reasonably available at their customary location for examination during normal business hours by:

(A) An authorized employee or representative of the Department of Labor or the Internal Revenue Service,

(B) Any fiduciary of a plan that engaged in a transaction pursuant to this exemption, or any authorized employee or representative of such fiduciary;

(C) Any contributing employer and any employee organization whose members are covered by a plan described in paragraph (e)(1)(B), or any authorized employee or representative of these entities; or

(D) Any participant or beneficiary of a plan described in paragraph (e)(1)(B), IRA owner or the authorized representative of such participant, beneficiary or owner.

(2) None of the persons described in paragraph (e)(1)(B)–(D) of this exemption are authorized to examine records regarding a recommended transaction involving another investor, or privileged trade secrets or privileged commercial or financial information, of the broker-dealer engaging in the covered transaction, or information identifying other individuals.

(3) Should the broker-dealer engaging in the covered transaction refuse to disclose information on the basis that the information is exempt from disclosure, the broker-dealer must, by the close of the thirtieth (30th) day following the request, provide a written notice advising the requestor of the reasons for the refusal and that the Department may request such information.

(4) Failure to maintain the required records necessary to determine whether the conditions of this exemption have been met will result in the loss of the exemption only for the transaction or transactions for which records are missing or have not been maintained. It does not affect the relief for other transactions.

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

Signed at Washington, DC, this 1st day of April, 2016.

Phyllis C. Borzi,

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

[FR Doc. 2016–07927 Filed 4–6–16; 11:15 am]

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

ZRIN 1210–ZA25

[Application Number D–11850]

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

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

ACTION: Adoption of amendment to and partial revocation of PTE 84–24.

SUMMARY: This document amends and partially revokes Prohibited Transaction Exemption (PTE) 84–24, an exemption from certain prohibited transaction provisions of the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code of 1986 (the Code). The ERISA and Code provisions at issue generally prohibit fiduciaries with respect to employee benefit plans and individual retirement accounts (IRAs) from engaging in self-dealing in connection with transactions involving these plans and IRAs. Non-fiduciary service providers also may not enter into certain transactions with plans and IRAs without an exemption. The amended exemption allows fiduciaries and other service providers to receive compensation when plans and IRAs purchase insurance contracts, ''Fixed Rate Annuity Contracts,'' as defined in the exemption, securities of investment companies registered under the Investment Company Act of 1940, as well as certain related transactions. The amendments increase the safeguards of the exemption. This document also contains the revocation of the exemption as it applies to plan and IRA purchases of annuity contracts that do not satisfy the definition of a Fixed Rate Annuity Contract, and the revocation of the exemption as it applies to IRA purchases of investment company securities. The amendments and revocations affect participants and beneficiaries of plans, IRA owners, and certain fiduciaries and service providers of plans and IRAs.

DATES: *Issuance date:* This amendment and partial revocation is issued June 7, 2016.

Applicability date: This amendment and partial revocation is applicable to transactions occurring on or after April 10, 2017. For further information, see *Applicability Date,* below.

FOR FURTHER INFORMATION CONTACT: Brian Shiker or Brian Mica, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Suite 400, Washington, DC 20210, (202) 693–8824 (not a toll-free number).

SUPPLEMENTARY INFORMATION: The Department is amending PTE 84–24 [1] on its own motion, pursuant to ERISA section 408(a) and Code section 4975(c)(2), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637 (October 27, 2011)).

Executive Summary

Purpose of Regulatory Action

The Department grants this amendment to PTE 84–24 in connection with its publication today, elsewhere in this issue of the **Federal Register**, of a final regulation defining who is a ''fiduciary'' of an employee benefit plan under ERISA as a result of giving investment advice to a plan or its participants or beneficiaries (Regulation). The Regulation also applies to the definition of a ''fiduciary'' of a plan (including an IRA) under the Code. The Regulation amends a prior regulation, dating to 1975, specifying when a person is a ''fiduciary'' under ERISA and the Code by reason of the provision of investment advice for a fee or other compensation regarding assets of a plan or IRA. The Regulation takes into account the advent of 401(k) plans and IRAs, the dramatic increase in rollovers, and other developments that have transformed the retirement plan landscape and the associated investment market over the four decades since the existing regulation was issued. In light of the extensive changes in retirement investment practices and relationships, the Regulation updates existing rules to distinguish more appropriately between the sorts of advice relationships that should be

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[1] PTE 84–24, 49 FR 13208 (Apr. 3, 1984), as corrected, 49 FR 24819 (June 15, 1984), as amended, 71 FR 5887 (Feb. 3, 2006).

treated as fiduciary in nature and those that should not.

PTE 84–24 is an exemption originally granted in 1977, and amended several times over the years. It historically provided relief for certain parties to receive commissions when plans and IRAs purchased recommended insurance and annuity contracts and investment company securities (*e.g.,* mutual fund shares). In connection with the adoption of the Regulation, PTE 84–24 is amended to increase the safeguards of the exemption and partially revoked in light of alternative exemptive relief finalized today. As amended, the exemption generally permits certain investment advice fiduciaries and other service providers to receive commissions in connection with the purchase of insurance contracts and Fixed Rate Annuity Contracts by plans and IRAs, as well as the purchase of investment company securities by plans. A Fixed Rate Annuity Contract is a fixed annuity contract issued by an insurance company that is either an immediate annuity contract or a deferred annuity contract that (i) satisfies applicable state standard nonforfeiture laws at the time of issue, or (ii) in the case of a group fixed annuity, guarantees return of principal net of reasonable compensation and provides a guaranteed declared minimum interest rate in accordance with the rates specified in the standard nonforfeiture laws in that state that are applicable to individual annuities; in either case, the benefits of which do not vary, in part or in whole, based on the investment experience of a separate account or accounts maintained by the insurer or the investment experience of an index or investment model. A Fixed Rate Annuity Contract does not include a variable annuity or an indexed annuity or similar annuity. Relief for compensation received in connection with purchases of annuity contracts that are not Fixed Rate Annuity Contracts by plans and IRAs, and compensation received in connection with purchases of investment company securities by IRAs, is revoked.

This amendment to and partial revocation of PTE 84–24 is part of the Department's regulatory initiative to mitigate the effects of harmful conflicts of interest associated with fiduciary investment advice. In the absence of an exemption, ERISA and the Code generally prohibit fiduciaries from using their authority to affect or increase their own compensation. A new exemption for receipt of compensation by fiduciaries that provide investment advice to IRAs, plan participants and beneficiaries, and certain plan fiduciaries, is adopted elsewhere in this issue of the **Federal Register**, in the ''Best Interest Contract Exemption.'' That exemption provides relief for a broader range of transactions and compensation practices, including transactions involving annuity contracts that are not Fixed Rate Annuity Contracts, such as variable and indexed annuities. The Best Interest Contract Exemption contains important safeguards which address the conflicts of interest associated with investment recommendations in the more complex financial marketplace that has developed since PTE 84–24 was granted.

ERISA section 408(a) specifically authorizes the Secretary of Labor to grant and amend administrative exemptions from ERISA's prohibited transaction provisions.[2] Regulations at 29 CFR 2570.30 to 2570.52 describe the procedures for applying for an administrative exemption. In amending this exemption, the Department has determined that the amended exemption is administratively feasible, in the interests of plans and their participants and beneficiaries and IRA owners, and protective of the rights of participants and beneficiaries of plans and IRA owners.

Summary of the Major Provisions

PTE 84–24, as amended, provides an exemption for certain prohibited transactions that occur when investment advice fiduciaries and other service providers receive compensation for their recommendation that plans or IRAs purchase ''Fixed Rate Annuity Contracts'' as defined in the exemption, and insurance contracts. IRAs are defined in the exemption to include other plans described in Code section 4975(e)(1)(B)–(F), such as Archer MSAs, Health Savings Accounts (HSAs), and Coverdell education savings accounts. Relief is also provided for certain prohibited transactions that occur when investment advice fiduciaries and other service providers receive compensation as a result of recommendations that plans purchase investment company securities. The exemption permits insurance agents, insurance brokers, pension consultants and investment company principal underwriters that are parties in interest or fiduciaries with respect to plans or IRAs, as applicable, to effect these purchases and receive a commission on them. The exemption is also available for the prohibited transaction that occurs when an insurance company selling a Fixed Rate Annuity Contract or insurance contract is a party in interest or disqualified person with respect to the plan or IRA.

As amended, the exemption requires fiduciaries engaging in these transactions to adhere to certain ''Impartial Conduct Standards,'' including acting in the best interest of the plans and IRAs when providing advice. The amendment also more specifically defines the types of payments that are permitted under the exemption and revises the disclosure and recordkeeping requirements of the exemption.

Executive Order 12866 and 13563 Statement

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

Under Executive Order 12866, ''significant'' regulatory actions are subject to the requirements of the Executive Order and review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order

[2] Code section 4975(c)(2) authorizes the Secretary of the Treasury to grant exemptions from the parallel prohibited transaction provisions of the Code. Reorganization Plan No. 4 of 1978 (5 U.S.C. app. at 214 (2000)) (''Reorganization Plan'') generally transferred the authority of the Secretary of the Treasury to grant administrative exemptions under Code section 4975 to the Secretary of Labor. Specifically, section 102(a) of the Reorganization Plan provides the DOL with ''all authority'' for ''regulations, rulings, opinions, and exemptions under section 4975 [of the Code]'' subject to certain exceptions not relevant here. Reorganization Plan section 102. In President Carter's message to Congress regarding the Reorganization Plan, he made explicitly clear that as a result of the plan, ''Labor will have statutory authority for fiduciary obligations. . . . Labor will be responsible for overseeing fiduciary conduct under these provisions.'' Reorganization Plan, Message of the President. This amended exemption provides relief from the indicated prohibited transaction provisions of both ERISA and the Code.

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

Background

Regulation Defining a Fiduciary

As explained more fully in the preamble to the Regulation, ERISA is a comprehensive statute designed to protect the interests of plan participants and beneficiaries, the integrity of employee benefit plans, and the security of retirement, health, and other critical benefits. The broad public interest in ERISA-covered plans is reflected in its imposition of fiduciary responsibilities on parties engaging in important plan activities, as well as in the tax-favored status of plan assets and investments. One of the chief ways in which ERISA protects employee benefit plans is by requiring that plan fiduciaries comply with fundamental obligations rooted in the law of trusts. In particular, plan fiduciaries must manage plan assets prudently and with undivided loyalty to the plans and their participants and beneficiaries.[3] In addition, they must refrain from engaging in ''prohibited transactions,'' which ERISA does not permit because of the dangers posed by the fiduciaries' conflicts of interest with respect to the transactions.[4] When fiduciaries violate ERISA's fiduciary duties or the prohibited transaction rules, they may be held personally liable for the breach.[5] In addition, violations of the prohibited transaction rules are subject to excise taxes under the Code.

The Code also has rules regarding fiduciary conduct with respect to tax-favored accounts that are not generally covered by ERISA, such as IRAs. In particular, fiduciaries of these arrangements, including IRAs, are subject to the prohibited transaction rules, and, when they violate the rules, to the imposition of an excise tax enforced by the Internal Revenue Service (IRS). Unlike participants in plans covered by Title I of ERISA, IRA owners do not have a statutory right to bring suit against fiduciaries for violation of the prohibited transaction rules.

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

The statutory definition deliberately casts a wide net in assigning fiduciary responsibility with respect to plan and IRA assets. Thus, ''any authority or control'' over plan or IRA assets is sufficient to confer fiduciary status, and any persons who render ''investment advice for a fee or other compensation, direct or indirect'' are fiduciaries, regardless of whether they have direct control over the plan's or IRA's assets and regardless of their status as an investment adviser or broker under the federal securities laws. The statutory definition and associated responsibilities were enacted to ensure that plans, plan participants, and IRA owners can depend on persons who provide investment advice for a fee to provide recommendations that are untainted by conflicts of interest. In the absence of fiduciary status, persons who provide investment advice are neither subject to ERISA's fundamental fiduciary standards, nor accountable under ERISA or the Code for imprudent, disloyal, or biased advice.

In 1975, the Department issued a regulation, at 29 CFR 2510.3–21(c), defining the circumstances under which a person is treated as providing ''investment advice'' to an employee benefit plan within the meaning of section ERISA 3(21)(A)(ii) (the ''1975 regulation'').[6] The 1975 regulation narrowed the scope of the statutory definition of fiduciary investment advice by creating a five-part test for fiduciary advice. Under the 1975 regulation, for advice to constitute ''investment advice,'' an adviser[7] must—(1) render advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing or selling securities or other property (2) on a regular basis (3) pursuant to a mutual agreement, arrangement or understanding, with the plan or a plan fiduciary that (4) the advice will serve as a primary basis for investment decisions with respect to plan assets, and that (5) the advice will be individualized based on the particular needs of the plan. The regulation provided that an adviser is a fiduciary with respect to any particular instance of advice only if he or she meets each and every element of the five-part test with respect to the particular advice recipient or plan at issue.

The market for retirement advice has changed dramatically since the Department first promulgated the 1975 regulation. Individuals, rather than large employers and professional money managers, have become increasingly responsible for managing retirement assets as IRAs and participant-directed plans, such as 401(k) plans, have supplanted defined benefit pensions. At the same time, the variety and complexity of financial products have increased, widening the information gap between advisers and their clients. Plan fiduciaries, plan participants and IRA investors must often rely on experts for advice, but are unable to assess the quality of the expert's advice or effectively guard against the adviser's

[3] ERISA section 404(a).

[4] ERISA section 406. ERISA also prohibits certain transactions between a plan and a ''party in interest.''

[5] ERISA section 409; *see also* ERISA section 405.

[6] The Department of the Treasury issued a virtually identical regulation, at 26 CFR 54.4975–9(c), which interprets Code section 4975(e)(3).

[7] When using the term ''adviser,'' the Department does not intend to refer only to investment advisers registered under the Investment Advisers Act of 1940 or under state law, but rather to any person rendering fiduciary investment advice under the Regulation. For example, as used herein, the term adviser can be an individual who is, among other things, a representative of a registered investment adviser, a bank or similar financial institution, an insurance company, or a broker-dealer.

conflicts of interest. This challenge is especially true of retail investors who typically do not have financial expertise and can ill-afford lower returns to their retirement savings caused by conflicts. The IRA accounts of these investors often account for all or the lion's share of their assets, and can represent all of savings earned for a lifetime of work. Losses and reduced returns can be devastating to the investors who depend upon such savings for support in their old age. As baby boomers retire, they are increasingly moving money from ERISA-covered plans, where their employer has both the incentive and the fiduciary duty to facilitate sound investment choices, to IRAs where both good and bad investment choices are myriad and advice that is conflicted is commonplace. These rollovers are expected to approach $2.4 trillion cumulatively from 2016 through 2020.[8] These trends were not apparent when the Department promulgated the 1975 rule. At that time, 401(k) plans did not yet exist and IRAs had only just been authorized.

As the marketplace for financial services has developed in the years since 1975, the five-part test has now come to undermine, rather than promote, the statutes' text and purposes. The narrowness of the 1975 regulation has allowed advisers, brokers, consultants and valuation firms to play a central role in shaping plan and IRA investments, without ensuring the accountability that Congress intended for persons having such influence and responsibility. Even when plan sponsors, participants, beneficiaries, and IRA owners clearly relied on paid advisers for impartial guidance, the 1975 regulation has allowed many advisers to avoid fiduciary status and disregard basic fiduciary obligations of care and prohibitions on disloyal and conflicted transactions. As a consequence, these advisers have been able to steer customers to investments based on their own self-interest (*e.g.,* products that generate higher fees for the adviser even if there are identical lower-fee products available), give imprudent advice, and engage in transactions that would otherwise be prohibited by ERISA and the Code without fear of accountability under either ERISA or the Code.

In the Department's amendments to the regulation defining fiduciary advice within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) (the ''Regulation''), which are also published in this issue of the **Federal Register**, the Department is replacing the existing regulation with one that more appropriately distinguishes between the sorts of advice relationships that should be treated as fiduciary in nature and those that should not, in light of the legal framework and financial marketplace in which IRAs and plans currently operate.[9]

The Regulation describes the types of advice that constitute ''investment advice'' with respect to plan and IRA assets for purposes of the definition of a fiduciary at ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B). The Regulation covers ERISA-covered plans, IRAs, and other plans not covered by Title I of ERISA, such as Keogh plans, and HSAs described in section 223(d) of the Code.

As amended, the Regulation provides that a person renders investment advice with respect to assets of a plan or IRA if, among other things, the person provides, directly to a plan, a plan fiduciary, a plan participant or beneficiary, IRA or IRA owner, one of the following types of advice, for a fee or other compensation, whether direct or indirect:

(i) A recommendation as to the advisability of acquiring, holding, disposing of, or exchanging, securities or other investment property, or a recommendation 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; and

(ii) A recommendation 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, types of investment account arrangements (brokerage versus advisory), or recommendations with respect to rollovers, transfers or distributions from a plan or IRA, including whether, in what amount, in what form, and to what destination such a rollover, transfer or distribution should be made.

In addition, in order to be treated as a fiduciary, such person, either directly or indirectly (*e.g.,* through or together with any affiliate), must: Represent or acknowledge that it is acting as a fiduciary within the meaning of ERISA or the Code with respect to the advice described; represent or acknowledge that it is acting as a fiduciary within the meaning of the ERISA or the Code; render the advice pursuant to a written or verbal agreement, arrangement or understanding that the advice is based on the particular investment needs of the advice recipient; or direct the advice to a specific advice recipient or recipients regarding the advisability of a particular investment or management decision with respect to securities or other investment property of the plan or IRA. The Regulation also provides that as a threshold matter in order to be fiduciary advice, the communication must be a ''recommendation'' as defined therein. The Regulation, as a matter of clarification, provides that a variety of other communications do not constitute ''recommendations,'' including non-fiduciary investment education; general communications; and specified communications by platform providers. These communications which do not rise to the level of ''recommendations'' under the regulation are discussed more fully in the preamble to the final Regulation.

The Regulation also specifies certain circumstances where the Department has determined that a person will not be treated as an investment advice fiduciary even though the person's activities technically may satisfy the definition of investment advice. For example, the Regulation contains a provision excluding recommendations to independent fiduciaries with financial expertise that are acting on behalf of plans or IRAs in arm's length transactions, if certain conditions are met. The independent fiduciary must be a bank, insurance carrier qualified to do business in more than one state, investment adviser registered under the Investment Advisers Act of 1940 or by a state, broker-dealer registered under the Securities Exchange Act of 1934 (Exchange Act), or any other independent fiduciary that holds, or has under management or control, assets of at least $50 million, and: (1) The person making the recommendation must know or reasonably believe that the independent fiduciary of the plan or IRA is capable of evaluating investment risks independently, both in general and with regard to particular transactions and investment strategies (the person may rely on written representations from the plan or independent fiduciary to satisfy this condition); (2) the person

[8] Cerulli Associates, ''Retirement Markets 2015.''

[9] The Department initially proposed an amendment to its regulation defining a fiduciary within the meaning of ERISA section 3(21)(A)(ii) and Code section 4975(e)(3)(B) on October 22, 2010, at 75 FR 65263. It subsequently announced its intention to withdraw the proposal and propose a new rule, consistent with the President's Executive Orders 12866 and 13563, in order to give the public a full opportunity to evaluate and comment on the new proposal and updated economic analysis. The first proposed amendment to the rule was withdrawn on April 20, 2015, *see* 80 FR 21927.

must fairly inform the independent fiduciary that the person is not undertaking to provide impartial investment advice, or to give advice in a fiduciary capacity, in connection with the transaction and must fairly inform the independent fiduciary of the existence and nature of the person's financial interests in the transaction; (3) the person must know or reasonably believe that the independent fiduciary of the plan or IRA is a fiduciary under ERISA or the Code, or both, with respect to the transaction and is responsible for exercising independent judgment in evaluating the transaction (the person may rely on written representations from the plan or independent fiduciary to satisfy this condition); and (4) the person cannot receive a fee or other compensation directly from the plan, plan fiduciary, plan participant or beneficiary, IRA, or IRA owner for the provision of investment advice (as opposed to other services) in connection with the transaction.

Similarly, the Regulation provides that the provision of any advice to an employee benefit plan (as described in ERISA section 3(3)) by a person who is a swap dealer, security-based swap dealer, major swap participant, major security-based swap participant, or a swap clearing firm in connection with a swap or security-based swap, as defined in section 1a of the Commodity Exchange Act (7 U.S.C. 1a) and section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)) is not investment advice if certain conditions are met. Finally, the Regulation describes certain communications by employees of a plan sponsor, plan, or plan fiduciary that would not cause the employee to be an investment advice fiduciary if certain conditions are met.

Prohibited Transactions

ERISA section 406(a)(1)(A)–(D) and Code section 4975(c)(1)(A)–(D) prohibit certain transactions between plans or IRAs and ''parties in interest,'' as defined in ERISA section 3(14), or ''disqualified persons,'' as defined in Code section 4975(e)(2). Fiduciaries and other service providers are parties in interest and disqualified persons under ERISA and the Code. As a result, they are prohibited from engaging in (1) the sale, exchange or leasing of property with a plan or IRA, (2) the lending of money or other extension of credit to a plan or IRA, (3) the furnishing of goods, services or facilities to a plan or IRA and (4) the transfer to or use by or for the benefit of a party in interest of plan assets.

ERISA section 406(b) and Code section 4975(c)(1)(E) and (F) are aimed at fiduciaries only. These provisions generally prohibit a fiduciary from dealing with the income or assets of a plan or IRA in his or her own interest or his or her own account and from receiving payments from third parties in connection with transactions involving the plan or IRA. Parallel regulations issued by the Departments of Labor and the Treasury explain that these provisions impose on fiduciaries of plans and IRAs a duty not to act on conflicts of interest that may affect the fiduciary's best judgment on behalf of the plan or IRA. Under these provisions, a fiduciary may not cause a plan or IRA to pay an additional fee to such fiduciary, or to a person in which such fiduciary has an interest that may affect the exercise of the fiduciary's best judgment.

The receipt of a commission on the sale of an insurance or annuity contract or investment company securities by a fiduciary that recommended the investment violates the prohibited transaction provisions of ERISA section 406(b) and Code section 4975(c)(1)(E) and (F). In addition, the effecting of the sale by a fiduciary or service provider is a service, potentially in violation of ERISA section 406(a)(1)(C) and Code section 4975(c)(1)(C). Finally, the purchase of an insurance or annuity contract by a plan or IRA from an insurance company that is a fiduciary, service provider or other party in interest or disqualified person, violates ERISA section 406(a)(1)(A) and (D) and Code section 4975(c)(1)(A) and (D).

Prohibited Transaction Exemption 84–24

As the prohibited transaction provisions demonstrate, ERISA and the Code strongly disfavor conflicts of interest. In appropriate cases, however, the statutes provide exemptions from their broad prohibitions on conflicts of interest. In addition, the Secretary of Labor has discretionary authority to grant administrative exemptions under ERISA and the Code on an individual or class basis, but only if the Secretary first finds that the exemptions are (1) administratively feasible, (2) in the interests of plans and their participants and beneficiaries and IRA owners, and (3) protective of the rights of the participants and beneficiaries of such plans and IRA owners. Accordingly, while fiduciary advisers may always give advice without need of an exemption if they avoid the sorts of conflicts of interest that result in prohibited transactions, when they choose to give advice in which they have a financial interest, they must rely upon an exemption.

Pursuant to its exemption authority, the Department has previously granted several conditional administrative class exemptions that are available to fiduciary advisers in defined circumstances. PTE 84–24 historically provided an exemption from the prohibited transaction provisions of ERISA and the Code for insurance agents, insurance brokers, pension consultants, insurance companies and investment company principal underwriters to engage in certain transactions involving insurance and annuity contracts, and investment company securities. Prior to this amendment, PTE 84–24 provided relief to these parties in connection with transactions involving ERISA-covered plans, Keogh plans, as well as IRAs and other plans described in Code section 4975, such as Archer MSAs, HSAs and Coverdell education savings accounts.[10]

Specifically, PTE 84–24 permitted insurance agents, insurance brokers and pension consultants to receive, directly or indirectly, a commission for selling insurance or annuity contracts to plans and IRAs. The exemption also permitted the purchase by plans and IRAs of insurance and annuity contracts from insurance companies that are parties in interest or disqualified persons. The term ''insurance and annuity contract'' included a variable annuity contract.[11]

With respect to transactions involving investment company securities, PTE 84–24 also permitted the investment company's principal underwriter to receive commissions in connection with a plan's or IRA's purchase of investment company securities. The term ''principal underwriter'' is defined in the same manner as it is defined in the Investment Company Act of 1940. Section 2(a)(29) of the Investment Company Act of 1940 [12] provides that a

> 'Principal underwriter' of or for any investment company other than a closed-end company, or of any security issued by such a company, means any underwriter who as principal purchases from such company, or pursuant to contract has the right (whether absolute or conditional) from time to time to purchase from such company, any such security for distribution, or who as agent for such company sells or has the right to sell any such security to a dealer or to the public or both, but does not include a dealer who purchases from such company through a principal underwriter acting as agent for such company.

[10] *See* PTE 2002–13, 67 FR 9483 (March 1, 2002) (preamble discussion of certain exemptions, including PTE 84–24, that apply to plans described in Code section 4975).

[11] *See* PTE 77–9, 42 FR 32395 (June 24, 1977) (predecessor to PTE 84–24).

[12] 15 U.S.C. 80a–2(a)(29).

As the Department stated in a 1980 Advisory Opinion,[13] the exemption is limited, in this regard, to principal underwriters acting in their ordinary course of business as principal underwriters, and does not extend more generally to all broker-dealers.[14]

In connection with the proposed Regulation, the Department proposed an amendment to PTE 84–24 that included several important changes. First, the Department proposed to increase the safeguards of the exemption by requiring fiduciaries that rely on the exemption to adhere to ''Impartial Conduct Standards,'' including acting in the best interest of the plans and IRAs when providing advice, and by more precisely defining the types of payments that are permitted under the exemption. Second, on a going forward basis, the Department proposed to revoke relief for insurance agents, insurance brokers and pension consultants to receive a commission in connection with the purchase by IRAs of variable annuity contracts and other annuity contracts that are securities under federal securities laws, and for investment company principal underwriters to receive a commission in connection with the purchase by IRAs of investment company securities.

This amended exemption follows a lengthy public notice and comment process, which gave interested persons an extensive opportunity to comment on the proposed Regulation and the related exemption proposals, including the proposed amendment to and partial revocation of PTE 84–24. The proposals initially provided for 75-day comment periods, ending on July 6, 2015, but the Department extended the comment periods to July 21, 2015. The Department then also held four days of public hearings on the new regulatory package, including the proposed exemptions, in Washington, DC from August 10 to 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 comment on the proposals or hearing transcript until September 24, 2015. A total of over 3,000 comment letters were received on the new proposals. There were also over 300,000 submissions made as part of 30 separate petitions submitted on the proposals. These comments and petitions came from consumer groups, plan sponsors, financial services companies, academics, elected government officials, trade and industry associations, and others, both in support and in opposition to the rule and related exemption proposals.[15] The Department has reviewed all comments, and after careful consideration of the comments, has decided to grant this amendment to and partial revocation of PTE 84–24, as described below.

[13] Advisory Opinion 80–30A (May 21, 1980).

[14] PTE 84–24 also provides relief for: (1) The purchase, with plan assets, of an insurance or annuity contract from an insurance company which is a fiduciary or a service provider (or both) with respect to the plan solely by reason of the sponsorship of a master or prototype plan, and (2) the purchase, with plan assets, of investment company securities from, or the sale of such securities to, an investment company or investment company principal underwriter, when such investment company or its principal underwriter or investment adviser is a fiduciary or a service provider (or both) with respect to the plan solely by reason of: The sponsorship of a master or prototype plan or the provision of nondiscretionary trust services to the plan; or both.

Description of the Amendment and Partial Revocation of PTE 84–24

The final amendment to PTE 84–24 preserves the availability of the exemption for the receipt of commissions by insurance agents, insurance brokers and pension consultants, in connection with the recommendation that plans or IRAs purchase insurance contracts and certain types of annuity contracts defined in the exemption as ''Fixed Rate Annuity Contracts.'' A Fixed Rate Annuity Contract is a fixed annuity contract issued by an insurance company that is either an immediate annuity contract or a deferred annuity contract that (i) satisfies applicable state standard nonforfeiture laws at the time of issue, or (ii) in the case of a group fixed annuity, guarantees return of principal net of reasonable compensation and provides a guaranteed declared minimum interest rate in accordance with the rates specified in the standard nonforfeiture laws in that state that are applicable to individual annuities; in either case, the benefits of which do not vary, in part or in whole, based on the investment experience of a separate account or accounts maintained by the insurer or the investment experience of an index or investment model. A Fixed Rate Annuity Contract does not include a variable annuity, or an indexed annuity or similar annuity.

The Department's approach to the definition of Fixed Rate Annuity Contract is generally based on satisfaction of applicable state standard nonforfeiture laws at the time of issue. If the applicable law does not have a standard nonforfeiture provision, the definition may be satisfied by compliance with the National Association of Insurance Commissioners (NAIC) Model Standard Nonforfeiture Law. However, for group fixed annuities, which the Department understands are not typically covered by standard nonforfeiture laws, the definition requires the annuity to meet comparable standards. Therefore, the group fixed annuity must guarantee return of principal net of reasonable compensation and provide a guaranteed declared minimum interest rate in accordance with the rates specified in the standard nonforfeiture laws in that state that are applicable to individual annuities (or the NAIC Model Standard Nonforfeiture Law if there is no applicable state standard nonforfeiture law).

By defining a Fixed Rate Annuity Contract in this manner, the Department intends to cover within PTE 84–24 fixed annuities that currently are referred to as immediate annuities, traditional annuities, declared rate annuities or fixed rate annuities (including deferred income annuities). These annuities provide payments that are the subject of insurance companies' contractual guarantees and that are predictable. Permitting such annuities to be recommended under the terms of PTE 84–24 will promote access to these annuity contracts which have important lifetime income guarantees and terms that are more understandable to consumers. As noted by commenters, lifetime income products are increasingly critical for retirement savers due to the shift away from defined benefit plans. The Department notes that the fact that an annuity contract allows for the payment of dividends, allows the insurance company in its discretion to credit a rate higher than the minimum guarantee, or provides for a cost-of-living adjustment does not in and of itself remove an annuity contract from the definition of a Fixed Rate Annuity Contract under the exemption.

On the other hand, the exemption does not cover variable annuities, indexed annuities or similar annuities, in which contract values vary, in whole or in part, based on the investment experience of a separate account or accounts maintained by the insurer or the investment experience of an index or investment model. In this regard, the exemption also does not cover any annuity registered as a security under federal securities laws. These investments typically require the customer to shoulder significant investment risk and do not offer the

[15] As used throughout this preamble, the term ''comment'' refers to information provided through these various sources, including written comments, petitions and witnesses at the public hearing.

same predictability of payments as Fixed Rate Annuity Contracts. The Department determined that these annuities, which are often quite complex and subject to significant conflicts of interest at the point of sale, should be sold under the more stringent conditions of the Best Interest Contract Exemption. The Best Interest Contract Exemption contains important safeguards which address the conflicts of interest associated with investment recommendations in the more complex financial marketplace that has developed since PTE 84–24 was granted. While it is the Department's general intent that new types of annuity products introduced after the finalization of this amendment should be sold under the conditions of the Best Interest Contract Exemption, the Department, as needed, will provide additional guidance or interpretations regarding whether a particular annuity contract, available now or in the future, satisfies the definition of Fixed Rate Annuity Contract for purposes of PTE 84–24.

The amendment adopts the proposal's approach to the receipt of commissions by investment company principal underwriters. The exemption remains available for these transactions involving ERISA plans and Keogh plans, but not for IRAs and other plans described in Code section 4975(e)(1)(B)-(D), including Archer MSAs, HSAs and Coverdell education savings accounts.

As amended, the exemption requires fiduciaries engaging in these transactions to adhere to certain ''Impartial Conduct Standards,'' including acting in the best interest of the plans and IRAs when providing advice. The amendment also more specifically defines the types of payments that are permitted under the exemption and revises the disclosure and recordkeeping requirements of the exemption.

The Department amended and revoked PTE 84–24 in these ways only in conjunction with the grant of a new exemption, the Best Interest Contract Exemption, adopted elsewhere in this issue of the **Federal Register**, that is applicable to advice to certain ''retirement investors''—generally retail investors such as plan participants and beneficiaries, IRA owners, and certain plan fiduciaries. The Best Interest Contract Exemption provides broad relief for investment advice fiduciaries to recommend all investments, subject to protective conditions, including that the recommendation be in the best interest of the retirement investor. The exemption applies to all annuities, including Fixed Rate Annuity Contracts as well as variable annuity contracts and indexed annuity contracts. Likewise, broader relief is available in the Best Interest Contract Exemption for transactions involving investment company securities involving both plans and IRAs that are retirement investors. As discussed in more detail below, the conditions of the Best Interest Contract Exemption more appropriately address these conflicted arrangements.

In addition, the Regulation adopted today permits investment professionals—including insurance agents, insurance brokers, pension consultants, and mutual fund principal underwriters—to avoid fiduciary status when they engage in arm's length transactions with plans or IRAs that are independently represented by a fiduciary with financial expertise. Such independent fiduciaries generally include banks, insurance carriers, registered investment advisers, broker-dealers and other fiduciaries with $50 million or more in assets under management or control. This provision in the Regulation complements the limitations in the Best Interest Contract Exemption and is available for transactions involving all insurance and annuity contracts and investment company securities.[16]

A number of commenters objected generally to changes to PTE 84–24 on the basis that the original exemption, in combination with other regulatory safeguards under insurance law or securities law, provides sufficient protections to plans and IRAs. Commenters said there is no demonstrated harm to these consumers under the existing approach.

The Department does not agree. The extensive changes in the retirement plan landscape and the associated investment market in recent decades undermine the continued adequacy of the original approach in PTE 84–24. In the years since the exemption was originally granted in 1977,[17] the growth of 401(k) plans and IRAs has increasingly placed responsibility for critical investment decisions on individual investors rather than professional plan asset managers. Moreover, at the same time as individual investors have increasingly become responsible for managing their own investments, the complexity of investment products and range of conflicted compensation structures have likewise increased. As a result, it is appropriate to revisit and revise the exemption to better reflect the realities of the current marketplace.

Therefore, while the exemption remains available for insurance contracts and Fixed Rate Annuity Contracts, it is revoked for annuity contracts that do not satisfy the definition of Fixed Rate Annuity contracts. Accordingly, the exemption specifically excludes recommendations of variable annuities, indexed annuities and similar annuities. Given the complexity, investment risks, and conflicted sales practices associated with these products, the Department has determined that recommendations to purchase such annuities should be subject to the greater protections of the Best Interest Contract Exemption.

Both the Securities and Exchange Commission (SEC) staff and the Financial Industry Regulatory Authority (FINRA)[18] have issued publications specifically addressing variable annuities and indexed annuities. In its Investor Alert ''Variable Annuities: Beyond the Hard Sell,'' which focused on deferred variable annuities, FINRA stated:

> The marketing efforts used by some variable annuity sellers deserve scrutiny—especially when seniors are the targeted investors. Sales pitches for these products might attempt to scare or confuse investors. One scare tactic used with seniors is to claim that a variable annuity will protect them from lawsuits or seizures of their assets. Many such claims are not based on facts, but nevertheless help land a sale. While variable annuities can be appropriate as an investment under the right circumstances, as an investor, you should be aware of their restrictive features, understand that substantial taxes and charges may apply if you withdraw your money early, and guard against fear-inducing sales tactics.

The FINRA alert further stated:

> Investing in a variable annuity within a tax-deferred account, such as an individual retirement account (IRA) may not be a good idea. Since IRAs are already tax-advantaged, a variable annuity will provide no additional tax savings. It will, however, increase the

[16] Parties satisfying this provision of the Regulation are not fiduciaries subject to the provisions of ERISA section 406(b) and Code section 4975(c)(1)(E) and (F) but they may still be subject to the prohibited transactions restrictions of ERISA section 406(a) and Code section 4975(c)(1)(A)–(D) for transactions involving parties in interest and disqualified persons. To the extent relief from those provisions is necessary for non-fiduciaries entering into insurance and annuity contract transactions, the Best Interest Contract Exemption provides such relief in a supplemental exemption in Section VI of the exemption, even for parties that are not retirement investors.

[17] *See* PTE 77–9, 42 FR 32395 (June 24, 1977) (predecessor to PTE 84–24).

[18] FINRA is registered with the Securities and Exchange Commission (SEC) as a national securities association and is a self-regulatory organization, as those terms are defined in the Exchange Act, which operates under SEC oversight.

expense of the IRA, while generating fees and commissions for the broker or salesperson.[19]

With respect to indexed annuities, a FINRA Investor Alert, ''Equity-Indexed Annuities: A Complex Choice,'' stated:

Sales of equity-indexed annuities (EIAs) . . . have grown considerably in recent years. Although one insurance company at one time included the word 'simple' in the name of its product, EIAs are anything but easy to understand. One of the most confusing features of an EIA is the method used to calculate the gain in the index to which the annuity is linked. To make matters worse, there is not one, but several different indexing methods. Because of the variety and complexity of the methods used to credit interest, investors will find it difficult to compare one EIA to another.'' [20]

Similarly, in its 2011 ''Investor Bulletin: Indexed Annuities,'' the SEC staff stated:

You can lose money buying an indexed annuity. If you need to cancel your annuity early, you may have to pay a significant surrender charge and tax penalties. A surrender charge may result in a loss of principal, so that an investor may receive less than his original purchase payments. Thus, even with a specified minimum value from the insurance company, it can take several years for an investment in an indexed annuity to 'break even.' [21]

The SEC staff further noted:

It is important to note that indexed annuity contracts commonly allow the insurance company to change the participation rate, cap, and/or margin/spread/asset or administrative fee on a periodic—such as annual—basis. Such changes could adversely affect your return.[22]

Finally, a commenter noted that the North American Securities Administrators Association has issued the following statement on equity indexed annuities:

Equity indexed annuities are extremely complex investment products that have often been used as instruments of fraud and abuse. For years, they have taken an especially heavy toll on our nation's most vulnerable investors, our senior citizens for whom they are clearly unsuitable.[23]

In the Department's view, the increasing complexity and conflicted payment structures associated with these annuity products have heightened the conflicts of interest experienced by investment advice providers that recommend them. These are complex products requiring careful consideration of their terms and risks. Assessing the prudence of a particular indexed annuity requires an understanding of surrender terms and charges; interest rate caps; the particular market index or indexes to which the annuity is linked; the scope of any downside risk; associated administrative and other charges; the insurer's authority to revise terms and charges over the life of the investment; and the specific methodology used to compute the index-linked interest rate and any optional benefits that may be offered, such as living benefits and death benefits. In operation, the index-linked interest rate can be affected by participation rates; spread, margin or asset fees; interest rate caps; the particular method for determining the change in the relevant index over the annuity's period (annual, high water mark, or point-to-point); and the method for calculating interest earned during the annuity's term (*e.g.,* simple or compounded interest). Investors can all too easily overestimate the value of these contracts, misunderstand the linkage between the contract and index performance, underestimate the costs of the contract, and overestimate the scope of their protection from downside risk (or wrongly believe they have no risk of loss). As a result, retirement investors are acutely dependent on sound advice that is untainted by the conflicts of interest posed by advisers' incentives to secure the annuity purchase, which can be quite substantial.

These developments have undermined the protections of PTE 84–24 as applied to variable and indexed annuities purchased by plans and IRAs. As stated in the accompanying Regulatory Impact Analysis, conflicts of interest in the marketplace for retail investments result in billions of dollars of underperformance to investors saving for retirement. Both categories of annuities, variable and indexed annuities, are susceptible to abuse, and all retirement investors—plans and IRAs alike—would benefit from a requirement that advisers adhere to enforceable standards of fiduciary conduct and fair dealing. The Department has therefore concluded that variable annuities, indexed annuities and similar annuities are properly recommended to both plans and IRAs under the conditions of the Best Interest Contract Exemption.

The Best Interest Contract Exemption's important protections include fiduciary advisers' enforceable contractual commitment to adhere to the Impartial Conduct Standards, such as giving best interest advice; financial institutions' express written acknowledgment of their fiduciary status; and full disclosure of conflicts of interest, compensation practices, and financial arrangements with third parties. As part of the Best Interest Contract Exemption's protections, financial institutions must also adopt and adhere to stringent anti-conflict policies and procedures aimed at ensuring advice that is in the best interest of the retirement investor and avoiding misaligned financial incentives. These protective conditions serve as strong counterweights to the conflicts of interest associated with complex investment products, such as variable and indexed annuities.

However, the Department is not fully revoking PTE 84–24. In this final amendment, the scope of the exemption as applicable to insurance transactions has been narrowed to focus on ''Fixed Rate Annuity Contracts,'' which are defined as fixed annuity contracts issued by an insurance company that are either immediate annuity contracts or deferred annuity contracts that (i) satisfy applicable state standard nonforfeiture laws at the time of issue, or (ii) in the case of a group fixed annuity, guarantee return of principal net of reasonable compensation and provide a guaranteed declared minimum interest rate in accordance with the rates specified in the standard nonforfeiture laws in that state that are applicable to individual annuities; in either case, the benefits of which do not vary, in part or in whole, based on the investment experience of a separate account or accounts maintained by the insurer or the investment experience of an index or investment model. A Fixed Rate Annuity Contract does not include

[19] ''Variable Annuities: Beyond the Hard Sell,'' *available at http://www.finra.org/sites/default/files/InvestorDocument/p125846.pdf.* FINRA also has special suitability rules for certain investment products, including variable annuities. *See* FINRA Rule 2330 (imposing heightened suitability, disclosure, supervision and training obligations regarding variable annuities); *see also* FINRA rule 2360 (options) and FINRA rule 2370 (securities futures). *See also* SEC Office of Investor Education and Advocacy Investor Publication ''Variable Annuities: What You Should Know'' *available at http://www.sec.gov/investor/pubs/varannty.htm.* ''[I]f you are investing in a variable annuity through a tax-advantaged retirement plan (such as a 401(k) plan or IRA), you will get no additional tax advantage from the variable annuity. Under these circumstances, consider buying a variable annuity only if it makes sense because of the annuity's other features, such as lifetime income payments and death benefit protection. The tax rules that apply to variable annuities can be complicated—before investing, you may want to consult a tax adviser about the tax consequences to you of investing in a variable annuity.''

[20] ''Equity-Indexed Annuities: A Complex Choice'' *available at https://www.finra.org/investors/alerts/equity-indexed-annuities_a-complex-choice.*

[21] SEC Office of Investor Education and Advocacy Investor Bulletin: Indexed Annuities, *available at https://www.sec.gov/investor/alerts/secindexedannuities.pdf.*

[22] Id.

[23] *See* NASAA Statement on SEC Equity-Indexed Annuity Rule (December 17, 2008) *available at http://www.nasaa.org/5611/statement-on-sec-equity-indexed-annuity-rule/.*

a variable annuity or an indexed annuity or similar annuity. Accordingly, PTE 84–24 effectively provides a more streamlined exemption for less complex annuity products that provide guaranteed lifetime income.

Additionally, the Department revokes the exemption for covered mutual fund transactions involving IRAs (as defined in the exemption). The amended exemption incorporates the Impartial Conduct Standards, and applies to narrow categories of payments. The Department finds that the conditions of the amended exemption are appropriate in connection with the narrow scope of relief provided in the amended exemption.

The specific changes to PTE 84–24, and comments received on the proposed amendment and revocation, are discussed below.

Scope of the Amended Exemption

Section I(b) of the exemption, as amended, provides relief for six transactions if the conditions of the exemption are satisfied. The exemption provides relief from the application of ERISA section 406(a)(1)(A) though (D) and 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code section 4975(c)(1)(A) through (F). The six transactions are:

(1) The receipt, directly or indirectly, by an insurance agent or broker or a pension consultant of an Insurance Commission and related employee benefits, from an insurance company in connection with the purchase, with assets of a Plan or Individual Retirement Account (IRA),[24] including through a rollover or distribution, of an insurance contract or Fixed Rate Annuity Contract. A Fixed Rate Annuity Contract is a fixed annuity contract issued by an insurance company that is either an immediate annuity contract or a deferred annuity contract that (i) satisfies applicable state standard nonforfeiture laws at the time of issue, or (ii) in the case of a group fixed annuity, guarantees return of principal net of reasonable compensation and provides a guaranteed declared minimum interest rate in accordance with the rates specified in the standard nonforfeiture laws in that state that are applicable to individual annuities; in either case, the benefits of which do not vary, in part or in whole, based on the investment experience of a separate account or accounts maintained by the insurer or the investment experience of an index or investment model. A Fixed Rate Annuity Contract does not include a variable annuity or an indexed annuity or similar annuity.

(2) The receipt of a Mutual Fund Commission by a Principal Underwriter for an investment company registered under the Investment Company Act of 1940 (an investment company) in connection with the purchase, with Plan assets, including through a rollover or distribution, of securities issued by an investment company.

(3)(i) The effecting by an insurance agent or broker, or pension consultant of a transaction for the purchase, with assets of a Plan or IRA, including through a rollover or distribution, of a Fixed Rate Annuity Contract or insurance contract, or (ii) the effecting by a Principal Underwriter of a transaction for the purchase, with assets of a Plan, including through a rollover or distribution, of securities issued by an investment company.

(4) The purchase, with assets of a Plan or IRA, including through a rollover or distribution, of a Fixed Rate Annuity Contract or insurance contract from an insurance company, and the receipt of compensation or other consideration by the insurance company.

(5) The purchase, with assets of a Plan, of a Fixed Rate Annuity Contract or insurance contract from an insurance company which is a fiduciary or a service provider (or both) with respect to the Plan solely by reason of the sponsorship of a Master or Prototype Plan.

(6) The purchase, with assets of a Plan, of securities issued by an investment company from, or the sale of such securities to, an investment company or an investment company Principal Underwriter, when the investment company, Principal Underwriter, or the investment company investment adviser is a fiduciary or a service provider (or both) with respect to the Plan solely by reason of: (A) The sponsorship of a Master or Prototype Plan; or (B) the provision of Nondiscretionary Trust Services to the Plan; or (C) both (A) and (B).

The amended exemption is, therefore, limited to plan and IRA transactions involving Fixed Rate Annuity Contracts and insurance contracts. The exemption's transactions regarding investment company securities are limited to transactions involving plans. Transactions involving advice with respect to annuities that do not meet the definition of Fixed Rate Annuity Contract (*i.e.,* variable annuities, indexed annuities, and similar annuities) and investment company transactions involving IRAs must occur under the conditions of another exemption, such as the Best Interest Contract Exemption, to the extent the transactions are otherwise prohibited. Section I(c) makes these issues of scope clear.[25]

The Department also made certain additional revisions to the description of the covered transactions, as a result of commenters' input. Although the Department intended that the exemption, as amended, cover transactions resulting from a rollover or distribution, some commenters expressed concern about the exemption's applicability in that context, and the text now specifically states that the exemption applies in the context of a rollover or distribution. In addition, in Section I(b)(1), the final exemption explicitly provides that, in addition to Insurance Commissions, the payment of related employee benefits is covered under the exemption. This revision was made in response to comments, discussed in greater detail below, regarding certain types of payments commonly paid to insurance company statutory employees that commenters believed may raise prohibited transactions issues.[26] Finally, in Section I(a)(4), the Department expressly revised the scope of covered transactions regarding Fixed Rate Annuity Contracts and insurance contracts to specify that the relief under the exemption extends to the receipt of compensation or other consideration by the insurance company involved in the transaction, in addition to the commission received by the insurance agent, insurance broker, or pension consultant.[27]

[24] For purposes of this amendment, the terms ''Individual Retirement Account'' or ''IRA'' mean 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 an HSA described in section 223(d) of the Code.

[25] The Department notes that the provisions of the exemption for ''insurance contracts'' refer to an insurance contract that is not an annuity; accordingly, it is not possible to rely on the exemption for a variable annuity contract transaction, for example, under the theory that a variable annuity contract falls within the provisions for insurance contracts as opposed to annuity contracts.

[26] Some commenters asked whether the exemption covered salary, bonuses, overtime pay, and employee benefits provided to common law employees. Based on the information provided in the comments, the Department was unable to determine why the commenters believed salary, overtime pay and benefits provided to common law employees constitute prohibited transactions for which relief is necessary. With respect to bonus payments that raise prohibited transaction issues, without additional information, the Department is unable to evaluate how the conditions of this amended exemption would apply to such payments. The Department will provide additional guidance if commenters wish to provide additional information and analysis related to any of these payments to common law employees. Additionally, to the extent the conditions are met, the Department notes that the Best Interest Contract Exemption is not limited to any particular form of compensation and therefore would provide relief for such payments.

[27] Regarding the scope of the exemption, one commenter requested that the Department clarify whether the Department's Advisory Opinion 2000–15 allows fiduciaries providing investment advice for a fee to utilize PTE 84–24. The advisory opinion concerned the application of PTE 84–24 to transactions involving IRAs offered by TIAA–CREF. The opinion did not disallow investment advice fiduciaries from using PTE 84–24, but rather expressed the Department's longstanding view that the types of payments available under PTE 84–24 are limited to commissions, as opposed to other types of fees for investment advice. Thus the

Continued

Comments on these issues of scope are discussed below. Although the majority of commenters on the proposed revocation focused on the amendment's application to insurance and annuity contracts, some also addressed the proposed revocation of relief for investment company transactions.

a. Insurance and Annuity Products

In the proposed amendment, the Department proposed to revoke relief for transactions involving IRAs and variable annuities and other annuity contracts that are securities under federal securities laws. As an initial matter, some commenters raised a concern about terminology, noting that all annuity products are securities, but some are ''exempt'' securities under section 3(a) of the Securities Act of 1933. For purposes of this preamble discussion, the Department has adopted that the ''exempt'' terminology.

The proposed amendment to PTE 84–24 stated that the proposed Best Interest Contract Exemption was designed for IRA owners and other investors that rely on fiduciary investment advisers in the retail marketplace, and expressed the view that some of the transactions involving IRAs that were permitted under PTE 84–24 should instead occur under the conditions of the Best Interest Contract Exemption, specifically, transactions involving variable annuity contracts and other annuity contracts that are non-exempt securities under federal securities laws, and investment company securities.

The proposed amendment further proposed that transactions involving insurance and annuity contracts that are exempt securities could continue to occur under PTE 84–24, with the added protections of the Impartial Conduct Standards. In taking this approach, the proposal noted that that the Department was not certain that the conditions of the proposed Best Interest Contract Exemption, including some of the disclosure requirements, would be readily applicable to insurance and annuity contracts that are exempt securities, or that the distribution methods and channels of such insurance products would fit within the exemption's framework.

The proposal, therefore, distinguished between transactions that involve insurance products that are exempt securities and those that are non-exempt securities. This distinction was based on the view that annuity contracts that are non-exempt securities and investment company securities are distributed through the same channels as many other investments covered by the Best Interest Contract Exemption, and such investment products have similar disclosure requirements under existing regulations. Accordingly, the conditions of the proposed Best Interest Contract Exemption were viewed as appropriately tailored for such transactions.

The Department considered the contractual enforcement mechanism proposed in the Best Interest Contract Exemption as especially relevant to IRA owners, who do not have a mechanism to enforce the prohibited transactions provisions of ERISA and the Code. However, other conditions of the proposed Best Interest Contract Exemption were equally protective of both plans and IRAs, including the requirement that financial institutions relying on the exemption adopt anti-conflict policies and procedures designed to ensure that advisers satisfy the Impartial Conduct Standards.

The Department sought comment on the distinction drawn in the proposed amendment to PTE 84–24 between exempt and non-exempt securities. In particular, the proposal asked whether revoking relief for non-exempt securities transactions involving IRAs but leaving in place relief for IRA transactions involving insurance products that are exempt securities struck the appropriate balance, and whether that approach would be sufficiently protective of the interests of the IRAs. The Department also sought comment in the proposed Best Interest Contract Exemption on a number of issues related to the workability of that exemption (particularly, the disclosure requirements) for exempt insurance and annuity products. A number of comments on the two proposals addressed this issue of scope.

Some commenters, expressing concern about the risks associated with variable annuities, commended the Department for proposing that variable annuities should be recommended under the conditions of the Best Interest Contract Exemption rather than PTE 84–24. Generally, the commenters argued that due to the complexity, illiquidity and commission and fee structure of variable annuities and similar products, investors should be provided the additional protections of the Best Interest Contract Exemption for transactions involving these investments.

In this regard, commenters argued that variable annuities and investment company securities are similar to the other assets listed in the definition of assets in the proposed Best Interest Contract Exemption in that their value may fluctuate on a daily basis and, as such, variable annuities and investment company securities should be treated consistently with other investments in securities. The comments stated that the Best Interest Contract Exemption would offer protection and a means of redress for investors due to the conflicts of interest created by the commission and fee structure of variable annuities.

In addition to comments on variable annuities, some commenters argued that due to their complexity, fee structure, inherent conflicts of interest, as well as lack of regulation under the securities laws, indexed annuities similarly require heightened regulation. Consistent with this position, commenters argued that indexed annuities should be treated the same as variable annuities under the Department's exemptions. Additionally, one commenter noted that the compensation structure for indexed annuities is similar to that of variable annuities, raising comparable concerns regarding conflicts of interest. As a result, commenters said that recommendations of such products by fiduciaries should be subject to the same protective conditions as those proposed for variable annuities under the Best Interest Contract Exemption.

The Department understands that like Fixed Rate Annuity Contracts, indexed annuities are generally not regulated as registered securities under federal securities laws. Although the SEC issued a rule in 2008 that would have treated certain indexed annuities as securities, the rule was vacated by court order [28] and the SEC subsequently withdrew the rule.[29] As several commenters noted, the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act), Title IX, section 989J calls for certain annuity contracts to be considered exempt securities by the SEC if the conditions of that section are met. In addition, the SEC Web site's Investor Information section states ''An indexed annuity may or may not be a security;

opinion stated, ''[i]t is the Department's view that PTE 84–24 would not provide relief for any prohibited transaction that may arise in connection with the receipt of any fees or other compensation separate and apart from the commission paid to a principal underwriter upon a plan's purchase of recommended securities. Thus, PTE 84–24 does not exempt any prohibited transaction arising out of transactions involving fees paid to a fiduciary service provider with respect to an advice program which provides specific/individualized asset allocation recommendations to participants based on their responses to questionnaires.''

[28] *Am. Equity Life Ins. Co.* v. *SEC,* 613 F.3d 166, 179 (D.C. Cir. 2010).

[29] 75 FR 64642 (Oct. 20, 2010).

however, most indexed annuities are not registered with the SEC.'' [30]

Despite the fact that the proposed amendment to PTE 84–24 focused on the distinction between exempt and non-exempt securities under federal securities law, some commenters asserted that indexed annuities should also be covered under the Best Interest Contract Exemption in order to enhance retirement investor protection in an area lacking sufficient protections for investors in tax qualified accounts. A commenter argued that IRA owners need greater protections when investing in indexed annuities precisely because such products are not regulated as securities and therefore do not fall within FINRA's jurisdiction.

A few commenters cited statements by the SEC staff, FINRA and the North American Securities Administrators Association, regarding indexed annuities. The statements, quoted at length above, touch upon the risks, complexity and sales tactics associated with these products. In particular, the SEC staff pointed to the possibility of significant surrender charges, and the fact that the insurance company may be permitted to change the terms of the annuity on an annual basis, adversely affecting the return. As noted, the FINRA Investor Alert, ''Equity-Indexed Annuities: A Complex Choice,'' states that equity-indexed annuities ''are anything but easy to understand.'' [31] One commenter asserted that many advisers, in addition to their clients, do not fully understand indexed annuities.

In this regard, a commenter further argued that there is no difference between the conflicted compensation arrangements of variable annuity contracts and indexed annuity contracts and asserted that typically compensation paid to advisers for sales of indexed annuities is higher than other products, creating an incentive to sell indexed annuities. The commenter noted that requiring indexed annuity transactions to occur under the Best Interest Contract Exemption would result in firms developing policies and procedures that would protect retirement investors from compensation practices that encourage recommendations not in the investor's best interest. The commenter argued that the lack of regulation of indexed annuities under the securities laws supports the argument for applying expanded safeguards under the Best Interest Contract Exemption for recommendations involving these products.

The industry generally opposed the approach taken in the proposal to revoke the relief historically provided by PTE 84–24 for variable annuities and other annuities that are non-exempt securities under federal securities laws. They wrote that the insurance industry should be able to rely on PTE 84–24 for all insurance products, rather than bifurcating relief between two exemptions. A number of commenters asserted that variable annuity contracts were more closely aligned with insurance products than with securities, and that variable annuities were not just a ''package'' of mutual funds. Commenters argued that, like fixed annuities, variable annuities provide retirement income guarantees and insurance guarantees that distinguish the annuities from other investments that lack such guarantee, and therefore fixed and variable annuities should be treated the same under the Department's exemptions. One commenter stated that federal securities laws recognize that variable annuities are different from mutual funds and the laws accommodate these differences. These commenters disputed the suggestion that the distinction between annuities that are exempt securities and non-exempt securities merited different treatment in the exemptions.

In this regard, some industry commenters focused on indexed annuities, in particular. These commenters asserted that fixed indexed annuities and fixed annuities are identical insurance products except for the method of calculating interest credited to the contract. They said that indexed annuities are treated the same as other fixed annuities under state insurance law and federal securities law, and stated that indexed annuities can offer the same income, insurance and contractual guarantees as fixed annuities. Moreover, some commenters noted that significant investment risk is borne by the insurer and there is no risk of principal loss, assuming that the investor does not incur surrender charges.[32] According to some commenters, indexed annuities are no more complex than other fixed annuities, and there are no different conflicts of interest created with their sales, as compared to fixed annuities.

Commenters also emphasized the benefit, for compliance purposes, of having one exemption for all insurance products, including variable annuities and indexed annuities. These commenters highlighted the importance of lifetime income options, and the ways the Department, the Treasury Department and the IRS have worked to make annuities more accessible to retirement investors. Many of these commenters took the position that the Department's proposed approach would undermine these efforts by hindering access to lifetime income products by plans and IRAs.

Commenters said that some aspects of the proposed Best Interest Contract Exemption would exacerbate this problem. In particular, they expressed uncertainty as to the extent to which the Best Interest Contract Exemption permitted commission-based compensation for fiduciary advisers. By comparison, it was maintained, PTE 84–24 clearly referenced the receipt of a commission. There were also concerns about the disclosure requirements and certain other requirements as applicable to the insurance industry. Commenters said the burden of complying with the Best Interest Contract Exemption would cause some in the insurance industry to leave the market. Many commenters took the position that existing regulation of these products is sufficient.

After consideration of all of the comments, the Department has made revisions to both PTE 84–24 and the final Best Interest Contract Exemption as applicable to annuity contracts. Under this final amendment to PTE 84–24, the scope of covered annuity transactions is limited to plan and IRA transactions involving Fixed Rate Annuity Contracts. Accordingly, PTE 84–24 now provides a streamlined exemption for relatively straightforward guaranteed lifetime income products such as immediate and deferred income annuities, while leaving coverage of variable annuity contracts, indexed annuity contracts, and similar annuity contracts, to the Best Interest Contract Exemption. Based upon its significant concerns about the complexity, risk, and conflicts of interest associated with recommendations of variable annuity contracts, indexed annuity contracts and similar contracts, the final exemption treats these transactions the

[30] *https://www.sec.gov/answers/annuity.htm.*

[31] ''Equity-Indexed Annuities: A Complex Choice'' *available at https://www.finra.org/investors/alerts/equity-indexed-annuities_a-complex-choice.*

[32] However, as the SEC staff noted in its 2011 ''Investor Bulletin: Indexed Annuities'': ''You can lose money buying an indexed annuity. If you need to cancel your annuity early, you may have to pay a significant surrender charge and tax penalties. A surrender charge may result in a loss of principal, so that an investor may receive less than his original purchase payments. Thus, even with a specified minimum value from the insurance company, it can take several years for an investment in an indexed annuity to 'break even.' ''

same way whether the investor is a plan or IRA.[33]

At the same time, the Department revised the Best Interest Contract Exemption in ways that accommodate fiduciary recommendations for both plans and IRAs to purchase variable annuities and indexed annuities. The final Best Interest Contract Exemption contains more streamlined disclosure conditions that are applicable to a wide variety of products. The pre-transaction disclosure does not require a projection of the total cost of the recommended investment, which commenters indicated would be difficult to provide in the insurance context. The final exemption does not include the proposed data collection requirement, which also posed problems for insurance products, according to commenters. Further, the language of the final exemption was adjusted to address industry concerns in other places and the preamble provides interpretations to address the particular questions and concerns raised by the insurance industry. For example, the preamble of the Best Interest Contract Exemption makes clear that commissions are permitted under the exemption and that annuity commissions do not necessarily violate the Impartial Conduct Standards. In addition, the ''reasonable compensation'' standard adopted in the final exemption addresses comments from the insurance industry. Section IV of that exemption additionally provides specific guidance on the satisfaction of the Best Interest standard by proprietary product providers. Commenters stressed a desire for one exemption covering all insurance and annuity products; the final Best Interest Contract Exemption does just that, while ensuring a greater level of protection to vulnerable retirement investors.

In light of the ways in which these products have developed, and the concerns articulated by other regulators and the commenters regarding the complexity, risks, and enhanced conflicts of interest associated with them, the Department determined that the conditions of PTE 84–24 are insufficiently protective to safeguard the interests of plans and IRAs investing in these products. The Best Interest Contract Exemption's conditions, such as a contractual commitment to adhere to the Impartial Conduct Standards when transacting with IRA owners, the required adoption of and adherence to anti-conflict policies and procedures, and the required disclosures of conflicts of interest, are necessary to address dangerous conflicts present in transactions involving these products. Moreover, this final amendment and partial revocation of PTE 84–24 creates a uniform approach for plans and IRAs under which indexed annuities and variable annuities can be recommended only under the same protective conditions as other investments covered in the Best Interest Contract Exemption and avoids creating a regulatory incentive to preferentially recommend indexed annuities. As a final issue of scope, one commenter stated the Department should add an exclusion to the Regulation that would apply to the recommendation of a Qualified Longevity Annuity Contract as described in Treasury Regulation sections 1.401(a)(9) and 1.408, provided the disclosure requirements found in Treasury Regulation section 1.408–6 are satisfied and any disclosure requirements under applicable state insurance law are met. As an alternative, the commenter recommended that the Department should exclude recommendations on Qualified Longevity Annuity Contracts from PTE 84–24's Impartial Conduct Standards and the recordkeeping requirements.

The Department considered this request but declined to single out Qualified Longevity Annuity Contracts for unique treatment under PTE 84–24. Regardless of the merit of any particular investment in such an annuity, the Department is mindful that the exemption permits investment advice fiduciaries to make recommendations and receive compensation pursuant to conflicted arrangements. The conditions of PTE 84–24, as amended, are streamlined to promote access to such lifetime income products, but the Impartial Conduct Standards and recordkeeping requirements are critical conditions aimed at ensuring that all retirement investors receive basic fiduciary protections, regardless of the particular product the adviser chooses to recommend. The mere fact that a recommended investment is a Qualified Longevity Annuity Contract does not guarantee that the recommendation is prudent, unbiased, or in the customer's best interest. An important goal of this regulatory project is to ensure that all retirement investors receive advice that adheres to these basic standards of prudence, loyalty, honesty, and reasonable compensation.

For the reader's convenience, the chart attached as Appendix I describes some of the basic features and attributes of the different categories of annuities discussed above.

b. Investment Company Transactions

The proposed amendment and partial revocation also applied to investment company transactions historically covered under the exemption. Under the proposed amendment, receipt of compensation by investment company principal underwriters in connection with IRA transactions involving investment company securities would no longer be permitted under PTE 84–24.[34] These transactions are, however, covered under the Best Interest Contract Exemption as applicable to ''retirement investors.''

A few commenters addressed this aspect of the proposal. The commenters indicated the exemption had long been used by broker-dealers for mutual fund transactions and questioned the basis for the revocation of such relief. In this regard, relief under the exemption was historically limited by the Department to investment company principal underwriters ''in the ordinary course of [their] business'' as principal underwriters.[35] The Department never intended for the exemption to provide relief for broker-dealers that are not principal underwriters. The Best Interest Contract Exemption is specifically designed to address recommendations by such broker-dealers and contains appropriate safeguards for these transactions involving IRAs, as discussed in detail in the preamble to the Best Interest Contract Exemption.

One commenter requested that the Department extend relief under the exemption to include Mutual Fund Commissions paid to principal underwriters and their agents. The Department has not revised the exemption in this respect because the

[33] One commenter suggested the Department create a streamlined exemption for a class of fixed annuity that pays a contractually guaranteed rate of interest, has a surrender charge period of no more than seven years and restricts the commission structure to trail payments only. The Department considered this approach when amending the scope of PTE 84–24, but the suggested approach did not address all the Department's concerns with the conflicts of interest associated with annuities. In particular, as discussed herein, the Department determined that indexed annuities—which could fit within the parameters established by the commenter—have characteristics that warrant the particular protections of the Best Interest Contract Exemption.

[34] For purposes of this amendment, the terms ''Individual Retirement Account'' or ''IRA'' mean 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 an HSA described in section 223(d) of the Code.

[35] *See* Advisory Opinion 80–30A. As noted above, the term ''principal underwriter'' is defined in the same manner as it is defined in section 2(a)(29) of the Investment Company Act of 1940 (15 U.S.C. 80a-2(a)(29)).

exemption already permits the principal underwriter to share the commissions with its agents and employees.[36] Accordingly, no amendment was necessary.

One commenter suggested that ''sophisticated'' IRA owners should not be subject to the exemption's amendments, but instead should be able to use the exemption under the same conditions applicable to plans. The commenter suggested the Department could rely on the federal securities laws, specifically the accredited investor rules, which the commenter said are commonly used and understood and identify investors who may be financially sophisticated. In response, the Department notes that, as amended, the exemption's conditions do apply equally to plans and IRAs in the context of Fixed Rate Annuity Contracts. With respect to investment company transactions, the Department declines to provide a special rule based on the accredited investor rules or similar criteria. As explained above, the Regulation describes circumstances under which a person will not be a fiduciary when he or she engages in a transaction with an independent plan or IRA fiduciary with financial expertise. This approach in the Regulation does not extend to individual IRA owners or plan participants and beneficiaries. Individuals with large account balances may have reached that point through years of hard work, careful savings, the rollover of an account balance from a defined benefit plan, or from an inheritance. None of these paths necessarily correlate with financial expertise or sophistication, or suggest a reduced need for stringent fiduciary protections. Although relief is no longer available under this exemption for investment company securities transactions with IRA owners, individual plan participants or beneficiaries, the Best Interest Contract Exemption is available for such transactions. The Best Interest Contract Exemption was designed for IRA owners and other investors that rely on fiduciary investment advisers in the retail marketplace.

One commenter indicated that the exemptions uniformly failed to provide relief for non-proprietary mutual fund transactions sold to plans on an agency basis. The Department does not agree with this comment. The existing exemption, PTE 86–128 [37] (also amended today), permits non-proprietary mutual fund sales to plans on an agency basis. Further, the Best Interest Contract Exemption explicitly covers such advice with respect to retail investors, and the Regulation defining fiduciary advice creates a carve-out from fiduciary coverage for arm's length transactions between sophisticated counterparties engaged in such transactions. To the extent that commenters asked to expand the scope of PTE 84–24 to other investments, the Department responds that the Best Interest Contract Exemption and its specifically tailored and protective conditions is available for such expanded relief. To the extent firms do not wish to comply with the conditions in that exemption, they may provide advice under circumstances that are free from the sorts of conflicts of interest that trigger the prohibited transaction rules.

Impartial Conduct Standards

A new Section II of the exemption requires that insurance agents, insurance brokers, pension consultants, insurance companies and investment company principal underwriters that are fiduciaries engaging in the exempted transactions comply with fundamental Impartial Conduct Standards.

Generally stated, the Impartial Conduct Standards require that when insurance agents, insurance brokers, pension consultants, insurance companies or investment company principal underwriters provide fiduciary investment advice, they act in the plan's or IRA's Best Interest, and not make misleading statements to the plan or IRA about recommended transactions. As defined in the exemption, the insurance agent or broker, pension consultant, insurance company or investment company principal underwriter act in the Best Interest of a plan or IRA when they act ''with 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 Plan or IRA, without regard to the financial or other interests of the fiduciary, any affiliate or other party.''

It is important to note that, unlike some of the other exemptions finalized today in this issue of the **Federal Register**, there is no requirement under this exemption that parties contractually commit to the Impartial Conduct Standards. Also unlike some of the other exemptions finalized or amended today, the Impartial Conduct Standards in PTE 84–24 do not include a requirement that the compensation received by the fiduciary and affiliates be reasonable. Such a requirement already exists under Section III(c) of the exemption, and is therefore unnecessary in Section II. As discussed below, Section III(c) aligns the conditions of this exemption with the standards finalized in the other exemptions including the Best Interest Contract Exemption.[38]

The Impartial Conduct Standards represent fundamental obligations of fair dealing and fiduciary conduct. The concepts of prudence and undivided loyalty are deeply rooted in ERISA and the common law of agency and trusts.[39] These longstanding concepts of law and equity were developed in significant part to deal with the issues that arise when agents and persons in a position of trust have conflicting loyalties, and accordingly, are well-suited to the problems posed by conflicted investment advice. The requirement that the adviser act ''without regard to'' the adviser's own financial interests or the interests of persons other than the retirement investor is a concise expression of ERISA's duty of loyalty as expressed in section 404(a)(1)(A) of ERISA and applied in the context of advice. It is consistent with the formulation stated in common law, and it is consistent with the language used by Congress in Section 913(g)(1) of the Dodd-Frank Act,[40] and cited in the Staff of the U.S. Securities and Exchange Commission ''Study on Investment Advisers and Broker-Dealers, as required under the Dodd-Frank Act'' (Jan. 2011) (SEC staff Dodd-Frank

[36] See Letter to John A. Cardon, et al., (October 31, 1977) (discussing payment of a portion of the commission to an employee of the principal underwriter).

[37] Exemption for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers, 51 FR 41686 (November 18, 1986), as amended, 67 FR 64137 (October 17, 2002).

[38] There is also no requirement in the other exemptions finalized today to contractually warrant compliance with applicable federal and state laws, as was proposed. However, significant violations of applicable federal or state law could also amount to violations of the Impartial Conduct Standards, such as the Best Interest standard, in which case, this exemption, as amended, would be unavailable for transactions occurring in connection with such violations.

[39] See generally ERISA sections 404(a), 408(b)(2); Restatement (Third) of Trusts section 78 (2007), and Restatement (Third) of Agency section 8.01.

[40] Section 913(g) governs ''Standard of Conduct'' and subsection (1) provides that ''The Commission may promulgate rules to provide that the standard of conduct for all brokers, dealers, and investment advisers, when providing personalized investment advice about securities to retail customers (and such other customers as the Commission may by rule provide), shall be to act in the best interest of the customer without regard to the financial or other interest of the broker, dealer, or investment adviser providing the advice.''

Study).[41] The Department notes, however, that the standard is not intended to outlaw investment advice fiduciaries' provision of advice from investment menus that are restricted on the basis of proprietary products or revenue sharing. Finally, the "reasonable compensation" obligation is a feature of ERISA and the Code under current law that has long applied to financial services providers, whether fiduciaries or not.

The Department received many comments on the proposed Impartial Conduct Standards. A number of commenters focused on the Department's authority to impose the Impartial Conduct Standards as conditions of this exemption. Commenters' arguments regarding the Impartial Conduct Standards as applicable to IRAs and non-ERISA plans were based generally on the fact that the standards, as noted above, are consistent with longstanding principles of prudence and loyalty set forth in ERISA section 404, but which have no counterpart in the Code. Commenters took the position that because Congress did not choose to impose the standards of prudence and loyalty on fiduciaries with respect to IRAs and non-ERISA plans, the Department exceeded its authority in proposing similar standards as a condition of relief in a prohibited transaction exemption.

With respect to ERISA plans, commenters stated that Congress' separation of the duties of prudence and loyalty (in ERISA section 404) from the prohibited transaction provisions (in ERISA section 406), showed an intent that the two should remain separate. Commenters additionally questioned why the conduct standards were necessary for ERISA plans, when such plans already have an enforceable right to fiduciary conduct that is both prudent and loyal. Commenters asserted that imposing the Impartial Conduct Standards as conditions of the exemption created strict liability for prudence violations.

Some commenters additionally took the position that Congress, in the Dodd-Frank Act, gave the SEC the authority to establish standards for broker-dealers and investment advisers and therefore, the Department did not have the authority to act in that area. The Department disagrees that the exemption exceeds its authority. The Department has clear authority under ERISA section 408(a) and the Reorganization Plan[42] to grant administrative exemptions from the prohibited transaction provisions of both ERISA and the Code. Congress gave the Department broad discretion to grant or deny exemptions and to craft conditions for those exemptions, subject only to the overarching requirement that the exemption be administratively feasible, in the interests of plans, plan participants and beneficiaries and IRA owners, and protective of their rights.[43] Nothing in ERISA or the Code suggests that, in exercising its express discretion to fashion appropriate conditions, the Department is forbidden to borrow from time-honored trust-law standards and principles developed by the courts to ensure proper fiduciary conduct.

The Impartial Conduct Standards represent, in the Department's view, baseline standards of fundamental fair dealing that must be present when fiduciaries make conflicted investment recommendations to retirement investors. After careful consideration, the Department determined that relief should be provided to investment advice fiduciaries receiving conflicted compensation only if such fiduciaries provided advice in accordance with the Impartial Conduct Standards—*i.e.,* if they provided prudent advice without regard to the interests of such fiduciaries and their affiliates and related entities, in exchange for reasonable compensation and without misleading investors.

These Impartial Conduct Standards are necessary to ensure that advisers' recommendations reflect the best interest of their retirement investor customers, rather than the conflicting financial interests of the advisers and their financial institutions. As a result, advisers and financial institutions bear the burden of showing compliance with the exemption and face liability for engaging in a non-exempt prohibited transaction if they fail to provide advice that is prudent or otherwise in violation of the standards. The Department does not view this as a flaw in the exemption, as commenters suggested, but rather as a significant deterrent to violations of important conditions under an exemption that accommodates a wide variety of potentially dangerous compensation practices. The Department similarly disagrees that Congress' directive to the SEC in the Dodd-Frank Act limits its authority to establish appropriate and protective conditions in the context of a prohibited transaction exemption. Section 913 of that Act directs the SEC to conduct a study on the standards of care applicable to brokers-dealers and investment advisers, and issue a report containing, among other things:

> an analysis of whether [sic] any identified legal or regulatory gaps, shortcomings, or overlap in legal or regulatory standards in the protection of retail customers relating to the standards of care for brokers, dealers, investment advisers, persons associated with brokers or dealers, and persons associated with investment advisers for providing personalized investment advice about securities to retail customers.[44]

Section 913 authorizes, but does not require, the SEC to issue rules addressing standards of care for broker-dealers and investment advisers for providing personalized investment advice about securities to retail customers.[45] Nothing in the Dodd-Frank Act indicates that Congress meant to preclude the Department's regulation of fiduciary investment advice under ERISA or its application of such a regulation to securities brokers or dealers. To the contrary, Dodd-Frank in directing the SEC study specifically directed the SEC to consider the effectiveness of existing legal and regulatory standard of care under other federal and state authorities. Dodd-Frank Act, sec. 913(b)(1) and (c)(1). The Dodd-Frank Act did not take away the Department's responsibility with respect to the definition of fiduciary under ERISA and in the Code; nor did it qualify the Department's authority to issue exemptions that are administratively feasible, in the interests of plans, participants and beneficiaries, and IRA owners, and protective of the rights of participants and beneficiaries of the plans and IRA owners.

Some commenters suggested that it would be unnecessary to impose the Impartial Conduct Standards on advisers with respect to ERISA plans because fiduciaries to these Plans already are required to adhere to these obligations under the provisions of the statute. The Department considered this comment but has determined not to eliminate the conduct standards as conditions of the exemption for ERISA plans. One of the Department's goals is to ensure equal footing for all retirement investors. The SEC staff Dodd-Frank Study found that investors were frequently confused by the differing standards of care applicable to broker-dealers and registered investment advisers. The Department hopes to

[41] SEC Staff Study on Investment Advisers and Broker-Dealers, January 2011, available at *https://www.sec.gov/news/studies/2011/913studyfinal.pdf,* pp.109–110.

[42] *See* fn. 2, *supra,* discussing of Reorganization Plan No. 4 of 1978 (5 U.S.C. app. at 214 (2000)).

[43] *See* ERISA section 408(a) and Code section 4975(c)(2).

[44] Dodd-Frank Act, sec. 913(d)(2)(B).

[45] 15 U.S.C. 80b–11(g)(1).

minimize such confusion in the market for retirement advice by holding investment advice fiduciaries to similar standards, regardless of whether they are giving the advice to an ERISA plan, IRA, or a non-ERISA plan.

Moreover, inclusion of the standards in the exemption's conditions adds an important additional safeguard for ERISA and IRA investors alike because the party engaging in a prohibited transaction has the burden of showing compliance with an applicable exemption, when violations are alleged.[46] In the Department's view, this burden-shifting is appropriate because of the dangers posed by conflicts of interest, as reflected in the Department's Regulatory Impact Analysis and because of the difficulties plans and IRA investors have in effectively policing such violations.[47]

A few commenters also expressed concern that the requirements of this exemption, as proposed, would interfere with state insurance regulatory programs. In particular, one commenter asserted that the Impartial Conduct Standards could usurp state insurance regulations. The Department does not agree with these comments. In addition to consulting with state insurance regulators and the NAIC as part of this project, the Department has also reviewed NAIC model laws and regulations and state reactions to those models in order to ensure the requirements of this exemption work cohesively with the requirements currently in place. The Department has crafted the exemption so that it will work with, and complement, state insurance regulations. In addition, the Department confirms that it is not its intent to preempt or supersede state insurance law and enforcement, and that state insurance laws remain subject to the ERISA section 514(b)(2)(A) savings clause.

Several commenters also raised questions about the role of the McCarran-Ferguson Act[48] and the Department's authority to regulate insurance products. The McCarran-Ferguson Act states that federal laws do not preempt state laws to the extent they relate to or are enacted for the purpose of regulating the business of insurance; it does not, however, prohibit federal regulation of insurance.[49] The Department has designed the exemption to work with and complement state insurance laws, not to invalidate, impair, or preempt state insurance laws.[50] Specifically, the Supreme Court has made it clear that ''the McCarran-Ferguson Act does not surrender regulation exclusively to the States so as to preclude the applicable of ERISA to an insurer's actions.''[51]

Other commenters generally asserted that some of the exemption's terms were too vague and would result in the exemption failing to meet the ''administratively feasible'' requirement under ERISA section 408(a) and Code section 4975(c)(2). The Department disagrees with these commenters' suggestion that ERISA section 408(a) and Code section 4975(c)(2) fail to be satisfied by the exemption's principles-based approach or that the exemption's standards are unduly vague. It is worth repeating that the Impartial Conduct Standards are building on concepts that are longstanding and familiar in ERISA and the common law of trusts and agency. Far from requiring adherence to novel standards with no antecedents, these conditions primarily require adherence to fundamental obligations of fair dealing and fiduciary conduct. In addition, the exemption and this preamble includes a section, below, designed to provide specific interpretations and responses to issues raised in connection with the Impartial Conduct Standards.

In this regard, some commenters focused their comments on the Impartial Conduct Standards in the proposed Best Interest Contract Exemption and other proposals, as opposed to the proposed amendment to PTE 84–24. The Department determined it was important that the provisions of the exemptions, including the Impartial Conduct Standards, be uniform and compatible across exemptions. For this reason, the Department considered all comments made on any of the exemption proposals on a consolidated basis, and made corresponding changes across the projects. For ease of use, this preamble includes the same general discussion of comments as in the Best Interest Contract Exemption, despite the fact that some comments discussed below were not made directly with respect to this exemption.

a. Best Interest Standard

Under Section II(a), the insurance agent or broker, pension consultant, insurance company or investment company principal underwriter must comply with a Best Interest standard when providing investment advice to the plan or IRA. The exemption provides that these parties act in the best interest of the plan or IRA when they:

> 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, based on the investment objectives, risk tolerance, financial circumstances and needs of the [p]lan or IRA, without regard to the financial or other interests of the fiduciary, any affiliate or other party.

The Best Interest standard set forth in the amended exemption is based on longstanding concepts derived from ERISA and the law of trusts. It is meant to express the concept, set forth in ERISA section 404, that a fiduciary is required to act ''solely in the interest of the participants . . . 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.'' Similarly, both ERISA section 404(a)(1)(A) and the trust-law duty of loyalty require fiduciaries to put the interests of trust beneficiaries first, without regard to the fiduciaries' own self-interest. Under this standard, for example, an investment advice fiduciary, in choosing between two investments, could not select an investment because it is better for the investment advice fiduciary's bottom line even though it is a worse choice for the plan or IRA.[52]

[46] *See e.g., Fish* v. *GreatBanc Trust Company,* 749 F.3d 671 (7th Cir. 2014).

[47] As a practical matter, one way for financial institutions to ensure that they can meet this burden is by implementing strong anti-conflict policies and procedures, and by refraining from creating incentives to violate the Impartial Conduct Standards. Although this exemption does not require that financial institutions make any warranty to their customers about the adoption of such policies and procedures, the Department expects that financial institutions that take the Impartial Conduct Standards seriously will adopt such practices.

[48] 15 U.S.C. 1011 *et seq.* (1945).

[49] *See John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank,* 510 U.S. 86, 97–101 (1993) (holding that ''ERISA leaves room for complementary or dual federal or state regulation, and calls for federal supremacy when the two regimes cannot be harmonized or accommodated'').

[50] *See BancOklahoma Mortg. Corp.* v. *Capital Title Co., Inc.,* 194 F.3d 1089 (10th Cir. 1999) (stating that McCarran-Ferguson Act bars the application of a federal statute only if (1) the federal statute does not specifically relate to the business of insurance; (2) a state statute has been enacted for the purpose of regulating the business of insurance; and (3) the federal statute would invalidate, impair, or supersede the state statute); *Prescott Architects, Inc.* v. *Lexington Ins. Co.,* 638 F. Supp. 2d 1317 (N.D. Fla. 2009); *see also U.S.* v. *Rhode Island Insurers' Insolvency Fund,* 80 F.3d 616 (1st Cir. 1996).

[51] *John Hancock,* 510 U.S. at 98.

[52] The standard does not prevent investment advice fiduciaries relying on the exemption from restricting their recommended investments to proprietary products or products that generate

Continued

A wide range of commenters indicated support for a broad ''best interest'' standard. Some comments indicated that the Best Interest standard is consistent with the way advisers provide investment advice to clients today. However, a number of these commenters expressed misgivings as to the definition used in the proposed exemption, in particular, the ''without regard to'' formulation. The commenters indicated uncertainty as to the meaning of the phrase, including: whether it permitted the investment advice fiduciary to be paid; whether it permitted investment advice on proprietary products; and whether it effectively precluded recommending annuities if they generate higher commissions than mutual funds.

Other commenters asked that the exemption use a different definition of best interest, or simply use the exact language from ERISA's section 404 duty of loyalty. Others suggested definitional approaches that would require that the investment advice fiduciary ''not subordinate'' their customers' interests to their own interests, or that the investment advice fiduciary ''put their customers' interests ahead of their own interests,'' or similar constructs.

FINRA suggested that the federal securities laws should form the foundation of the Best Interest standard. Specifically, FINRA urged that the best interest definition in the exemption incorporate the ''suitability'' standard applicable to investment advisers and broker-dealers under federal securities laws. According to FINRA, this would facilitate customer enforcement of the Best Interest standard by providing adjudicators with a well-established basis on which to find a violation.

Other commenters found the Best Interest standard to be an appropriate statement of the obligations of a fiduciary investment advice provider and believed it would provide concrete protections against conflicted recommendations. These commenters asked the Department to maintain the best interest definition as proposed. One commenter wrote that the term ''best interest'' is commonly used in connection with a fiduciary's duty of loyalty and cautioned the Department against creating an exemption that failed to include the duty of loyalty. Others urged the Department to avoid definitional changes that would reduce current protections to plans and IRAs. Some commenters also noted that the ''without regard to'' language is consistent with the recommended standard in the SEC staff Dodd-Frank Study, and suggested that it had the added benefit of potentially harmonizing with a future securities law standard for broker-dealers.

The final exemption retains the best interest definition as proposed, with minor adjustments. The first prong of the standard was revised to more closely track the statutory language of ERISA section 404(a) and is consistent with the Department's intent to hold investment advice fiduciaries to a prudent investment professional standard. Accordingly, the definition of best interest now requires advice that reflects ''the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person *acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims,* based on the investment objectives, risk tolerance, financial circumstances and needs of the plan or IRA. . .'' The exemption adopts the second prong of the proposed definition, ''without regard to the financial or other interests of the fiduciary, any affiliate or other party,'' without change. The Department continues to believe that the ''without regard to'' language sets forth the appropriate, protective standard under which a fiduciary investment adviser should act. Although the exemption provides broad relief for fiduciary investment advisers to receive commissions based on their advice, the standard ensures that the advice will not be tainted by self-interest. Many of the alternative approaches suggested by commenters pose their own ambiguities and interpretive challenges, and lower standards run the risk of undermining this regulatory initiative's goal of reducing the impact of conflicts of interest on plans and IRAs.

The Department has not specifically incorporated the suitability obligation as an element of the Best Interest standard, as suggested by FINRA but many aspects of suitability are also elements of the Best Interest standard. An investment recommendation that is not suitable under the securities laws would not meet the Best Interest standard. Under FINRA's Rule 2111(a) on suitability, broker-dealers ''must have a reasonable basis to believe that a recommended transaction or investment strategy involving a security or securities is suitable for the customer.'' The text of rule 2111(a), however, does not do any of the following: reference a best interest standard, clearly require brokers to put their client's interests ahead of their own, expressly prohibit the selection of the least suitable (but more remunerative) of available investments, or require them to take the kind of measures to avoid or mitigate conflicts of interests that are required as conditions of this exemption.

The Department recognizes that FINRA issued guidance on Rule 2111 in which it explains that ''in interpreting the suitability rule, numerous cases explicitly state that a broker's recommendations must be consistent with his customers' best interests,'' and provided examples of conduct that would be prohibited under this standard, including conduct that this exemption would not allow.[53] The guidance goes on to state that ''[t]he suitability requirement that a broker make only those recommendations that are consistent with the customer's best interests prohibits a broker from placing his or her interests ahead of the customer's interests.'' The Department, however, is reluctant to adopt as an express standard such guidance, which has not been formalized as a clear rule and that may be subject to change. Additionally, FINRA's suitability rule may be subject to interpretations which could conflict with interpretations by the Department, and the cases cited in the FINRA guidance, as read by the Department, involved egregious fact patterns that one would have thought violated the suitability standard, even without reference to the customer's ''best interest.'' The scope of the guidance also is different than the scope of this exemption. For example, insurance providers who decide to accept conflicted compensation will need to comply with the terms of this exemption, but, in many instances, may not be subject to FINRA's guidance. Accordingly, after review of the issue, the Department has decided not to accept the comment. The Department has concluded that its articulation of a clear loyalty standard within the exemption, rather than by reference to the FINRA guidance, will provide clarity and certainty to investors, and better protect their interests.

The Best Interest standard, as set forth in the exemption, is intended to effectively incorporate the objective standards of care and undivided loyalty that have been applied under ERISA for more than 40 years. Under these objective standards, the investment advice fiduciary must adhere to a professional standard of care in making investment recommendations that are in the plan's or IRA's best interest. The investment advice fiduciary may not

revenue sharing. Section IV of the Best Interest Contract Exemption specifically addresses how the standard may be satisfied under such circumstances.

[53] FINRA Regulatory Notice 12–25, p. 3 (2012).

base his or her recommendations on his or her own financial interest in the transaction. Nor may the investment advice fiduciary recommend the investment unless it meets the objective prudent person standard of care. Additionally, the duties of loyalty and prudence embodied in ERISA are objective obligations that do not require proof of fraud or misrepresentation, and full disclosure is not a defense to making an imprudent recommendation or favoring one's own interests at the plan's or IRA's expense.

Several commenters requested additional guidance on the Best Interest standard. Investment advice fiduciaries that are concerned about satisfying the standard may wish to consult the policies and procedures requirement in Section II(d) of the Best Interest Contract Exemption. While these policies and procedures are not a condition of the PTE 84–24, they may provide useful guidance for financial institutions wishing to ensure that individual advisers adhere to the Impartial Conduct Standards. The preamble to the Best Interest Contract Exemption provides examples of policies and procedures prudently designed to ensure that advisers adhere to the Impartial Conduct Standards. The examples are not intended to be exhaustive or mutually exclusive, and they range from examples that focus on eliminating or nearly eliminating compensation differentials to examples that permit, but police, the differentials.

A few commenters also questioned the requirement in the Best Interest standard that recommendations be made without regard to the interests of ''*other parties.''* The commenters indicated they did not know the purpose of the reference to ''other parties'' and asked that it be deleted. The Department intends the reference to make clear that a fiduciary operating within the Impartial Conduct Standards should not take into account the interests of any party other than the plan or IRA—whether the other party is related to the fiduciary or not—in making a recommendation. For example, an entity that may be unrelated to the fiduciary but could still constitute an ''other party,'' for these purposes, is the manufacturer of the investment product being recommended.

Other commenters asked for confirmation that the Best Interest standard is applied based on the facts and circumstances as they existed at the time of the recommendation, and not based on hindsight. Consistent with the well-established legal principles that exist under ERISA today, the Department confirms that the Best Interest standard is not a hindsight standard, but rather is based on the facts as they existed at the time of the recommendation. Thus, the courts have evaluated the prudence of a fiduciary's actions under ERISA by focusing on the process the fiduciary used to reach its determination or recommendation—whether the fiduciaries, ''at the time they engaged in the challenged transactions, employed the proper procedures to investigate the merits of the investment and to structure the investment.'' [54] The standard does not measure compliance by reference to how investments subsequently performed or turn the fiduciaries relying on the exemption into guarantors of investment performance, even though they gave advice that was prudent and loyal at the time of transaction.[55]

This is not to suggest that the ERISA section 404 prudence standard or the Best Interest standard are solely procedural standards. Thus, the prudence obligation, as incorporated in the Best Interest standard, is an objective standard of care that requires the fiduciary relying on the exemption to investigate and evaluate investments, make recommendations, and exercise sound judgment in the same way that knowledgeable and impartial professionals would. ''[T]his is not a search for subjective good faith—a pure heart and an empty head are not enough.'' [56] Whether or not the fiduciary is actually familiar with the sound investment principles necessary to make particular recommendations, the fiduciary must adhere to an objective professional standard. Additionally, fiduciaries are held to a particularly stringent standard to prudence when they have a conflict of interest.[57] For this reason, the Department declines to provide a safe harbor based on ''procedural prudence'' as requested by a commenter.

The Department additionally confirms its intent that the phrase ''without regard to'' be given the same meaning as the language in ERISA section 404 that requires a fiduciary to act ''solely in the interest of'' participants and beneficiaries, as such standard has been interpreted by the Department and the courts. Therefore, the standard would not, as some commenters suggested, foreclose the investment advice fiduciary from being paid. In response to concerns about the satisfaction of the standard in the context of proprietary product recommendations, the Department has provided additional clarity and specific guidance in the preamble on this issue.

In response to commenter concerns, the Department also confirms that the Best Interest standard does not impose an unattainable obligation on investment advice fiduciaries to somehow identify the single ''best'' investment for the plan or IRA out of all the investments in the national or international marketplace, assuming such advice were even possible. Instead, as discussed above, the Best Interest standard set out in the exemption, incorporates two fundamental and well-established fiduciary obligations: the duties of prudence and loyalty. Thus, the advice fiduciary's obligation under the Best Interest standard is to give advice that adheres to professional standards of prudence, and to put the plan's or IRA's financial interests in the driver's seat, rather than the competing interests of the advice fiduciary or other parties.

To the extent parties want more certainty as to compliance with the Impartial Conduct Standards, the Department refers them to examples provided in the Best Interest Contract Exemption's preamble discussion of policies and procedures that could be adopted to support compliance with the Impartial Conduct Standards.

Finally, in response to questions regarding the extent to which this or other provisions impose an ongoing monitoring obligation on fiduciaries, the text does not impose a monitoring requirement. As noted in the preamble to the Best Interest Contract Exemption, adherence to a Best Interest standard does not mandate an ongoing or long-term relationship, but instead leaves that to agreements, arrangements, and

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

[55] One commenter requested an adjustment to the ''prudence'' component of the Best Interest standard, under which the standard would be that of a ''prudent person serving clients with similar retirement needs and offering a similar array of products.'' In this way, the commenter sought to accommodate varying perspectives and opinions on particular investment products and business practices. The Department disagrees with the comment because it could be read as qualifying the stringency of the prudence obligation based on the financial institution's or adviser's independent decisions on which products to offer, rather than on the needs of the particular retirement investor. Therefore, the Department did not adopt this suggestion.

[56] *Donovan* v. *Cunningham,* 716 F .2d 1455, 1467 (5th Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984); *see also DiFelice* v. *U.S. Airways, Inc.*, 497 F. 3d 410, 418 (4th ir. 2007) (''Good faith does not provide a defense to a claim of a breach of these fiduciary duties; 'a pure heart and an empty head are not enough.'')

[57] *Donovan* v. *Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982) (''the[ ] decisions [of the fiduciary] must be made with an eye single to the interests of the participants and beneficiaries''); *see also Bussian* v. *RJR Nabisco, Inc.,* 223 F.3d 286, 298 (5th Cir. 2000); *Leigh* v. *Engle*, 727 F.2d 113, 126 (7th Cir. 1984).

understandings of the parties. This is consistent with the Department's interpretation of an investment advice fiduciary's monitoring responsibility as articulated in the preamble to the Regulation.

b. Misleading Statements

The second Impartial Conduct Standard, set forth in Section II(b), requires that

> The statements by the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter about recommended investments, fees, Material Conflicts of Interest, and any other matters relevant to a Plan's or IRA owner's investment decisions, are not materially misleading at the time they are made.

Section II(b) continues, ''[f]or this purpose, the insurance agent's or broker's, pension consultant's, insurance company's or investment company Principal Underwriter's failure to disclose a Material Conflict of Interest relevant to the services it is providing or other actions it is taking in relation to a Plan's or IRA owner's investment decisions is considered a misleading statement.'' In response to commenters, the Department adjusted the text to clarify that the standard is measured at the time of the representations, *i.e.,* the statements must not be misleading ''at the time they are made.'' Similarly, the Department added a materiality standard in response to comments.

Some comments focused on the proposed definition of Material Conflict of Interest. As proposed, a Material Conflict of Interest was defined to exist when a person has a financial interest that could affect the exercise of its best judgment as a fiduciary in rendering advice to a plan or IRA. Some commenters took the position that the proposal did not adequately explain the term ''material'' or incorporate a ''materiality'' standard into the definition. A commenter wrote that the proposed definition was so broad it would be difficult for financial institutions to comply with the various aspects of the exemption related to Material Conflicts of Interest, such as provisions requiring disclosures of Material Conflicts of Interest.

Another commenter indicated that the Department should not use the term ''material'' in defining conflicts of interest. The commenter believed that it could result in a standard that was too subjective from the perspective of the investment advice fiduciary, and could undermine the protectiveness of the exemption.

After consideration of the comments, the Department adjusted the definition of Material Conflict of Interest to provide that a material conflict of interest exists when a fiduciary has a ''financial interest that *a reasonable person would conclude* could affect the exercise of its best judgment as a fiduciary in rendering advice to a Plan or IRA.'' This language responds to concerns about the breadth and potential subjectivity of the standard.

The Department did not accept certain other comments, however. One commenter requested that the Department add a qualifier providing that the standard is violated only if the statement was ''reasonably relied'' on by the retirement investor. The Department rejected the comment. The Department's aim is to ensure that investment advice fiduciaries uniformly adhere to the Impartial Conduct Standards, including the obligation to avoid materially misleading statements, when they give advice.

One commenter asked the Department to require only that the adviser ''reasonably believe'' the statements are not misleading. The Department is concerned that this standard too could undermine the protections of this condition by requiring retirement investors or the Department to prove the adviser's actual belief rather than focusing on whether the statement is objectively misleading. However, to address commenters' concerns about the risks of engaging in a prohibited transaction, as noted above, the Department has clarified that the standard is measured at the time of the representations and has added a materiality standard. The Department believes that plans and IRAs are best served by statements and representations that are free from material misstatements. Investment advice fiduciaries best avoid liability—and best promote the interests of plans and IRAs—by making accurate communications a consistent standard in all their interactions with their customers.

Another commenter suggested that the Department adopt FINRA's ''Frequently Asked Questions regarding Rule 2210'' in this connection.[58] FINRA's Rule 2210, Communications with the Public, sets forth a number of procedural rules and standards that are designed to, among other things, prevent broker-dealer communications from being misleading. The Department agrees that adherence to FINRA's standards can promote materially accurate communications, and certainly believes that investment advice fiduciaries should pay careful attention to such guidance documents. After review of the rule and FAQs, however, the Department declines to simply adopt FINRA's guidance, which addresses written communications, since the exemption is broader in this respect. In the Department's view, the meaning of the standard is clear, and is already part of plan fiduciary's obligations under ERISA. If, however, issues arise in implementation of the exemption, the Department will consider requests for additional guidance.

c. Other Interpretive Issues

Some commenters asserted that some of the exemption's terms were too vague and would result in the exemption failing to meet the ''administratively feasible'' requirement under ERISA section 408(a) and Code section 4975(c)(2). The Department disagrees with these commenters' suggestion that ERISA section 408(a) and Code section 4975(c)(2) fail to be satisfied by this exemption's principles-based approach, or that the exemption's standards are unduly vague. It is worth repeating that the Impartial Conduct Standards are built on concepts that are longstanding and familiar in ERISA and the common law of trusts and agency. Far from requiring adherence to novel standards with no antecedents, the exemption primarily requires adherence to basic well-established obligations of fair dealing and fiduciary conduct. This section is designed to provide specific interpretations and responses to a number of specific issues raised in connection with a number of the Impartial Conduct Standards.

In this regard, the Department received several comments regarding the sale of proprietary insurance products. Generally, commenters expressed concern that the proposed amendments to the exemption appeared to be setting barriers to the sale of proprietary products, and the receipt of differential compensation such as commissions and health benefits and the ability to earn a profit inherent in such sales. Commenters maintained that the advantages of a proprietary sales force include the in-depth training received by such agents on the proprietary products. Comments requested that the Department clarify whether PTE 84–24 continues to cover the sale of proprietary products and the receipt of differential compensation as a result of the sale.

In response to commenters, the Department specifically notes that the Impartial Conduct Standards (either as proposed or finalized) are not properly

[58] *Currently available at http://www.finra.org/industry/finra-rule-2210-questions-and-answers.*

interpreted to foreclose the recommendation of proprietary products. The Department recognizes that insurance sales frequently involve proprietary products, and it does not intend to forbid such sales. Section IV of the Best Interest Contract Exemption specifically addresses the Best Interest standard in the context of proprietary products. While not a specific condition of this exemption, financial institutions would clearly satisfy the standard by complying with the requirements of that section.

The Impartial Conduct Standards also are not properly interpreted to foreclose the receipt of commissions or other transaction-based payments. To the contrary, a significant purpose of granting this amended exemption is to continue to permit such payments, as long as investment advice fiduciaries are willing to adhere to Best Interest standards. In particular, the Department confirms that the receipt of a commission on an annuity product does not result in a per se violation of any of the Impartial Conduct Standards or other conditions of the exemption, even though such a commission may be greater than the commission on a mutual fund purchase of the same amount as long as the commission meets the requirement of ''reasonable compensation'' and other applicable conditions.

Several commenters stated the Impartial Conduct Standards could be interpreted to exclude any compensation other than commissions paid to the agent, such as employee benefits for agents selling the insurance companies' proprietary products and meeting production goals. The commenters pointed out that many insurance companies use a business model whereby their agents are statutory employees under the Code. In order to receive employee benefits, the agents must predominately sell the employing insurance companies' products. Commenters argued that the provision of employee benefits such as health care and retirement benefits does not create a conflict of interest.

The Department did not intend the exemption to effectively prohibit the receipt of employee benefits by statutory employees. The final exemption makes clear in Section I(b)(1) that such payments can be provided. Additionally, the Department confirms that the receipt by an insurance agent or broker of reasonable and customary deferred compensation or subsidized health or pension benefit arrangements such as typically provided to an ''employee'' as defined in Code section 3121(d)(3) does not, in and of itself, violate the Impartial Conduct Standards. However, insurance companies providing such payments should take special care that the payments do not undermine such insurance agents' or brokers' ability to adhere to the standards.

Some commenters urged the Department to state that fiduciary status does not apply to the manufacturer company that issues an annuity, insurance or investment product in the ordinary course of its business so long as the company and its employees do not render investment advice for a fee or represent that it is acting as a fiduciary. Another commenter expressed the opinion that the sale of proprietary products should not in and of itself create a fiduciary relationship. The Department responds that application of the Regulation determines the status of investment advice fiduciaries. This exemption provides relief that is necessary for parties with fiduciary status under the Regulation. However, the Department notes that the Best Interest Contract Exemption requires that a financial institution (which could be an insurer) acknowledge fiduciary status, ensure that an appropriate supervisory structure is in place to implement policies and procedures, police incentives, and generally oversee the conduct of individual advisers, so that the conduct comports with the fiduciary norms required in the Impartial Conduct Standards.

Commissions

While PTE 84–24 provides an exemption for the specified parties to receive commissions in connection with the purchase of insurance or annuity contracts and investment company securities, it did not contain a separate definition of commission. The Department has viewed the exemption as limited to sales commissions on insurance or annuity contracts and investment company securities, as opposed to any related or alternative forms of compensation. This exemption was originally granted in 1977, and the conditions were crafted with simple commission payments in mind. In the interim, the exemption was not amended or formally interpreted to broadly permit more types of payments. To provide certainty with respect to the payments permitted by the exemption, however, the amended exemption now provides a specific definition of Insurance Commission and Mutual Fund Commission.

These definitions should dispel any concern that commissions are no longer permitted under the exemption, or that the Impartial Conduct Standards cannot be satisfied with respect to such commission payments. This exemption remains specifically available for commissions as they are defined herein. Moreover, as noted above, the Department confirms that the receipt of a commission on an annuity product does not, in and of itself, violate any of the Impartial Conduct Standards, even though such a commission would be greater than the commission on a mutual fund purchase of the same amount.

In the final amendment, Section VI(f) defines an Insurance Commission to mean a sales commission paid by the insurance company to the insurance agent, insurance broker or pension consultant for the service of effecting the purchase of an insurance or annuity contract, including renewal fees and trailers that are paid in connection with the purchase of the insurance or annuity contract.[59] The term Insurance Commission does not include revenue sharing payments, administrative fees or marketing fees. Similarly, Section VI(i) of the exemption defines Mutual Fund Commission as ''a commission or sales load paid either by the Plan or the investment company for the service of effecting or executing the purchase of investment company securities, but does not include a 12b–1 fee, revenue sharing payment, administrative fee, or marketing fee.''[60]

The definition of Insurance Commission in the final amendment was revised slightly from the proposed amendment. As proposed, the definition excluded ''revenue sharing payments, administrative fees or marketing payments, *or payments from parties other than the insurance company or its Affiliates.''* Commenters questioned whether the phrase ''or payments from parties other than the insurance company or its Affiliates'' would require a direct payment from the insurance company, and thought this appeared to conflict with the description of the covered transaction in Section I(a), which specifically says the exemption applies to ''direct and indirect''

[59] The proposed definition of Insurance Commission included commissions paid on the ''purchase or sale'' of an insurance or annuity contract. Because the exemption extends only to the commissions on the purchase of an insurance or annuity contract, the language ''or sale'' was deleted in this final amendment.

[60] The proposed definition of Mutual Fund Commission included commissions paid for the service of effecting or executing the ''purchase or sale'' of investment company securities. Because the exemption extends only the commissions on the purchase of investment company securities, the language ''or sale'' was deleted in this final amendment.

payments. Commenters explained that commissions may be paid to insurance agents, insurance brokers and pension consultants, through other intermediaries.

It was not the Department's intent with respect to the Insurance Commission definition to disrupt the practice of paying commissions through a third party, such as an independent marketing organization. Accordingly the final amendment does not include the language ''payments from parties other than the insurance company or its Affiliates'' from the definition. The Department nevertheless cautions that the change does not extend relief under the exemption to revenue sharing or other payments not within the definition of Insurance Commission.[61]

A few commenters have requested that the Department clarify whether or not ''gross dealer concessions'' or ''overrides'' would be considered Insurance Commissions under the new definition. The commenters explained that ''gross dealer concessions'' and ''overrides'' are commission payments made to someone who oversees the agent that is working directly with the customer. The Department responds that, as these types of payments generally represent a portion of the overall commission payment associated with an insurance or annuity transaction, they are included within the amended exemption's definition of Insurance Commission. In connection with this clarification, however, the Department revised the disclosure conditions to reflect that both the agent's or broker's commission and the gross dealer concession or override must be disclosed if the exemption is relied upon for such payments.

Many of the comments received from the industry expressed the opinion more generally that the proposed definitions of Insurance Commission and Mutual Fund Commission were too narrow and should be expanded to include the receipt of all types of payments for all sales of annuities and mutual funds such as revenue sharing payments, administrative fees, marketing fees and 12b–1 fees. Commenters stated that due to the increased disclosures required by the Department and the Securities and Exchange Commission's simplification of the disclosures for 12b–1 fees and other mutual fund fees in prospectuses there is no reason why any form of disclosed and agreed upon compensation should not be allowed. Some commenters stated that the definition of Insurance Commission in the proposal would create uncertainty in the industry as to what is permissible compensation under PTE 84–24 and may cause reduction in sales of annuity products that provide valuable lifetime income benefits. These commenters argued that the exclusion of revenue sharing payments, administrative fees or marketing payments is inconsistent with current business models and would create ambiguity with respect to long standing industry practices under which such payments are received. They stated that such restrictions would not be necessary in light of the Best Interest standard.

Some commenters represented that revenue sharing payments are received by the insurance company or financial institution, itself, as opposed to the individual adviser, and are used to offset expenses related to servicing the annuity contract or mutual fund account and therefore do not create a conflict of interest at the agent level or point of sale. Additionally, one commenter asserted that revenue sharing and marketing fees are not retained but instead credited back on a daily basis to the insurance company separate account to offset other fees of the separate account and therefore are credited back to the participants invested in that separate account. A few other commenters argued that the conflicts of interest arising from revenue sharing, administrative fees and marketing fees can be addressed by only allowing the payments when they are paid on the basis of total aggregate sales and are not linked to a specific investment product.

The Department was not persuaded by these comments to expand the definitions of Insurance Commission or Mutual Fund Commission beyond the historical intent of the exemption. The Department specifically provided relief for such payments in the Best Interest Contract Exemption. That exemption addresses the payment structures that have developed since PTE 84–24 was originally adopted. The Department intends that relief for such payments be provided through the Best Interest Contract Exemption on the grounds that that exemption was drafted to specifically address the unique conflicts of interest that are created by these types of payments.

In addition, it is the Department's understanding that third party payments such as revenue sharing and 12b–1 fees generally are not paid in connection with the Fixed Rate Annuity Contracts that are covered by the amended exemption. The expanded definitions are, therefore, unnecessary because the investments that would generate such payments are covered by the Best Interest Contract Exemption, rather than this exemption.

The Department does not believe this exemption was properly interpreted over the years to provide relief for payments such as administrative services fees, which are not akin to a commission. No determination has been made that the conditions of the exemption are protective in the context of such payments. Without further information on these fees, or suggested additional conditions addressed at these types of payments, the Department declines to take such an expansive approach to relief from the prohibited transaction rules under the terms of this exemption. For parties who are interested in broader relief in this area, the Best Interest Contract Exemption is available.

Reasonable Compensation

Section III(c) of the amended exemption imposes a reasonable compensation standard as a condition of the exemption. The requirement is that:

> The combined total of all fees and compensation received by the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter for their services does not exceed reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2).

The language of the requirement differs from the definition in the proposal, but it is not intended as a substantive change. The language in the proposal provided:

> The combined total of all fees, Insurance Commissions, Mutual Fund Commissions and other consideration received by the insurance agent or broker, pension consultant, insurance company, or investment company Principal Underwriter:
> (1) For the provision of services to the plan or IRA; and
> (2) In connection with the purchase of insurance or annuity contracts or securities issued by an investment company is not in excess of ''reasonable compensation'' within the contemplation of section 408(b)(2) and 408(c)(2) of the Act and sections 4975(d)(2)and 4975(d)(10) of the Code. If such total is in excess of ''reasonable compensation,'' the ''amount involved'' for purposes of the civil penalties of section 502(i) of the Act and the excise taxes imposed by section 4975 (a) and (b) of the Code is the amount of compensation in excess of ''reasonable compensation.''

The language was changed in the amendment to correspond to the same provision in the Best Interest Contract Exemption. Commenters indicated that there should be a common reasonable compensation standard across the exemptions. Commenters on the Best

[61] Under the exemption, the term ''insurance company'' includes the insurance company and its affiliates.

Interest Contract Exemption also expressed a preference for a reference to the ERISA section 408(b)(2) and Code section 4975(d)(2) provisions on reasonable compensation.

More generally, commenters asked that the Department provide more certainty as to the meaning of the reasonable compensation standard. There was concern that the standard could be applied retroactively rather than based on the parties' reasonable beliefs as to the reasonableness of the compensation at the time of the recommendation. Commenters also indicated uncertainty as to how to comply with the condition and asked whether it would be necessary to survey the market to determine market rates. Some commenters requested that the Department include the words ''and customary'' in the reasonable compensation definition, to specifically permit existing compensation arrangements. One commenter raised the concern that the reasonable compensation determination raised antitrust concerns because it would require investment advice fiduciaries to agree upon a market rate and result in anti-competitive behavior.

Commenters also asked how the standard would be satisfied for Proprietary Products, particularly insurance and annuity contracts. In such a case, commenters indicated, the retirement investor is not only paying for a service, but also for insurance guarantees; a standard that appeared to focus solely on services appeared inapposite. Commenters asked about the treatment of the insurance company's spread, which was described, in the case of a fixed annuity, or the fixed component of a variable annuity, as the difference between the fixed return credited to the contract holder and the insurer's general account investment experience. One commenter indicated that the calculation should not include affiliates' or related entities' compensation as this would appear to put them at a comparative disadvantage.

The Department confirms that the standard is the same as the well-established requirement set forth in ERISA section 408(b)(2) and Code section 4975(d)(2), and the regulations thereunder. The reasonableness of the fees depends on the particular facts and circumstances at the time of the recommendation. Several factors inform whether compensation is reasonable including, *inter alia,* the market pricing of service(s) provided and the underlying asset(s), the scope of monitoring, and the complexity of the product. No single factor is dispositive in determining whether compensation is reasonable; the essential question is whether the charges are reasonable in relation to what the investor receives. Consistent with the Department's prior interpretations of this standard, the Department confirms that parties relying on this exemption do not have to recommend the investment that is the lowest cost or that generates the lowest fees without regard to other relevant factors. Recommendation of the lowest cost or lowest fee product is also not a requirement under the Impartial Conduct Standards in Section II of the exemption.

Some commenters suggested that the reasonable compensation determination be made by another plan fiduciary. However, the exemption (like the statutory obligation) obligates investment advice fiduciaries to avoid overcharging their plan and IRA customers, despite any conflicts of interest associated with their compensation. Fiduciaries and other service providers may not charge more than reasonable compensation regardless of whether another fiduciary has signed off on the compensation. The reasonable compensation condition has long been required under PTE 84–24 and the approach in the final amendment is consistent with other class exemptions granted and amended today. Nothing in the exemptions, however, precludes fiduciaries from seeking impartial review of their fee structures to safeguard against abuse, and they may well want to include such reviews in their policies and procedures.

Further, the Department disagrees that the requirement is inconsistent with antitrust laws. Nothing in the exemption contemplates or requires that advisers or financial institutions agree upon a price with their competitors. The focus of the reasonable compensation condition is on preventing overcharges to plans and IRAs, not promoting anti-competitive practices. Indeed, if advisers and financial institutions consulted with competitors to set prices, the agreed-upon price could well violate the condition.

In response to concerns about application of the standard to investment products that bundle together services and investment guarantees or other benefits, such as annuities, the Department responds that the reasonable compensation condition is intended to apply to the compensation received by the financial institution, adviser, and any Affiliates in same manner as the reasonable compensation condition set forth in ERISA section 408(b)(2) and Code section 4975(d)(2). Accordingly, the exemption's reasonable compensation standard covers compensation received directly from the plan or IRA and indirect compensation received from any source other than the plan or IRA in connection with the recommended transaction.[62] In the case of a charge for an annuity or insurance contract that covers both the provision of services and the purchase of the guarantees and financial benefits provided under the contract, it is appropriate to consider the value of the guarantees and benefits in assessing the reasonableness of the arrangement, as well as the value of the services. When assessing the reasonableness of a charge, one generally needs to consider the value of all the services and benefits provided for the charge, not just some. If parties need additional guidance in this respect, they should refer to the Department's interpretations under ERISA section 408(b)(2) and Code section 4975(d)(2) and the Department will provide additional guidance if necessary.

A commenter urged the Department to provide that compensation received by an Affiliate would not have to be considered in applying the reasonable compensation standard. According to the commenter, including such compensation in the assessment of reasonable compensation would place proprietary products at a disadvantage. The Department disagrees with the proposition that a proprietary product would be disadvantaged merely because more of the compensation goes to affiliated parties than in the case of competing products, which allocate more of the compensation to non-affiliated parties. The availability of the exemption, however, does not turn on how compensation is allocated between affiliates and non-affiliates. Certainly, the Department would not expect that a proprietary product would be at a disadvantage in the marketplace because it carefully ensures that the associated compensation is reasonable. Assuming the Best Interest standard is satisfied and the compensation is reasonable, the exemption should not impede the recommendation of

[62] Such compensation includes, for example charges against the investment, such as commissions, sales loads, sales charges, redemption fees, surrender charges, exchange fees, account fees and purchase fees, as well as compensation included in operating expenses and other ongoing charges, such as wrap fees, mortality, and expense fees. For purposes of this exemption, the ''spread'' is not treated as compensation. A commenter described the ''spread'', in the case of a fixed annuity, or the fixed component of a variable annuity, as the difference between the fixed return credited to the contract holder and the insurer's general account investment experience.

proprietary products. Accordingly, the Department disagrees with the commenter.

The Department declines suggestions to provide specific examples of ''reasonable'' amounts or specific safe harbors, as requested by some commenters. Ultimately, the ''reasonable compensation'' standard is a market based standard. At the same time, the Department is unwilling to condone all ''customary'' compensation arrangements and declines to adopt a standard that turns on whether the agreement is ''customary.'' For example, it may in some instances be ''customary'' to charge customers fees that are not transparent or that bear little relationship to the value of the services actually rendered, but that does not make the charges reasonable.

Conditions for Transaction Described in Section I(a)(1) Through (4)

Section IV establishes certain conditions and limitations applicable to the transactions described in Section I(b)(1)–(4). Section IV(a) identifies certain parties that may not rely on the exemption, including discretionary trustees, plan administrators, fiduciaries expressly authorized in writing to manage, acquire or dispose of the asset of the plan or IRA on a discretionary basis, and employers of employees covered by a plan. Section IV(b) and (c) establish pre-transaction disclosures and approval requirements, and Section IV(d) indicates when repeat disclosures must be provided.

One commenter asked about the applicability of these conditions to transactions described in Section I(b)(5) and (6), which generally relate to master and prototype plan sponsors. The commenter expressed the view that these transactions should not be excluded from the conditions of Section IV.

The covered transactions described in Section I(b)(5) and (6) are narrowly tailored to apply to the provider of a master or prototype plan that receives compensation in connection with a transaction involving an insurance or Fixed Rate Annuity Contract, or investment company securities. The preamble to PTE 77–9, the predecessor of PTE 84–24, stated that the transactions are limited to the circumstances where the insurance company, investment company or investment company principal underwriter is a fiduciary or service provider to a plan solely by reason of sponsorship of a master or prototype plan but has no other relationship to the plan, such as being the investment adviser to the plan directly or through an affiliate.[63] Therefore, the relief provided does not extend to the circumstances in which the insurance company or mutual fund principal underwriter is causing itself to receive compensation. Given the limited nature of the exemption, the Department found it appropriate to provide different conditions for this transaction.

a. Section IV(b) and (c)—Transaction Disclosure

Section IV(b) sets forth disclosure and consent requirements for Fixed Rate Annuity Contracts and insurance contracts. As amended, the exemption imposes the following conditions:

(b)(1) With respect to a transaction involving the purchase with Plan or IRA assets of a Fixed Rate Annuity Contract or insurance contract, or the receipt of an Insurance Commission thereon, the insurance agent or broker or pension consultant provides to an independent fiduciary with respect to the Plan, or in the case of an IRA, to the IRA owner, prior to the execution of the transaction the following information in writing and in a form calculated to be understood by a plan fiduciary or IRA owner who has no special expertise in insurance or investment matters:

(A) If the agent, broker, or consultant is an Affiliate of the insurance company whose contract is being recommended, or if the ability of the agent, broker or consultant to recommend Fixed Rate Annuity Contracts or insurance contracts is limited by any agreement with the insurance company, the nature of the affiliation, limitation, or relationship;

(B) The Insurance Commission, expressed to the extent feasible as an absolute dollar figure, or otherwise, as a percentage of gross annual premium payments, asset accumulation value or contract value, for the first year and for each of the succeeding renewal years, that will be paid directly or indirectly by the insurance company to the agent, broker, or consultant in connection with the purchase of the recommended contract, including, if applicable, separate identification of the amount of the Insurance Commission that will be paid to any other person as a gross dealer concession, override, or similar payment; and

(C) A statement of any charges, fees, discounts, penalties or adjustments which may be imposed under the recommended contract in connection with the purchase, holding, exchange, termination, or sale of the contract.

Subsection (B) of this condition was revised in several respects from the existing language of the exemption. Originally, the exemption provided that disclosure must be made of ''[t]he sales commission, expressed as a percentage of gross annual premium payments for the first year and for each of the succeeding renewal years, that will be paid by the insurance company to the agent, broker or consultant in connection with the purchase of the recommended contract.'' Some commenters requested that the Insurance Commission be expressed as a percentage of asset accumulation value or contract value, in addition to the gross annual premium payments. Another commenter indicated that in some cases, such as a retirement benefit contribution paid to an agent that is considered an Insurance Commission, it is difficult to represent the Insurance Commission as a percentage and therefore requested that a dollar figure be permitted. The Department accepted these comments, and indicated that all Insurance Commissions should be expressed as a dollar figure unless that is not feasible, in which case a percentage will be permitted. Expression of the Insurance Commission as a dollar amount results in an accurate, salient and simple disclosure that facilitates a clearer understanding of the conflicts associated with the investment. But where it is difficult to express Insurance Commissions in dollars, the disclosure will allow for percentage disclosures.

A commenter also questioned whether the required disclosure for commissions would encompass payments made to the agent indirectly by entities other than the insurance company. The Department revised the language of subsection (B) to indicate disclosure must be made of the Insurance Commission paid directly or indirectly by the insurance company. As explained in the definition of Insurance Commission and discussed above, the amended exemption more clearly sets forth the exemption's historical limitation to such payments.

Subsection (C) was minimally revised to provide that the exemption requires a ''statement'' of any charges, fees, discounts, penalties or adjustments, rather than a ''description.'' This change was made to ensure that the level of specificity provided by the disclosures is not limited to an unduly general narrative description but rather to a more precise statement of the amounts of these charges, fees, discounts, penalties or adjustments. However, the statement can reference dollar amounts, percentages, formulas, or other means reasonably designed to present materially accurate disclosure. Similar language is used in the Best Interest Contract Exemption disclosures, and the change was made to correspond to the approach in that exemption.

For consistency across exemptions, the Department made corresponding amendments to the language in Section

[63] 42 FR 32395 (June 24, 1977).

IV(c), which sets forth the disclosure provisions applicable to investment company transactions.

Regarding the disclosures, a few commenters stated that the requirement to disclose the gross annual premium payments in year 1 and in succeeding years, as well as to describe any fees, charges, penalties, discounts or adjustments under the contract, would be difficult because independent broker-dealers do not create, maintain, or compile this type of information, and would need to expend significant resources to develop systems to compile or obtain the information to be disclosed. Another commenter argued the Department should limit the disclosure of compensation to the commissions as it would be impossible to disclose all additional forms of compensation.

These disclosure requirements are not new conditions, however, but rather have been a part of this exemption since it was initially granted in 1977,[64] and are an integral part of the exemption, which aims to ensure full disclosure of material conflicts of interest, so that retirement investors can make fully informed choices. The Department did not make changes in response to the comment because these disclosures are necessary to informing the plan or IRA customer of the fiduciary's conflicts.

b. Section IV(b)(2) and (c)(2)—Approval

Additional clarifying changes were also made to Section IV(b)(2) which addresses approval of the transaction following receipt of the disclosure. In the amended exemption, Section IV(b)(2) provides:

> Following the receipt of the information required to be disclosed in paragraph (b)(1), and prior to the execution of the transaction, the fiduciary or IRA owner acknowledges in writing receipt of the information and approves the transaction on behalf of the Plan or IRA. The fiduciary may be an employer of employees covered by the Plan but may not be an insurance agent or broker, pension consultant, or insurance company involved in the transaction (*i.e.,* an independent fiduciary). The independent fiduciary may not receive, directly or indirectly (*e.g.,* through an Affiliate), any compensation or other consideration for his or her own personal account from any party dealing with the Plan in connection with the transaction.

The section in the originally granted exemption referred to acknowledgment of the disclosure and approval by an ''independent fiduciary.'' The language stated:

> Following the receipt of the information required to be disclosed in paragraph (b)(1), and prior to the execution of the transaction, the independent fiduciary acknowledges in writing receipt of such information and approves the transaction on behalf of the plan. Such fiduciary may be an employer of employees covered by the plan, but may not be an insurance agent or broker, pension consultant or insurance company involved in the transaction. Such fiduciary may not receive, directly or indirectly (*e.g.* through an affiliate), any compensation or other consideration for his or her own personal account from any party dealing with the plan in connection with the transaction.

Commenters asked for clarification of this requirement in the context of IRAs. The Department revised the language of the section to indicate that the independent fiduciary *or IRA owner* must provide this acknowledgment and approval.

This change addresses another issue, raised by commenters, regarding the independence requirement as applicable to IRA owners. Under the original independence requirement, the fiduciary approving the transaction may not be the insurance agent or broker, pension consultant, or insurance company involved in the transaction (or an affiliate, including a family member). The Department did not add ''or IRA owner'' to this independence requirement and accordingly confirms that the independence requirement does not apply to IRA owners. This allows insurance agents and brokers to recommend Fixed Rate Annuity Contracts and insurance contracts to family members and receive a commission. The Department did not make corresponding changes to Section IV(c)(2) because transactions with IRAs involving investment company securities are not covered by the exemption.

Some commenters asked for a negative consent procedure in Section IV(b)(2) in which consent could be demonstrated by a failure to object to a written disclosure. They referenced Section IV(c)(2), which is applicable to investment company transactions, and states that ''[u]nless facts or circumstances would indicate the contrary, the approval may be presumed if the fiduciary permits the transaction to proceed after receipt of the written disclosure.''

The Department declined to adjust the consent procedure in the context of Fixed Rate Annuity Contract and insurance contract sales. The Department believes that investments in these products are significant enough that a negative consent procedure is not warranted.

c. Section IV(d)—Repeat Disclosures

Finally, a revision was made to Section IV(d), which sets forth the requirement for disclosure to be made in connection with additional purchases of Fixed Rate Annuity Contracts, insurance contracts, or securities issued by an investment company. Under the revised condition, the written disclosure required under Section IV(b) and (c) need not be repeated, unless:

> (1) More than one year has passed since the disclosure was made with respect to the purchase of the same kind of contract or security, or
>
> (2) The contract or security being recommended for purchase or the Insurance Commission or Mutual Fund Commission with respect thereto is materially different from that for which the approval described in paragraphs (b) and (c) of this Section was obtained.

This requirement was changed from three years, in the existing exemption, to one year in the final amendment. This change corresponds to the approach taken in the Best Interest Contract Exemption that these types of disclosures should be made on at least an annual basis. For example, in the Best Interest Contract Exemption, the transaction disclosure required by Section III(a) is required to be repeated on an annual basis with respect to additional recommendations of the same investment. This reflects the Department's view that if conflicted arrangements exist, plans and IRAs should receive sufficient notice to enable them to provide informed consent to the transaction, and a one year interval is the appropriate time in which the disclosure should be repeated, under the circumstances of this exemption as well as the Best Interest Contract Exemption.

In addition, the language was revised so that the one year period runs from the purchase of an annuity. If any disclosures were given with respect to a recommendation that was not acted upon by the customer, the one year period does not apply.

In connection with the changes to this section, the Department clarified in the introductory language that these disclosures are required to be made only with respect to additional transactions that are *recommended* by the investment advice fiduciary.

Recordkeeping

Section V of the amended exemption includes a recordkeeping requirement under which the insurance agent or broker, pension consultant, insurance company, or investment company principal underwriter engaging in the transaction must maintain records of the

[64] See PTE 77–9, 42 FR 32395 (June 24, 1977) (predecessor to PTE 84–24).

transaction for six years, accessible for audit and examination. A commenter on this provision recommended that the word ''reasonably'' be inserted prior to the term ''accessible.'' The commenter asserted that this clarification would remove the subjective views of the person requesting to examine or audit the records. The commenter also recommended that the Department clarify that fiduciaries, employers, employee organizations, participants, and their employees and representatives only have access to information concerning their own plans. This commenter also stated the exemption should clarify that any failure to maintain the required records with respect to a given transaction or set of transactions does not affect the relief for other transactions.

The Department has accepted these comments and made the requested revisions. Thus, the Department specifically clarified that ''[f]ailure to maintain the required records necessary to determine whether the conditions of this exemption have been met will result in the loss of the exemption only for the transaction or transactions for which records are missing or have not been maintained. It does not affect the relief for other transactions.'' In addition, in accordance with other exemptions granted and amended today, financial institutions are also not required to disclose records if such disclosure would be precluded by 12 U.S.C. 484, relating to visitorial powers over national banks and federal savings associations.[65]

Definitions

The definition of ''Plan,'' set forth in Section VI(l) of the amended exemption, provides that a 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. The proposal did not contain a definition of Plan. This definition was added in response to commenters who questioned the exemption's application to plans such as Simplified Employee Pensions (SEPs), Savings Incentive Match Plans for Employees (SIMPLEs) and Keoghs. The Department intends for the definition of Plan to include all of these plans.

The definition of ''relative'' set forth in Section VI(n) refers to a ''relative'' as that term is defined in ERISA section 3(15) (or a ''member of the family'' as that term is defined in Code section 4975(e)(6)). These provisions include spouses, ancestors, lineal descendants and spouses of a lineal descendant. Originally, the definition used in the exemption was more expansive, and, in addition to these entities also included ''a brother, a sister, or a spouse of a brother or a sister.'' A commenter stated that this definition was broader than the definition of ''relative'' in the other exemptions granted and amended today, and asked that the Department eliminate the references to brothers, sisters and their spouses. The Department concurs and has changed the text so that the definitions are consistent across exemptions.

Section VI(d) defines ''Individual Retirement Account'' or ''IRA'' as 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 an HSA described in section 223(d) of the Code. This definition is unchanged from the proposal.

The Department received comments on both the application of the proposed Regulation and the exemption proposals to other non-ERISA plans covered by Code section 4975, such as HSAs, Archer Medical Savings Accounts and Coverdell Education Savings Accounts. The Department notes that these accounts are given tax preferences as are IRAs. Further, some of the accounts, such as HSAs, can be used as long term savings accounts for retiree health care expenses. These types of accounts also are expressly defined by Code section 4975(e)(1) as plans that are subject to the Code's prohibited transaction rules. Thus, although they generally may hold fewer assets and may exist for shorter durations than IRAs, there is no statutory reason to treat them differently than other conflicted transactions and no basis for suspecting that the conflicts are any less influential with respect to advice on these arrangements. Accordingly, the Department does not agree with the commenters that the owners of these accounts are entitled to less protection than IRA investors. The Regulation continues to include advisers to these ''plans,'' and this exemption provides relief to them in the same manner as it does for individual retirement accounts described in section 408(a) of the Code.

Grandfathering

The Department received several comments from the industry requesting that the exemption include a grandfathering provision for pre-existing annuity contracts. The commenters stated that the grandfathering provision would help the industry avoid costly unraveling of ongoing client relationships. Many of the commenters requested that the grandfathering provision include coverage for transactions occurring after the Applicability Date of the exemption but based on advice that was given prior to the Applicability Date. The commenters argued that without a grandfathering provision existing relationships will become fiduciary relationships creating undue compliance burdens and costs that were not priced into the contracts and as a result many advisers may be forced to abandon existing IRA relationships.

The Department has not included a grandfathering provision in this amended exemption, however some of the relief requested by commenters is available in the Best Interest Contract Exemption. Specifically, Section VII of the Best Interest Contract Exemption sets forth an exemption for investments that are pre-existing at the time of the Applicability Date and is available for pre-existing insurance and annuity contracts. Under Section VII of the Best Interest Contract Exemption, additional advice may be provided on existing investments after the Applicability Date, and additional compensation may be received, if the advice reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the retirement investor, and the advice is rendered without regard to the financial or other interests of the investment advice fiduciary or any affiliate or other party.

The exemption set forth in Section VII of the Best Interest Contract Exemption is generally limited to securities or other property purchased prior to the Applicability Date, and does not generally extend to advice on additional contributions to an annuity purchased prior to the Applicability Date. Although commenters requested broader relief in this area, the Department has declined to permit advice on additional contributions to existing investments, without compliance with the conditions of this

[65] A commenter with respect to the Best Interest Contract Exemption raised concerns that the Department's right to review a bank's records under that exemption could conflict with federal banking laws that prohibit agencies other than the Office of the Comptroller of the Currency (OCC) from exercising ''visitorial'' powers over national banks and federal savings associations. To address the comment, financial institutions are not required to disclose records if the disclosure would be precluded by 12 U.S.C. 484. A corresponding change was made in this exemption.

exemption or the conditions of Section I of the Best Interest Contract Exemption. The primary purpose of the exemption for pre-existing investments in Section VII of the Best Interest Contract Exemption is to preserve compensation for services already rendered and to permit orderly transition from past arrangements, not to exempt future advice and investments from the important protections of the Regulation and this amended exemption or the Best Interest Contract Exemption. Permitting investment advice fiduciaries to recommend additional investments in an existing insurance or annuity contract, without the safeguards provided by the fiduciary norms in this amended exemption, would permit conflicts to flourish unchecked.

Applicability Date

The Regulation will become effective June 7, 2016 and this amended exemption is issued on that same date. The Regulation is effective at the earliest possible effective date under the Congressional Review Act. For the exemption, the issuance date serves as the date on which the amended exemption is intended to take effect for purposes of the Congressional Review Act. This date was selected in order to provide certainty to plans, plan fiduciaries, plan participants and beneficiaries, IRAs, and IRA owners that the new protections afforded by the Regulation are officially part of the law and regulations governing their investment advice providers, and to inform financial services providers and other affected service providers that the Regulation and amended exemption are final and not subject to further amendment or modification without additional public notice and comment. The Department expects that this effective date will remove uncertainty as an obstacle to regulated firms allocating capital and other resources toward transition and longer term compliance adjustments to systems and business practices.

The Department has also determined that, in light of the importance of the Regulation's consumer protections and the significance of the continuing monetary harm to retirement investors without the rule's changes, that an Applicability Date of April 10, 2017, is appropriate for plans and their affected financial services and other service providers to adjust to the basic change from non-fiduciary to fiduciary status. The amendment to and partial revocation of PTE 84–24, as finalized herein, can be relied on beginning on the Applicability Date. For the avoidance of doubt, no revocation will be applicable prior to the Applicability Date.

Paperwork Reduction Act Statement

In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)), the Department solicited comments on the information collections included in the proposed Amendment to and Partial Revocation of PTE 84–24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies, and Investment Company Principal Underwriters. 80 FR 22010 (Apr. 20, 2015). The Department also submitted an information collection request (ICR) to OMB in accordance with 44 U.S.C. 3507(d), contemporaneously with the publication of the proposal, for OMB's review. The Department received two comments from one commenter that specifically addressed the paperwork burden analysis of the information collections. Additionally many comments were submitted, described elsewhere in this preamble and in the preamble to the accompanying final rule, which contained information relevant to the costs and administrative burdens attendant to the proposals. The Department took into account such public comments in connection with making changes to the prohibited transaction exemption, analyzing the economic impact of the proposals, and developing the revised paperwork burden analysis summarized below.

In connection with publication of this final amendment to and partial revocation of PTE 84–24, the Department is submitting an ICR to OMB requesting approval of a new collection of information under a new OMB Control Number. The Department will notify the public when OMB approves the ICR.

A copy of the ICR may be obtained by contacting the PRA addressee shown below or at *http://www.RegInfo.gov.*

PRA ADDRESSEE: G. Christopher Cosby, Office of Policy and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue NW., Room N–5718, Washington, DC 20210. Telephone: (202) 693–8410; Fax: (202) 219–4745. These are not toll-free numbers.

As discussed in detail below, PTE 84–24, as amended, provides an exemption for certain prohibited transactions that occur when investment advice fiduciaries and other service providers receive compensation for their recommendation that plans or IRAs purchase ''Fixed Rate Annuity Contracts'' and insurance contracts. Relief is also provided for certain prohibited transactions that occur when investment advice fiduciaries and other service providers receive compensation as a result of recommendations that plans purchase securities in an investment company registered under the Investment Company Act of 1940. The amended exemption permits insurance agents, insurance brokers, pension consultants, and investment company principal underwriters that are parties in interest or fiduciaries with respect to plan investors to effect these purchases and receive a commission on them. The amended exemption is also available for the prohibited transaction that occurs when the insurance company selling the Fixed Rate Annuity Contract or insurance contract is a party in interest or disqualified person with respect to the plan or IRA. As amended, the exemption requires fiduciaries engaging in these transactions to adhere to certain Impartial Conduct Standards, including acting in the best interest of the plans and IRAs when providing advice.

The amendment revises the disclosure and recordkeeping requirements of the exemption by requiring insurance agents and brokers, pension consultants, insurance companies, and investment company principal underwriters to make certain disclosures to and receive an advance authorization from plan fiduciaries or, as applicable, IRA owners, in order to receive relief from ERISA's and the Code's prohibited transaction rules for the receipt of compensation when plans and IRAs enter into certain recommended insurance and mutual fund transactions. The amendment will require insurance agents and brokers, pension consultants, insurance companies, and investment company principal underwriters relying on PTE 84–24 to maintain records necessary to demonstrate that the conditions of the exemption have been met. These requirements are ICRs subject to the PRA.

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

- 51.8 percent of disclosures to and advance authorizations from plans[66]

[66] According to data from the National Telecommunications and Information Administration (NTIA), 33.4 percent of individuals age 25 and over have access to the Internet at work. According to a Greenwald & Associates survey, 84 percent of plan participants find it acceptable to make electronic delivery the default option, which is used as the proxy for the number of participants

Continued

and 44.1 percent of disclosures to and advance authorizations from IRAs [67] will be distributed electronically via means already used by respondents in the normal course of business, and the costs arising from electronic distribution will be negligible, while the remaining disclosures and advance authorizations will be distributed on paper and mailed at a cost of $0.05 per page for materials and $0.49 for First class Postage;

- Insurance agents and brokers, pension consultants, insurance companies, investment company principal underwriters, and plans will use existing in-house resources to prepare the legal authorizations and disclosures, and maintain the recordkeeping systems necessary to meet the requirements of the exemption;
- A combination of personnel will perform the tasks associated with the ICRs at an hourly wage rate of $167.32 for a financial manager, $55.21 for clerical personnel, and $133.61 for a legal professional; [68]
- Three percent of plans and three percent of IRAs will engage in covered transactions with insurance agents and brokers, pension consultants, and insurance companies annually;
- Approximately 1,500 insurance agents and brokers, pension consultants, and insurance companies will take advantage of this exemption with all of their client plans and IRAs; [69] and
- Ten investment company principal underwriters will take advantage of this exemption and each will do so once with one client plan annually.[70]

Disclosures and Consent Forms

In order to receive commissions in conjunction with the purchase of insurance contracts or Fixed Rate Annuity Contracts, Section IV(b) of PTE 84–24 as amended requires the insurance agent or broker or pension consultant to obtain advance written authorization from a plan fiduciary independent of the insurance company (the independent fiduciary), or, in the case of an IRA, the IRA owner, following certain disclosures, including: If the agent, broker, or consultant is an Affiliate of the insurance company whose contract is being recommended, or if the ability of the agent, broker, or consultant to recommend insurance or Fixed Rate Annuity Contracts is limited by any agreement with the insurance company, the nature of the affiliation, limitation, or relationship; the insurance commission; and a statement of any charges, fees, discounts, penalties, or adjustments which may be imposed under the recommended contract in connection with the purchase, holding, exchange, termination, or sale of the contract.

In order to receive commissions in conjunction with the purchase of securities issued by an investment company, Section IV(c) of PTE 84–24 as amended requires the investment company principal underwriter to obtain approval from an independent plan fiduciary following certain disclosures: If the person recommending securities issued by an investment company is the principal underwriter of the investment company whose securities are being recommended, the nature of the relationship and of any limitation it places upon the principal underwriter's ability to recommend investment company securities; the Mutual Fund Commission; and a statement of any charges, fees, discounts, penalties, or adjustments which may be imposed under the recommended securities in connection with the purchase, holding, exchange, termination, or sale of the securities. Unless facts or circumstances would indicate the contrary, the approval required under Section IV(c) may be presumed if the independent plan fiduciary permits the transaction to proceed after receipt of the written disclosure.

Legal Costs

According to 2013 Annual Return/Report of Employee Benefit (Form 5500) data and IRS Statistics of Income data, the Department estimates that there are approximately 681,000 ERISA covered pension plans and approximately 54.4 million IRAs. Of these plans and IRAs, the Department assumes that, as stated previously, three percent of these plans and three percent of these IRAs will engage in transactions covered under PTE 84–24 annually with insurance agents or brokers and pension consultants. In the plan universe, the Department assumes that a legal professional will spend five hours per plan reviewing the disclosures and preparing an authorization form for each of the approximately 20,000 plans engaging in covered transactions each year. In the IRA universe, IRA holders are also required to provide an authorization, but the Department assumes that a legal professional working on behalf of each of the 1,500 insurance companies or pension consultants will spend three hours drafting a standard authorization form for IRA holders to sign and return. The Department also estimates that it will take two hours of legal time for each of the approximately 1,500 insurance companies and pension consultants, and one hour of legal time for each of the 10 investment company principal underwriters, to produce the disclosures.[71] This legal work results in a total of approximately 110,000 hours annually at an equivalent cost of $14.7 million.

who will not opt out that are automatically enrolled (for a total of 28.1 percent receiving electronic disclosure at work). Additionally, the NTIA reports that 38.9 percent of individuals age 25 and over have access to the Internet outside of work. According to a Pew Research Center survey, 61 percent of Internet users use online banking, which is used as the proxy for the number of Internet users who will opt in for electronic disclosure (for a total of 23.7 percent receiving electronic disclosure outside of work). Combining the 28.1 percent who receive electronic disclosure at work with the 23.7 percent who receive electronic disclosure outside of work produces a total of 51.8 percent who will receive electronic disclosure overall.

[67] According to data from the NTIA, 72.4 percent of individuals age 25 and older have access to the Internet. According to a Pew Research Center survey, 61 percent of Internet users use online banking, which is used as the proxy for the number of Internet users who will opt in for electronic disclosure. Combining these data produces an estimate of 44.1 percent of individuals who will receive electronic disclosures.

[68] For a description of the Department's methodology for calculating wage rates, see *http://www.dol.gov/ebsa/pdf/labor-cost-inputs-used-in-ebsa-opr-ria-and-pra-burden-calculations-march-2016.pdf.* The Department's methodology for calculating the overhead cost input of its wage rates was adjusted from the proposed amendment to this PTE to the final amendment to this PTE. In the proposal, the Department based its overhead cost estimates on longstanding internal EBSA calculations for the cost of overhead. In response to a public comment stating that the overhead cost estimates were too low and without any supporting evidence, the Department incorporated published U.S. Census Bureau survey data on overhead costs into its wage rate estimates.

[69] According to 2013 Form 5500 data, 1,007 pension consultants service the retirement market. Additionally, SNL Financial data show that 398 life insurance companies reported receiving either individual or group annuity considerations in 2014. The Department has used these data as the count of insurance companies working in the ERISA-covered plan and IRA markets. The Department has rounded up to 1,500 to account for any other pension consultants or insurance companies that may not otherwise be accounted for.

[70] In the Department's experience, investment company principal underwriters almost never use PTE 84–24. Therefore, the Department assumes that 10 investment company principal underwriters will engage in one transaction annually under PTE 84–24.

[71] The Department assumes that it will require one hour of legal time per financial institution to prepare plan-oriented disclosures and one hour of legal time per financial institution to prepare IRA-oriented disclosures. Because insurance agents and pension consultants are permitted to use PTE 84–24 in their transactions with both plans and IRAs, this totals two hours of legal burden each. Because investment company principal underwriters are only permitted to use PTE 84–24 in their transactions with plans, this totals one hour of legal burden each.

Production and Distribution of Required Disclosures

The Department estimates that approximately 20,000 plans and 1.6 million IRAs have engage in covered transactions with insurance agents or brokers and pension consultants under this exemption each year. The Department assumes that 10 plans engage in covered transactions with investment company principal underwriters under this exemption each year.

The Department estimates that 20,000 plans will send insurance agents or brokers and pension consultants a two-page authorization letter and 1.6 million IRAs will receive a two-page authorization letter from insurance agents or brokers and pension consultants to sign and return each year. Prior to obtaining authorization, insurance companies and pension consultants will send the same 20,000 plans and 1.6 million IRAs a seven-page pre-authorization disclosure. Paper copies of the authorization letter and the pre-authorization disclosure will be mailed for 48.2 percent of the plans and distributed electronically for the remaining 51.8 percent. Paper copies of the authorization letter and the pre-authorization disclosure will be mailed to 55.9 percent of the IRAs and distributed electronically to the remaining 44.1 percent. The Department estimates that electronic distribution will result in a de minimis cost, while paper distribution will cost approximately $1.3 million. Paper distribution of the letter and disclosure will also require two minutes of clerical preparation time [72] resulting in a total of 62,000 hours at an equivalent cost of approximately $3.4 million.

The Department estimates that 10 plans will receive the seven-page pre-transaction disclosure from investment company principal underwriters; 51.8 percent will be distributed electronically and 48.2 percent will be mailed. The Department estimates that electronic distribution will result in a de minimis cost, while the paper distribution will cost $4. Paper distribution will also require two minutes of clerical preparation time resulting in a total of 10 minutes at an equivalent cost of $9. Approval to investment company principal underwriters will be granted orally at de minimis cost.

[72] The Department has run experiments involving clerical staff suggesting that most notices can be printed and prepared for mailing in less than one minute per disclosure. Therefore, an estimate of two minutes per disclosure is a conservative estimate.

Recordkeeping Requirement

Section V of PTE 84–24, as amended, requires insurance agents and brokers, insurance companies, pension consultants, and investment company principal underwriters to maintain or cause to be maintained for six years and disclosed upon request the records necessary for the Department, IRS, plan fiduciary, contributing employer or employee organization whose members are covered by the plan, plan participant, beneficiary or IRA owner, to determine whether the conditions of this exemption have been met.

The Department assumes that each institution will maintain these records in their normal course of business. Therefore, the Department has estimated that the additional time needed to maintain records consistent with the exemption will only require about one-half hour, on average, annually for a financial manager to organize and collate the documents or else draft a notice explaining that the information is exempt from disclosure, and an additional 15 minutes of clerical time to make the documents available for inspection during normal business hours or prepare the paper notice explaining that the information is exempt from disclosure. Thus, the Department estimates that a total of 45 minutes of professional time (30 minutes of financial manager time and 15 minutes of clerical time) per financial institution per year would be required for a total hour burden of 1,000 hours at an equivalent cost of $147,000.

In connection with the recordkeeping and disclosure requirements discussed above, Section V(b) (2) and (3) of PTE 84–24 provides that parties relying on the exemption do not have to disclose trade secrets or other confidential information to members of the public (*i.e.,* plan fiduciaries, contributing employers or employee organizations whose members are covered by the plan, participants and beneficiaries and IRA owners), but that in the event a party refuses to disclose information on this basis, it must provide a written notice to the requester advising of the reasons for the refusal and advising that the Department may request such information. The Department's experience indicates that this provision is not commonly invoked, and therefore, the written notice is rarely, if ever, generated. Therefore, the Department believes the cost burden associated with this clause is de minimis. No other cost burden exists with respect to recordkeeping.

Overall Summary

Overall, the Department estimates that in order to meet the conditions of this amended exemption, almost 22,000 financial institutions and plans will produce 3.3 million disclosures and notices annually. These disclosures and notices will result in over 172,000 burden hours annually, at an equivalent cost of $18.2 million. This amended exemption will also result in a total annual cost burden of over $1.3 million.

These paperwork burden estimates are summarized as follows:

Type of Review: New collection (Request for new OMB Control Number).

Agency: Employee Benefits Security Administration, Department of Labor.

Titles: (1) Amendment to and Partial Revocation of Prohibited Transaction Exemption (PTE) 84–24 for Certain Transactions Involving Insurance Agents and Brokers, Pension Consultants, Insurance Companies and Investment Company Principal Underwriters.

OMB Control Number: 1210–NEW.

Affected Public: Businesses or other for-profits; not for profit institutions.

Estimated Number of Respondents: 21,940.

Estimated Number of Annual Responses: 3,306,610.

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

Estimated Total Annual Burden Hours: 172,301 hours.

Estimated Total Annual Burden Cost: $1,319,353.

General Information

The attention of interested persons is directed to the following:

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

(2) The Department finds that the class exemption as amended is administratively feasible, in the interests of the plan and of its

participants and beneficiaries and IRA owners, and protective of the rights of the plan's participants and beneficiaries and IRA owners;

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

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

Amended Exemption

Section I. Covered Transactions

(a) In general. ERISA and the Code prohibit fiduciary advisers to employee benefit plans and IRAs from self-dealing, including receiving compensation that varies based on their investment advice, and from receiving compensation from third parties in connection with their advice. ERISA and the Code also prohibit fiduciaries and other parties related to plans and IRAs from engaging in purchases and sales of products with the plans and IRAs. This exemption permits certain, specified persons, including specified persons who are fiduciaries due to their provision of investment advice to plans and IRAs, to receive these types of compensation in connection with transactions involving insurance contracts, specified annuity contracts, and investment company securities, as described below.

(b) Exemptions. The restrictions of ERISA section 406(a)(1)(A) through (D) and 406(b) and the taxes imposed by Code section 4975(a) and (b) by reason of Code section 4975(c)(1)(A) through (F), do not apply to any of the following transactions if the conditions set forth in Sections II, III, IV, and V, as applicable, are met:

(1) The receipt, directly or indirectly, by an insurance agent or broker or a pension consultant of an Insurance Commission and related employee benefits from an insurance company in connection with the purchase, with assets of a Plan or IRA, including through a rollover or distribution, of an insurance contract or a Fixed Rate Annuity Contract. A Fixed Rate Annuity Contract is a fixed annuity contract issued by an insurance company that is either an immediate annuity contract or a deferred annuity contract that (i) satisfies applicable state standard nonforfeiture laws at the time of issue, or (ii) in the case of a group fixed annuity, guarantees return of principal net of reasonable compensation and provides a guaranteed declared minimum interest rate in accordance with the rates specified in the standard nonforfeiture laws in that state that are applicable to individual annuities; in either case, the benefits of which do not vary, in part or in whole, based on the investment experience of a separate account or accounts maintained by the insurer or the investment experience of an index or investment model. A Fixed Rate Annuity Contract does not include a variable annuity or an indexed annuity or similar annuity.

(2) The receipt of a Mutual Fund Commission by a Principal Underwriter for an investment company registered under the Investment Company Act of 1940 (an investment company) in connection with the purchase, with Plan assets, including through a rollover or distribution, of securities issued by an investment company.

(3)(i) The effecting by an insurance agent or broker, or pension consultant of a transaction for the purchase, with assets of a Plan or IRA, including through a rollover or distribution, of a Fixed Rate Annuity Contract or insurance contract, or (ii) the effecting by a Principal Underwriter of a transaction for the purchase, with assets of a Plan, including through a rollover or distribution, of securities issued by an investment company.

(4) The purchase, with assets of a Plan or IRA, including through a rollover or distribution, of a Fixed Rate Annuity Contract or insurance contract from an insurance company, and the receipt of compensation or other consideration by the insurance company.

(5) The purchase, with assets of a Plan, of a Fixed Rate Annuity Contract or insurance contract from an insurance company which is a fiduciary or a service provider (or both) with respect to the Plan solely by reason of the sponsorship of a Master or Prototype Plan.

(6) The purchase, with assets of a Plan, of securities issued by an investment company from, or the sale of such securities to, an investment company or an investment company Principal Underwriter, when the investment company, Principal Underwriter, or the investment company investment adviser, is a fiduciary or a service provider (or both) with respect to the Plan solely by reason of: (A) The sponsorship of a Master or Prototype Plan; or (B) the provision of Nondiscretionary Trust Services to the Plan; or (C) both (A) and (B).

(c) Scope of these Exemptions.

(1) The exemptions set forth in Section I(b) do not apply to the purchase by a Plan or IRA, each as defined in Section VI, of a variable annuity contract, indexed annuity contract, or similar contract; and

(2) The exemptions set forth in Section I(b) do not apply to the purchase by an IRA of investment company securities.

Section II. Impartial Conduct Standards

If the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter is a fiduciary within the meaning of ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) with respect to the assets involved in the transaction, the following conditions must be satisfied with respect to the transaction to the extent they are applicable to the fiduciary's actions:

(a) When exercising fiduciary authority described in ERISA section 3(21)(A)(ii) or Code section 4975(e)(3)(B) with respect to the assets involved in the transaction, the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter acts in the Best Interest of the Plan or IRA at the time of the transaction; and

(b) The statements by the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter about recommended investments, fees, Material Conflicts of Interest, and any other matters relevant to a Plan's or IRA owner's investment decisions, are not materially misleading at the time they are made. For this purpose, the insurance agent's or broker's, pension consultant's, insurance company's or investment company Principal Underwriter's failure to disclose a Material Conflict of Interest relevant to the services it is providing or other actions it is taking in relation to a Plan's or IRA owner's investment decisions is considered a misleading statement.

Section III. General Conditions

(a) The transaction is effected by the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter in the ordinary course of its business as such a person.

(b) The transaction is on terms at least as favorable to the Plan or IRA as an arm's length transaction with an unrelated party would be.

(c) The combined total of all fees and compensation received by the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter for their services does not exceed reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2),

Section IV. Conditions for Transactions Described in Section I(b)(1) Through (4)

The following conditions apply solely to a transaction described in paragraphs (b)(1), (2), (3) or (4) of Section I:

(a) The insurance agent or broker, pension consultant, insurance company, or investment company Principal Underwriter is not (1) a trustee of the Plan or IRA (other than a Nondiscretionary Trustee who does not render investment advice with respect to any assets of the Plan), (2) a plan administrator (within the meaning of ERISA section 3(16)(A) and Code section 414(g)), (3) a fiduciary who is expressly authorized in writing to manage, acquire, or dispose of the assets of the Plan or IRA on a discretionary basis, or (4) an employer any of whose employees are covered by the Plan. Notwithstanding the above, an insurance agent or broker, pension consultant, insurance company, or investment company Principal Underwriter that is Affiliated with a trustee or an investment manager (within the meaning of Section VI(e)) with respect to a Plan or IRA may engage in a transaction described in Section I(b)(1)–(4) of this exemption (if permitted under Section I(b)) on behalf of the Plan or IRA if the trustee or investment manager has no discretionary authority or control over the Plan's or IRA's assets involved in the transaction other than as a Nondiscretionary Trustee.

(b)(1) With respect to a transaction involving the purchase with Plan or IRA assets of a Fixed Rate Annuity Contract or insurance contract, or the receipt of an Insurance Commission thereon, the insurance agent or broker or pension consultant provides to an independent fiduciary with respect to the Plan, or in the case of an IRA, to the IRA owner, prior to the execution of the transaction the following information in writing and in a form calculated to be understood by a plan fiduciary or IRA owner who has no special expertise in insurance or investment matters:

(A) If the agent, broker, or consultant is an Affiliate of the insurance company whose contract is being recommended, or if the ability of the agent, broker, or consultant to recommend Fixed Rate Annuity Contracts or insurance contracts is limited by any agreement with the insurance company, the nature of the affiliation, limitation, or relationship;

(B) The Insurance Commission, expressed to the extent feasible as an absolute dollar figure, or otherwise, as a percentage of gross annual premium payments, asset accumulation value, or contract value, for the first year and for each of the succeeding renewal years, that will be paid directly or indirectly by the insurance company to the agent, broker, or consultant in connection with the purchase of the recommended contract, including, if applicable, separate identification of the amount of the Insurance Commission that will be paid to any other person as a gross dealer concession, override, or similar payment; and

(C) A statement of any charges, fees, discounts, penalties or adjustments which may be imposed under the recommended contract in connection with the purchase, holding, exchange, termination, or sale of the contract.

(2) Following the receipt of the information required to be disclosed in paragraph (b)(1), and prior to the execution of the transaction, the fiduciary or IRA owner acknowledges in writing receipt of the information and approves the transaction on behalf of the Plan or IRA. The fiduciary may be an employer of employees covered by the Plan but may not be an insurance agent or broker, pension consultant, or insurance company involved in the transaction (*i.e.,* an independent fiduciary). The independent fiduciary may not receive, directly or indirectly (*e.g.,* through an Affiliate), any compensation or other consideration for his or her own personal account from any party dealing with the Plan in connection with the transaction.

(c)(1) With respect to a transaction involving the purchase with plan assets of securities issued by an investment company or the receipt of a Mutual Fund Commission thereon by an investment company Principal Underwriter, the investment company Principal Underwriter provides to an independent fiduciary with respect to the Plan, prior to the execution of the transaction, the following information in writing and in a form calculated to be understood by a plan fiduciary who has no special expertise in insurance or investment matters:

(A) If the person recommending securities issued by an investment company is the Principal Underwriter of the investment company whose securities are being recommended, the nature of the relationship and of any limitation it places upon the Principal Underwriter's ability to recommend investment company securities;

(B) The Mutual Fund Commission, expressed to the extent feasible, as an absolute dollar figure, or otherwise, as a percentage of the dollar amount of the Plan's gross payment and of the amount actually invested, that will be received by the Principal Underwriter in connection with the purchase of the recommended securities issued by the investment company; and

(C) A statement of any charges, fees, discounts, penalties, or adjustments which may be imposed under the recommended securities in connection with the purchase, holding, exchange, termination, or sale of the securities.

(2) Following the receipt of the information required to be disclosed in paragraph (c)(1), and prior to the execution of the transaction, the independent fiduciary approves the transaction on behalf of the Plan. Unless facts or circumstances would indicate the contrary, the approval may be presumed if the fiduciary permits the transaction to proceed after receipt of the written disclosure. The fiduciary may be an employer of employees covered by the Plan, but may not be a Principal Underwriter involved in the transaction. The independent fiduciary may not receive, directly or indirectly (*e.g.,* through an Affiliate), any compensation or other consideration for his or her own personal account from any party dealing with the Plan in connection with the transaction.

(d) With respect to additional recommendations regarding purchases of Fixed Rate Annuity Contracts, insurance contract, or securities issued by an investment company, the written disclosure required under paragraphs (b) and (c) of this Section IV need not be repeated, unless:

(1) More than one year has passed since the disclosure was made with respect to the purchase of the same kind of contract or security, or

(2) The contract or security being recommended for purchase or the Insurance Commission or Mutual Fund Commission with respect thereto is materially different from that for which the approval described in paragraphs (b) and (c) of this Section was obtained.

Section V. Recordkeeping Requirements

(a) The insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter engaging in the covered transactions maintains or causes to be maintained for a period of six years, in a manner that is reasonably accessible for audit and examination, the records necessary to enable the persons described in Section V(b) to determine whether the conditions of this exemption have been met, except that:

(1) If the records necessary to enable the persons described in Section V(b) below to determine whether the conditions of the exemption have been met are lost or destroyed, due to circumstances beyond the control of the insurance agent or broker, pension consultant, insurance company, or investment company Principal Underwriter, then no prohibited transaction will be considered to have occurred solely on the basis of the unavailability of those records; and

(2) No party in interest, other than the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter shall be subject to the civil penalty that may be assessed under ERISA section 502(i) or the taxes imposed by Code section 4975(a) and (b) if the records are not maintained or are not available for examination as required by paragraph (b) below; and

(b)(1) Except as provided below in subparagraph (2) or as precluded by 12 U.S.C. 484, and notwithstanding any provisions of ERISA section 504(a)(2) and (b), the records referred to in the above paragraph are reasonably available at their customary location for examination during normal business hours by—

(A) Any duly authorized employee or representative of the Department or the IRS;

(B) Any fiduciary of the Plan or any duly authorized employee or representative of the fiduciary;

(C) Any contributing employer and any employee organization whose members are covered by the Plan, or any authorized employee or representative of these entities; or

(D) Any participant or beneficiary of the Plan or the duly authorized representative of the participant or beneficiary or IRA owner; and

(2) None of the persons described in subparagraph (1)(B)–(D) above shall be authorized to examine records regarding a transaction involving a Plan or IRA unrelated to the person, or trade secrets or commercial or financial information of the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter which is privileged or confidential.

(3) Should the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter refuse to disclose information on the basis that the information is exempt from disclosure, the insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter shall, by the close of the thirtieth (30th) day following the request, provide a written notice advising that person of the reasons for the refusal and that the Department may request the information.

(c) Failure to maintain the required records necessary to determine whether the conditions of this exemption have been met will result in the loss of the exemption only for the transaction or transactions for which records are missing or have not been maintained. It does not affect the relief for other transactions.

Section VI. Definitions

For purposes of this exemption:

(a) The term ''Affiliate'' of a person means:

(1) Any person directly or indirectly controlling, controlled by, or under common control with the person;

(2) Any officer, director, employee (including, in the case of Principal Underwriter, any registered representative thereof, whether or not the person is a common law employee of the Principal Underwriter), or relative of any such person, or any partner in such person; or

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

(b) The insurance agent or broker, pension consultant, insurance company or investment company Principal Underwriter that is a fiduciary acts in the ''Best Interest'' of the Plan or IRA when the fiduciary acts 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, based on the investment objectives, risk tolerance, financial circumstances and needs of the Plan or IRA, without regard to the financial or other interests of the fiduciary, any affiliate or other party.

(c) The term ''control'' means the power to exercise a controlling influence over the management or policies of a person other than an individual.

(d) The terms ''Individual Retirement Account'' or ''IRA'' mean 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 an HSA described in section 223(d) of the Code.

(e) The terms ''insurance agent or broker,'' ''pension consultant,'' ''insurance company,'' ''investment company,'' and ''Principal Underwriter'' mean such persons and any Affiliates thereof.

(f) The term ''Insurance Commission'' mean a sales commission paid by the insurance company to the insurance agent or broker or pension consultant for the service of effecting the purchase of a Fixed Rate Annuity Contract or insurance contract, including renewal fees and trailers, but not revenue sharing payments, administrative fees, or marketing payments.

(g) The term ''Master or Prototype Plan'' means a Plan which is approved by the Service under Rev. Proc. 2011–49, 2011–44 I.R.B. 608 (10/31/2011), as modified, or its successors.

(h) A ''Material Conflict of Interest'' exists when a person has a financial interest that a reasonable person would conclude could affect the exercise of its best judgment as a fiduciary in rendering advice to a Plan or IRA.

(i) The term ''Mutual Fund Commission'' means a commission or sales load paid either by the Plan or the investment company for the service of effecting or executing the purchase of investment company securities, but does not include a 12b–1 fee, revenue sharing payment, administrative fee, or marketing fee.

(j) The term ''Nondiscretionary Trust Services'' means custodial services, services ancillary to custodial services, none of which services are discretionary, duties imposed by any provisions of the Code, and services performed pursuant to directions in accordance with ERISA section 403(a)(1). The term ''Nondiscretionary Trustee'' of a Plan or IRA means a trustee whose powers and duties with respect to the Plan are limited to the provision of Nondiscretionary Trust Services. For purposes of this exemption, a person who is otherwise a Nondiscretionary Trustee will not fail to be a Nondiscretionary Trustee solely by reason of his having been delegated, by the sponsor of a Master or Prototype Plan, the power to amend the Plan.

(k) The term ''Fixed Rate Annuity Contract'' means a fixed annuity contract issued by an insurance company that is either an immediate annuity contract or a deferred annuity contract that (i) satisfies applicable state standard nonforfeiture laws at the time of issue, or (ii) in the case of a group fixed annuity, guarantees return of principal net of reasonable compensation and provides a guaranteed declared minimum interest rate in accordance with the rates specified in the standard nonforfeiture laws in that state that are applicable to individual annuities; in either case, the benefits of which do not vary, in part or in whole, based on the investment experience of a separate account or accounts maintained by the insurer or the investment experience of an index or investment model. A Fixed Rate Annuity Contract does not include a variable annuity or an indexed annuity or similar annuity.

(l) 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.

(m) The term ''Principal Underwriter'' is defined in the same manner as that term is defined in section 2(a)(29) of the Investment Company Act of 1940 (15 U.S.C. 80a–2(a)(29)).

(n) The term ''relative'' means a ''relative'' as that term is defined in ERISA section 3(15) (or a ''member of the family'' as that term is defined in Code section 4975(e)(6)).

Signed at Washington, DC, this 1st day of April, 2016.

Phyllis C. Borzi,

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

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Appendix I - Comparing Different Types of Deferred Annuities

	Fixed-Rate	Fixed-Indexed	Variable
Overview	• A contract providing a guaranteed, specified rate of interest on premiums paid.	• A contract providing for the crediting of interest based on changes in a market index.	• A contract with an account value that rises or falls based on the performance of investment options, known as "subaccounts," chosen by the contract owner.
		Returns	
Allocation of Investment Risk	• Premiums are guaranteed to earn at least a minimum specified interest rate. The insurance company may in its discretion credit interest at rates higher than the minimum. • Under most current state laws, upon surrender of the contract the buyer is guaranteed to always receive at least 87.5% of premiums paid, credited with a minimum interest rate such as 1%. This is known as the Nonforfeiture Amount.	• Returns are less predictable because the interest credited at the end of each index period depends on changes in a market index. • The surrender value must always equal at least the Nonforfeiture Amount and the interest rate is guaranteed to never be less than zero during each index period. • In general, returns depend on what index is linked and how the index-linked gains are calculated.[3] Many current product designs offer alternatives to traditional indexes such as the S&P 500 and allow owners to allocate premiums among different indexes. These alternative indexes may include precious commodities, international and emerging markets, and proprietary indexes developed by insurance companies. • Changes in the index can be determined by several methods such as annual reset, high water mark, low water mark, point-to-point, and index averaging.[3]	• Returns are variable based on the performance of underlying funds in the subaccounts.[1] • The insurance company does not guarantee investment performance. Investment risk is borne by the contract owner. • A variable annuity contract can offer hundreds of subaccounts and generally allows owners to transfer or reallocate their account values among the various subaccounts.

	Fixed-Rate	Fixed-Indexed	Variable
		Returns	
		• Index-linked gains are not always fully credited. How much of the gain in the index will be credited depends on the particular features of the annuity such as participation rates, interest rate caps, and spread/margin/asset fees.[3] • The insurer generally reserves the right to change participation rates, interest rate caps, and spread/margin/asset fees, subject to minimums and maximums specified in the contract[3]	
		Surrender Charges & Surrender Period	
Fees	• If the owner withdraws all or part of the value out of the annuity within a specified period, surrender charge will be applied.[1]	• same as fixed-rate	• same as fixed-rate
	• The buyer can often receive a partial withdrawal (usually up to 10%) without paying surrender charges[1] and the charge may be waived in certain circumstances, such as confinement in a nursing home.	• same as fixed-rate	• same as fixed-rate
	• State laws generally require "free-look" provisions under which the owner can return the contract free of charge within a stated number of days after purchase.[2]	• same as fixed-rate	• same as fixed-rate
	• Some annuities have a market value adjustment (MVA). If at the time of surrender interest rates are higher than at the time of purchase, the MVA could reduce the amount paid on surrender; conversely, if interest rates have fallen, the MVA could increase the surrender value.[1,2]	• same as fixed-rate	

	Fixed-Rate	Fixed-Indexed	Variable
	Other Fees & Charges		
Fees	• Generally no express fees[6]	• Generally no express fees[6] • Often sold with a guaranteed lifetime withdrawal benefit, which requires a rider fee.	• Contract Fee[2] • Transaction Fee • Mortality and Expense risk fee • Underlying fund fees • Additional fees or charges for certain product features (often contained in "riders" to the base contract) such as stepped-up death benefits, guaranteed minimum income benefits, and principal protection.[4]
Guaranteed Optional Benefits	Guaranteed Living Benefit Riders[7]		
	• Seldom offered.	• The most popular benefit, the guaranteed lifetime withdrawal benefit, is offered with 84% of all new fixed indexed annuity sales in 2014.[5]	• Contracts constituting 83% of all new variable annuity sales in 2014 offered guaranteed living benefit riders.[5]
	Death Benefit		
	• Annuities pay a death benefit to the beneficiary upon death of the owner or annuitant during the accumulation phase.[2] Benefit is typically the greater of the accumulated account value or the Nonforfeiture Amount. Different rules govern death benefits during the payout phase.	• same as fixed-rate	• If the owner dies during the accumulation period, the beneficiary generally receives the greater of (a) the accumulated account value or (b) premium payments less prior withdrawals. An enhanced guaranteed minimum death benefit may be available for an additional fee.[8]

Sources: 1: NAIC Buyer's Guide for Deferred Annuities, 2013

2: NAIC Buyers' Guide to Fixed Deferred Annuities with Appendix for Equity-Indexed Annuities, 1999

3: FINRA Investor Alert "Equity-Indexed Annuities: A Complex Choice," 2012

4: FINRA Investor Alert "Variable Annuities: Beyond the Hard Sell," 2012

5: LIMRA "U.S. Individual Annuity Yearbook 2014"

6: The insurer covers its expenses via the margin of premiums received over the cost of the annuity benefits, commonly referred to a "spread."

7: Guaranteed living benefits are available for additional fees and generally protect against investment risks by guaranteeing the level of account values or annuity payments, regardless of market performance. There are three types of guaranteed living benefits—guaranteed minimum income, guaranteed minimum accumulation, and guaranteed minimum withdrawal (including lifetime withdrawal benefits).

8: Some fixed-indexed annuities also offer this benefit for an additional fee.

[FR Doc. 2016–07928 Filed 4–6–16; 11:15 am]
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DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

[Application Number D–11327]

ZRIN 1210–ZA25

Amendment to and Partial Revocation of Prohibited Transaction Exemption (PTE) 86–128 for Securities Transactions Involving Employee Benefit Plans and Broker-Dealers; Amendment to and Partial Revocation of PTE 75–1, Exemptions From Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefits Plans and Certain Broker-Dealers, Reporting Dealers and Banks.

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

ACTION: Adoption of amendments to and partial revocations of PTEs 86–128 and 75–1.

SUMMARY: This document contains amendments to Prohibited Transaction Exemptions (PTEs) 86–128 and 75–1, exemptions from certain prohibited transaction provisions of the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code of 1986 (the Code). The ERISA and Code provisions at issue generally prohibit fiduciaries with respect to employee benefit plans and individual retirement accounts (IRAs) from engaging in self-dealing in connection with transactions involving plans and IRAs. PTE 86–128 allows fiduciaries to receive compensation in connection with certain securities transactions entered into by plans and IRAs. The amendments increase the safeguards of the exemption. This document also contains a revocation of PTE 86–128 with respect to transactions involving investment advice fiduciaries and IRAs, and of PTE 75–1, Part II(2), and PTE 75–1, Parts I(b) and I(c), in light of existing or newly finalized relief, including the relief provided in the ''Best Interest Contract Exemption,'' published elsewhere in this issue of the **Federal Register**. The amendments and revocations affect participants and beneficiaries of plans, IRA owners and certain fiduciaries of plans and IRAs.

DATES: *Issance date:* These amendments and partial revocations are issued June 7, 2016.

Applicability date: These amendments are applicable to transactions occurring on or after April 10, 2017. For more information, see *Applicability Date,* below.

FOR FURTHER INFORMATION CONTACT: Brian Shiker or Erin Hesse, Office of Exemption Determinations, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Suite 400, Washington DC 20210, (202) 693–8540 (not a toll-free number).

SUPPLEMENTARY INFORMATION: The Department is amending and partially revoking PTEs 86–128 and 75–1 on its own motion, pursuant to ERISA section 408(a) and Code section 4975(c)(2), and in accordance with the procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637 (October 27, 2011)).

Executive Summary

Purpose of Regulatory Action

These amendments and revocations are being granted in connection with its publication today, elsewhere in this issue of the **Federal Register**, of a final regulation defining who is a ''fiduciary'' of an employee benefit plan under ERISA as a result of giving investment advice to a plan or its participants or beneficiaries (Regulation). The Regulation also applies to the definition of a ''fiduciary'' of a plan (including an IRA) under the Code. The Regulation amends a prior regulation, dating to 1975, specifying when a person is a ''fiduciary'' under ERISA and the Code by reason of the provision of investment advice for a fee or other compensation regarding assets of a plan or IRA. The Regulation takes into account the advent of 401(k) plans and IRAs, the dramatic increase in rollovers, and other developments that have transformed the retirement plan landscape and the associated investment market over the four decades since the existing regulation was issued. In light of the extensive changes in retirement investment practices and relationships, the Regulation updates existing rules to distinguish more appropriately between the sorts of advice relationships that should be treated as fiduciary in nature and those that should not.

PTE 86–128 permits certain fiduciaries to receive fees in connection with certain mutual fund and other securities transactions entered into by plans and IRAs. A number of changes are finalized with respect to the scope of the exemption and of another existing exemption, PTE 75–1, including revocation of many transactions originally permitted with respect to IRAs. These amendments and revocations affect the conditions under which fiduciaries may receive fees and compensation when they transact with plans and IRAs.

The amendments and the partial revocations to PTEs 86–128 and 75–1 are part of the Department's regulatory initiative to mitigate the effects of harmful conflicts of interest associated with fiduciary investment advice. In the absence of an exemption, ERISA and the Code generally prohibit fiduciaries from using their authority to affect or increase their own compensation. A new exemption for receipt of compensation by fiduciaries that provide investment advice to IRA owners,[1] plan participants and beneficiaries, and certain plan fiduciaries, is adopted elsewhere in this issue of the **Federal Register**, in the ''Best Interest Contract Exemption.'' In the Department's view, the provisions of the Best Interest Contract Exemption better protect the interests of IRAs with respect to investment advice regarding the transactions for which relief was revoked.

ERISA section 408(a) specifically authorizes the Secretary of Labor to grant administrative exemptions from ERISA's prohibited transaction provisions.[2] Regulations at 29 CFR

[1] For purposes of this amendment, the terms ''Individual Retirement Account'' or ''IRA'' mean 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.

[2] Code section 4975(c)(2) authorizes the Secretary of the Treasury to grant exemptions from the parallel prohibited transaction provisions of the Code. Reorganization Plan No. 4 of 1978 (5 U.S.C. app. at 214 (2000)) (Reorganization Plan) generally transferred the authority of the Secretary of the Treasury to grant administrative exemptions under Code section 4975 to the Secretary of Labor. To rationalize the administration and interpretation of dual provisions under ERISA and the Code, the Reorganization Plan divided the interpretive and rulemaking authority for these provisions between the Secretaries of Labor and of the Treasury, so that, in general, the agency with responsibility for a given provision of Title I of ERISA would also have responsibility for the corresponding provision in the Code. Among the sections transferred to the Department were the prohibited transaction provisions and the definition of a fiduciary in both Title I of ERISA and in the Code. ERISA's prohibited transaction rules, 29 U.S.C. 1106–1108, apply to ERISA-covered plans, and the Code's corresponding prohibited transaction rules, 26 U.S.C. 4975(c), apply both to ERISA-covered pension plans that are 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 ERISA. Specifically, section 102(a) of the Reorganization Plan provides the Department of Labor with ''all authority'' for ''regulations, rulings, opinions, and exemptions under section 4975 [of the Code]'' subject to certain exceptions not relevant here. Reorganization Plan section 102. In President Carter's message to Congress regarding the Reorganization Plan, he made explicitly clear

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