graduate School of Management Research Paper (November 8, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3752296.
[393] *Ibid.*
[394] *See* Employee Benefits Security Administration, *2013-03A*, Advisory Opinions, (2013), https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/advisory-opinions/2013-03a.

distribution options. Given the large number of participants in ERISA plans and the huge asset holdings of such plans, the benefits of protecting the advice received by plan fiduciaries is likely to be substantial.

Increased Confidence in Advisers and in the Reliability of Their Advice

The market for financial advice generally works best when investors trust investment advice providers and their trust is well-placed. Both conditions are necessary for optimal results. If investors distrust investment advice providers, they will incur higher costs to select a provider and monitor their conduct. Their provider may also incur higher costs to counter prospective and existing customers' distrust. Distrustful investors may be less likely to obtain beneficial advice and more likely not to follow beneficial advice.[395] Likewise, if investors trust investment advice providers more than is warranted, they may reduce their monitoring of the advisor's actions and accept less transparency in policies, procedures and fees, making them more vulnerable to harm from advice that is biased by advisory conflicts.[396] A 2019 survey regarding the Australian financial advice industry reported that the biggest barriers for consumers in accessing financial advice are cost (35 percent), limited financial circumstances in which it is "not worth getting financial advice" (29 percent), the desire to manage an individual's own finances (26 percent), a lack of trust (19 percent), or a lack of perceived value in paying for financial advice (18 percent).[397]

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

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[395] Paul Gerrans & Douglas A. Hershey, *Financial Adviser Anxiety, Financial Literacy, and Financial Advice Seeking*, 51(1) Journal of Consumer Affairs 54-90 (2017), https://www.jstor.org/stable/44154765.
[396] Winchester, Danielle & Sandra Huston, *Trust Reduces Costs Associated with Consumer-Financial Planner Relationship*, 71(4) Journal of Financial Service Professionals 80-91 (2017), https://web.p.ebscohost.com/ehost/pdfviewer/pdfviewer?vid=0&sid=1ca603cd-53ca-4cbb-99b1-5fd43782b0c4%40redis.
[397] Australian Securities and Investments Commission, *Report 627- Financial Advice: What Consumers Really Think*, Australian Securities and Investments Commission, (August 2019), https://download.asic.gov.au/media/5243978/rep627-published-26-august-2019.pdf.

obtain and follow beneficial advice, at lower cost.

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

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

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[398] Claude Montmarquette & Nathalie Viennot-Briot, *The Value of Financial Advice*, 16(1) Annals of Economics and Finance 69-94 (2015), http://aeconf.com/articles/may2015/aef160104.pdf.
[399] Jill E. Fisch, Tess Wilkinson-Ryan, & Kristin Firth, *The Knowledge Gap in Workplace Retirement Investing and the Role of Professional Advisors*, 66(3) Duke Law Journal (2016), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3875&context=dlj.
[400] *Id.*

professional advisers had a higher level of financial knowledge, which enabled them to make better retirement investing decisions from which unsophisticated investors could benefit.

Enforcement

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

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

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[401] Ben Charoenwong, Alan Kwan, & Tarik Umar, *Does Regulatory Jurisdiction Affect the Quality of Investment-Adviser Regulation*, 109(10) *American Economic Review* (October 2019), https://www.aeaweb.org/articles?id=10.1257/aer.20180412.

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

Implications for Retirement Savings Estimates

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

One major market development resulting from the 2016 Final Rule and exemptions involved the development of new mutual fund share classes designed to eliminate advisory conflicts attributable to variation in commissions. As discussed in the Baseline section, Mitchell, Sethi, and Szapiro (2019) found that the share classes that are less likely to have traditional conflicts of interest have become more popular in recent years.[402] In 2020, 94 percent of 401(k) mutual fund assets were invested in no-load funds, compared to 66 percent in 2000.[403]

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[402] Lia Mitchell, Jasmin Sethi, & Aron Szapiro, *Regulation Best Interest Meets Opaque Practices: It's Time to Dive Past Surface-Level Conflicts*, Morningstar (November 2019), https://ccl.yale.edu/sites/default/files/files/wp_Conflicts_Of_Interest_111319%20FINAL.pdf.

[403] Investment Company Institute, *The Economics of Providing 401(k) Plans: Services, Fees, and Expenses, 2020*, 27(6) ICI Research Perspective Figure 5. (June 2021), https://www.ici.org/system/files/2021-06/per27-06.pdf.

In the 2016 RIA, the Department estimated that broker-sold mutual funds underperformed direct-sold mutual funds by approximately 50 basis points per year.[404] In response to this estimate, Morningstar opined that transparency improvements associated with such shares "should encourage advisors to provide high quality advice to remain competitive" and that "50 basis points is a reasonable estimate of savings to investors from reducing conflicted advice."[405] Their support of the Department estimate was based on a study looking at mutual fund T shares. However, this share class has faded following the revocation of the 2016 rule.[406] As a result, it is largely uncertain how many retirement investors would have adopted the new share class had it been permitted to go fully into effect. For the purposes of this illustration, if it were assumed that half of the roughly $2.0 trillion assets invested in long-term mutual funds with front-end load fees were transitioned into T shares, investors could have saved approximately $5 billion.[407]

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

However, Mitchell, Sethi, and Szapiro (2019) also found that the newer share classes appear to have their own conflicts that are opaque to investors and regulators, such as revenue

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[404] Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest - Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, pp. 162, (April 2016), https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.

[405] Aron Szapiro & Paul Ellenbogen, *Early Evidence on the Department of Labor Conflict of Interest Rule: New Share Classes Should Reduce Conflicted Advice, Likely Improving Outcomes for Investors*, Morningstar Policy Research (April 2017).

[406] Greg Iacurci, *T Shares Are Dead*, InvestmentNews (December 20, 2018), https://www.investmentnews.com/t-shares-are-dead-77482.

[407] According to the Investment Company Institute, in 2017, the total net assets invested in long-term mutual funds with front-end load fees was $1.99 trillion. *See* Investment Company Institute. "Trends in the Expenses and Fees of Funds, 2017." Figure 20. *ICI Research Perspective* (April 2018), Vol. 24, No. 3. If it were assumed that all $1.99 trillion in assets were invested in A shares and that they were all then moved to T shares, then this would have translated into an estimated increase in returns of $4.98 billion for IRA investors.

sharing.[408] Many of the commonly considered potential conflicts of interest are embedded in a bundled share class arrangement, where the investor pays the mutual fund a load or 12b-1 fee, and the mutual fund pays a portion back to an intermediary, such as the intermediary that sold the fund to the investor. Semi-bundled share classes use revenue sharing or sub-accounting fees.

The damages associated with conflicts of interest in compensation structures are exacerbated in that many of these compensation structures incentivize excessive trading. Good advice can help investors avoid timing errors when trading by reducing panic-selling during large and abrupt downturns. However, conflicted advice providers may profit by encouraging investors' natural inclination to trade more and "chase returns," an activity that tends to produce harmful timing errors.[409]

Friesen and Sapp (2007) found that equity mutual fund investors made timing decisions that reduced fund investor average returns by 1.56 percent annually.[410] Their evidence "suggests that those investors who are most likely relying on advice from a broker perform especially poorly from a timing standpoint." Bullard, Friesen, and Sapp (2008) found that the difference in performance between load and no-load funds has two components: the difference in prospectus returns across share classes and the difference in investor returns resulting from differences in investor timing.[411] Additionally, Christoffersen, Evans, and Musto (2013) found that as the size of the load-share increased, mutual fund returns decreased. This suggests that the greater the adviser's conflict of interest, the worse off the IRA investor can expect to be.[412, 413]

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[408] Lia Mitchell, Jasmin Sethi, & Aron Szapiro, *Regulation Best Interest Meets Opaque Practices: It's Time to Dive Past Surface-Level Conflicts*, Morningstar (November 2019), https://ccl.yale.edu/sites/default/files/files/wp_Conflicts_Of_Interest_111319%20FINAL.pdf.
[409] YiLi Chien, *The Cost of Chasing Returns,* 18 Economic Synopses (2014), https://doi.org/10.20955/es.2014.18.
[410] Geoffrey Friesen & Travis Sapp*, Mutual Fund Flows and Investor Returns: An Empirical Examination of Fund Investor Timing Ability* 31(9) Journal of Banking and Finance 2796-2816 (2007), https://www.sciencedirect.com/science/article/abs/pii/S0378426607001422.
[411] Mercer Bullard, Geoffrey C. Friesen, & Travis Sapp, *Investor Timing and Fund Distribution Channels*, Social Science Research Network (2008).
[412] Susan Christoffersen, Richard Evans, & David Musto, *What Do Consumers' Fund Flows Maximize? Evidence From Their Broker's Incentives*, 68 Journal of Finance 201-235 (2013), https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1540-6261.2012.01798.x.
[413] The performance reduction presented in Christoffersen, Evans and Musto (2013) does not include loads paid by investors in front-end-load funds.

A Department-sponsored study by Panis and Padmanabhan (2023) examined how investors timed the purchase and sale of mutual funds between 2007 and June 2023. During the decade from 2007 to 2016, the authors found that investors in load funds had worse timing than investors in no-load funds, with an excess performance gap, comparing measures of the impact of purchase and sales timing, of 1.12 percent per year for U.S. equity funds and 0.63 percent for all funds. After Regulation Best Interest took effect, the authors observed that there had been dramatic improvement in the timing of trades. Between July of 2020 and June of 2023, the excess performance gap was only 0.13 percent for U.S. equity funds and was negative, -0.11 percent, overall. This means that in the later period, looking across all funds in the aggregate, investors in load funds timed their transactions slightly better than investors in no-load funds. While it is not certain what factors underlie the reduction in timing errors, it is consistent with an interpretation that Regulation Best Interest enhanced the standard of conduct for broker-dealers to act in the best interest of retail customers and persuade their customers to refrain from return chasing behavior.[414]

The nature of the conflicts facing broker-dealers in the mutual fund space is similar to that facing insurance agents and independent producers in the annuity space. As discussed in the Baseline section, commissions earned by selling annuities vary considerably even within a certain type of product.[415] For example, commissions for variable annuities vary widely, creating a strong incentive for brokers to sell some variable annuities over others. Egan, Ge, and Tang (2022) showed that variable annuity sales were four times more sensitive to brokers' financial interests than to investors' financial interests.[416]

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[414] Constantijn Panis & Karthik Padmanabhan, *Buy Low, Sell High: The Ability of Investors to Time Purchases and Sales of Mutual Funds*, Intensity, LLC. (August 14, 2023). Unpublished draft.

[415] The commission paid varies significantly, from as little as 0 percent to as much as 10 percent of the investment with the most common amount being 7 percent. *See* Mark Egan, Shan Ge, & Johnny Tang, *Conflicting Interests and the Effect of Fiduciary Duty—Evidence from Variable Annuities*, 35(12) The Review of Financial Studies 5334-5486 (December 2022), https://academic.oup.com/rfs/article-abstract/35/12/5334/6674521.

[416] Mark Egan, Shan Ge, & Johnny Tang, *Conflicting Interests and the Effect of Fiduciary Duty—Evidence from Variable Annuities*, 35(12) The Review of Financial Studies 5334-5486 (December 2022), https://academic.oup.com/rfs/article-abstract/35/12/5334/6674521.

After the Department published its 2015 proposal, sales of high-expense variable annuities fell by 52 percent, which Egan, Ge, and Tang (2022) attributed to sales becoming more sensitive to expenses and insurers increasing the availability of low-expense products. In fact, the authors stated that the "regulatory change improved the distribution of products available to investors along the extensive margin, in terms of the annuities available for sale, as well as the intensive margin, in terms of the actual annuities sold by brokers." Thus, the authors concluded, the 2016 Final Rule resulted in improved investor welfare, increasing risk-adjusted returns of investors by up to 30 basis points per year, with two-thirds of the effect associated with investors moving into lower-expense products and the remainder from sales of annuities with more desirable investment options and characteristics.[417] The long-run impact of such a regulation can be estimated by applying the 30 basis point figure to the assets held in variable annuities in 2018, which was $2.2 trillion, yielding a total annual increase in risk-adjusted returns of approximately $6.6 billion.[418] Because the 2016 Final Rule was vacated, its long-run effects on the annuity market remain unknown. The current proposal, however, would help ensure a long-run positive impact on the market for variable annuities.

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

The recent SEC actions extended new protections to retail customers advised by broker-dealers on securities transactions. According to the SEC, the Conflict of Interest Obligation under Regulation Best Interest is "intended to reduce the agency costs that arise when a broker-dealer and its associated persons provide a recommendation to a retail customer by addressing

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[417] *Id.*

[418] This estimate is based on variable annuity assets in 2018 of $2.2 trillion, as reported in the referenced study. *See* Mark Egan, Shan Ge, & Johnny Tang, *Conflicting Interests and the Effect of Fiduciary Duty—Evidence from Variable Annuities*, 35(12) *The Review of Financial Studies* 5346 (December 2022), https://academic.oup.com/rfs/article-abstract/35/12/5334/6674521.

the effect of the associated person's or broker-dealer's conflicts of interest on the recommendation." In its Economic Analysis, the SEC explored the market mechanisms by which this and other provisions would benefit retail investors. The SEC estimated that the present value of potential future mutual fund fee reductions after Regulation Best Interest would be between $14 billion to $76 billion.[419] The SEC separately estimated that the potential present value of improved future mutual fund performance net of fees (which would overlap with fee reductions) would be between $7 billion to $35 billion. The SEC noted that these estimates represented only "some of the potential benefits" and that more benefits were expected. It also noted that while its estimates focused on mutual funds, it expected that "the same or similar dynamics could apply to other financial products."

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

6. Impact of the Proposal on Small Savers

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

The Department recognizes that investment advice is often very valuable for small savers. There is also ample evidence and broad consensus that many U.S. consumers struggle to

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[419] Regulation Best Interest, 84 FR 33458, 33491 (July 12, 2019).

make and implement good retirement saving and investment decisions without effective help. Many lack the skills, motivation, or discipline to accumulate adequate savings, optimize their investment strategies, and thereby realize financial security in retirement.[420] Less sophisticated investors may benefit from "hand-holding" to make sure they are taking basic steps such as saving adequately and allocating their investments with an appropriate amount of risk.

The Department believes that small savers are especially vulnerable to the detrimental effects of conflicted advice. With fewer economic resources, small savers are particularly susceptible to any practices that diminish their resources by extracting unnecessary fees or by yielding lower returns. These savers cannot afford to lose any of their retirement savings. Yet conflicts sometimes lead advisers to recommend products with lower expected net returns than available alternatives. Consumers' losses from advisory conflicts tend to exceed what can be justified as fair compensation for good advice as these consumers could often benefit more from competitively priced impartial advice.[421] However, advisory conflicts have historically distorted the market in ways that have prevented consumers from accessing less conflicted investment alternatives. Less sophisticated investors frequently do not know how much they are paying for advice and are not equipped to effectively monitor the quality of the advice they receive.[422] Indeed, Agnew et al. (2021) found in an experimental setting that younger, less financially

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[420] Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest - Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, pp. 108, (April 2016), https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf. ("many IRA investors lack sophistication"); 136 (older individuals often "lack even a rudimentary understanding of stock and bond prices, risk diversification, portfolio choice, and investment fees"); and 137 ("only one-half of individuals aged 50 and older in the United States can correctly answer two simple financial questions that involve calculations. Many respondents failed to correctly conclude that $100 would grow to more than $102 after five years if interest accrues at 2 percent per year, while others were unable to determine that an account earning interest at 1 percent while inflation was 2 percent would lose buying power").

[421] Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest - Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, pp. 155-158, (April 2016), https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.

[422] Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest - Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, pp. 136-40, (April 2016), https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.

literate, and less numerate participants were more likely to hire a low-quality adviser.[423] It is possible that they do not understand the potential effects of their advisers' conflicts.[424] By itself, disclosure directly to the consumer is unlikely to change this without other protections also in place.[425]

Small investors often save using an ERISA plan. Frequently this is the main vehicle they use to save for retirement; in fact, approximately two-thirds of households participating in a pension plan do not own an IRA.[426] This proposal will require advice given to the plan fiduciaries to meet a fiduciary standard. Improvements in plan design and selection of investments on the menu will benefit small savers. The vast majority of small savers choose investments from their plan's platform rather than investing through a brokerage account, if their plan even offers a brokerage account option.[427] Research shows that low-income participants tend to be influenced by default options more than high income participants.[428] Small savers will benefit from plan fiduciaries choosing default options that are well selected and well monitored.

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[423] Julie Agnew, Hazel Bateman, Christine Eckert, Fedor Iskhakov, Jordan Louviere, and Susan Thorp. *Who Pays the Price for Bad Advice?: The Role of Financial Vulnerability, Learning and Confirmation Bias,"* ARC Centre of Excellence in Population Ageing Research, Working Paper 2021/19, (July 1, 2021).

[424] Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest - Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, pp. 143-144, (April 2016), https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.

[425] Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest - Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, pp. 268-271, (April 2016), https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.

[426] Constantijn W.A. Panis & Michael J. Brien, *Savers With and Without a Pension* (2015), https://www.dol.gov/sites/dolgov/files/EBSA/researchers/analysis/retirement/savers-with-and-without-a-pension.pdf.

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

[428] John Beshears, Ruofei Guo, David Laibson, Brigitte C. Madrian, & James J. Choi, *Automatic Enrollment with a 12% Default Contribution Rate* (August 18, 2023), https://spinup-000d1a-wp-offload-media.s3.amazonaws.com/faculty/wp-content/uploads/sites/27/2023/08/JPEF-20230802.pdf. James Choi, David Laibson, Brigette Madrian, & Andrew Metrick, *For Better or For Worse: Default Effects and 401(k) Savings Behavior*, In Wise DA (ed.), Perspectives on the Economics of Aging. Chicago: University of Chicago Press, pp. 81–121.

During the 2016 Rulemaking, the Department devoted considerable attention to the question of small investors' access to financial services, including advice.[429] The Department believed that the rule would benefit small investors and generally would not adversely affect their access to advice.[430] It noted ongoing market innovations that promised to make good advice more affordable and predicted that the rule would accelerate these efforts.[431] However, the Department also acknowledged the potential for short-term disruption and transition costs[432] and noted that the services of independent brokers and insurance agents might be most affected.[433]

The 2016 Rulemaking was significantly different than the current rulemaking in that it imposed a fiduciary obligation on virtually all investment recommendations specifically directed to retirement investors, imposed demanding contract and warranty requirements in the IRA market, which gave investors a direct cause of action against firms and advisers for breach of the Impartial Conduct Standards, and represented a significant break from the then-existing regulatory baseline. Confronted with these significant changes, a number of industry commenters both during the rulemaking process of the 2016 Final Rule, and in the period immediately

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https://spinup-000d1a-wp-offload-media.s3.amazonaws.com/faculty/wp-content/uploads/sites/27/2019/06/betterorworse.pdf

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

[430] Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest - Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, pp. 312-318, (April 2016), https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.

[431] Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest - Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, pp. 318-324, (April 2016), https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.

[432] Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest - Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, pp. 318, (April 2016), https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.

[433] Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest - Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, pp. 308-309, (April 2016), https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.

following the rule's finalization, expressed concern that the regulatory changes could erode small investors' access to affordable advice and to some beneficial financial products, primarily based on surveys conducted by the industry of its members.

The Department carefully reviewed such comments and papers prior to the publishing of the 2016 Final Rule and found many contained analytic flaws that rendered the comments' conclusions unsupported and unreliable. The Department accordingly discussed in the 2016 RIA its points of concern with the comments' methods and conclusions.[434] The Department also sought assistance from an outside consultant to help review the comment letters and claims.[435] The consultant generally found "the studies lacking in rigor, failing to recognize emerging alternatives to traditional offerings of investment advice, incorrectly equating the benefits of conflicted advice to those of non-conflicted advice, or suffering from logical fallacies."

In 2021, the Hispanic Leadership Fund and Quantria prepared a paper on the effects of reinstatement of the 2016 Rule. Based on the same approach as Quantria's prior paper, they estimated that reinstatement of the rule would reduce retirement savings of individuals with incomes below $100,000 by $140 billion over 10 years.[436] The 2021 findings have shortcomings similar to those identified in the 2014 analysis, such as assuming such policy action would eliminate all financial advice received by these individuals or purporting causation from correlation. Padmanabhan, Panis, and Tardiff (2016) point out that several of the paper's key assertions, such as many advisers will not be willing to operate under the fiduciary standard set out by the Department's rule, do not have empirical support and are not consistent with current

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[434] Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest - Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, pp. 108-109 & 136-137, (April 2016), https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.

[435] Karthik Padmanabhan, Constantijn Panis & Timothy Tardiff, *Review of Selected Studies and Comments in Response to the Department of Labor's Conflicts of Interest 2015 Proposed Rule and Exemptions*, (March 2016), https://www.dol.gov/sites/dolgov/files/EBSA/researchers/analysis/retirement/review-of-selected-studies-and-comments-in-response-to-the-dol-coi-2015-proposed-rule-and-exemptions.pdf.

[436] Hispanic Leadership Fund and Quantria Strategies, LLC, *Analysis of the Effects of the 2016 Department of Labor Fiduciary Regulation on Retirement Savings and Estimate of the Effects of Reinstatement*, (November 2021).

practices. Furthermore, the paper's findings are not applicable to the current proposal because it assumes reinstatement of the 2016 Rulemaking, which was markedly different than the current proposal. For instance, the 2016 Final Rule required fiduciary advisers to enter into a written contract with a plan or IRA investor, which is not included in this proposal.

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

Additionally, in 2017, Deloitte prepared a report that suggested the 2016 Final Rule had accelerated the trend toward fee-based accounts.[439] Deloitte interviewed and collected data from 21 Securities Industry and Financial Markets Association (SIFMA) member firms regarding their response to the 2016 Final Rule as of June 9, 2017, its initial applicability date.[440] Of the member firms that participated in the study, nearly half reported that they maintained advice for all of their brokerage customers, while 29 percent limited advice and 24 percent eliminated advice. Firms that eliminated or limited their advised brokerage platforms gave retirement investors an option to either transition to a fee-based program, self-directed brokerage account, or in some

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[437] U.S. Chamber of Commerce, *The Data is In: The Fiduciary Rule Will Harm Small Retirement Savers*, (Spring 2017), https://www.uschamber.com/assets/archived/images/ccmc_fiduciaryrule_harms_smallbusiness.pdf.
[438] Investment Company Institute comment letter August 7, 2017. https://www.ici.org/system/files/attachments/17_conduct_sec_clayton_ltr.pdf
[439] Deloitte, *The DOL Fiduciary Rule: A Study in How Financial Institutions Have Responded and the Resulting Impacts on Retirement Investors*, (August 9, 2017).
[440] Deloitte notes in the report that "The findings were made based on the analysis of information and data provided by the study participants to Deloitte. Deloitte has analyzed, aggregated and summarized the information provided, but was not asked to and did not independently verify, validate or audit the information presented by the study participants."

cases, a new platform they were launching (e.g., robo-advice, call-center, self-directed). According to Deloitte, firms reported that many of the investors that moved into self-directed accounts either did not want to move to a fee-based account, had accounts too small to qualify for fee-based advisory accounts at the same firms, wished to retain investments that were not eligible for the same firms' fee-based accounts, or some combination.

In a report for the Financial Services Institute, a trade group representing independent financial firms and advisers, Oxford Economics (2017), predicted that "smaller investors will be offered robo-investing type account services and that these small, often entry level, novice investors would lose access to personalized financial planning."[441] According to a survey conducted by the Insured Retirement Institute, 70 percent of respondents either already had or were considering exiting smaller markets such as small employer-based plans and lower balance IRAs.[442] In another survey, two-thirds of responding advisers said they believed that small investors would have less access to professional financial advice.[443]

The preliminary market reaction to the 2016 Rule, however, differed from those expected by the studies discussed above and are inconsistent with more rigorous academic research. In a survey conducted in September 2017, 82 percent of broker-dealers had not made changes to their handling of smaller, retail retirement accounts, although about 18 percent had raised their minimum account threshold and closed smaller accounts.[444] In examining the effects of the 2016 Final Rule, Egan, Ge, and Tang (2022) found that while variable annuity sales had decreased, there is no evidence that the change affected investors with less wealth more than others. They concluded that variable annuity sales had become more sensitive to expenses and that insurers had increased the relative availability of low-expense products. Even if there is reporting error in the maximum upfront commission rates data, it would tend to understate the effect of brokerage

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[441] Oxford Economics, *How the Fiduciary Rule Increases Costs and Decreases Choice*, (April 15, 2017).
[442] Comment letter submitted by dated on April 17, 2017 (#1413).
[443] Comment letter by Lincoln Financial Network dated March 17, 2017 (#1420).
[444] John Crabb, *The Fiduciary Rule Poll, International Financial Law Review*, International Finance Law Review (October 2017), https://media2.mofo.com/documents/171000-fiduciary-rule-poll.pdf.

commissions on investment transactions. Therefore, the study concluded that investor welfare had improved because of the 2016 Rulemaking, despite the fact that it was vacated.[445]

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

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

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

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[445] Egan, Mark, Shan Ge, & Johnny Tang, *Conflicting Interests and the Effect of Fiduciary Duty—Evidence from Variable Annuities*, 35(12) The Review of Financial Studies 5334-5486. (December 2022).
[446] Cerulli Associates, *U.S. Broker/Dealer Marketplace 2016: Retooling for a New Competitive Landscape*, The Cerulli Report.
[447] Bruce Kelly, *Plenty of Advisers Eager to Scoop Up 'Orphaned' Accounts*, Investment News (August 2017).
[448] Blackrock, *Elite RIA Study*, (2017).

(which generally provides a customized investment mix based on information about the investor's financial circumstances and existing investment assets).[449] Robo-advisers and target-date funds, in particular, are rapidly gaining market share.[450,451]

The Department requests comment on research or data demonstrating how access to advice has changed, particularly for small savers, following the 2016 Final Rule, vacatur of the Final rule, recent regulatory actions taken by the Department and the SEC, and the increased use of technology to provide advice.

The Department expects the proposed rule and exemptions would not significantly impact the overall availability of affordable investment advice but rather improve the quality of this advice as conflicts are removed. This would apply as well to small investors who continue to have access to advice. Furthermore, increasing the quality of advice provided to retirement plan fiduciaries will benefit many workers who are participating in a defined contribution or defined benefit pension plan.

This is supported by the experience in the U.K., which adopted a far more aggressive stance in addressing conflicted advice than the Department proposed in the 2016 Rulemaking or the current proposals. When the U.K. initially banned commissions for investment advice and required more stringent qualifications for advisers under its Retail Distribution Review (RDR) in 2013, the advice rate fell both in the lead up to the regulatory change and in the years immediately following its implementation. However, more recent research has found evidence of improvements in the market since 2017, including a 35 percent increase in the number of U.K. adults that received financial advice, a 5 percent increase in the number of advisers, and a 9-

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[449] Christine Benz & Jeremy Glaser, *The Best Ways for Small Investors to Get Advice*, Morningstar (February 21, 2017), https://www.morningstar.com/articles/794212/the-best-ways-for-smaller-investors-to-get-advice.
[450] Deloitte, *The Expansion of Robo-Advisory in Wealth Management*, (2016).
[451] Sarah Holden, Jack VanDerhei, & Steven Bass, *Target Date Funds: Evidence Points to Growing Popularity and Appropriate Use by 401 (k) Plan Participants*, Employee Benefit Research Institute (2021).

percentage point increase in consumer awareness of automated advice,[452] which suggested a greater focus on digital advice as a potential solution to provide low-cost investment advice with specifically tailored outcomes to individual investors at scale.[453]

The Department has reason to believe that such alternative forms of advice have become more available in the U.S. and, as in the U.K., are beneficial to small investors. In recent years, the investment advice market has seen an increase in financial technology and robo-advice service providers, which cater to small savers. In 2017, Morningstar noted that advances in financial technology could increase personal advisers' productivity and streamline compliance, enabling them to offer higher service levels affordably to small investors even as they adapt business practices to mitigate conflicts of interest.[454] Because the core portfolio management functions are performed by computer algorithm, robo-adviser services generally can be expanded more easily than traditional advisory services. The marginal cost incurred by a robo-adviser to serve additional customers is very small relative to that incurred by traditional advisers. Robo-advisers often serve investors with assets under $500,[455] and some robo-advisers do not require a minimum investment at all.[456] The financial needs of small investors often can be easily met by basic services and given the low balance of many such accounts, there may be little need or justification for a more intensively personalized (and expensive) strategy. The increasing presence of robo-advice has proved to be such an innovation.

Many robo-advice providers claim to offer relatively conflict-free services, claiming no

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[452] The U.K. Financial Conduct Authority, *Evaluation of the Impact of the Retail Distribution Review and the Financial Advice Market Review,* (December 2020), https://www.fca.org.uk/publication/corporate/evaluation-of-the-impact-of-the-rdr-and-famr.pdf.

[453] The U.K. Financial Conduct Authority (FCA) has highlighted that digital advice can be more convenient for consumers and can offer efficiency and cost benefits to providers. *See* FCA, *Feedback Statement on Call for Input: Regulatory Barriers to Innovation in Digital and Mobile Solutions* (March 2016), http://www.fca.org.uk/static/fca/article-type/feedback%20statement/fs16-02.pdf).

[454] Michael Wong, *Financial Services: Weighing the Strategic Tradeoffs of the Fiduciary Rule*, Morningstar (February 2017), https://www.morningstar.com/articles/798573/financial-services-weighing-the-strategic-tradeoffs-of-the-fiduciary-rule.

[455] Wealthfront, *Account Minimums to Invest with Wealthfront*, Wealthfront, https://support.wealthfront.com/hc/en-us/articles/210994423--Account-minimums-to-invest-with-Wealthfront.

[456] One example is Betterment. *See* Betterment, *Pricing at Betterment*, Betterment, https://www.betterment.com/pricing/.

commission, no performance fees, and no compensation from third parties. Others claim to serve investors as fiduciaries. Robo-adviser offerings are typically comprised of ETFs that, in comparison to mutual funds, offer little room for revenue streams and payment shares that would create a conflict of interest for investment advisers (e.g., 12b-1 fees, subtransfer agent fees).[457]

Despite the increasing popularity of robo-advisers, empirical evidence on their performance and returns, especially during market downturns, is limited. In 2015, SEC Commissioner Kara Stein stated, "Do investors using robo-advisors appreciate that, for all their benefits, robo-advisors will not be on the phone providing counsel if there is a market crash?"[458] However, a recent study by Liu et al. (2021) looked specifically at the impact of using robo-advisers on investment performance during the 2020 financial crisis caused by the COVID-19 global pandemic.[459] Using portfolio and transaction data from investors at a Taiwanese mutual fund online investment platform, Liu et al. (2021) found that robo-advice significantly reduced the losses experienced by investors during the crisis and that investors using robo-advice adjusted risk levels and trading to adapt to changes in the market while other investors did not. Younger users and those with less investment experience benefited the most from robo-advice.

7. Reform in the United Kingdom

As regulators in several countries have identified failures in their investment advice markets, they have undertaken a range of regulatory and legislative initiatives that directly address conflicted investment advice. One of the most studied initiatives occurred in the developed pension markets of the United Kingdom, where the Financial Conduct Authority

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[457] Jennifer Klass & Eric Perelman, *Chapter 3: The Transformation of Investment Advice: Digital Investment Advisors as Fiduciarie*s, *The Disruptive Impact of FinTech on Retirement Systems,* Oxford University Press 38 (2019).

[458] Kara M. Stein, Comm'r, SEC, *Surfing the Wave: Technology, Innovation, and Competition—-Remarks at Harvard Law School's Fidelity Guest Lecture Series*, (November 9, 2015), https://www.sec.gov/news/speech/surfing-wave-technology-innovation-and-competition-remarks-harvard-law-schools-fidelity.

[459] Che-Wei Liu, Mochen Yang, & Ming-Hui Wen, *Judge Me on My Losers: Does Adaptive Robo-Advisors Outperform Human Investors During the COVID-19 Financial Market Crash?*, Production and Operations Management Forthcoming, (Accessed Aug. 31, 2023), https://doi.org/10.1111/poms.14029.

(FCA) issued new regulations effective January 1, 2013, called the Retail Distribution Review (RDR). The U.K. focused its new regulatory regime on more transparent fee-for-service compensation structures. The U.K. enacted an aggressive reform that banned commissions on all retail investment products, not just those related to retirement savings;[460] required that customers in the U.K. be charged directly for advice; and raised qualification standards for advisers.

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

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

The experience of the U.K. suggests that while there are transitional costs of overhauling the incentive structure and qualifications of the financial advisers, the changes have resulted in a

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

modest increase in the number of adults accessing financial advice as well as their satisfaction with the advice they are receiving.[461] In general, the U.K, experience, which was more broadly applied, indicates that these reforms will not result in a significant reduction of advice but will instead increase confidence in that advice's value.

8. Cost

To estimate compliance costs associated with the proposal, the Department considers the marginal cost associated with the proposed amendments. The Department estimates that the proposal would impose total costs of $253.2 million in the first year and $216.2 million in each subsequent year. The estimated compliance costs associated with the proposed amendments in the rule and PTEs are summarized in the table below. Over 10 years, the costs associated with the proposal would total approximately $1,553.1 million, annualized to $221.1 million per year (using a 7 percent discount rate).[462]

Table 4: Summary of Marginal Cost and Per-Entity Cost by Exemption		
	Total Cost	
	First Year	*Subsequent Years*
3(21)(A)(ii) of ERISA		
PTE 2020-02	$231,518,275	$197,282,110
PTE 84-24	$18,107,613	$15,302,629
Mass Amendments		
PTE 75-1	$3,005,854	$3,005,854
PTE 77-4	$0	$0
PTE 80-83	$0	$0
PTE 83-1	$0	$0
PTE 86-128	$609,487	$609,487
Total	**$253,241,229**	**$216,200,080**

The estimated costs associated with each exemption are broken down and explained below. More details can be found in the Paperwork Reduction Act sections of each respective

[461] UK Financial Conduct Authority, *Evaluation of the Impact of the Retail Distribution Review and the Financial Advice Market Review*, UK Financial Conduct Authority, (December 2020), https://www.fca.org.uk/publication/corporate/evaluation-of-the-impact-of-the-rdr-and-famr.pdf.

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

exemption, also published in today's *Federal Register*. [463]

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

Preliminary Assumptions and Cost Estimate Inputs

The Department acknowledges that not all entities would decide to use the amended PTE 2020-02 and PTE 84-24 for transactions resulting from fiduciary investment advice. Some may instead rely on other existing exemptions that better align with their business models. However, for this cost estimation, the Department assumes that all eligible entities would use the PTE 2020-02 and PTE 84-24 for such transactions. The Department recognizes that this may result in an overestimate.

The Department does not have information on how many retirement investors – including plan beneficiaries, plan participants, and IRA owners – receive electronic disclosures from investment advice fiduciaries. For the purposes of this analysis, the Department assumes that the percent of retirement investors receiving electronic disclosures would be similar to the percent of plan participants receiving electronic disclosures under the Department's 2020 and 2002 electronic disclosure safe harbors.[464] Accordingly, the Department estimates that 94.2 percent of

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[463] As noted above, the Department is proposing to amend the following exemptions: PTE 2020-02 (*Improving Investment Advice for Workers & Retirees*), PTE 84-24 (*Class Exemption for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters*), PTE 75-1 (*Exemptions From Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers and Banks*), PTE 80-83 (*Class Exemption for Certain Transactions Between Investment Companies and Employee Benefit Plans*), PTE 80-83 (*Class Exemption for Certain Transactions involving Purchase of Securities where Issuer May Use Proceeds to Reduce or Retire Indebtedness to Parties In Interest*), PTE 83-1 (*Class Exemption for Certain Transactions Involving Mortgage Pool Investment Trusts*) and PTE 86-128 (*Class Exemption for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers*).

[464] 67 FR 17263 (Apr. 9, 2002); 85 FR 31884 (May 27, 2020).

the disclosures sent to retirement investors would be sent electronically, and the remaining 5.8 percent would be sent by mail.[465] For disclosure sent by mail, the Department estimates that entities will incur a cost of $0.66[466] for postage and $0.05 per page for material and printing costs.

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

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

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

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

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[465] The Department estimates 94.2 percent of retirement investors receive disclosures electronically. This is the sum of the estimated share of retirement investors receiving electronic disclosures under the 2002 electronic disclosure safe harbor (58.2 percent) and the estimated share of retirement investors receiving electronic disclosures under the 2020 electronic disclosure safe harbor (36 percent).

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

[467] Internal DOL calculation based on 2023 labor cost data. For a description of the Department's methodology for calculating wage rates, see Internal DOL calculation based on 2023 labor cost data. For a description of the Department's methodology for calculating wage rates. *See* Employee Benefits Security Administration, *Labor Cost Inputs Used in the Employee Benefits Security Administration, Office of Policy and Research's Regulatory Impact Analyses and Paperwork Reduction Act Burden Calculations,* Employee Benefits Security Administration, 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.

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

Costs Associated with PTE 2020-02

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

Summary of Affected Entities

The entities that the Department expects to be affected by the proposed amendments to the PTE are also affected by the existing PTE 2020-02. The Department estimates that 19,290 financial institutions, composed of 1,894 broker-dealers, 15,982 registered investment

advisers,[468] 183 insurers, 200 pure robo-advisers, 1,011 pension consultants, and 20 investment company underwriters would be affected by the proposed amendments.[469]

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

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

Costs to Review the Rule

The Department estimates that all of the 19,290 financial institutions discussed above would be affected by the proposed amendments to PTE 2020-02 and would need to review the rule. The Department estimates that such a review would take a legal professional, on average, nine hours to review the rule, resulting in an estimated cost of $27.7 million in the first year.[470]

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[468] The Department estimates that 15,982 registered investment advisers that do not provide pure robo-advice.
[469] For more information on how the number of each type of entity is estimated, refer to the Affected Entities section.
[470] The burden is estimated as: (19,290 entities x 9 hours) = 173,610 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: (38,580 entities x 9 hours) x $159.34 = $27,663,017.

This estimate also assumes all effected financial institutions expend the effort, however, that may not be the case as other arrangements may exist where individual financial firms receive compliance assistants from other sources. The Department asks for comments on this estimate.

Costs Associated with General Disclosures for Investors

Costs Associated with Modifications of Existing Disclosure Requirements

As discussed in the preamble, Section II(b) currently requires financial institutions to provide certain disclosures to retirement investors before engaging in a transaction pursuant to the exemption. These disclosures include:

(1) a written acknowledgment that the financial institution and its investment professionals are fiduciaries;

(2) a written description of the services to be provided and any conflicts of interest of the investment professional and financial institution; and

(3) 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.

As discussed in more detail in the preamble and below, the proposed amendments make minor language edits to the existing disclosures.

The proposed amendment makes minor edits to the written acknowledgment that the financial institution and its investment professionals are fiduciaries. Financial institutions would be required to 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, the Code, or both when making an investment recommendation. This condition would not be met if the fiduciary acknowledgement states that the financial institution and its investment professionals "may" be fiduciaries or would become fiduciaries only "if" or "when" providing fiduciary investment advice as defined under the applicable regulation.

The Department does not have data on how many financial institutions would need to

modify their disclosures in response to this amendment; however, the Department expects that the disclosures required under the existing form of PTE 2020-02 likely satisfy this requirement for most financial institutions covered under the existing exemption. For the purposes of this analysis, the Department assumes that 10 percent of financial entities under the existing exemption would need to update their disclosures and that it would take a legal professional at a financial institution, on average, 10 minutes to update existing disclosures. Robo-advisers, pension consultants, and investment company underwriters, who are not covered under the existing exemption would need to draft the acknowledgement. The Department estimates that it would take a legal professional at these entities, on average, 30 minutes to draft the acknowledgement. Updating and drafting the acknowledgement is estimated to result in a cost of approximately $0.1 million in the first year.[471]

The proposed amendments would also expand on the existing requirement for a written description of the services provided to also require a statement on whether the retirement investor would pay for such services, directly or indirectly, including through third-party payments. The Department assumes it would take a legal professional at a financial institution under the existing exemption 30 minutes to update existing disclosures to include this information. Robo-advisers, pension consultants, and investment company underwrites, who are not covered under the existing exemption, would need to draft a written description of services provided, which the Department estimates would take a legal professional a large institution five hours and a legal professional at a small institution one hour, on average, to prepare such a

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[471] The number of financial entities needing to update their written acknowledgement is estimated as: (1,894 broker-dealers x 10%) + (7,570 SEC-registered investment advisers x 10%) + (8,412 state-registered investment advisers x 10%) + (183 insurers x 10%) = 1,806 financial institutions updating existing disclosures. The number of financial entities needing to draft their written acknowledgement is estimated as: 200 robo-advisers + 1,011 pension consultants + 20 investment company underwriters = 1,231 financial institutions drafting new disclosures. The burden is estimated as: (1,806 financial institutions x (10 minutes ÷ 60 minutes)) + (1,231 financial institutions x (30 minutes ÷ 60 minutes) = 917 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(1,806 financial institutions x (10 minutes ÷ 60 minutes)) + (1,231 financial institutions x (30 minutes ÷ 60 minutes)] x $159.34 = $146,035.

draft.[472] The Department requests comment on how long it would take entities of varying size to prepare such a disclosure. This results in an estimated cost of approximately $1.8 million in the first year.[473]

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

Costs Associated with New Disclosure Requirements

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

(1) a written statement of the best interest standard of care owed; and

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

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

[473] The number of financial entities needing to update their written description of services is estimated as: (1,894 broker-dealers + 7,750 SEC-registered investment advisers + 8,412 state-registered investment advisers + 183 insurers) = 18,059 financial institutions updating existing disclosures. The number of financial entities needing to draft their written description of services is estimated as: (200 robo-advisers + 1,011 pension consultants + 20 investment company underwriters) = 1,231 financial institutions drafting new descriptions. Of these, 960 financial institutions, or 10 robo-advisers, 930 pension consultants, and 20 investment company underwriters, are considered small entities. For more information, refer to the Affected Entities discussion in the Regulatory Flexibility Act section of this document. The burden is estimated as: (18,059 financial institutions x (30 / 60 hours)) + (960 small financial institutions x 1 hour) + [(1,231 financial institutions - 960 small financial institutions) x 5 hours] = 11,345 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: {(18,059 financial institutions x (30 / 60 minutes)) + (960 small financial institutions x 1 hour) + [(1,231 financial institutions -960 small financial institutions) x 5 hours]} x $159.34 = $1,807,712.

Under the Investment Advisers Act and the SEC's Regulation Best Interest, most registered investment advisers and broker-dealers with retail investors already provide disclosures that the Department expects would satisfy these requirements.[474]

The Department expects that the written statement of the Best Interest standard of care owed would not take a significant amount of time to prepare and would be uniform across clients. The Department assumes that a legal professional employed by a broker-dealer or registered investment advisers, on average, would take 30 minutes to modify existing disclosures and that it would take insurers, robo-advisers, pension consultants, and investment company underwriters, on average, one hour to prepare the statement. This results in a cost estimate of approximately $1.7 million in the first year.[475]

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

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

[475] The burden is estimated as: [(1,894 broker-dealers + 15,982 registered investment advisers) x (30 minutes ÷ 60 minutes)] + [(183 insurers + 200 robo-advisers + 1,011 pension consultants, and 20 investment company underwriters) x 1 hour] = 10,352 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: {[(1,894 broker-dealers + 15,982 registered investment advisers) x (30 minutes ÷ 60 minutes)] + [(183 insurers + 200 robo-advisers + 1,011 pension consultants, and 20 investment company underwriters) x 1 hour]} x $159.34 = $1,649,488.

company underwriters, on average, one hour to prepare the statement. This results in a cost estimate of approximately $1.7 million in the first year.[476]

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

Costs Associated with the Provision of Disclosures to Retirement Investors

Financial institutions would incur costs associated with preparing and sending the new disclosure requirements. The Department does not have data on the number of retirement investors that have relationships with financial institutions that would engage in transactions covered under the amended exemption. For the purposes of this analysis, the Department uses the number of participants who roll over defined contribution plan assets to IRAs as a proxy for the number of retirement investors that would receive general disclosures. Accordingly, the Department estimates that approximately 3.2 million retirement investors have relationships with financial institutions and are likely to engage in transactions covered under this PTE.[477]

Of these 3.2 million retirement investors, it is assumed that 5.8 percent, or 184,643 retirement investors would receive paper disclosures.[478] The Department assumes that there would not be a measurable increase in the time burden for a clerical worker to prepare the additional disclosures for individuals already receiving disclosures. The Department estimates that providing the additional disclosures would require two additional pages, resulting in a material cost estimate of $18,464.[479]

Financial institutions would also incur costs associated with preparing and sending

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[476] The burden is estimated as: [(1,894 broker-dealers + 15,982 registered investment advisers) x (30 minutes ÷ 60 minutes)] + [(183 insurers + 200 robo-advisers + 1,011 pension consultants, and 20 investment company underwriters) x 1 hour] = 10,352 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: {[(1,894 broker-dealers + 15,982 registered investment advisers) x (30 minutes ÷ 60 minutes)] + [(159 insurers + 200 robo-advisers + 1,060 pension consultants, and 20 investment company underwriters) x 1 hour]} x $159.34 = $1,649,488.

[477] The Department estimates the number of affected plans and IRAs to be equal to 50 percent of rollovers from retirement plans to IRAs. As discussed in the Affected Entities section, the Department estimates that there are 6,367,005 total rollovers annually.

[478] The number of retirement investors receiving paper disclosures is estimated as: (3,183,503 retirement investors x 5.8%) = 184,643 paper disclosures.

[479] The cost is estimated as: (184,643 paper disclosures x 2 pages) x $0.05 = $18,464.

requested written descriptions of policies and procedures and information regarding costs, fees, and compensation. The Department does not have data on how often investors would request this information. The Department assumes that, on average, each financial institution would receive 10 such requests annually and that most financial institutions already have such information available. The Department requests comments on the assumption that financial institutions readily have this information available and the time necessary to gather such information. The Department estimates it would take a clerical worker five minutes to distribute, regardless of whether it is sent electronically or by mail. This results in an estimated cost of approximately $1.0 million.[480] As discussed at the beginning of the cost section, the Department assumes that 5.8 percent of these disclosures (11,188 disclosures) would be mailed. Financial institutions would incur $0.66 for postage and $0.10 for the paper and printing costs of two pages for each of the disclosures, which the Department estimates to cost approximately $8,503.[481]

Summary Costs Associated with the General Disclosures

The Department estimates that the total cost associated with preparing and providing the general disclosures discussed above would be approximately $6.3 million in the first year and $1.0 million in subsequent years.[482]

Costs Associated with Rollover Documentation and Disclosure for Financial Institutions

Compared to the requirements in the existing exemption, the proposed amendment would clarify the rollover disclosure requirements in Sections II(b)(3) and II(c)(3) of PTE 2020-02.

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[480] The burden is estimated as: (19,290 financial institutions x 10 disclosures) x (5 minutes ÷ 60 minutes) = 16,075 hours. A labor rate of $63.45 is used for a clerical worker. The labor rate is applied in the following calculation: [(19,290 financial institutions x 10 disclosures) x (5 minutes ÷ 60 minutes)] x $63.45 = $1,019,959.

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

[482] The cost in the first year is estimated as: ($146,035 to prepare the written acknowledgment + $1,807,633 to prepare the written description of services provided + $1,649,488 to prepare the written statement of the Best Interest standard of care + $1,649,488 to prepare the written statement informing the investor of their right to obtain a written description of the financial institution's policies and procedures + $18,464 to prepare and send disclosures + $1,019,959 to prepare requested written policies and procedures + $8,053 for material costs associated with requested policies and procedures) = $6,299,569. The cost in subsequent years is attributable to the $18,464 to prepare and send disclosures + $1,019,959 to prepare requested written policies and procedures + $8,503 for material costs associated with requested policies and procedures = $1,046,926. Note that the total value may not equal the sum of the parts due to rounding.

Before engaging in a rollover or making a recommendation to a plan participant as to the post-rollover investment of assets, the investment professional must consider and document their conclusions as to whether a rollover is in the retirement investor's best interest and provide that documentation to the retirement investor. Relevant factors to consider must include but are not limited to:

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

(ii) the comparative fees and expenses;

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

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

As discussed in the Affected Entities section, the Department estimates that 3,119,832 rollovers would be affected by the proposed amendments to PTE 2020-02.[483]

As a best practice, the SEC already encourages firms to record the basis for significant investment decisions, such as rollovers, although doing so is not required under Regulation Best Interest. In addition, some firms may voluntarily document significant investment decisions to demonstrate compliance with applicable law, even if not required. SIFMA commissioned Deloitte to conduct a survey of its member firms to learn how they expected to implement Regulation Best Interest. The survey was conducted by December 31, 2019, prior to Regulation Best Interest's effective date of June 30, 2020. Just over half (52 percent) of the firms surveyed will require their financial advisers to provide best interest rationale documentation for rollover recommendations.[484] The Department estimates that documenting each rollover recommendation will require 30 minutes for a personal financial adviser whose firms currently do not require rollover documentations and five minutes for financial advisers whose firms already require

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[483] For more information on how the number of IRA rollover is estimated, refer to the Affected Entities section. In light of ongoing litigation, the Department is assuming for purposes of this discussion that all Affected Entities will become subject to these requirements, regardless of whether they currently provide fiduciary investment advice.
[484] Deloitte, R*egulation Best Interest: How Wealth Management Firms are Implementing the Rule Package*, Deloitte, (Mar. 6, 2020).

them to do so. This results in an estimated annual cost of approximately $193.8 million.[485] The Department requests comment on how long such documentation would take.

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

Costs Associated with Disclosures for PEPs

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

The Department does not have data on what percent of PEPs would be affected by the exemption. For the purposes of this analysis, the Department assumes that all PEPs would be affected. The Department requests comment on this assumption. The Department assumes that, on average, one financial institution would need to prepare one disclosure for each PEP in the first year. The Department requests comment on this assumption and how frequently PPPs would provide investment advice to a PEP within the framework of the exemption. The Department

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[485] The burden is estimated as: (3,119,833 rollovers x 48% x (30 minutes ÷ 60 minutes)) + (3,119,833 rollovers x 52% x (5 minutes ÷ 60 minutes)) = 883,953 hours. A labor rate of $219.23 is used for a personal financial adviser. The labor rate is applied in the following calculation: (3,119,833 rollovers x 48% x (30 minutes ÷ 60 minutes)) + (3,119,833 rollovers x 52% x (5 minutes ÷ 60 minutes)) x $219.23 = $193,788,961.

[486] For more information on this estimate, refer to the Affected Entities section.

estimates that, on average, it would take a legal professional at each entity two hours to prepare the disclosure, resulting in a cost of approximately $0.1 million in the first year.[487]

In addition to providing the disclosure described above to each PEP, financial institutions must also provide these disclosures to each participating employer. According to filings submitted to the Department by August 22, 2023, there are 955 employers in PEPs.[488] The Department assumes that all of these disclosures will be sent electronically. Distributing the disclosures is estimated to take clerical personnel one minute per disclosure, resulting in an estimated cost of approximately $1,010.[489]

Costs Associated with Annual Report of Retrospective Review for Financial Institutions

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

Robo-advisers, pension consultants, and investment company underwrites, who are not

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

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

[489] The burden is estimated as: (955 employers x (1 minute ÷ 60 minutes)) = 16 hours. A labor rate of $63.45 is used for a clerical worker. The labor rate is applied in the following calculation: (955 employers x (1 minute ÷ 60 minutes)) x $63.45 = $1,010.

covered under the existing exemption, would incur costs associated with conducting the annual review. The Department does not have data on how many would incur costs associated with this requirement; however, the Department expects that many of these entities already develop an audit report. The Department assumes that 10 percent of these entities do not currently produce an audit report, while the remaining 90 percent would need to make modifications to satisfy the requirements. This results in an estimate of 123 entities not currently producing audit reports, of which 96 are small entities and 27 are large entities.[490] The Department requests comment on this assumption.

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

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

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

[491] The burden is estimated as: (96 financial institutions x 5 hours) + (27 financial institutions x 10 hours) = 750 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(96 financial institutions x 5 hours) + ((27 financial institutions x 10 hours)] x $159.34 = $119,505.

[492] The number of total entities affected is estimated as: (200 robo-advisers + 1,011 pension consultants + 20 investment company underwriters) x 90% = 1,108 entities. As discussed in the Regulatory Flexibility Act analysis of this document, 10 robo-advisers, 930 pension consultants, and 20 investment company underwriters are estimated to be small entities. The number of small entities affected is estimated as: (10 robo-advisers + 930 pension consultants + 20 investment company underwriters) x 90% = 864 small entities. The burden is estimated as: (905 financial institutions x 1 hours) + (248 financial institutions x 2 hours) = 1,401 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(864 financial institutions x 1 hour) + (244 financial institutions x 2 hours)] x $159.34 = $215,428.

[493] The burden is estimated as: (960 financial institutions x 2 hours) + ((1,231- 960 financial institutions) x 4 hours) = 3,004 hours. A labor rate of $190.63 is used for a top executive. The labor rate is applied in the following calculation: [(960 financial institutions x 2 hours) + ((1,231- 960 financial institutions) x 4 hours)] x $190.63 = $572,653.

The results in a total cost annual cost of $0.9 million.[494]

Costs Associated with Written Policies and Procedures for Financial Institutions

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

The proposed amendments would also require financial institutions to provide their complete policies and procedures to the Department upon request. Based on the number of past cases as well as current open cases that would merit such a request, the Department estimates that the Department would request 165 policies and procedures in the first year and 50 policies and procedures in subsequent years. The Department assumes that a clerical worker would prepare and send their complete policies and procedures to the Department and that it would take them 15 minutes. The Department requests comment on these assumptions. The Department estimates that the requirement would result an estimated cost of approximately $2,600 in the first year[496] and $790 in subsequent years.[497] The Department assumes financial institutions would send the documents electronically and thus would not incur costs for postage or materials.

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[494] This is estimated as: ($119,505 + $215,428 + $572,653) = $907,586.

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

[496] The burden is estimated as: (165 x (15 minutes ÷ 60 minutes)) = 41 hours. A labor rate of $63.45 is used for a clerical worker. The labor rate is applied in the following calculation: (165 x (15 minutes ÷ 60 minutes)) x $63.45 = $2,617.

[497] The burden is estimated as: (50 x (15 minutes ÷ 60 minutes)) = 12.5 hours. A labor rate of $63.45 is used for a clerical worker. The labor rate is applied in the following calculation: (50 x (15 minutes ÷ 60 minutes)) x $63.45 = $793.

This results in a total cost of $2.6 million in the first year and $1.5 million in subsequent years.[498]

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

The Department estimates that in order to meet the additional conditions of the amended PTE 2020-02, affected entities would incur a total cost of $231.6 million and a per-firm cost of $12,002 in the first year and a total cost of $197.3 million and a per-firm cost of $10,227 in subsequent years.[499]

Costs Associated with PTE 84-24

Currently, PTE 84-24 provides an exemption for insurance agents, insurance brokers, and pension consultants to receive a sales commission from an insurance company for the purchase of an insurance or annuity contract with plan or IRA assets. Relief is also provided for a principal underwriter for an investment company registered under the Investment Company Act of 1940 to receive a sales commission for the purchase of securities issued by the investment company with plan or IRA assets.

The Department is proposing an amendment to PTE 84-24 that would exclude many investment advice fiduciaries from the existing relief. Except for independent producers, fiduciary advisers would be expected to rely on the relief provided by PTE 2020-02, rather than PTE 84-24. The proposed amendment would provide exemptive relief to fiduciaries who are independent producers that recommend annuities from an unaffiliated financial institution to retirement investors. Relief for independent producers depends on protective conditions that substantially mirror those contained in PTE 2020-02. The conditions are tailored to protect retirement investors from the specific conflicts that arise for independent producers who are

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[498] The cost in the first year is estimated as: ($2,635,404 + $2,617) = $2,638,021. The cost in subsequent years is estimated as: ($1,536,834 + $793) = $1,537,627.

[499] The first-year total cost includes: ($27,663,017 for rule review + $6,422,616 for general disclosures + $193,788,961 for rollover disclosures + 907,585 for the retrospective review + $2,736,095 for policies and procedures) = $231,518,275. The total cost in subsequent years includes: ($1,047,936 for general disclosures + $193,788,961 for rollover disclosures + 907,585 for the retrospective review + $1,537,627 for policies and procedures) = $197,282,110. Note, the total values may not equal the sum of the parts due to rounding.

compensated through commissions when providing investment advice to retirement investors regarding the purchase of an annuity.

The Department recognizes that entities within the insurance industry are subject to different regulatory regimes, depending on the types of products they offer. The Department does not have data what proportion of entities are subject to the requirements in the NAIC Model regulation, SEC, or state insurance departments. The analysis below considers the full cost of compliance. This likely is an overestimate, as many of these entities are already meeting some, if not most, of the requirements of this proposal. The Department requests comment on this assumption.

Summary of Affected Entities

The Department expects that 5,246 financial entities would be affected by the proposed amendments, consisting of 1,011 pension consultants, 10 investment company principal underwriters that service plans, 10 investment company principal underwriters that service IRAs, 4,000 independent producers, and 215 insurance companies would be affected by the proposed amendments to PTE 84-24.[500] Additionally, the Department estimates that 1,722 plans would be affected by the proposed amendments.[501]

Costs to Rule Review

The Department estimates that the financial entities—including pension consultants, investment company principal underwriters, and insurance companies— currently relying on the exemption and independent producers affected by the proposed amendments would need to review the rule. The Department estimates that such a review will take a legal professional, on

[500] For more information on how the number of each entity type is calculated, refer to the Affected Entities section.
[501] For more information on how the number of each type of entity is estimated, refer to the Affected Entities section.

average, two hours to review the rule, resulting in an estimated cost of approximately $1.7 million.[502]

Costs Associated with Disclosures for Investors

The proposed amendment would require independent producers to provide disclosures to retirement investors before engaging in a transaction covered by this exemption. Under the proposed amendments, independent producers seeking relief would be required to provide:

- a written fiduciary acknowledgement,
- a written statement of the Best Interest standard of care owed,
- a written description of the service provided by the independent producer and the products they are licensed to sell,
- a written statement of the independent producer's material conflicts of interest and the amount of insurance commission paid in connection with the purchase by a retirement investor of the recommended annuity, and
- a written explanation of whether a rollover is in the retirement investor's best interest before engaging in a rollover or making a recommendation to a plan participant.

Costs Associated with Preparing General Disclosure Documents

For more generalized disclosures, the Department assumes that insurance companies would prepare and provide disclosures to independent producers selling their products. However, some of the disclosures are tailored specifically to the independent producer. For these, the Department assumes that the disclosure would need to be prepared by the independent producer themselves. The Department recognizes that some may rely on intermediaries in the distribution channel to prepare more specific disclosures and that the costs associated with the preparation

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[502] The burden is estimated as: (5,246 entities x 2 hours) = 10,492 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: (5,246 entities x 2 hours) x $159.34 = $1,671,795.

would be covered by a commission retained by the intermediary for its services. The costs for the intermediary to prepare the disclosure may result in an increase in commission. The Department expects that this increase in commission would not exceed the cost of preparing the disclosure in house.

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

Due to the nature of independent producers, the Department assumes that most financial institutions would make draft disclosures available to independent producers, pertaining to their fiduciary status. However, the Department expects that a small percentage of independent producers may draft their own disclosures. The Department assumes that an in-house attorney for all 215 insurance companies and 5 percent of independent producers, or 200 independent producers, would spend 10 minutes of legal staff time to produce a written acknowledgement in the first year. This results in an estimated cost of approximately $11,000 in the first year.[503]

Regarding the required written statement of the Best Interest standard of care owed by the independent producer, the Department similarly assumes that most financial institutions would make draft disclosures available to independent producers. The Department assumes that an in-house attorney for all 215 insurance companies and 5 percent of independent producers, or 200

[503] The burden is estimated as: (215 insurance companies + 200 independent producers) x (10 minutes ÷ 60 minutes) = 69 hours. A labor rate of approximately $159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(215 insurance companies + 200 independent producers) x (10 minutes ÷ 60 minutes)] x $159.34 = $11,021.

independent producers, would spend 30 minutes of legal staff time to prepare the statement in the first year. This results in an estimated cost of approximately $33,100 in the first year.[504]

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

Accordingly, the Department assumes that all 4,000 independent producers in this analysis would need to prepare the disclosure. The Department assumes that for each of these independent producers, an attorney would spend 30 minutes of legal staff time drafting the written description. This results in an estimated cost of approximately $0.3 million in the first year.[505]

Similarly, the Department expects that the statement of the independent producer's material conflicts of interest and the amount of insurance commission paid in connection with the purchase by a retirement investor of the recommended annuity would need to be prepared by the individual producer. As with the written statement on the description of services, the Department recognizes that many independent producers may not have the internal resources to prepare such disclosures, however they may already have similar statements to satisfy other legal

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[504] The burden is estimated as: (215 insurance companies + 200 independent producers) x (30 minutes ÷ 60 minutes) = 208 hours. A labor rate of approximately $159.43 is used for a legal professional. The labor rate is applied in the following calculation: [(215 insurance companies + 200 independent producers) x (30 minutes ÷ 60 minutes)] x $159.34 = $33,063.

[505] The burden is estimated as: (4,000 independent producers x (30 minutes ÷ 60 minutes)) = 2,000 hours. A labor rate of approximately $159.34 is used for a legal professional. The labor rate is applied in the following calculation: (4,000 independent producers x (30 minutes ÷ 60 minutes)) x $159.34 = $318,680.

requirements. The Department expects that some may rely on intermediaries in the distribution channel to prepare the disclosures and some may seek external legal support. However, the Department expects that the costs associated with the preparation would be covered by commissions retained by the intermediary for its services or by the fee paid to external legal support. As such, the Department still attributes this cost to the independent producer. The Department requests comment on this assumption.

Accordingly, the Department assumes that all 4,000 independent producers in this analysis would need to prepare the disclosure. The Department assumes that, for each of these entities, an attorney would spend one hour of legal staff time drafting the written description. This results in an estimated cost of approximately $0.6 million the first year. [506]

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

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

The Department estimates that 52,449 retirement investors would receive documentation on whether the recommended annuity is in their best interest each year.[507] The Department

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[506] The burden is estimated as: (4,000 independent producers x 1 hour) = 4,000 hours. A labor rate of approximately $159.34 is used for a legal professional. The labor rate is applied in the following calculation: (4,000 independent producers x 1 hour) x $159.34 = $637,360.

[507] For information on this estimate, refer to the estimate of IRAs affected by the proposed amendments to PTE 84-24 in the Affected Entities section.

assumes that, for each of these retirement investors, an independent producer would spend one hour of a financial manager's time drafting the documentation. This results in an estimated cost of approximately $8.3 million annually.[508]

Costs Associated with the Provision of Disclosures to Retirement Investors

The Department does not have data on the number of retirement investors that have relationships with independent producers that would engage in transactions covered under the exemption. For the purposes of this analysis, the Department uses its estimate for the number of new IRA accounts held by insurance companies as a proxy for the number of retirement investors that have relationships with independent producers that would engage in transactions covered under the exemption. As such, the Department estimates that 52,449 retirement investors would receive documentation on whether the recommended annuity is in their best interest each year.[509]

As discussed at the beginning of the cost section, the Department assumes that 5.8 percent of disclosures sent to retirement investors would be mailed. Accordingly, of the estimated 52,449 affected retirement investors, 3,042 retirement investors are estimated to receive paper disclosures.[510] For paper copies, a clerical staff member is assumed to require five minutes to prepare and mail the required information to the retirement investor. This requirement results in an estimated labor cost of approximately $16,100.[511] The Department assumes that this information would include seven pages, resulting annual cost burden for material and paper costs of approximately $3,100.[512]

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[508] The burden is estimated as: (52,449 rollovers x 1 hour) = 52,449 hours. A labor rate of approximately $158.94 is used for an independent producer. The labor rate is applied in the following calculation: (52,449 rollovers x 1 hour) x $158.94 = $8,336,244.

[509] For information on this estimate, refer to the estimate of IRAs affected by the proposed amendments to PTE 84-24 in the Affected Entities section.

[510] This is estimated as: (52,449 retirement investors x 5.8%) = 3,042 paper disclosures.

[511] This is estimated as: (3,042 paper disclosures x (5 minutes ÷ 60 minutes)) = 253.5 hours. A labor rate of $63.45 is used for a clerical worker. The labor rate is applied in the following calculation: (3,042 paper disclosures x (5 minutes ÷ 60 minutes)) x $63.45 = $16,085.

[512] This is estimated as: 3,042 rollovers resulting in a paper disclosure x [$0.66 postage + ($0.05 per page x 7 pages)] = $3,072.

Additionally, independent producers would be required to send the documentation to the insurance company. The Department expects that such documentation would be sent electronically and result in a de minimis burden. The Department requests comment on this assumption.

Summary Costs Associated with Disclosures

The estimates described above result in a total cost estimate of $9.4 million in the first year and $8.4 million in subsequent years.[513]

Costs Associated with Policies and Procedures

The proposed amendment would require insurance companies to establish, maintain, and enforce written policies and procedures to review each recommendation from an independent producer before an annuity is issued to a retirement investor. The insurance company's policies and procedures must mitigate conflicts of interest to the extent that a reasonable person reviewing the policies and procedures and incentive practices as a whole would conclude that they do not create an incentive for the independent producer to place its interests, or those of the insurance, or any affiliate or related entity, ahead of the interests of the retirement investor. Insurance companies' policies and procedures include a prudent process for determining whether to authorize an independent producer to sell the insurance company's annuity contracts to retirement investors, and for taking action to protect retirement investors from independent producers who have failed or are likely to fail to adhere to the impartial conduct standards, or who lack the necessary education, training, or skill. Finally, insurance companies must provide their complete policies and procedures to the Department within 10 days upon request.

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[513] The cost in the first year is estimated as: ($11,021 for the disclosure confirming fiduciary status + $33,063 for the written statement of the Best Interest standard of care + $318,680 for the written description of services provided + $637,360 for the statement on material conflicts of interest and commissions paid + $8,336,244 for the rollover disclosure + $16,085 to prepare and send disclosures + $3,072 for material and postage costs) = $9,355,525. The cost in subsequent years is estimated as: ($8,336,244 for the rollover disclosure + $16,085 to prepare and send disclosures + $3,072 for material and postage costs) = $8,355,401. Note, the total values may not equal the sum of the parts due to rounding.

These requirements are consistent with, though more protective than, the requirements in NAIC Model Regulation 275. Model Regulation 275 has been updated and revised several times; however, both the 2010 Model Regulation 275[514] and the 2020 revisions to Model Regulation 275[515] include a requirement to "establish and maintain procedures for the review of each recommendation prior to issuance of an annuity."[516] While the 2010 version required such procedures "are designed to ensure that there is a reasonable basis to determine that a recommendation is suitable,"[517] the 2020 version requires such procedures are "are designed to ensure there is a reasonable basis to determine that the recommended annuity would effectively address the particular consumer's financial situation, insurance needs and financial objectives."[518] The 2020 revisions impose a higher best interest standard, compared to the suitability standard in 2010 standard.

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

While many insurance companies may have policies and procedures in place that would largely satisfy the requirements of the proposed amendments, the Department expects that many

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[514] NAIC, *Model Suitability Regulations*, § 6(F)(1)(d) NAIC (2010), https://naic.soutronglobal.net/Portal/Public/en-GB/RecordView/Index/25201.
[515] NAIC, *Model Suitability Regulations*, § 6(F)(1)(d) NAIC (2010), https://naic.soutronglobal.net/Portal/Public/en-GB/RecordView/Index/25201.
[516] This language was included in both the 2010 and 2020 versions of Model Regulation 275. See NAIC, *Model Suitability Regulations*, § 6(F)(1)(d) NAIC (2010), https://naic.soutronglobal.net/Portal/Public/en-GB/RecordView/Index/25201. ; NAIC, *Model Suitability Regulations*, § 6(F)(1)(d) NAIC (2020).
[517] NAIC, *Model Suitability Regulations*, § 6(F)(1)(d) NAIC (2010), https://naic.soutronglobal.net/Portal/Public/en-GB/RecordView/Index/25201.
[518] NAIC, *Model Suitability Regulations*, § 6(F)(1)(d) NAIC (2020), https://content.naic.org/sites/default/files/inline-files/MDL-275.pdf.
[519] Based on internal Department analysis, the modified Model Regulation #275, including a best interest standard, was adopted by Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.
[520] NAIC. *Suitability in Annuity Transactions Model Regulation* (#275) Best Interest Standard of Conduct Revisions Frequently Asked Question, (May 2021).

would need to change and improve policies and procedures to be fully compliant. The Department requests comment on how extensive and costly changes to existing policies and procedures would need to be, both in terms of establishing and updating policies and procedures and in terms of the annual review in subsequent years.

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

In the following years, the Department assumes for each insurance company, an in-house attorney would spend two hours of legal staff time reviewing. This results in an estimated cost of approximately $68,500 in subsequent years.[522]

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

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[521] This is estimated as: (177 small insurance companies x 5 hours) + (38 large insurance companies x 10 hours) = 1,265 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(177 small insurance companies x 5 hours) + (38 large insurance companies x 10 hours)] x $159.34 = $201,565.

[522] This is estimated as: (215 insurance companies x 2 hours) = 430 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: (215 insurance companies x 2 hours) x $159.34 = $68,516.

already reviewed or how many additional recommendations would need to be reviewed based on this proposal. The Department requests data and comment to inform its estimate.

The proposed amendments would also require insurance companies to provide their complete policies and procedures to the Department upon request. As discussed above for PTE 2020-02, the Department estimates that it would request 165 policies and procedures in the first year and 50 in subsequent years. Assuming that the number of requests for the entities covered under PTE 2020-02 is equivalent to the number of requests for the entities covered under PTE 84-24, the Department assumes that it will request two policies and procedures from insurers in the first year and one request in subsequent years, on average.[523] This results in an estimated cost of approximately $30 in the first year[524] and $15 in subsequent years.[525]

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

The Department estimates that satisfying the requirements described above would result in an estimated total cost of approximately $0.2 million in first year and $68,500 in subsequent years.[526]

Costs Associated with Retrospective Review

The proposed amendment would require insurance companies to conduct a retrospective review at least annually. The review would be required to be reasonably designed to prevent

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[523] The number of requests in the first year is estimated as 215 insurance companies x (165 requests in PTE 2020-02 / 19,290 financial institutions in PTE 2020-02) = 2 requests. The number of requests in subsequent years is estimated as: 215 insurance companies x (50 requests in PTE 2020-02 / 19,290 financial institutions in PTE 2020-02) = 1 request.

[524] The burden is estimated as: (2 x (15 minutes ÷ 60 minutes)) = 0.5 hours. A labor rate of $63.45 is used for a clerical worker. The labor rate is applied in the following calculation: (2 x (15 minutes ÷ 60 minutes)) x $63.45 = $32.

[525] The burden is estimated as: (1 x (15 minutes ÷ 60 minutes)) = 0.25 hours. A labor rate of $63.45 is used for a clerical worker. The labor rate is applied in the following calculation: (1 x (15 minutes ÷ 60 minutes)) x $63.45 = $16.

[526] The cost in the first year is estimated as: ($201,565 to develop policies and procedures + $32 to provide policies and procedures upon request) = $201,597. The cost in subsequent years is estimated as: ($68,516 to review policies and procedures + $16 to provide policies and procedures upon request) = $68,532. Note, the total values may not equal the sum of the parts due to rounding.

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

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

Insurers would also be required to provide the independent producer with the underlying methodology and results of the retrospective review. The Department assumes that the insurance company would provide the methodology and results electronically.

The Department lacks data on the average number of independent producers selling annuities per insurance company. For the purposes of this analysis, the Department assumes that, on average, each independent producer sells the products of three insurance companies. From each of these insurance companies, they may sell multiple products. As such, the Department assumes that each year, insurance companies would need to prepare a total 12,000 retrospective reviews,[527] or on average, each insurance company would need to prepare approximately 56 retrospective reviews.[528] The Department requests comment on this estimate.

The Department assumes that, for each independent producer selling an insurance company's products, an in-house attorney at the insurance company would spend one hour of legal staff time, on average, conducting and drafting the retrospective review. This results in an estimated cost of approximately $1.9 million.[529]

The Department assumes it would take a Senior Executive Officer 15 minutes to review and certify the report. This results in an estimated annual cost of approximately $0.4 million.[530]

The Department assumes that the insurance company would provide the methodology and results electronically. The Department requests comment on this assumption. The Department estimates that it would take clerical staff five minutes each to prepare and send each of the estimated 12,000 retrospective reviews. This results in an estimated annual cost of approximately $63,500.[531] The Department expects that the results would be provided

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[527] This is estimated as: (4,000 independent producers x 3 insurance companies covered) = 12,000 retrospective reviews.
[528] This is estimated as: (12,000 retrospective reviews / 215 insurance companies) = 55.8 retrospective reviews, on average.
[529] This is estimated as: (12,000 retrospective reviews x 1 hour) = 12,000 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: (12,000 retrospective reviews x 1 hour) x $159.34 = $1,912,080.
[530] This is estimated as: (12,000 retrospective reviews x (15 minutes ÷ 60 minutes)) = 3,000 hours. A labor rate of $128.11 is used for a senior executive officer. The labor rate is applied in the following calculation: (12,000 retrospective reviews x (15 minutes ÷ 60 minutes)) x $128.11 = $384,330.
[531] This is estimated as: (12,000 retrospective reviews x (5 minutes ÷ 60 minutes)) = 1,000 hours. A labor rate of $63.45 is used for a clerical worker. The labor rate is applied in the following calculation: (12,000 retrospective reviews x (5 minutes ÷ 60 minutes)) x $63.45 = $63,450.

electronically, thus the Department does not expect there to be any material costs with providing independent producers with the retrospective review.

The Department estimates that satisfying the requirements for retrospective reviews would result in an estimated total annual cost of approximately $2.4 million.[532]

Costs Associated with Recordkeeping

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

For this analysis, the Department only considers the cost for insurance companies and independent producers complying with the proposed recordkeeping requirements. The Department estimates that the additional time needed to maintain records to be consistent with the exemption would require an independent producer two hours, resulting in an estimated cost of $1.3 million.[533]

The proposed amendment would require fiduciaries engaging in all transactions covered

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[532] The annual cost is estimated as: ($1,912,080 to conduct the retrospective review + $384,330 for the review of the retrospective review + $63,450 for the provision of the report to Independent Producers) = $2,359,860.

[533] This is estimated as: (4,000 independent producers + 215 insurance companies) x 2 hours = 8,430 hours. A labor rate of $158.94 is used for an independent producer and $159.34 for a legal professional at an insurance company. The labor rate is applied in the following calculation: (4,000 independent producers x 2 hours x $159.34) + (215 insurance companies x 2 hours x $158.34) = $1,340,036.

by the exemption to maintain records necessary for the following entities to determine whether the conditions of this exemption have been met.

(1) any authorized employee of the Department or the IRS or another state or federal regulator,

(2) any fiduciary of a plan that engaged in a transaction pursuant to this exemption,

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

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

The Department does not have data on how often independent producers would receive requests for records. For the purposes of this analysis, the Department assumes that, on average, independent producer would receive 10 requests per year and that preparing and sending each request would take a legal professional, on average, 30 minutes. Based on these assumptions, the Department estimates that the proposed amendments would result in an annual cost of approximately $3.2 million.[534] The Department requests comment on how often financial institutions would receive requests for records, who would prepare such reports, and how long the preparation of such records would take.

This results in a total annual cost of $4.5 million associated with recordkeeping.[535]

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

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

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

The Department estimates that in order to meet the additional conditions of the amended PTE 84-24, affected entities would incur a total cost of $18.1 million in the first year and $15.3 million in subsequent years.[536]

Costs Associated with the Mass Amendments

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

Costs Associated with PTE 75-1

Summary of Affected Entities

The amendment to PTE 75-1 would affect banks, reporting dealers, and broker-dealers registered under the Security Exchange Act of 1934. As discussed in the Affected Entities section above, the Department estimates that 1,894 broker-dealers and 2,048 banks would use PTE 75-1.[537]

Costs Associated with Disclosure Requirements in Part V

The Department proposes to amend PTE 75-1 Part V to allow an investment advice fiduciary to receive reasonable compensation for extending credit to a plan or IRA to avoid a failed purchase or sale of securities involving the plan or IRA if (1) the potential failure of the purchase or sale of the securities is not caused by such fiduciary or an affiliate, and (2) the terms of the extension of credit are at least as favorable to the plan or IRA as the terms available in an arm's length transaction between unaffiliated parties. Prior to the extension of credit, the plan or

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[536] The first-year total cost includes: ($1,671,795 for rule review + $9,355,525 for general disclosures + $201,597 for policies and procedures + $2,359,860 for the retrospective review + $4,518,836 for recordkeeping) = $18,107,613. The total cost in subsequent years includes: ($8,355,401 for disclosures + $68,532 for policies and procedures + $2,359,860 for the retrospective review + $4,518,836 for recordkeeping) = 15,302,629. Note, the total values may not equal the sum of the parts due to rounding.

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

IRA receives written disclosure, including the interest rate or other fees that will be charged on the credit extension as well as the method of determining the balance upon which interest will be charged. The Department believes that it is a usual and customary business practice to maintain records required to demonstrate compliance with SEC-mandated disclosure distribution regulations. The Department believes that this new requirement is consistent with the disclosure requirement mandated by the SEC in 17 CFR 240.10b-16(1) for margin transactions.[538] Therefore, the Department concludes that this requirement produces no additional burden to the public.

Costs Associated with Recordkeeping in Parts II and V

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

The Department has estimated that the amount of time needed for financial professional to maintain records for the financial institutions to be consistent with the exemption and to make the record available for inspection would require four hours, on average, resulting in an estimated cost of $3.0 million.[539]

Costs Associated with Removing Fiduciary Investment Advice from Parts III and IV

Finally, the Department is proposing to amend PTE 75-1 Parts III and IV, which currently provide relief for investment advice fiduciaries, by removing fiduciary investment advice from the covered transactions. Investment advice providers would instead have to rely on

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[538] Employee Benefits Security Administration, *Regulating Advice Markets Definition of the Term "Fiduciary" Conflicts of Interest - Retirement Investment Advice Regulatory Impact Analysis for Final Rule and Exemptions*, pp. 258, (April 2016), https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/rules-and-regulations/completed-rulemaking/1210-AB32-2/ria.pdf.

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

the amended PTE 2020-02 for exemptive relief covering investment advice transactions. The Department believes that since investment advice providers were already required to provide records and documentation under PTE 2020-02, this amendment would not result in additional costs.

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

The Department estimates that in order to meet the additional conditions of the amended PTE 75-1, affected entities would annually incur a total cost of $3.0 million.[540]

Costs Associated with PTE 77-4, PTE 80-83, PTE 83-1

Summary of Affected Entities

The amendment to PTE 77-4 would affect mutual fund companies. As discussed in the Affected Entities section, the Department estimates that 825 mutual fund companies would be affected by the amended PTE 77-4. [541]

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

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

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

The Department is proposing to amend PTE 77-4, PTE 80-83, and PTE 83-1 which currently include relief for investment advice fiduciaries, by removing fiduciary investment

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[540] This cost is the estimated $3,005,854 cost to maintain recordkeeping.
[541] For more information on how the number of each type of entity is estimated, refer to the Affected Entities section.
[542] For more information on how the number of each type of entity is estimated, refer to the Affected Entities section.

advice from the covered transactions. Investment advice providers would instead have to rely on the amended PTE 2020-02 for exemptive relief covering investment advice transactions. The Department believes that since investment advice providers were already required to provide documentation under PTE 2020-02, these amendments would not result in additional costs.

Costs Associated with PTE 86-128

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

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

Summary of Affected Entities

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

With the removal of exemptive relief for investment advice, the Department requests comment on what types of financial institutions would continue to rely on PTE 86-128, as well

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

as how many entities would do so. Additionally, the Department requests comment on how many plans or managed IRAs would receive services from these entities.

Costs Associated with Recordkeeping

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

Costs Associated with Written Authorization from the Authorizing Fiduciary to the Investment Advice Provider

Authorizing fiduciaries of IRAs entering into a relationship with an investment advice provider are required to provide the investment advice provider with advance written authorization to perform transactions for the IRA. The Department estimates that there are approximately 210 IRAs that are new or that enter new arrangements each year.[546] Therefore, the Department estimates that approximately 210 authorizing fiduciaries are expected to send an advance written authorization. It is assumed that a legal professional will spend 15 minutes per

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[544] The burden is estimated as: (1,894 investment advice providers x (30 minutes ÷ 60 minutes)) = 947 hours. A labor rate of $190.63 is used for a financial manager. The labor rate is applied in the following calculation: (1,894 investment advice providers x (30 minutes ÷ 60 minutes)) x $190.63 per hour = $180,527.

[545] The burden is estimated as: (1,894 investment advice providers x (15 minutes ÷ 60 minutes)) = 474 hours. A labor rate of $63.45 is used for a clerical worker. The labor rate is applied in the following calculation: (1,894 investment advice providers x (15 minutes ÷ 60 minutes)) x $63.45 per hour = $30,044.

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

IRA reviewing the disclosures and preparing an authorization form, resulting in an estimated cost of approximately $8,400.[547]

As discussed at the beginning of the cost section, the Department assumes that 5.8 percent of these authorizations will be mailed. For paper and electronic authorizations, the Department assumes that clerical staff will spend five minutes per participant to prepare and send the authorization, resulting in an estimated labor cost of approximately $1,100.[548] It is assumed that the authorization will be two pages and paper authorizations will cost $0.76 each, which results in a cost burden of approximately $9.[549]

This results in a total cost for the written authorization of approximately $9,500.[550]

Cost Associated with the Provision of Materials for the Evaluation of Authorization of Transaction

Prior to a written authorization, the investment advice provider must provide the authorizing fiduciary with a copy of the exemption, a form for termination of authorization, a description of broker's placement practices, and any other reasonably available information. The Department assumes that this information is readily available. As discussed at the beginning of the cost section, the Department assumes that 5.8 percent of these authorizations will be mailed, while the remaining 94.2 percent will be delivered electronically. A clerical staff member is assumed to require five minutes per participant to electronically send and mail the required information to the authorizing fiduciary. This information will be sent to the authorizing fiduciaries of 210 IRAs entering into an agreement with an investment advice provider. Based on

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[547] The burden is estimated as: (210 IRAs x (15 minutes ÷ 60 minutes) per IRA) = 52.5 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: (210 IRA x (15 minutes ÷ 60 minutes)) per IRA) x $159.34 per hour = $8,365.

[548] The burden is estimated as: (210 IRA x (5 minutes ÷ 60 minutes) per IRA) = 17.5 hours. A labor rate of $63.45 is used for a clerical worker. The labor rate is applied in the following calculation: (210 IRA x (5 minutes ÷ 60 minutes) per IRA) x $63.45 = $1,110.

[549] The burden is estimated as: (2 pages x $0.05 per page) + $0.66 for postage = $0.76; The mailing rate is applied in the following calculation: (210 authorizations for IRAs x 5.8%) x $0.76 = $9.

[550] This is estimated as: ($8,365 to prepare the written authorization + $1,110 to send the written authorization + $9 for material costs) = $9,485.

the above, the Department estimates that this requirement results in estimated cost of approximately $1,100.[551] It is assumed that this information will be seven pages and paper distribution will cost $1.01 each, which results in an estimated cost of approximately $12.[552]

This results in a total cost of approximately $1,100.[553]

Costs Associated with the Provision of an Annual Termination Form

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

As discussed in the Affected Entities section, the Department estimates that 10,000 IRAs will engage in transactions covered under this class exemption and would receive the form.[555] As discussed at the beginning of the cost section, the Department assumes that 5.8 percent of IRAs will receive paper copies of the termination forms. The Department estimates that clerical staff will spend five minutes per IRA preparing and distributing the paper and electronic termination forms, resulting in an estimated cost of approximately $52,900.[556] It is assumed that the form will be two pages, so paper copies will cost $0.76 each for materials and postage, which results in a cost burden of approximately $441.[557]

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[551] The burden is estimated as: (210 IRAs x (5 minutes ÷ 60 minutes) per IRA) = 17.5 hours. A labor rate of $63.45 is used for a clerical worker. The labor rate is applied in the following calculation: (210 IRAs x (5 minutes ÷ 60 minutes) per IRA) x $63.45 = $1,110.

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

[553] This is estimated as: ($1,110 to prepare the information + $12 for materials and postage) = $1,123.

[554] The burden is estimated as: (1,894 investment advice providers x 1 hour per broker-dealer) = 1,894 hours; A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: (1,894 investment advice providers x 1 hour per broker-dealer) x $159.34 per hour = $301,790.

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

[556] The burden is estimated as: (10,000 IRAs x (5 minutes ÷ 60 minutes) per IRA) = 833 hours. A labor rate of $63.45 is used for a clerical worker. The labor rate is applied in the following calculation: (10,000 IRAs x (5 minutes ÷ 60 minutes) per IRA) x $63.45 per hour = $52,875.

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

This results in a total cost of 0.4 million.[558]

Cost Associated with Transaction Reporting

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

Costs Associated with the Annual Statement

Investment advice providers are required to send to each authorizing fiduciary an annual report that contains the same information as the quarterly report, including all security transaction-related charges, the brokerage placement practices, and a portfolio turnover ratio. As such, the Department does not expect that financial institutions would incur an additional burden to produce the annual statement, aside from what is already incurred to produce the quarterly report. Additionally, the Department assumes that this information could be sent with the annual termination form. Therefore, the clerical staff hours required to prepare and distribute the report, as well as postage costs, have been included with the provision of annual termination form requirement, and no additional burden has been reported. It is assumed that the annual statement will be five pages, and the paper and print costs are $0.25 each. Therefore, the overall cost burden for the paper and print costs are approximately $145.[559]

Costs Associated with the Report of Commissions Paid

A discretionary trustee must provide an authorizing fiduciary with an annual report that separately shows the commissions paid to affiliated brokers and non-affiliated brokers on both a total dollar basis and a cents-per-share basis. The clerical hour burden to prepare and distribute

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[558] This cost is estimated as: ($301,790 to prepare the termination form + $52,875 to distribute the termination form + $441 for material and postage costs) = $355,106.

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

the report is included with the provision of annual termination form requirement, because both items are required to be sent annually. However, the collecting and generating information for the report of commissions paid is reported as a cost burden.

An investment advice provider that is a discretionary trustee must provide each of the 10,000 authorizing fiduciaries with this annual commissions report.[560] As discussed at the beginning of the cost section, the Department assumes that 5.8 percent of investment advice providers will mail the annual reports. As the report is sent annually, it is assumed that it could be sent with the transaction report, therefore postage costs are not counted here. It is assumed that the report will be two pages, and the paper and print costs are $0.10 each. Therefore, the overall cost burden of the paper and print costs is approximately $58.[561]

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

This results in a total cost of approximately $33,100.[564]

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[560] For more information on how the number of IRAs is estimated, refer to the Affected Entities section.
[561] The mailing cost is estimated as: (2 pages x $0.05 per page) = $0.10. The mailing cost is applied in the following calculation: (10,000 IRAs x 5.8%) x $0.10 = $58.
[562] This estimate is based on information from a Request for Information and from industry sources.
[563] This burden is estimated as: (10,000 IRAs x $3.30) = $33,000.
[564] This cost is estimated as: ($58 for material and post costs+ $33,000 to track relevant information for mailing annual reports) = $33,058.

Summary of Total Cost for the Proposed Amendments to PTE 86-128

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

9. Regulatory Alternatives

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

Broader Rule

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

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

In developing this proposal, the Department has crafted a more focused definition that would consider the scope issues identified by the Fifth Circuit while still protecting retirement investors. The Department was also cognizant of stated concerns of some stakeholders that the

[565] The annual cost is estimated as: ($180,527 for recordkeeping + $30,044 for preparing and sending documents for inspection + $9,485 for the written authorization + $1,123 for the materials for the evaluation of authorization of transaction + $355,106 for the annual termination form + $145 for materials for the annual statement + $33,058 for the report on commissions paid) = $609,487. Note, the total may not equal the sum of components due to rounding.

compliance costs associated with the broader 2016 Final Rule would lead to adverse consequences such as increases in the cost of investment advice and potential loss of access by retirement investors with small account balances.

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

No Amendment to PTE 2020-02

The Department considered not amending PTE 2020-02 and leaving the exemption in its present form. The Department supports the existing PTE 2020-02 and has retained its core components in the amendment, including the Impartial Conduct Standards and the requirement for strong policies and procedures. These are fundamental investor protections that are necessary to ensure the financial institutions and investment professionals provide investment advice that is in the best interest of retirement investors. The retention of the core elements of PTE 2020-02

will also ensure that any work financial institutions have done to comply with PTE 2020-02 will prepare them to comply with the amended exemption.

However, the Department believes that additional protections are necessary to ensure that fiduciary investment advice providers adhere to the stringent standards outlined in PTE 2020-02. Therefore, as discussed in detail earlier, the proposed amendments clarify and tighten the existing text of PTE 2020-02 to enhance the disclosure requirements. In order to more fully protect retirement investors, the Department is proposing additional disclosures to ensure that investors have sufficient information to make informed decisions about the costs of an investment advice transaction and about the significance and severity of the investment advice fiduciary's conflicts of interest.

In addition to the need for additional protections, upon reviewing the implementation of PTE 2020-02, the Department determined it is necessary to provide financial institutions and investment professionals with additional guidance on implementing the exemption's core elements. As a result, the proposed amendment would also provide more guidance on how to best comply with the Impartial Conduct Standards and implement the policies and procedures condition.

No Amendment to PTE 84-24

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

Through outreach with financial institutions after issuing PTE 2020-20, the Department heard concerns from insurance companies that distribute annuities through independent agents and believed that they may not be able to effectively comply with PTE 2020-02. This is primarily due to the difficulty insurers confront when overseeing independent insurance

producers who do not work for any one insurance company and are not obligated to recommend only one company's annuities. The Department understands that this compliance issue has been resolved by reliance on PTE 84-24.

However, the Department is concerned that PTE 84-24, if left in its current state, offers few of the protections provided by PTE 2020-02. Further, insurance companies' continued reliance on PTE 84-24 instead of PTE 2020-02 could prevent retirement investors from being able to fully compare varying products and services. In order to address these concerns, the Department proposes to amend PTE 84-24 to provide an exemption to independent insurance producers to sell annuities or other insurance products. The proposed amendment addresses insurance industry concerns regarding the workability of PTE 2020-02's conditions, while providing a tailored exemption for insurance companies and independent agents that ensures that fiduciary investment advice with respect to all products is delivered pursuant to the same core principles that protect retirement investors.

Including an Individual Contract Requirement

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

In crafting the proposed amendment, the Department reviewed the decision to not include an enforceable written contract in PTE 2020-02 but concluded that the better course of action was not to include such a requirement. Given that the Fifth Circuit found that the contractual requirement for IRAs exceeded the scope of the Department's authority, a proposal attempting to reinstate that requirement would likely be invalidated in the Fifth Circuit, leading to uncertainty

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[566] *See* 81 FR 21002 (Apr. 8, 2016)

in the regulated community. Such uncertainty could lead to the potential for disruption in the market for investment advice, and in crafting an exemption that does not include an enforceable written contract, the Department intends to avoid this potential disruption.

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

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

Relying on Disclosure Alone

Some commenters responding to the 2015 NPRM[567] argued that disclosure of potential adviser conflicts is, by itself, sufficiently protective of plan and IRA investors' interests. According to these comments, if conflicts are transparent, then investors can choose between

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[567] *See* FR 21927 (Apr. 20, 2015).

more and less conflicted advisers. The commenters advocated that the Department should issue broad PTEs that exempt all or almost all existing and potential adviser business models and compensation arrangements on the sole condition that material conflicts be disclosed. The Department does not believe that disclosure alone is adequately protective of retirement investors. The Department chose not to take that approach in the 2016 Final Rule and chooses not to take that approach with this proposal.

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

Adding a Requirement for a Web Disclosure

The Department considered amending PTE 2020-02 and PTE 84-24 to require financial institutions to disclosure the sources of third-party compensation received in connection with recommended investment products on a public webpage. The Department believes such

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[568] *See* FR 20946, 20950-51 (Apr. 8, 2016).
[569] George Loewenstein, Daylian M. Cain & Sunita Sah, *The Limits of Transparency: Pitfalls and Potential of Disclosing Conflicts of Interest*, 101(3) American Economic Review 423-28, (May 2011).

disclosures would allow market-based forces to extend protections to consumers by discouraging and eliminating the most conflicted compensation practices. Moreover, public disclosure of firms' compensation arrangements with the third parties whose products they recommend would provide an additional focus on firm-level, as opposed to individual adviser-level, conflicts of interest.

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

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

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[570] Augustin Landier & David Thesmar, *Regulating Systemic Risk Through Transparency: Tradeoffs in Making Data Public*, Working Paper 17664 National Bureau of Economic Research (December 2011), 320, https://www.nber.org/system/files/working_papers/w17664/w17664.pdf.

[571] For example: Randall A. Heron & Erik Lie, *Does Backdating Explain the Stock Price Pattern Around Executive Stock Option Grants?*, 83(2) Journal of Financial Economics 271-295 (2007).; Randall A. Heron & Erik Lie, *What Fraction of Stock Option Grants to Top Executives Have Been Backdated or Manipulated*?, 55(4) Management Science 513-525.; Mark Carhart, Ron Kaniel & Adam Reed, *Leaning for the Tape: Evidence of Gaming Behavior in Equity Mutual Funds*, 57(2) Journal of Finance 661-693 (2002).; Truong X. Duong & Felix Meschke, *The Rise and Fall of Portfolio Pumping Among U.S. Mutual Funds*, 60 Journal of Corporate Finance (February 2020).

The Department estimates that, if such a disclosure were required, it would require eight hours of labor annually from a computer programmer, on average, resulting in an annual cost of approximately $20.5 million for PTE 2020-02[572] And $$4.5 million for PTE 84-24.[573] The Department welcomes comments on the accuracy of Department's estimates on the required time to maintain the disclosure, and how many financial institutions currently have the technology infrastructure to post a web disclosure. The Department is also interested in the benefits of such a disclosure, as well as in any data that commenters may have that estimate how frequently retirement investors may visit a webpage that includes such disclosures, and the extent to which various consultants and financial intermediaries would likely use the website to assist retirement investors and others.

Allowing for More Parties to Review Records

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

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

The Department does not have data on how often financial institutions would receive such requests. For the purposes of this analysis, the Department assumes that, on average, financial institutions would receive 10 requests per year and that preparing and sending each

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[572] The burden is estimated as: (19,290 entities x 8 hours) = 154,320 hours. A labor rate of $133.05 is used for a computer programmer professional. The labor rate is applied in the following calculation: (19,290 entities x 8 hours) x $133.05 = $20,532,276.

[573] The burden is estimated as: (215 insurance companies + 4,000 independent producers) x 8 hours = 33,720 hours. A labor rate of $133.05 is used for a computer programmer professional. The labor rate is applied in the following calculation: (215 insurance companies + 4,000 independent producers) x 8 hours x $133.05 = $4,486,446.

request would take a legal professional, on average, 30 minutes. Based on these assumptions, the Department estimates that the proposed amendments would result in an annual cost of approximately $15.4 million.[574] The Department requests comment on how often financial institutions would receive requests for records, who would prepare such reports, and how long the preparation of such records would take.

10. Uncertainty

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

The Department welcomes any comments and data that can help estimate the number of rollovers affected by the exemptions. The Department also invites comments about financial services professionals' practices for documenting rollover recommendations, particularly the extent to which financial services professionals use standardized forms or templates to document the reasons for recommending rollovers and how long on average it would take for a financial services professional to document a rollover recommendation.[575]

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[574] The burden is estimated as follows: (19,290 financial institutions x 10 requests) x (30 minutes ÷ 60 minutes) = 96,450 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(19,290 financial institutions x 10 requests) x (30 minutes ÷ 60 minutes)] x $159.34 = $15,368,343.

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

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

G. Paperwork Reduction Act

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

The Department is soliciting comments regarding the information collection request (ICR) included in the proposed amendments to the prohibited transaction exemptions. To obtain a copy of the ICR, contact the PRA addressee below or go to RegInfo.gov. The Department has submitted a copy of the rule to the Office of Management and Budget (OMB) in accordance with 44 U.S.C. 3507(d) for review of its information collections. The Department and OMB are particularly interested in comments that:

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

Commenters may send their views on the Departments' PRA analysis in the same way they send comments in response to the proposed rule as a whole (for example, through the www.regulations.gov website), including as part of a comment responding to the broader proposed rule. Comments are due by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER]** to ensure their consideration.

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

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

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

PTE 75-1

Type of Review: Revision of an existing collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Titles: Prohibited Transaction Exemption 75-1

(Security Transactions with Broker-Dealers, Reporting Dealers and Banks)

OMB Control Number: 1210-0092.

Affected Public: Businesses or other for-profits; not for profit institutions.

Estimated Number of Respondents: 3,942.

Estimated Number of Annual Responses: 3,942.

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

Estimated Total Annual Burden Hours: 15,768 hours.

Estimated Total Annual Burden Cost: $0

PTE 84-24

Type of Review: Revision of an Existing Collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Prohibited Transaction Exemption (PTE) 84-24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters.

OMB Control Number: 1210-0158.

Affected Public: Businesses or other for-profits; not for profit institutions.

Estimated Number of Respondents: 7,221.

Estimated Number of Annual Responses: 119,376.

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

Estimated Total Annual Burden Hours: 123,726 hours.

Estimated Total Annual Burden Cost: $8,457.

PTE 86-128

Type of Review: Revision to an existing collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Titles: PTE 86-128 (Securities Broker-Dealers)

OMB Control Number: 1210-0059.

Affected Public: Businesses or other for-profits; not for profit institutions.

Estimated Number of Respondents: 2,179.

Estimated Number of Annual Responses: 33,570.

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

Estimated Total Annual Burden Hours: 2,929 hours.

Estimated Total Annual Burden Cost: $37,034

PTE 2020-02

OMB Control Number: 1210-0163.

Affected Public: Businesses or other for-profits; not for profit institutions.

Estimated Number of Respondents: 19,290.

Estimated Number of Annual Responses: 6,504,119.

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

Estimated Total Annual Burden Hours: 1,044,050 hours.

Estimated Total Annual Burden Cost: $167,296.

H. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)[576] 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.[577] Under section 603 of the RFA, agencies must submit an initial regulatory flexibility analysis (IRFA) of a proposal that is likely to have a significant economic impact on a

[576] *5 U.S.C. 601 et seq.*
[577] *5 U.S.C. 601(2), 603(a)*; also see *5 U.S.C. 551*.

substantial number of small entities, such as small businesses, organizations, and governmental jurisdictions. Below is the Department's IRFA.

1. Need for and Objectives of the Rule

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

Smaller plans may be more exposed to conflicts of interest on the part of service providers, because they are less likely than larger plans to receive investment assistance from a service provider that is acting as a fiduciary. Smaller plans have historically received investment assistance from insurance brokers or broker-dealers, who may be subject to conflicts of interest.[578] Larger plans may also have sufficient resources and in-house expertise to make investment decisions without outside assistance.[579] Additionally, many sponsors of smaller plans may have a lack of knowledge of whether the providers to the plan are fiduciaries and how the provider's compensation varies based on the investment options selected.[580]

2. Affected Small Entities

The Small Business Administration (SBA)[581, 582] defines small businesses and issues size standards by industry. The SBA defines a small business in the financial investments and related activities sector as a business with up to $47.0 million in annual receipts. Over 97 percent of

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[578] U.S. Government Accountability Office, GAO-11-119, *401(K) Plans: Improved Regulation Could Better Protect Participants from Conflicts of Interest,* U.S. Government Accountability Office (2011), http://www.gao.gov/products/GAO-11-119.
[579] *Id.*
[580] *Id.*
[581] *13 CFR 121.201.*
[582] *15 U.S.C. 631 et seq.*

broker-dealers[583] and 99 percent of registered investment advisers[584] are small businesses according to the SBA size standards.

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

Table 5: Affected Small Financial Entities						
Prohibited Transaction Exemptions						
	2020-02	*84-24*	*75-1*	*77-4*	*80-83*	*86-128*
Broker-Dealers	1,835		1,835			
Registered Investment Advisers	15,775					
Pure Robo-Advisers	10					
Discretionary Fiduciaries						1,835
Insurance Companies	151	177				
Insurance Producers		3,960				
Banks			1,568		19	
Mutual Fund Companies				796		
Investment Company Principal Underwriters	20	20				20
Pension Consultants	930	930				930

In its economic analysis for its 2020 rulemaking, the Department included all entities eligible for relief on a variety of transactions and compensation that may not have been covered by prior exemptions in its cost estimate. In 2020, the Department acknowledged that not all these entities will serve as investment advice fiduciaries to plans and IRAs within the meaning of Title I and the Code. Additionally, the Department acknowledged that because other exemptions are

[583] This is estimated on the percent of entities with less than $47.0 million for the industry Securities Brokerage, NAICS 523120. See NAICS Association, Count by NAICS Industry Sectors, NAICS Association, https://www.naics.com/business-lists/counts-by-naics-code/.
[584] This is estimated on the percent of entities with less than $47.0 million for the industry Investment Advice, NAICS 523930. See NAICS Association, Count by NAICS Industry Sectors, NAICS Association, https://www.naics.com/business-lists/counts-by-naics-code/.

also currently available to these entities, it is unclear how widely financial institutions will rely upon the new exemptions and which firms are most likely to choose to rely on it.

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

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

Registered Investment Advisers

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

Robo Advisers

The proposed changes to PTE 2020-02 would affect robo-advisers. As discussed in the RIA, the Department estimates that 200 robo-advisers will be affected by the proposed amendments. The Department does not have information on how many of these robo-advisers

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[585] For more information on this estimate, refer to the Affected Entities section of the RIA.
[586] This is estimated on the percent of entities with less than $47.0 million for the industry Investment Advice, NAICS 523930. See NAICS Association, Count by NAICS Industry Sectors, NAICS Association, https://www.naics.com/business-lists/counts-by-naics-code/.
[587]The number of small investment advisers, who do not provide pure robo-advice, is estimated as: (16,182 investment advisers – 200 robo-advisers) x 98.7% = 15,775 small investment advisers.

would be considered small entities. The Department expects that most robo-advisers would not be considered small. For the purposes of this analysis, the Department assumes that 5 percent of robo-advisers, or 10 robo-advisers, are small entities. The Department requests comment on these estimates.

Broker-Dealers

Small broker-dealers who provide investment advice to retirement plans or retirement investors and registered investment advisers who act as pension consultants would be directly affected by the proposed amendments to PTE 2020-02. Additionally, the proposed amendments would modify PTE 75-1 and PTE 86-128 such that small broker-dealers would no longer be able to rely on the exemption for investment advice. The Department does not have information about how many small broker-dealers provide investment advice to plan fiduciaries, plan participants and beneficiaries, and IRA owners. However, the Department believes that few broker-dealers, including small broker-dealers, will continue to rely on PTE 75-1 and PTE 86-128 for transactions that do not involve investment advice.

As discussed in the RIA, the Department assumes that 1,894 broker-dealers would be affected by the proposed amendments.[588] The Department estimates that 96.9 percent of broker-dealers are small businesses according to the SBA size standards.[589] Accordingly, the Department assumes that 1,835 small broker-dealers would be affected by the proposed amendments.[590] The Department requests comment on this estimate.

Discretionary Fiduciary

The proposed amendments to PTE 86-128 would delete Section IV(a), which provides an exclusion from the conditions of the exemption for certain plans not covering employees,

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[588] For more information on this estimate, refer to the Affected Entities section of the RIA.
[589] This is estimated on the percent of entities with less than $47.0 million for the industry Securities Brokerage, NAICS 523120. See NAICS Association, Count by NAICS Industry Sectors, NAICS Association, https://www.naics.com/business-lists/counts-by-naics-code/.
[590] The estimated of retail broker-dealers affected by this exemption is estimated as: (1,894 broker-dealers x 96.9%) = 1,835 broker dealers.

including IRAs, to increase the safeguards available to these retirement investors. Therefore, investment advice fiduciaries to IRAs would have to rely on another exemption, such as PTE 2020-02. Fiduciaries that exercise full discretionary authority or control with respect to IRAs could continue to rely on PTE 86-128, as long as they comply with all of the exemption's conditions. Under PTE 86-128, discretionary fiduciaries would still be able to effect or execute securities transactions. Any discretionary fiduciaries seeking relief for investment advice, however, would be required to rely on the amended PTE 2020-02. The Department lacks reliable data on the number of investment advice providers who are discretionary fiduciaries that would rely on the amended exemption.

For the purposes of this analysis, the Department assumes that the number of discretionary fiduciaries relying on the exemption is no larger than the estimated number of broker-dealers estimated to be affected by the amendments to PTE 2020-02. As discussed in the RIA, the Department assumes that 1,894 broker-dealers would be affected by the proposed amendments.[591] The Department estimates that 96.9 percent of broker-dealers are small businesses according to the SBA size standards.[592] Accordingly, the Department assumes that 1,835 small discretionary fiduciaries would be affected by the proposed amendments.[593]

The Department requests comment on this assumption, particularly with regard to what types of entities would be likely to rely on the amended exemption, as well as any underlying data.

Insurance Companies

The proposed amendments to PTE 2020-02 and PTE 84-24 would affect small insurance companies and captive agents. The existing version of PTE 84-24 granted relief for captive

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[591] For more information on this estimate, refer to the Affected Entities section of the RIA.
[592] This is estimated on the percent of entities with less than $47.0 million for the industry Securities Brokerage, NAICS 523120. See NAICS Association, Count by NAICS Industry Sectors, NAICS Association, https://www.naics.com/business-lists/counts-by-naics-code/.
[593] The estimated of retail broker-dealers affected by this exemption is estimated as: (1,894 broker-dealers x 96.9%) = 1,835 broker dealers.

insurance agents, overseen by insurance companies; however, the proposed amendments would exclude insurance companies and captive agents currently relying on the exemption for investment advice. These entities would be required to comply with the requirements of PTE 2020-02 for relief involving investment advice.

As discussed in the RIA, the Department estimates that 398 insurance companies would be affected by the proposed rulemaking. The Department estimates that 70 of these entities are large entities.[594] The Department does not have data on whether small insurance companies are more likely to rely on captive or independent distribution channels. For the purposes of this analysis, the Department assumes the percent of small insurance companies using each distribution channel is the same as for all insurance companies. That is, the Department assumes that 46 percent of insurance companies (183 insurance companies) sell annuities through captive distribution channels, of which 151 are estimated to be small insurance companies and 32 are estimated to be large insurance companies.[595] Additionally, 54 percent (215 insurance companies) sell annuities through independent distribution channels, of which 177 are estimated to be small insurance companies and the remaining 38 are large insurance companies.[596] The Department requests comment on this assumption.

Captive Insurance Agents

Additionally, as discussed in the Affected Entities section of the RIA, the Department estimates that 1,577 captive insurance agents would be affected by the proposed amendments.

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

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

[596] The number of large insurance companies using an independent distribution channel is estimated as: (70 large insurance companies x 54%) = 38 insurance companies. The number of small insurance companies using an independent distribution channel is estimated as: (215 insurance companies – 38 large insurance companies) = 177 small insurance companies.

The Department estimates that 99 percent of these captive agents work for small entities.[597] Thus, the Department estimates there are 1,561 captive insurance agents and brokers that would be affected by the proposed amendments.[598]

Independent Producers

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

The Independent Insurance Agents and Brokers of America estimated that there were 40,000 independent producers in 2022. The Department does not have data on what percent of independent producers serve the retirement market. For the purposes of this analysis, the Department assumes that 10 percent, or 4,000, of these independent producers serve the retirement market. The Department estimates that 99 percent of these entities are small entities.[599] As such, the Department estimates that 3,960 small independent producers would be affected by the proposed amendment.

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[597] This is estimated on the percent of entities with annual receipts less than $15.0 million for the industry Insurance Agencies and Brokerages, NAICS 524210. *See* NAICS Association, *Count by NAICS Industry Sectors*, NAICS Association, https://www.naics.com/business-lists/counts-by-naics-code/.; Small Business Administration, *Table of Size Standards*, Small Business Administration, (December 2022), https://www.sba.gov/document/support--table-size-standards.

[598] The number of captive insurance agents is calculated as: (1,577 captive agents x 99.0%) = 1,561 captive insurance agents serving the annuity market.

[599] This is estimated on the percent of entities with annual receipts less than $15.0 million for the industry Insurance Agencies and Brokerages, NAICS 524210. *See* NAICS Association, *Count by NAICS Industry Sectors*, NAICS Association, https://www.naics.com/business-lists/counts-by-naics-code/.; Small Business Administration, *Table of Size Standards*, Small Business Administration, (December 2022), https://www.sba.gov/document/support--table-size-standards.

Pension Consultants

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

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

Principal Company Underwriter

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

As discussed in the Affected Entities section, the Department assumes that 10 investment company principal underwriters for plans and 10 investment company principal underwriters for IRAs will use this exemption once with one client plan. The Department estimates that

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[600] This is estimated on the percent of entities with annual receipts less than $45.5 million for the industry Third Party Administration of Insurance and Pension Funds, NAICS 524292. *See* NAICS Association, *Count by NAICS Industry Sectors*, NAICS Association, https://www.naics.com/business-lists/counts-by-naics-code/.; Small Business Administration, *Table of Size Standards*, Small Business Administration, (December 2022), https://www.sba.gov/document/support--table-size-standards.

approximately 97 percent of these entities are small entities.[601] As a result, the Department estimates that all 10 of the estimated small investment company principal underwriters for plans and all 10 of the estimated small investment company principal underwriters for IRAs would be affected by the proposed amendments.

Banks and Credit Unions

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

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

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[601] This is estimated on the percent of entities with less than $47.0 million for the industry Investment Banking and Securities Intermediation, NAICS 523150. *See* NAICS Association, *Count by NAICS Industry Sectors*, NAICS Association, https://www.naics.com/business-lists/counts-by-naics-code/.

[602] This is estimated on the percent of commercial banks with assets less than $850 million. *See* Federal Deposit Insurance Corporation, *FOIA RIS Data Bulk Download*, Federal Deposit Insurance Corporation, (December 2022), https://www.fdic.gov/foia/ris/index.html.; Small Business Administration, *Table of Size Standards*, Small Business Administration, (December 2022), https://www.sba.gov/document/support--table-size-standards.

[603] The number of small commercial banks that would use PTE 75-1 is estimated as: (4,096 banks x 76.5%) = 3,135 small banks.

[604] The number of small banks that would use PTE 80-83 is estimated as: (25 fiduciary-banks with public offering services x 76.5%) = 19 banks.

[605] Jim DiSalvo, *Banking Trends: Has the Banking Industry Become Too Concentrated?*, Federal Reserve Bank of Philadelphia, (2023), https://www.philadelphiafed.org/-/media/frbp/assets/economy/articles/economic-insights/2023/q1/bt-has-the-banking-industry-become-too-concentrated.pdf.

Department requests comment on whether small banks are equally as likely as large banks to rely on such exemptions.

The Department requests comments on how many small banks would seek exemptive relief under PTE 80-83 and PTE 75-1.

As discussed in the Affected Entities section of the RIA, the proposed amendments could also affect credit unions that offer IRAs. The Department estimates that there are approximately 4,782 credit unions.[606] In 2023, the SBA estimated that there are 4,586 small credit unions.[607] The Department requests comment on what proportion of small credit unions offer IRAs and what proportion sell share certificate products. Additionally, the Department requests comment on how many of these entities currently rely on PTE 2020-02, 75-1, and PTE 80-83 for investment advice.

Mutual Fund Companies

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

As discussed in the Affected entities section of the RIA, the Department estimates that 812 mutual fund companies would be affected by the proposed amendments to PTE 77-4. The Department estimates that approximately 98 percent of these mutual fund companies, or 796 mutual fund companies, are small.[608]

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[606] For more information on how the number of credit unions is estimated, refer to the Affected Entities section of the RIA.

[607] 88 FR 18906 (March 29, 2023).

[608] This is estimated on the percent of entities with annual receipts less than $40 million for the industry Open End Investment Fund, NAICS 525910. *See* NAICS Association, *Count by NAICS Industry Sectors*, NAICS Association, https://www.naics.com/business-lists/counts-by-naics-code/.; Small Business Administration, *Table of Size Standards*, Small Business Administration, (December 2022), https://www.sba.gov/document/support--table-size-standards.

Mortgage Pool Sponsors

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

3. Impact of the Rule

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

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

Table 6: Summary of Total Cost and Average Per-Entity Cost by Exemption

	Total Cost		*Per-Entity Cost*	
	First Year	Subsequent Years	First Year	Subsequent Years
PTE 84-24	$17,425,393	$14,733,328	$3,425	$2,896
PTE 2020-02	$227,505,836	$194,922,497	$18,029	$2,757
Mass Amendments				
PTE 75-1	$2,594,856	$2,594,856	$763	$763
PTE 77-4	$0	$0	$0	$0

Table 6: Summary of Total Cost and Average Per-Entity Cost by Exemption				
	Total Cost		*Per-Entity Cost*	
	First Year	Subsequent Years	First Year	Subsequent Years
PTE 80-83	$0	$0	$0	$0
PTE 83-1	$0	$0	$0	$0
PTE 1986-128	$444,296	$444,296	$242	$242
Total	**$247,970,380**	**$212,694,976**	**$22,459**	**$6,657**

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

Preliminary Assumptions and Cost Estimate Inputs

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

The Department does not have information on how many retirement investors – including plan beneficiaries, plan participants, and IRA owners – receive electronic disclosures from investment advice fiduciaries. For the purposes of this analysis, the Department assumes that the percent of retirement investors receiving electronic disclosures would be similar to the percent of plan participants receiving electronic disclosures under the Department's 2020 and 2002 electronic disclosure safe harbors.[609] Accordingly, the Department estimates that 94.2 percent of the disclosures sent to retirement investors would be sent electronically, and the remaining 5.8 percent would be sent by mail.[610] The Department requests comment on these assumptions.

[609] 85 FR 31884 (May 27, 2020); 67 FR 17263 (Apr. 9, 2002).

[610] The Department estimates approximately 94.2 percent of retirement investors receive disclosures electronically. This is the sum of the estimated share of retirement investors receiving electronic disclosures under the 2002 electronic disclosure safe harbor (58.2 percent) and the estimated share of retirement investors receiving electronic disclosures under the 2020 electronic disclosure safe harbor (36 percent).

Additionally, the Department assumes that various types of personnel will perform the tasks associated with information collection requests at an hourly wage rate of $63.45 for clerical personnel, $128.11 for a top executive, $133.05 for a computer programmer, $158.94 for an insurance sales agent, $159.34 for a legal professional, $190.63 for a financial manager, and $219.23 for a financial adviser.[611]

Cost Associated with PTE 2020-02

Summary of Affected Entities

As discussed in the Affected Entities section of the Regulatory Flexibility Analysis, the Department estimates that 18,721 small financial institutions would be affected by the proposal, comprised of 1,835 broker-dealers, 15,775 registered investment advisers, 10 robo-advisers, 151 insurance companies, 20 investment company principal underwriters, and 930 pension consultants.[612]

Cost to Review the Rule

The Department estimates that all 18,721 of the small financial institutions affected would each need to review the rule, as it applies to their business. The Department estimates that such a review will take a legal professional, on average, nine hours to review the rule, resulting in a total cost of $26.9 million.[613]

Cost Associated with Disclosures

The proposed amendments would require small entities to modify existing general disclosures and develop additional general disclosures to those required under the existing

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[611] Internal Department calculation based on 2023 labor cost data. For a description of the Department's methodology for calculating wage rates. *See* Employee Benefits Security Administration, *Labor Cost Inputs Used in the Employee Benefits Security Administration, Office of Policy and Research's Regulatory Impact Analyses and Paperwork Reduction Act Burden Calculations,* Employee Benefits Security Administration, 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.

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

[613] The burden is estimated as: (18,721 entities x 9 hours) = 168,489 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: (18,721 entities x 9 hours) x $159.34 = $26,847,037.

exemption. For more information on the changed requirements for each disclosure, refer to the descriptions in the preamble and RIA of this document. The Department estimates the marginal cost for each of the disclosure requirements as:

- Drafting or updating a written acknowledgement that the financial institution and its investment professional are fiduciaries is estimated to result in an aggregate cost of approximately $123,647.[614]
- Drafting or updating a written description of service provided is estimated to result in an aggregate cost of $1.6 million in the first year.[615]
- Drafting the written statement of the Best Interest standard of care owed is estimated to result in an aggregate cost of $1.6 million in the first year.[616]
- Drafting a written statement informing the investor of their right to obtain a written description of the financial institution's policies and procedures and information

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[614] The number of financial entities needing to update their written acknowledgement is estimated as: (1,835 broker-dealers x 10%) + (15,775 registered investment advisers x 10%) + (151 insurers x 10%) = 1,776 financial institutions updating existing disclosures. The number of financial entities needing to draft their written acknowledgement is estimated as: (10 robo-advisers + 930 pension consultants + 20 investment company underwriters) = 960 financial institutions drafting new disclosures. The burden is estimated as: (1,776 financial institutions x (10 minutes ÷ 60 minutes)) + (960 financial institutions x (30 minutes ÷ 60 minutes)) = 776 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(1,776 financial institutions x (10 minutes ÷ 60 minutes)) + (960 financial institutions x (30 minutes ÷ 60 minutes)] x $159.34 = $123,647. For more information on the assumptions included in this calculation, refer to the RIA of this document.

[615] The number of financial entities needing to update their written description of services is estimated as: (1,835 broker-dealers + 15,775 registered investment advisers + 151 insurers) =17,761 financial institutions updating existing disclosures. The number of financial entities needing to draft their written description of services is estimated as: (10 robo-advisers + 930 pension consultants + 20 investment company underwriters) = 960 financial institutions drafting new descriptions. The burden is estimated as: (17,761 financial institutions x (30 minutes ÷ 60 minutes)) + (960 financial institutions x 1 hour) = 9,841 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(17,761 financial institutions x (30 minutes ÷ 60 minutes)) + (960 financial institutions x 1 hour)] x $159.34 = $1,567,985. For more information on the assumptions included in this calculation, refer to the RIA of this document.

[616] The burden is estimated as: [(1,835 broker-dealers + 15,775 registered investment advisers) x (30 minutes ÷ 60 minutes)] + [(151 insurers + 10 robo-advisers + 930 pension consultants + 20 investment company underwriters) x 1 hour] = 9,896 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(1,835 broker-dealers + 15,775 registered investment advisers) x (30 minutes ÷ 60 minutes)] + [(151 insurers + 10 robo-advisers + 930 pension consultants, and 20 investment company underwriters) x 1 hour] x $159.34 = $1,576,828. For more information on the assumptions included in this calculation, refer to the RIA of this document.

regarding costs, fees, and compensation is estimated to result in an aggregate cost of $1.6 million in the first year.[617]

- Preparing and sending the general disclosures described above is estimated to result in a de minimis marginal cost.[618]
- Preparing and sending requested written descriptions of policies and procedures and information regarding costs, fees, and compensation is estimated to result in an annual cost of $1.0 million.[619]
- Preparing disclosures for PEPs detailing any amounts the financial institution pays to or receives from the PPP or its affiliates, in addition to any conflicts of interest that arise in connection with the investment advice it provides to a PEP is estimated to result in an annual cost of approximately $118,230 in the first year.[620] The

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[617] The burden is estimated as: [(1,835 broker-dealers + 15,775 registered investment advisers) x (30 minutes ÷ 60 minutes)] + [(151 insurers + 10 robo-advisers + 930 pension consultants + 20 investment company underwriters) x 1 hour] = 9,916 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(1,835 broker-dealers + 15,775 registered investment advisers) x (30 minutes ÷ 60 minutes)] + [(151 insurers + 10 robo-advisers + 930 pension consultants, and 20 investment company underwriters) x 1 hour] x $159.34 = $1,580,015. For more information on the assumptions included in this calculation, refer to the RIA of this document.

[618] Based on FOCUS data, the SEC reported that in 2018, there were 143,333,278 cumulative customer broker-dealer accounts. Of these accounts, the SEC estimates that the 287 small retail broker-dealers held 5,281 customer accounts. The Department used this to estimate that small broker-dealers hold 0.004 percent of the total customer accounts. The Department assumes that the market for other types of financial institutions matches the broker-dealer market and applied this percentage to all other accounts. Accordingly, the burden is estimated as: [(3,183,503 paper disclosures x 0.004%) x 2 pages] x $0.05 = $0.74. The Department considers this to be a de minimis cost.

[619] The burden is estimated as: (18,721 financial institutions x 10 disclosures) x (5 minutes ÷ 60 minutes) = 15,601 hours. A labor rate of $63.45 is used for a clerical worker. The labor rate is applied in the following calculation: [(18,721 financial institutions x 10 disclosures) x (5 minutes ÷ 60 minutes)] x $63.45 = $989,873. The material cost is estimated as: (18,721 financial institutions x 10 disclosures x 2 pages x $0.05) + (18,721 financial institutions x 10 disclosures x $0.66)) x (5.8%) = $8,252. The total cost is estimated as: $989,873 + $8,252 = $998,125. For more information on the assumptions included in this calculation, refer to the RIA of this document.

[620] The Department assumes that the percent of PEPs that are serviced by small institutions is proportionate the percent of financial institutions that are estimated to be small. This percentage is estimated as: (18,721 small financial institutions / 19,290 financial institutions) = 97.1%. The number of PEPs services by small financial institutions is estimated as: (382 PEPs x 97.1%) = 371 PEPs. The burden is estimated as: (371 financial institutions x 2 hours) = 742 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: (371 financial institutions x 2 hours) x $159.34 = $118,230. For more information on the assumptions included in this calculation, refer to the RIA of this document.

Department estimates that this would result in 928 disclosures sent to employers of PEPs.[621] This results in an annual cost of approximately $981.[622]

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

Cost Associated with Rollover Documentation and Disclosure

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

Applying these assumptions to the 18,721 small financial institutions, using the same methodology described above to calculate the rollover documentation costs for all firms, the Department estimates a total annual cost of approximately $191.9 million.[624]

Costs Associated with Annual Report of Retrospective Review for Financial Institutions

PTE 2020-02 requires financial institutions to conduct a retrospective review at least

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[621] As discussed in the RIA, according to filings submitted to the Department by August 22, 2023, there are 955 employers in PEPs. The Department does not have data on how many of these disclosures are service by small financial institutions. For the purposes of this analysis, the Department estimates that the number of employers in PEPs serviced by small financial institutions is proportionate the number of PEPs serviced by small financial institutions. Accordingly, the Department estimates the number of disclosures sent to employers of PEPs in this context as: 955 PEPs x (371/382) = 928 PEPs.

[622] The burden is estimated as: (928 PEPs x 1 minute) = 15 hours. A labor rate of $63.45 is used for a clerical worker. The labor rate is applied in the following calculation: (928 PEPs x 1 minute) x $63.45 = $981. The Department expects that these disclosures would be sent electronically. For more information on the assumptions included in this calculation, refer to the RIA of this document.

[623] For more information on how the number of IRA rollovers is estimated, refer to the Affected Entities section of the RIA.

[624] The burden is estimated as: (3,088,633 rollovers x 48% x (30 minutes ÷ 60 minutes)) + (3,088,633 rollovers x 52% x (5 minutes ÷ 60 minutes)) = 875,113 hours. A labor rate of $219.23 is used for a personal financial adviser. The labor rate is applied in the following calculation: (3,088,633 rollovers x 48% x (30 minutes ÷ 60 minutes)) + (3,088,633 rollovers x 52% x (5 minutes ÷ 60 minutes)) x $219.23 = $191,850,954. For more information on the assumptions included in this calculation, refer to the RIA of this document.

annually that is reasonably designed to prevent violations of and achieve compliance with the conditions of this exemption, Impartial Conduct Standards, and the policies and procedures governing compliance with the exemption. While entities covered by the existing exemption would not incur additional costs with this requirement, robo-advisers, pension consultants, and investment company underwrites, who are not covered under the existing exemption, would incur costs associated with conducting the annual review. This requirement is estimated to result in an annual aggregate cost of $0.2 million.[625]

Additionally, the Department estimates the cost for a certifying officer to review the report and certify the exemption would result in an estimated annual cost burden of approximately $366,000.[626]

Cost Associated with Written Policies and Procedures

Entities that were not previously complying with PTE 2020-02 would incur the cost to develop policies and procedures in the first year. The requirements to maintain and review policies and procedures is estimated to result in an aggregate cost of $2.2 million in the first year[627] and $1.5 million in subsequent years.[628]

The proposed amendments would also require financial institutions to provide their complete policies and procedures to the Department upon request. Based on the number of past

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[625] The number of small entities not currently producing audit reports is estimated as: (10 robo-advisers + 930 pension consultants + 20 investment company underwriters) x 10% = 96 small entities. The number of small entities needing to modify existing audit reports is estimated as: (10 robo-advisers + 930 pension consultants + 20 investment company underwriters) x 90% = 864 small entities. The burden is estimated as: (96 financial institutions x 5 hours) + (864 financial institutions x 1 hour) = 1,344 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(96 financial institutions x 5 hours) + 864 financial institutions x 1 hour)] x $159.34 = $214,153. For more information on the assumptions included in this calculation, refer to the RIA of this document.

[626] The burden is estimated as: (10 robo-advisers + 930 pension consultants + 20 investment company underwriters) x 2 hours = 1,920 hours. A labor rate of $190.63 is used for a financial manager. The labor rate is applied in the following calculation: (10 robo-advisers + 930 pension consultants + 20 investment company underwriters) x 2 hours) x $190.63 = $366,010.

[627] The burden is estimated as: (17,761 x (30 minutes ÷ 60 minutes)) + (960 x 5 hours) = 13,681 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(17,761 x (30 minutes ÷ 60 minutes)) + (960 x 5 hours)] x $159.34 = $2,179,851. For more information on the assumptions included in this calculation, refer to the RIA of this document.

[628] The burden is estimated as: (18,721 small financial institutions x (30 minutes ÷ 60 minutes)) = 9,361 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: (18,721 small financial institutions x (30 minutes ÷ 60 minutes)) x $159.34 = $1,491,502.

cases as well as current open cases that would merit such a request, the Department estimates that the Department would request a total of 165 policies and procedures in the first year and 50 policies and procedures in subsequent years. Assuming the number of requests from small institutions is proportionate to the number of small financial institutions, the Department estimates that it would request 160 policies and procedures in the first year and 49 in subsequent years.[629] The Department estimates that the requirement would result an estimated cost of approximately $2,538 in the first year[630] and $777 in subsequent years.[631] The cost for a firm receiving the request would be approximately $80 in years when a request is made and no cost in most years when no request is made.

Summary of Total Cost

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

Table 7: Three-Year Average Cost by Type of Entity and Requirement

	Broker-Dealer	SEC Registered Investment Adviser	State-Registered Investment Adviser	Insurance Company	Robo-Adviser	Pension Consultant	Investment Company Underwriter
Rule Review							
Total	$877,167	$3,571,765	$3,969,000	$72,181	$4,780	$444,559	$9,560
Per-Entity	$478	$478	$478	$478	$478	$478	$478
Disclosure							
Total	$249,624	$1,016,368	$1,129,414	$28,559	$2,414	$224,469	$4,827
Per-Entity	$136	$136	$136	$189	$241	$241	$241
Rollover Disclosure							
Total	$18,804,898	$76,572,316	$85,088,322	$1,547,433	$102,479	$9,530,548	$204,958

[629] The percent of financial institutions that are small is estimated as: (18,721 small financial institutions / 19,290 financial institutions) = 97.1%. The number of policies and procedures requested from small financial entities in the first year is estimated as: (165 x 97.1%) = 160. The number of policies and procedures requested from small financial entities in the first year is estimated as: (50 x 97.1%) = 49.

[630] The burden is estimated as: (160 x (15 minutes ÷ 60 minutes)) = 40 hours. A labor rate of $63.45 is used for a clerical worker. The labor rate is applied in the following calculation: (160 x (15 minutes ÷ 60 minutes)) x $63.45 = $2,538. For more information on the assumptions included in this calculation, refer to the RIA of this document.

[631] The burden is estimated as: (49 x (15 minutes ÷ 60 minutes)) = 12 hours. A labor rate of $63.45 is used for a clerical worker. The labor rate is applied in the following calculation: (49 x (15 minutes ÷ 60 minutes)) x $63.45 = $777. For more information on the assumptions included in this calculation, refer to the RIA of this document.

Table 7: Three-Year Average Cost by Type of Entity and Requirement							
	Broker-Dealer	SEC Registered Investment Adviser	State-Registered Investment Adviser	Insurance Company	Robo-Adviser	Pension Consultant	Investment Company Underwriter
Per-Entity	$2	$2	$2	$2	$2	$2	$2
Policies and Procedures							
Total	$146,328	$595,837	$662,103	$12,041	$3,453	$321,138	$6,906
Per-Entity	$80	$80	$80	$80	$345	$345	$345
Retrospective Review							
Total					$6,043	$562,032	$12,087
Per-Entity					$604	$604	$604
Total							
Total	$20,078,016	$81,756,286	$90,848,839	$1,660,214	$119,169	$11,082,746	$238,339
Per-Entity	$696	$696	$696	$749	$1,671	$1,671	$1,671
SBA							
Threshold (in $ millions)	$47.0	$47.0	$47.0	$47.0	$47.0	$45.5	$47.0
Per-Entity Cost as a Percentage of SBA Threshold							
	0.001%	0.001%	0.001%	0.002%	0.004%	0.004%	0.004%

Cost Associated with PTE 84-24

Summary of Affected Entities

As discussed in the Affected Entities section of the Regulatory Flexibility Analysis, the Department expects that 5,087 small financial entities would be affected by the proposed amendments, including 930 pension consultants, 20 investment company principal underwriters, 3,960 independent producers, and 177 insurance companies.[632]

Cost to Review the Rule

The Department estimates that all 5,087 of the small financial institutions affected would each need to review the rule, as it applies to their business. The Department estimates that such a review will take a legal professional, on average, two hours to review the rule, resulting in a total cost of $1.6 million in the first year.[633]

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

[633] The burden is estimated as: (5,087 entities x 2 hours) = 10,174 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: (5,087 entities x 2 hours) x $159.34 = $1,621,125.

Costs Associated with Disclosures

The proposed amendment would require small independent producers to provide disclosures to retirement investors before engaging in a transaction covered by this exemption. For more information on the changed requirements for each disclosure, refer to the descriptions in the preamble and RIA of this document. The Department estimates the marginal cost for each of the disclosure requirements as:

- Drafting or updating a written acknowledgement that the financial institution and its investment professional are fiduciaries is estimated to result in an aggregate cost of approximately $10,000.[634]
- Drafting the written statement of the Best Interest standard of care owed is estimated to result in an aggregate cost $29,900.[635]
- Drafting or updating a written description of service provided is estimated to result in an aggregate cost of $0.3 million.[636]
- Drafting a written statement of the independent producer's material conflicts of interest and the amount of insurance commission paid in connection with the purchase by a retirement investor of the recommended annuity is estimated to result in an aggregate cost of $0.6 million. [637]

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[634] The burden is estimated as: [177 financial institutions + (3,960 independent producers x 5%)] x (10 minutes ÷ 60 minutes) = 63 hours. A labor rate of approximately $159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(177 financial institutions + 3,960 independent producers x 5%) x (10 minutes ÷ 60 minutes)] x $159.34 = $9,959. For more information on the assumptions included in this calculation, refer to the RIA of this document.

[635] The burden is estimated as: [177 financial institutions + (3,960 independent producers x 5%)] x (30 minutes ÷ 60 minutes) = 188 hours. A labor rate of approximately $159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(177 financial institutions + 3,960 independent producers x 5%) x (30 minutes ÷ 60 minutes)] x $159.34 = $29,876. For more information on the assumptions included in this calculation, refer to the RIA of this document.

[636] The burden is estimated as: (3,960 independent producers x (30 minutes ÷ 60 minutes)) = 1,980 hours. A labor rate of approximately $159.34 is used for a legal professional. The labor rate is applied in the following calculation: (3,960 independent producers x (30 minutes ÷ 60 minutes)) x $159.34 = $315,493. For more information on the assumptions included in this calculation, refer to the RIA of this document.

[637] The burden is estimated as: (3,960 independent producers x 1 hour) = 3,960 hours. A labor rate of approximately $159.34 is used for a legal professional. The labor rate is applied in the following calculation: (3,960 independent producers x 1 hour) x $159.34 = $630,986. For more information on the assumptions included in this calculation, refer to the RIA of this document.

For small entities, the Department estimates that developing the disclosures described above would result in a total cost of $1.0 million the first year.

Cost Associated with Rollover Documentation and Disclosure

The proposed amendment would require an independent producer to provide a rollover disclosure that is similar to the disclosure required in the proposed amendment to PTE 2020-02. As discussed in the RIA, the Department assumes that such disclosures would be prepared by the independent producer. The Department requests comment on whether this would be true for small independent producers.

In the RIA, the Department estimates that 52,449 retirement investors would receive documentation on whether the recommended annuity is in their best interest each year.[638] The Department does not have data on what proportion of rollovers would be produced by small independent producers. For the purposes of this analysis, the Department assumes that the proportion of rollovers advised by small independent producers is equal to the proportion of independent producers that are small. The Department estimates that 99 percent of rollovers would be produced by small independent producers.[639] The Department estimates small independent producers would need to provide 51,925 rollover disclosures annually. This results in an estimated cost of approximately $8.3 million annually.[640] These costs likely reflect an overestimate of the total cost, as it assumes that small independent producers would make the same number of recommended rollovers as the average independent producer. The Department requests comment on how many rollover recommendations a small independent producer is

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[638] For information on this estimate, refer to the estimate of IRAs affected by the proposed amendments to PTE 84-24 in the Affected Entities section of the RIA.

[639] This is estimated on the percent of entities with annual receipts less than $15.0 million for the industry Insurance Agencies and Brokerages, NAICS 524210. *See* NAICS Association, *Count by NAICS Industry Sectors*, NAICS Association, https://www.naics.com/business-lists/counts-by-naics-code/.; Small Business Administration, *Table of Size Standards,* Small Business Administration, (December 2022), https://www.sba.gov/document/support--table-size-standards.

[640] The burden is estimated as: (51,925 rollovers x 1 hour) = 51,925 hours. A labor rate of approximately $158.94 is used for an independent producer. The labor rate is applied in the following calculation: (51,925 rollovers x 1 hour) x $158.94 = $8,252,960. For more information on the assumptions included in this calculation, refer to the RIA of this document.

likely to make in a given year, on average.

Costs Associated with the Provision of Disclosures to Retirement Investors

The Department estimates that the number of disclosures that would need to be provided to retirement investors is equal to the number of rollover disclosures, or 51,925 disclosures. Preparing and sending the general disclosures described above is estimated to result in an estimated cost of approximately $18,968.[641]

Additionally, independent producers would be required to send the documentation to the insurance company. The Department expects that such documentation would be sent electronically and result in a de minimis burden. The Department requests comment on this assumption.

Costs Associated with the Retrospective Review

The proposed amendment would require small insurance companies to conduct a retrospective review at least annually. The review would be required to be reasonably designed to prevent violations of and achieve compliance with (1) the Impartial Conduct Standards, (2) the terms of this exemption, and (3) the policies and procedures governing compliance with the exemption. The review would be required to evaluate the effectiveness of the supervision system, any noncompliance discovered in connection with the review, and corrective actions taken or recommended, if any. Insurance companies would be required to annually provide a written report that details the review to a senior executive officer for certification. Insurance companies would also be required to provide the independent producer with the underlying methodology and results of the retrospective review.

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[641] The labor cost is estimated as: (51,925 disclosures x 5.8% sent by mail x (5 minutes ÷ 60 minutes)) = 251 hours. A labor rate of $63.45 is used for a clerical worker. The labor rate is applied in the following calculation: (51,925 disclosures x 5.8% sent by mail x (5 minutes ÷ 60 minutes)) x $63.45 = $15,926. The material cost is estimated as: 3,012 rollovers resulting in a paper disclosure x [$0.66 postage + ($0.05 per page x 7 pages)] = $3,042. The total cost is estimated as: $15,926 + $3,042 = $18,968. For more information on the assumptions included in this calculation, refer to the RIA of this document.

As discussed in the RIA, the Department estimates that insurance companies would need to prepare a total of 12,000 retrospective reviews.[642] The Department does not have data on the proportion of retrospective reviews that would be prepared by small insurance companies. For the purpose of this analysis, the Department assumes that the number of retrospective reviews prepared by small insurance companies is proportionate to the number of small insurance companies. This results in an estimate of 9,879 retrospective reviews.[643]

The Department estimates that conducting and drafting the retrospective review would result in an estimated annual cost of $1.6 million.[644] Additionally, the Department estimates the cost for a certifying officer to review the report and certify the exemption would result in an estimated cost burden of $0.3 million.[645] Finally, the Department estimates that the requirement to provide the methodology and results to each independent producer would result in an annual cost of approximately $52,200.[646]

Costs Associated with Policies and Procedures

The proposed amendment would require insurance companies to establish, maintain, and enforce written policies and procedures for the review of each independent producer's recommendation before an annuity is issued to a retirement investor. The insurance company's policies and procedures must mitigate conflicts of interest to the extent that a reasonable person reviewing the policies and procedures and incentive practices as a whole would conclude that

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[642] For more information on this estimate, refer to the RIA.
[643] The number of retrospective reviews prepared by small insurance companies is estimated as: [12,000 x (177/215)] = 9,879 retrospective reviews.
[644] This is estimated as: (9,879 retrospective reviews x 1 hour) = 9,879 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: (9,879 retrospective reviews x 1 hour) x $159.34 = $1,574,120. For more information on the assumptions included in this calculation, refer to the RIA of this document.
[645] The burden is estimated as: (9,879 retrospective reviews x (15 minutes ÷ 60 minutes)) = 2,470 hours. A labor rate of $128.11 is used for a top executive. The labor rate is applied in the following calculation: (9,879 retrospective reviews x (15 minutes ÷ 60 minutes)) x $128.11 = $316,400. For more information on the assumptions included in this calculation, refer to the RIA of this document.
[646] This is estimated as: (9,879 retrospective reviews x (5 minutes ÷ 60 minutes)) = 823 hours. A labor rate of $63.45 is used for a clerical worker. The labor rate is applied in the following calculation: (9,879 retrospective reviews x (5 minutes ÷ 60 minutes)) x $63.45 = $52,235. For more information on the assumptions included in this calculation, refer to the RIA of this document.

they do not create an incentive for the independent producer to place its interests, or those of the insurance, or any affiliate or related entity, ahead of the interests of the retirement investor. Insurance companies' policies and procedures include a prudent process for determining whether to authorize an independent producer to sell the insurance company's annuity contracts to retirement investors, and for taking action to protect retirement investors from independent producers who have failed or are likely to fail to adhere to the impartial conduct standards, or who lack the necessary education, training, or skill. Finally, insurance companies must provide their complete policies and procedures to the Department within 10 days upon request. Finally, insurance companies must provide their complete policies and procedures to the Department within 10 days upon request.

The Department estimates that drafting or modifying the policies and procedures and procedures would result in an estimated cost of approximately $0.1 million in the first year.[647] The requirement to review policies and procedures annually would result in an estimated cost of approximately $56,400 in subsequent years.[648] Providing policies and procedures to the Department upon request is estimated to result in a de minimis annual cost.[649]

Costs Associated with the Recordkeeping

The proposed amendment would amend the current recordkeeping requirements to incorporate new provisions that are similar to the recordkeeping provision in PTE 2020-02 for all entities relying on the exemption. The Department estimates that the additional time needed to

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[647] This is estimated as: (177 small insurance companies x 5 hours) = 885 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: (177 small insurance companies x 5 hours) x $159.34 = $141,016. For more information on the assumptions included in this calculation, refer to the RIA of this document.

[648] This is estimated as: (177 insurance companies x 2 hours) = 354 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: (177 insurance companies x 2 hours) x $159.34 = $56,406. For more information on the assumptions included in this calculation, refer to the RIA of this document.

[649] The number of requests in the first year is estimated as 177 small insurance companies x (39 requests in PTE 2020-02 / 4,430 small financial institutions in PTE 2020-02) = 2 requests. The number of requests in subsequent years is estimated as: 177 insurance companies x (12 requests in PTE 2020-02 / 4,430 small financial institutions in PTE 2020-02) = 1 request. The burden is estimated as: ((2 x 15 minutes) ÷ 60 minutes) = 0.50 hours. A labor rate of $63.45 is used for a clerical worker. The labor rate is applied in the following calculation: ((2 x 15 minutes) ÷ 60 minutes) x $63.45 = $31.73.

maintain records for the financial institutions to be consistent with the exemption would require an insurance company and independent producer two hours annually, resulting in an estimated annual cost of $1.3 million.[650] Additionally, the Department estimates that the requirement to distribute records upon request would result in an estimated annual cost of $3.1 million.[651]

Summary of Total Cost

The Department estimates that in order to meet the additional conditions of the amended PTE 84-24, affected entities would incur a total cost of $17.4 million in the first year and $14.7 million in subsequent years. The per-entity cost by type of entity is broken down in the table below.

Table 8: Cost by Type of Entity and Requirement, First Year

	Independent Producer	Insurance Agents and Pension Consultants	Financial Institutions/ Insurance Companies	Mutual Fund Underwriters
Rule Review				
Total	$1,261,973	$296,372	$56,406	$6,374
Per-Entity	$319	$319	$319	$319
Disclosure				
Total	$9,239,440	-	$18,802	-
Per-Entity	$2,434	-	$106	-
Policies and Procedures				
Total	-	-	$141,048	-
Per-Entity	-	-	$1,115	-
Retrospective Review				
Total	-	-	$1,942,755	-
Per-Entity	-	-	$10,976	-
Recordkeeping				
Total	$4,405,817	-	$56,406	-
Per-Entity	$397	-	$319	-
Total				
Total Cost	$14,907,230	$296,372	$2,215,417	$6,374
Per-Entity Cost	$3,960	$319	$12,835	$319
SBA				

[650] This is estimated as: (3,960 independent producers + 177 insurance companies) x 2 hours = 8,274 hours. A labor rate of $158.94 is used for an independent producer. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(3,960 independent producers x 2 hours x $158.94) + (177 insurance companies x 2 hours x $159.34)] = $1,315,211.

[651] The burden is estimated as: (3,960 independent producers x 10 requests) x (30 minutes ÷ 60 minutes) = 19,800 hours. A labor rate of $158.94 is used for an independent producer. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(3,960 independent producers x 10 requests) x (30 minutes ÷ 60 minutes)] x $158.94 = $3,147,012.

Table 8: Cost by Type of Entity and Requirement, First Year				
	Independent Producer	Insurance Agents and Pension Consultants	Financial Institutions/ Insurance Companies	Mutual Fund Underwriters
Threshold (in $ millions)	$15.0	$45.5	$47.0	$47.0
Per-Entity Cost as a Percentage of SBA Threshold	0.021%	0.001%	0.027%	0.001%

Costs Associated with the Mass Amendments

Cost Associated with PTE 75-1

Summary of Affected Entities

The amendment to PTE 75-1 would affect banks, reporting dealers, and broker-dealers registered under the Security Exchange Act of 1934. As discussed in the Affected Entities section above, the Department estimates that 3,403 financial institutions, comprised of 1,835 broker-dealers and 1,568 banks, would use PTE 75-1.[652]

Costs Associated with Disclosure Requirements in Part V

The Department proposes to amend PTE 75-1 Part V to allow an investment advice fiduciary to receive reasonable compensation for extending credit to a plan or IRA to avoid a failed purchase or sale of securities involving the plan or IRA if certain conditions are met.[653] Prior to the extension of credit, the plan or IRA must receive written a disclosure, including the interest rate or other fees that will be charged on the credit extension as well as the method of determining the balance upon which interest will be charged. As discussed in the RIA, the Department expects that these disclosures are common business practice and would not create an additional burden on small broker-dealers or banks.

[652] For more information on how the number of each type of entity is estimated, refer to the Affected Entities sections of the RIA and the Regulatory Flexibility Analysis.
[653] For more information on these conditions, refer to the Preamble and RIA of this document.

Costs Associated with Recordkeeping in Parts II and V

Additionally, the Department proposes to amend Parts II and V to adjust the recordkeeping requirement to shift the burden from plans and IRAs to financial institutions. The amended class exemption requires financial institutions engaging in the exempted transactions (rather than the plans or IRAs) to maintain all records pertaining to such transactions for six years and provide access to the records upon request to the specified parties. The Department estimates that the total cost for small financial institutions to maintain recordkeeping and provide access to records upon request is approximately $2.6 million annually and the per-firm cost is approximately $763 annually.[654]

Costs Associated with Removing Fiduciary Investment Advice from Parts III and IV

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

Summary of Total Cost

The Department estimates that in order to meet the additional conditions of the amended PTE 75-1, affected entities would annually incur a total cost of approximately $2.6 million and a per-firm cost of approximately $763. The per-entity cost by type of entity is broken down in the table below.

Table 9: Cost by Type of Entity and Requirement		
	Broker-Dealers	Commercial Banks
Recordkeeping		
Total	$1,399,224	$1,195,631

[654] The burden is estimated as: (3,403 small financial institutions x 4 hours) = 13,612 hours. A labor rate of $190.63 is used for a financial manager. The labor rate is applied in the following calculation: (3,403 small financial institutions x 4 hours) x $190.63 = $2,594,856.

Table 9: Cost by Type of Entity and Requirement		
	Broker-Dealers	Commercial Banks
Per-Entity	$763	$763
Total		
Total	$1,399,224	$1,195,631
Per-Entity	$763	$763
SBA		
Threshold (in $ millions)	$47.0	$850
Per-Entity Cost as a Percentage of SBA Threshold	0.0016%	0.0001%

Cost Associated with PTE 77-4, PTE 80-83, and PTE 83-1

Summary of Affected Entities

The amendment to PTE 77-4 would affect mutual fund companies. As discussed in the Affected Entities section, the Department estimates that 812 mutual fund companies would be affected by the amended PTE 77-4. [655]

PTE 80-83 allows banks to purchase, on behalf of employee benefit plans, securities issued by a corporation indebted to the bank that is a party in interest to the plan. The Department estimates that 19 small fiduciary-banks with public offering services would be affected by the amended PTE 80-83.[656]

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

Summary of Total Cost

The Department is proposing to amend PTE 77-4, PTE 80-83, and PTE 83-1 by removing fiduciary investment advice from the covered transactions. Investment advice providers would instead have to rely on the amended PTE 2020-02 for exemptive relief covering investment advice transactions. The Department believes that since investment advice providers were

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

already required to provide such documentation under these exemptions, these amendments would result in a de minimis change for investment advice providers. Thus, these amendments would not result in measurable additional costs.

Cost Associated with PTE 86-128

Summary of Affected Entities

The amendment to PTE 86-128 would affect fiduciaries of employee benefit plans that affect or execute securities transactions and independent plan fiduciaries that authorize the plan or IRA. As discussed in the Affected Entities section, the Department estimates that 1,835 investment advice providers would be affected by the proposed amendments to PTE 86-128.

As discussed in the RIA, the Department estimates that 10,000 IRAs, will engage in transactions covered under this class exemption, of which 210 are new IRAs.[657] The Department estimates that 96.9 percent of these IRAs would be overseen by a small investment advice provider.[658] As such, the Department estimates that, each year, there are 9,690 IRAs, of which 203 are new IRAs that would be overseen by a small investment advice provider.[659]

Costs Associated with Recordkeeping

The Department is proposing to amend Section VI of PTE 86-128 to require financial institutions to maintain for six years the records necessary for the Department, IRS, plan fiduciary, contributing employer or employee organization whose members are covered by the plan, participants and beneficiaries and IRA owners to determine whether conditions of this exemption have been met. As discussed above, the Department estimates that 395 small-business investment advice providers will be affected by this recordkeeping requirement. Applying this

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

[658] Based on data from the NAICS Association for NAICS code 523120, the Departments estimate the percent of businesses within the industry of Securities Brokerage with less than $47 million in annual sales. (*See* NAICS Association. "Market Analysis Profile: NAICS Code Annual Sales." *https://www.naics.com/business-lists/counts-by-naics-code/.*)

[659] The number of IRAs overseen by a small investment provider is estimated as: 10,000 IRAs x 96.9% = 9,690 IRAs. The number of new IRAs overseen by a small investment provider is estimated as: 210 IRAs x 96.9% = 203 IRAs.

assumption to the cost calculations described above, the Department estimates that the total cost for small-business investment advice providers to maintain recordkeeping is $204,011 annually[660] and the per-firm cost is $111 annually.

Cost Associated with the Written Authorization from the Authorizing Fiduciary to the Broker-Dealer

Authorizing fiduciaries of IRAs entering into a relationship with an investment advice provider are required to provide the investment advice provider with advance written authorization to perform transactions for the IRA. As discussed in the Summary of Affected Entities section for this exemption in this analysis, the Department estimates that approximately 44 authorizing fiduciaries are expected to send an advance written authorization. Applying this assumption to the cost calculations described above, the Department estimates that the total cost to send an advance written authorization is approximately $9,169 annually.[661] The per-transaction cost is $45 annually, and the per-firm cost is $5 annually.

Cost Associated with the Provision of Materials for Evaluation of Authorization of Transaction

Prior to a written authorization being made, the financial institution must provide the authorizing fiduciary with a copy of the exemption, a form for termination of authorization, a description of placement practices, and any other reasonably available information. This information is assumed to be readily available. As described above, the Department assumes this

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[660] The burden is estimated as: 1,835 broker-dealers x ((30 minutes + 15 minutes) ÷ 60 minutes) = 1,376 hours. The labor rates of $190.63 and $63.45 are used for a financial manager and a clerical worker, respectively. The labor rate is applied in the following calculation: (1,835 broker-dealers x (30 minutes ÷ 60 minutes) x $190.63 per hour) + (1,835 broker-dealers x (15 minutes ÷ 60 minutes) x $63.45) = $204,011. For more information on the assumptions included in this calculation, refer to the RIA of this document.

[661] The burden for a legal professional to prepare the authorization form is estimated as: 203 IRAs x (15 minutes ÷ 60 minutes) per IRA = 51 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: 203 IRA x (15 minutes ÷ 60 minutes) per IRA x $159.34 per hour = $8,087. The burden of clerical staff to send the authorization is estimated as: 203 IRA x (5 minutes ÷ 60 minutes) per IRA = 16 hours. A labor rate of $63.45 is used for a clerical worker. The labor rate is applied in the following calculation: 203 IRA x (5 minutes ÷ 60 minutes) per IRA x $63.45 = $1,073. The material cost and postage cost associated with the authorization is estimated as: 203 authorizations for IRAs x 5.8% paper x $0.76 = $9. Therefore, the total cost to send an advance written authorization is estimated as: $8,087 + $1,073 + $9 = $9,169. For more information on the assumptions included in this calculation, refer to the RIA of this document.

information will be sent to the 203 IRAs that enter into an agreement with a financial institution. Applying this assumption to the cost calculations described above, Department estimates that the total cost to send the materials is $1,085 annually.[662] The per-transaction cost is $5 annually, and the per-firm cost is $0.59 annually.

Cost Associated with the Provision of an Annual Termination Form

Financial institutions must annually supply each authorizing fiduciary with a form expressly providing an election to terminate the written authorization. The Department estimates that 395 investment advice providers would prepare the termination form, and 9,690 IRAs would receive the form. Applying these assumptions to the cost calculations described above, Department estimates that the total cost to prepare and send the annual termination form is approximately $197,857 annually.[663] The per-transaction cost is $20 annually, and the per-firm cost is $108 annually.

Transaction Reporting

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

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[662] The burden for a clerical worker to prepare the information is estimated as: 203 IRAs x (5 minutes ÷ 60 minutes) per IRA = 17 hours. A labor rate of $63.45 is used for a clerical worker. The labor rate is applied in the following calculation: 203 IRAs x (5 minutes ÷ 60 minutes) per IRA x $63.45 per hour = $1,073. The material and postage cost are estimated as: 203 IRAs x 5.8% paper x (7 pages x $0.05 per page + $0.66 for postage) = $12. Therefore, the total cost to send the materials is estimated as: $1,073 + $12 = $1,085. For more information on the assumptions included in this calculation, refer to the RIA of this document.

[663] The burden for a legal professional to prepare the forms is estimated as: 1,835 broker-dealers x (30 minutes ÷ 60 minutes) = 918 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: 1,835 broker-dealers x (30 minutes ÷ 60 minutes) x 159.34 = $146,194. The burden for a clerical worker to prepare and send the forms is estimated as: 9,900 IRAs x (5 minutes ÷ 60 minutes) = 808 hours. A labor rate of $63.45 is used for a clerical worker. The labor rate is applied in the following calculation: 9,690 IRAs x (5 minutes ÷ 60 minutes) x $63.45 = $51,236. The material and postage cost associated with the forms is estimated as: 9,690 IRAs x 5.8% paper x (2 pages x $0.05 per page + $0.66 for postage) = $427. Therefore, total cost to prepare and send the annual termination form is estimated as: $146,194 + $51,236 + $427 = $197,857. For more information on the assumptions included in this calculation, refer to the RIA of this document.

Annual Statement

Broker-dealers are required to send an annual report to each authorizing fiduciary containing the same information as the quarterly report and all security transaction-related charges, the brokerage placement practices, and a portfolio turnover ratio. The Department assumes this information could be sent together. Therefore, the clerical staff hours required to prepare and distribute the report has been included with the provision of annual termination form requirement, and no additional burden has been reported.

However, collecting and generating the information required for the annual report is reported as a burden. As discussed above, the Department estimates that 2,100 IRAs will receive an annual report. Applying these assumptions to the cost calculations described above, the Department estimates that the total cost to collect and generate information for the annual report is $141 annually.[664] The per-account cost is $0.01 annually, and the per-firm cost is $0.08 annually.

Report of Commissions Paid

A discretionary trustee must provide each authorizing fiduciary with an annual report that separately shows the commissions paid to affiliated brokers and non-affiliated brokers on both a total dollar basis and a cents-per-share basis. The burden to prepare and distribute the report is included with the provision of annual termination form requirement, because both items are required to be sent annually. However, the collection and generation of the information for the quarterly report is reported as a burden. As described above, the Department estimates that 2,100 IRAs will receive a report of the commissions paid. Applying this assumption to the cost calculations described above, the Department estimates that the total cost to collect and generate

[664] The mailing cost is estimated as: 5 pages x $0.05 per page = $0.25. The mailing rate is applied in the following calculation: 9,690 IRAs x 5.8% paper x $0.25 = $141. For more information on the assumptions included in this calculation, refer to the RIA of this document.

information for the report of commission paid is $56 annually.[665] The per-account cost is $0.01 annually, and the per-firm cost is less than $0.03 annually.

Financial institutions are also required to report total of all transaction-related charges incurred by the plan in connection with covered transactions, the allocation of such charges among various persons, as well as a conspicuous statement about the negotiability of brokerage commissions and an estimate of future commission rates to the plan fiduciaries. The information must be tracked, assigned to specific plans, and reported. As described above, the Department estimates that 9,690 IRAs will be affected by this requirement. Applying this assumption to the cost calculations described above, the Department estimates that the total cost to report this information is $31,977 annually.[666] The per-account cost is $3.30 annually, and the per-firm cost is $17 annually.

This results in a total annual cost of $32,033.[667]

Summary of Total Cost

The Department estimates that in order to meet the additional conditions of the amended PTE 86-128, affected entities would annually incur a total cost of $444,296 and a per-firm cost of $242. The per-entity cost is broken down in the table below.

Table 10: Cost by Type of Entity and Requirement		
	Total Cost	*Per-Entity Cost*
Recordkeeping	$204,011	$111
Written Authorization from the Authorizing Fiduciary to the Broker-Dealer	$9,169	$5
Provision of Materials for Evaluation of Authorization of Transaction	$1,085	$0.59
Annual Termination Form	$197,857	$108
Annual Statement	$141	$0.08
Report of Commissions Paid	$32,033	$17
Total	**$444,296**	**$242**
SBA Threshold (in $ millions)		$47.0

[665] The mailing cost is estimated as: 2 pages x $0.05 per page = $0.10. The mailing cost is applied in the following calculation: 9,690 IRAs x 5.8% x $0.10 = $56. For more information on the assumptions included in this calculation, refer to the RIA of this document.

[666] This burden is estimated as: 9,690 IRAs x $3.30 = $31,977. For more information on the assumptions included in this calculation, refer to the RIA of this document.

[667] This burden is estimated as: $56 + $31,977 = $32,033.

Table 10: Cost by Type of Entity and Requirement		
	Total Cost	*Per-Entity Cost*
Per-Entity Cost as a Percentage of SBA Threshold		0.0005%

4. Duplicate, Overlapping, or Relevant Federal Rules

The rules in ERISA and the Code that govern advice on the investment of retirement assets overlap with SEC rules that govern the conduct of investment advisers and broker-dealers that advise retail investors. The Department considered conduct standards set by other regulators, such as SEC, NAIC, and FINRA, in developing the proposal, with the goal of avoiding overlapping or duplicative requirements. If the requirements overlap, compliance with the other disclosure or recordkeeping requirements can be used to satisfy the exemption, as long as the conditions are satisfied.

5. Description of Alternatives Considered

Section 604 of the RFA requires the Department to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small entities. The Department tried to align the requirements in this proposal with the requirements set by other regulators to minimize regulatory burden.

The Department considered not amending PTE 2020-02 and leaving the exemption in its present form. The Department supports the existing PTE 2020-02 and has retained its core components in the amendment, including the Impartial Conduct Standards and the requirement for strong policies and procedures. However, the Department believes that additional protections are necessary to ensure that fiduciary investment advice providers adhere to the stringent standards outlined in PTE 2020-02. Therefore, the proposed amendments clarify and tighten the existing text of PTE 2020-02 to enhance the disclosure requirements and strengthen the disqualification provisions.

The Department has considered requiring financial institutions to disclosure the sources of third-party compensation received in connection with recommended investment products on a public webpage in PTE 2020-02. When considering this requirement, the Department discussed

exempting small financial institutions from this disclosure. The Department estimates that such a disclosure would cost small entities $4.8 million[668] with an average per-entity cost of $1,064. The Department requests comment on whether small financial institutions current provide website disclosures or have the technological infrastructure to do so.

I. Unfunded Mandate Reform Act

Title II of the Unfunded Mandates Reform Act of 1995[669] requires each federal agency to prepare a written statement assessing the effects of any federal mandate in a proposed or final rule that may result in an expenditure of $100 million or more (adjusted annually for inflation with the base year 1995) in any one year by state, local, and tribal governments, in the aggregate, or by the private sector. That threshold is approximately $177 million in 2023.

For purposes of the Unfunded Mandates Reform Act, this proposal is expected to have an impact on the private sector. For the purposes of the proposal, the RIA shall meet the UMRA obligations.

J. Federalism Statement

Executive Order 13132 outlines the fundamental principles of federalism. It also requires federal agencies to adhere to specific criteria in formulating and implementing policies that have "substantial direct effects" on the states, the relationship between the national government and states, or on the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that have these federalism implications must consult with state and local officials throughout the process of developing the proposed regulation.

As discussed throughout this analysis, this proposed regulatory action would affect the insurance industry pertaining to annuities. These entities are also regulated by states, many of

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[668] This estimate is based on the assumption that satisfying this requirement would require a computer programmer to spend, on average, 8 hours. A labor rate of $133.05 is used for a computer programmer professional. The cost is estimated as: (4,512 small financial institutions x 8 hours) x $133.05 = $4,802,573.
[669] Unfunded Mandates Reform Act of 1995, *Public Law 104-4, 109 Stat. 48,* (1995).

whom, as discussed in the discussion of the regulatory baseline, have taken regulatory or legislative actions. The Department has carefully considered the regulatory landscape in the states and worked to ensure that its proposed regulations would not impose obligations on advisers that are inconsistent with their responsibilities under state law, including the obligations imposed in states that based their laws on the NAIC Model Regulation. Nor would these proposed regulations impose obligations or costs on the state regulators. As discussed above, however, the Department has increased the protections afforded by many of these laws, consistent with its own responsibilities under ERISA, and has endeavored to lend greater uniformity on the provision of advice to retirement investors, so that advisers covered by the rule must all abide by a uniform fiduciary standard. The Department has had discussions with state insurance regulators and state-regulated parties about these issues including the need to ensure that retirement investors have sufficient protection when receiving investment advice. The Department expects to continue discussions with state insurance regulators to ensure that this proposed regulation complements the protections provided by the NAIC Model Rule. The Department also expects to continue its discussion with state securities regulators.

Authority

This regulation is proposed pursuant to the authority in section 505 of ERISA (Pub. L. 93–406, 88 Stat. 894 (Sept. 2, 1974); 29 U.S.C. 1135) and section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713 (Oct. 17, 1978)), 3 CFR, 1978 Comp. 332, effective December 31, 1978 (44 FR 1065 (Jan. 3, 1979)), 3 CFR, 1978 Comp. 332, 5 U.S.C. App. 237, and under Secretary of Labor's Order No. 1–2011, 77 FR 1088 (Jan. 9, 2012).

List of Subjects in 29 CFR Part 2510

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

For the reasons set forth in the preamble, the Department is proposing to amend part 2510 of subchapter B of Chapter XXV of Title 29 of the Code of Federal Regulations as follows:

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

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

Authority: 29 U.S.C. 1002(1)-(8), 1002(13)-(16), 1002(20), 1002(21), 1002(34), 1002(37), 1002(38), 1002(40)-(44), 1031, and 1135; Div. O, Title I, Sec. 101, Pub. L. 116-94, 133 Stat. 2534 (Dec. 20, 2019); Div. T, Title I, Sec. 105, Pub. L. 117-328, 136 Stat. 4459 (Dec. 29, 2022); Secretary of Labor's Order 1–2011, 77 FR 1088 (Jan. 9, 2012); Secs. 2510.3–21, 2510.3–101 and 2510.3–102 also issued under Sec. 102 of Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 237 (E.O. 12108, 44 FR 1065 (Jan. 3, 1979)), and 29 U.S.C. 1135 note. Section 2510.3–38 also issued under Sec. 1(b) Pub. L. 105–72, 111 Stat. 1457 (Nov. 10, 1997).

2. Revise § 2510.3–21 to read as follows:

§2510.3-21 Definition of "Fiduciary."

(a)-(b) [Reserved]

(c) *Investment advice*. (1) For purposes of section 3(21)(A)(ii) of the Employee Retirement Income Security Act of 1974 (the Act), section 4975(e)(3)(B) of the Internal Revenue Code (Code), and this paragraph, a person renders "investment advice" with respect to moneys or other property of a plan or IRA if the person makes a recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property (as defined in paragraph (f)(10) of this section) to the plan, plan fiduciary, plan participant or beneficiary, IRA, IRA owner or beneficiary or IRA fiduciary (retirement investor), and the person satisfies paragraphs (c)(1)(i), (ii), or (iii) of this section:

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

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

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

(iv) For purposes of this paragraph, when advice is directed to a plan or IRA fiduciary, the relevant retirement investor is both the plan or IRA and the fiduciary.

(v) Written statements by a person disclaiming status as a fiduciary under the Act, the Code, or this section, or disclaiming the conditions set forth in paragraph (c)(1)(ii) of this section, will not control to the extent they are inconsistent with the person's oral communications, marketing materials, applicable State or Federal law, or other interactions with the retirement investor.

(2) A person who is a fiduciary with respect to a plan or IRA by reason of rendering investment advice (as defined in paragraph (c)(1) of this section) for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan or IRA, or having any authority or responsibility to do so, shall not be deemed to be a fiduciary regarding any assets of the plan or IRA with respect to which such person does not have any discretionary authority, discretionary control, or discretionary responsibility, does not exercise any authority or control, does not render investment advice (as defined in paragraph (c)(1) of this section) for a fee or other compensation, and does not have any authority or responsibility to render such investment advice, provided that nothing in this paragraph shall be deemed to:

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

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

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

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

(ii) The instructions specify

(A) The security to be purchased or sold,

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

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

(D) The minimum or maximum quantity of such security which may be purchased or sold within such price range, or, in the case of a security issued by an open-end investment company registered under the Investment Company Act of 1940, the minimum or maximum quantity of

such security which may be purchased or sold, or the value of such security in dollar amount which may be purchased or sold, at the price referred to in paragraph (d)(1)(ii)(B) of this section.

(2) A person who is a broker-dealer, reporting dealer, or bank which is a fiduciary with respect to a plan or IRA solely by reason of the possession or exercise of discretionary authority or discretionary control in the management of the plan or IRA or the management or disposition of plan or IRA assets in connection with the execution of a transaction or transactions for the purchase or sale of securities on behalf of such plan or IRA which fails to comply with the provisions of paragraph (d)(1) of this section shall not be deemed to be a fiduciary regarding any assets of the plan or IRA with respect to which such broker-dealer, reporting dealer or bank does not have any discretionary authority, discretionary control, or discretionary responsibility, does not exercise any authority or control, does not render investment advice (as defined in paragraph (c)(1) of this section) for a fee or other compensation, and does not have any authority or responsibility to render such investment advice, provided that nothing in this paragraph shall be deemed to:

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

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

(e) *For a fee or other compensation, direct or indirect*. For purposes of section 3(21)(A)(ii) of the Act and section 4975(e)(3)(B) of the Code, a person provides investment advice "for a fee or other compensation, direct or indirect," if the person (or any affiliate) receives any explicit fee or compensation, from any source, for the advice or the person (or any affiliate) receives any other fee or other compensation, from any source, in connection with or as a result of the recommended purchase, sale, or holding of a security or other investment property

or the provision of investment advice, including, though not limited to, commissions, loads, finder's fees, revenue sharing payments, shareholder servicing fees, marketing or distribution fees, mark ups or mark downs, underwriting compensation, payments to brokerage firms in return for shelf space, recruitment compensation paid in connection with transfers of accounts to a registered representative's new broker-dealer firm, expense reimbursements, gifts and gratuities, or other non-cash compensation. A fee or compensation is paid "in connection with or as a result of" such transaction or service if the fee or compensation would not have been paid but for the recommended transaction or the provision of advice, including if eligibility for or the amount of the fee or compensation is based in whole or in part on the recommended transaction or the provision of advice.

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

(1) The term "affiliate" means any person directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with such person; any officer, director, partner, employee, representative, or relative (as defined in paragraph (f)(12) of this section) of such person; and any corporation or partnership of which such person is an officer, director, or partner.

(2) The term "control" means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(3) The term "IRA" means any account or annuity described in Code section 4975(e)(1)(B) through (F), including, for example, an individual retirement account described in section 408(a) of the Code and a health savings account described in section 223(d) of the Code.

(4) The term "IRA owner" means, with respect to an IRA, either the person who is the owner of the IRA or the person for whose benefit the IRA was established.

(5) The term "IRA fiduciary" means a person described in section 4975(e)(3) of the Code with respect to an IRA.

(6) The term “plan” means any employee benefit plan described in section 3(3) of the Act and any plan described in section 4975(e)(1)(A) of the Code.

(7) The term “plan fiduciary” means a person described in section (3)(21)(A) of the Act and/or 4975(e)(3) of the Code with respect to a plan. For purposes of this section, a participant or beneficiary of the plan who is receiving advice is not a “plan fiduciary” with respect to the plan.

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

(9) The term “beneficiary” means, for a plan described in section 3(3) of the Act, a person described in section 3(8) of the Act.

(10) The phrase “recommendation of any securities transaction or other investment transaction or any investment strategy involving securities or other investment property” means recommendations:

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

(ii) As to the management of securities or other investment property, including, among other things, recommendations on investment policies or strategies, portfolio composition, selection of other persons to provide investment advice or investment management services, selection of investment account arrangements (*e.g.*, account types such as brokerage versus advisory) or voting of proxies appurtenant to securities; and

(iii) As to rolling over, transferring, or distributing assets from a plan or IRA, including recommendations as to whether to engage in the transaction, the amount, the form, and the destination of such a rollover, transfer, or distribution.

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

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

(g) *Applicability*. Effective December 31, 1978, section 102 of the Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 237, transferred the authority of the Secretary of the Treasury to promulgate regulations of the type published herein to the Secretary of Labor. Accordingly, in addition to defining a “fiduciary” for purposes of section 3(21)(A)(ii) of the Act, this section applies to the parallel provision in section 4975(e)(3)(B) of the Code, which defines a “fiduciary” of a plan defined in Code section 4975 (including an IRA) for purposes of the prohibited transaction provisions in the Code. For example, a person who satisfies paragraphs (c)(1) and (e) of this section in connection with a recommendation to a retirement investor that is an employee benefit plan as defined in section 3(3) of the Act, a fiduciary of such a plan, or a participant or beneficiary of such plan, including a recommendation concerning the rollover of assets currently held in a plan to an IRA, is a fiduciary subject to Title I of the Act.

(h) *Continued applicability of State law regulating insurance, banking, or securities*. Nothing in this section shall be construed to affect or modify the provisions of section 514 of Title I of the Act, including the savings clause in section 514(b)(2)(A) for State laws that regulate insurance, banking, or securities.

Signed at Washington, DC, this 24th day of October, 2023

Lisa M. Gomez

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