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

(11) The term ''investment property'' does not include health insurance policies, disability insurance policies, term life insurance policies, or other property to the extent the policies or property do not contain an investment component.

(12) The term ''relative'' means a person described in section 3(15) of the Act and section 4975(e)(6) of the Code or a brother, a sister, or a spouse of a brother or sister.

(g) *Applicability.* Effective December 31, 1978, section 102 of the Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 237, transferred the authority of the Secretary of the Treasury to promulgate regulations of the type published herein to the Secretary of Labor. Accordingly, in addition to defining a ''fiduciary'' for purposes of section 3(21)(A)(ii) of the Act, this section applies to the parallel provision in section 4975(e)(3)(B) of the Code, which defines a ''fiduciary'' of a plan defined in Code section 4975 (including an IRA) for purposes of the prohibited transaction provisions in the Code. For example, a person who satisfies paragraphs (c)(1) and (e) of this section in connection with a recommendation to a retirement investor that is an employee benefit plan as defined in section 3(3) of the Act, a fiduciary of such a plan, or a participant or beneficiary of such plan, including a recommendation concerning the rollover of assets currently held in a plan to an IRA, is a fiduciary subject to Title I of the Act.

(h) *Continued applicability of State law regulating insurance, banking, or securities.* Nothing in this section shall be construed to affect or modify the provisions of section 514 of Title I of the Act, including the savings clause in section 514(b)(2)(A) for State laws that regulate insurance, banking, or securities.

Signed at Washington, DC, this 24th day of October, 2023.

Lisa M. Gomez,

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

[FR Doc. 2023–23779 Filed 11–2–23; 8:45 am]

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DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

[Application No. D–12057]

ZRIN 1210–ZA32

Proposed Amendment to Prohibited Transaction Exemption 2020–02

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

ACTION: Notice of Proposed Amendment to Class Exemption PTE 2020–02.

SUMMARY: This document contains a notice of pendency before the Department of Labor (the Department) of a proposed amendment to class prohibited transaction exemption (PTE) 2020–02, which provides relief for certain compensation received by investment advice fiduciaries. The proposed amendment would affect participants and beneficiaries of Plans, IRA owners, and fiduciaries with respect to such Plans and IRAs.

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

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

Applicability Date. The Department proposes to make the final amendment effective 60 days after it is published in the **Federal Register**.

ADDRESSES: All written comments concerning the proposed amendment should be sent to the Employee Benefits Security Administration, Office of Exemption Determinations, U.S. Department of Labor through the Federal eRulemaking Portal and identified by Application No. D–12057:

Federal eRulemaking Portal: Visit *http://www.regulations.gov.* Follow the instructions for sending comments.

Docket: For access to the docket to read background documents or comments, including the plain-language summary of the proposal required by the Providing Accountability Through Transparency Act of 2023, please go to the Federal eRulemaking Portal at *http://www.regulations.gov.*

See **SUPPLEMENTARY INFORMATION** below for additional information regarding comments.

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

SUPPLEMENTARY INFORMATION:

Comment Instructions

Warning: All comments received will be included in the public record without change and will be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be confidential or other information whose disclosure is restricted by statute. If you submit a comment, EBSA recommends that you include your name and other contact information, but DO NOT submit information that you consider to be confidential, or otherwise protected (such as Social Security number or an unlisted phone number), or confidential business information that you do not want publicly disclosed. However, if EBSA cannot read your comment due to technical difficulties and cannot contact you for clarification, EBSA might not be able to consider your comment. Additionally, the *http://www.regulations.gov* website is an ''anonymous access'' system, which means EBSA will not know your identity or contact information unless you provide it. If you send an email directly to EBSA without going through *http://www.regulations.gov,* your email address will be automatically captured and included as part of the comment that is placed in the public record and made available on the internet.

Background

The proposed amendment to PTE 2020–02 would provide additional protections for employee benefit plans described in ERISA section 3(3) and any plan described in Code section 4975(e)(1)(A) (Plans) and investors and additional clarity for investment advice fiduciaries seeking to receive compensation for their advice, including as a result of advice to roll over assets from a Plan to an individual retirement account (IRA), and to engage in principal transactions, that would otherwise violate the prohibited transaction provisions of Title I of the Employee Retirement Income Security Act of 1974 (ERISA) and Internal Revenue Code (Code) section 4975.

As described elsewhere in this edition of the **Federal Register**, the Department is proposing to amend the regulation defining when a person renders ''investment advice for a fee or other compensation, direct or indirect'' with respect to any moneys or other property of an employee benefit plan, for purposes of the definition of a ''fiduciary'' in section 3(21)(A)(ii) of ERISA and in section 4975(e)(3)(B) of the Code. The Department also is proposing amendments to existing prohibited transaction exemptions (PTEs) 75–1, 77–4, 80–83, 83–1, 86–128, and 84–24 elsewhere in this edition of the **Federal Register**.

Description of the Proposed Amendment to PTE 2020–02

The Department is proposing to amend PTE 2020–02, which was designed to promote investment advice that is in the best interest of retirement investors (for example, Plan participants and beneficiaries, and IRA owners) by permitting advisers to receive compensation for the advice that is otherwise barred by statute so long as advisers comply with the terms of the exemption. The current exemption conditions emphasize mitigating conflicts of interest and ensuring that retirement investors receive advice that is prudent and loyal. An important objective of the existing exemption is to require fiduciary investment advice providers to adhere to stringent standards that are designed to ensure that their investment recommendations reflect the best interest of Plan and IRA investors. Accordingly, under the current framework of PTE 2020–02, Financial Institutions and Investment Professionals relying on the existing exemption must:

- acknowledge their fiduciary status [1] in writing;
- disclose their services and material conflicts of interest;
- adhere to Impartial Conduct Standards requiring them to:
  - investigate and evaluate investments, provide advice, and exercise sound judgment in the same way that knowledgeable and impartial professionals would (in other words, their recommendations must be ''prudent'');
  - act with undivided loyalty to retirement investors when making recommendations (in other words, they must never place their own interests ahead of the retirement investor's interest, or subordinate the retirement investor's interests to their own);
  - charge no more than reasonable compensation and comply with Federal securities laws regarding ''best execution''; and
  - avoid making misleading statements about investment transactions and other relevant matters;
- adopt policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards and mitigate conflicts of interest that could otherwise cause violations of those standards;
- document and disclose the specific reasons that any rollover recommendations are in the retirement investor's best interest; and
- conduct an annual retrospective compliance review.

The Department is proposing to maintain all of these core protections in PTE 2020–02 that provide fundamental investor protections.

This proposed amendment would build on these existing conditions to provide more certainty for Retirement Investors receiving advice and Financial Institutions and Investment Professionals complying with the exemption's conditions. In this regard, the Department is proposing additional disclosures to ensure that Retirement Investors have sufficient information to make informed decisions about the costs of the investment advice transaction and about the significance and severity of the investment advice fiduciary's Conflicts of Interest. The proposed amendment also would provide more guidance for Financial Institutions and Investment Professionals complying with the Impartial Conduct Standards and implementing their policies and procedures.

Importantly, the Department is not proposing to require a contract for investment advice to IRAs, as it did in 2016. Neither the existing PTE 2020–02 nor the proposed amendment creates any new causes of action or requires Financial Institutions to provide enforceable warranties to Retirement Investors. The primary penalty for an IRA fiduciary that engages in a non-exempt prohibited transaction by failing to satisfy the exemption conditions of amended PTE 2020–02 would be the prohibited transaction excise tax imposed under Code section 4975 and enforced by the Department of the Treasury and the Internal Revenue Service (IRS). This proposal would require Financial Institutions, as part of their retrospective review, to report any non-exempt prohibited transactions in connection with fiduciary investment advice by filing IRS Form 5330, correcting those transactions, and paying any resulting excise taxes. The proposed amendment would add failure to correct prohibited transactions, report those transactions to the IRS on Form 5330, and pay the resulting excise tax imposed under Code section 4975 to the list of behaviors that could make a Financial Institution ineligible to rely on PTE 2020–02 for ten years. The Department believes these proposed conditions would provide important protections to Retirement Investors by enhancing the existing protections of PTE 2020–02.

Effective Date

PTE 2020–02 was originally published on December 18, 2020, and it became effective on February 16, 2021. The Department proposes that the amendment to PTE 2020–02 will be effective on the date that is 60 days after the publication of a final amendment in the **Federal Register**. This current exemption (PTE 2020–20) will remain effective under its existing conditions until the effective date of a final amendment, if granted.

To provide absolute clarity, the Department confirms that the restrictions of ERISA section 406(a)(1)(A), 406(a)(1)(D), and 406(b) and the sanctions imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(A), (D), (E) and (F), would not apply to the receipt of compensation by a Financial Institution, Investment Professional, or any Affiliate and Related Entity in connection with investment advice, if the recommendation were made before the effective date of the final amendment to PTE 2020–02, or if the compensation was received pursuant to a systematic purchase program established before the effective date of the final amendment. Also, no party would be required to comply with the amended conditions for a transaction that occurred before the effective date of the final amended exemption.

Exemption Scope

The Department is proposing minor changes and clarifications to the scope of the exemption. PTE 2020–02 currently permits Financial Institutions, Investment Professionals, and their Affiliates and Related Entities to receive reasonable compensation as a result of providing fiduciary investment advice, including as a result of investment advice to roll over assets from a Plan to an IRA. Subject to additional conditions, the exemption also provides relief for Financial Institutions, Investment Professionals, Affiliates and Related Entities to engage in certain principal transactions, and to receive a mark-up, mark-down, or other payment. The Department is not proposing changes to these covered transactions.

[1] For purposes of this disclosure, and throughout the exemption, the term fiduciary status is limited to fiduciary status under Title I of ERISA, the Code, or both. While this exemption and the SEC's Regulation Best Interest both use the term ''best interest,'' the Department retains interpretive authority with respect to satisfaction of this exemption.

At the same time, the Department notes that more parties may need to rely on an amended PTE 2020–02, because of the Department's proposed amendment to the definition of "fiduciary investment advice." If the new rule is adopted, parties that have not been fiduciaries under the five-part test may become fiduciaries in the future. In addition, the Department is proposing to amend other class prohibited transaction exemptions that provide relief for fiduciary investment advice.[2] Parties that have been relying on those exemptions may choose to comply with the amended PTE 2020–02 instead. The Department requests comment on whether other or additional changes are needed to the scope of the exemption in light of the changes proposed elsewhere in this edition of the **Federal Register**.

Covered Principal Transactions

The Department is proposing minor changes to the definition of Covered Principal Transaction. As proposed, a "Covered Principal Transaction" is a principal transaction that:

(1) For sales to a Plan or an IRA:

(i) Involves a U.S. dollar denominated debt security issued by a U.S. corporation and offered pursuant to a registration statement under the Securities Act of 1933, a U.S. Treasury Security, a debt security issued or guaranteed by a U.S. federal government agency other than the Department of the Treasury, a debt security issued or guaranteed by a government-sponsored enterprise, a municipal security, a certificate of deposit, an interest in a Unit Investment Trust, or any investment permitted to be sold by an investment advice fiduciary to a Retirement Investor under an individual exemption granted by the Department after the effective date of this exemption that includes the same conditions as this exemption; and

(ii) A debt security may only be recommended in accordance with written policies and procedures adopted by the Financial Institution that are reasonably designed to ensure that the security, at the time of the recommendation, has no greater than moderate credit risk and sufficient liquidity that it could be sold at or near carrying value within a reasonably short period of time; and

(2) For purchases from a Plan or an IRA, involves any securities or investment property.

This is very similar to the current definition in PTE 2020–02, with minor wording changes for clarity. The Department is considering revising the beginning of Section II(d) to read "A 'Covered Principal Transaction' is a principal transaction for cash that . . ." Adding the phrase "for cash" would prevent in-kind transactions from being Covered Principal Transactions. The Department seeks comment on this revision and particularly would like to receive information regarding whether eliminating in-kind assets would reduce the complexity and conflicts of interest involved in these transactions.

The Department is also proposing to add a definition of Riskless Principal Transaction to PTE 2020–02. Proposed Section V(l) provides that "Riskless Principal Transaction" means a transaction in which a Financial Institution, after having received an order from a Retirement Investor to buy or sell an asset, purchases or sells the asset for the Financial Institution's own account to offset the contemporaneous transaction with the Retirement Investor. A Riskless Principal Transaction is not a Covered Principal Transaction. While these are technically executed as principal transactions, the Department is not including them in the definition of Covered Principal Transaction. Thus, there is no limitation on the types of products that may be sold in a Riskless Principal Transaction. Adding the definition provides clarity regarding which transactions qualify as Riskless Principal Transactions. The Department requests comment on this definition. The Department notes that Financial Institutions should take care in determining that a product is eligible for a Covered Principal Transaction or Riskless Principal Transaction. These definitions are intentionally narrow, based on the potentially acute conflicts of interest created by principal transactions. If a Financial Institution later determines that an Investment Professional recommended a principal transaction that was neither a Covered Principal Transaction nor a Riskless Principal Transaction, then that transaction was not eligible for this exemption and may need to be reversed to put the Retirement Investor in the same position they would have been if the transaction had not occurred.

Financial Institutions, Investment Professionals, and Retirement Investors

The Department is not proposing substantive changes to definitions of the parties that can rely on the exemption. PTE 2020–02 is available to Financial Institutions (registered investment advisers,[3] broker-dealers, banks,[4] and insurance companies) and their Investment Professionals (individual employees, agents, and representatives) that provide fiduciary investment advice to Retirement Investors (Plan participants and beneficiaries, IRA owners, and Plan and IRA fiduciaries).[5] As it did in 2020, the Department requests comment on this definition of Financial Institution and whether any other type of entity should be included.[6]

The Department is proposing a very minor change to the definition of "Retirement Investor." Proposed Section V(l) defines Retirement Investor as "(1) A participant or beneficiary of a Plan with authority to direct the investment of assets in his or her account or to take a distribution; (2) The beneficial owner of an IRA acting on behalf of the IRA; or (3) A fiduciary of a Plan or an IRA." In the proposed amendment, the definition of Retirement Investor is re-designated as Section V(n), and section V(n)(3) reads "A fiduciary *acting on behalf* of a Plan or an IRA." The Department intends this

[2] Elsewhere in this edition of the **Federal Register**, the Department is proposing to amend PTEs 75–1, 77–4, 80–83, 84–24, and 86–128.

[3] The definition of Financial Institution in Section V(e) includes an entity that is "(1) Registered as an investment adviser under the Investment Advisers Act of 1940 (15 U.S.C. 80b–1 *et seq.*) or under the laws of the state in which the adviser maintains its principal office and place of business." References in the preamble to registered investment advisers include both SEC- and state-registered investment advisers.

[4] Section V(e)(2) includes "A bank or similar financial institution supervised by the United States or a state, or a savings association (as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1)))" In the preamble to PTE 2020–02, the Department clarified that the Department interprets this definition to extend to credit unions." 85 FR 82811.

[5] As defined in Section V(i) of the exemption, the term "Plan" means any employee benefit plan described in ERISA section 3(3) and any plan described in Code section 4975(e)(1)(A). In Section V(g), the term "Individual Retirement Account" or "IRA" is defined as any account or annuity described in Code section 4975(e)(1)(B) through (F), including an Archer medical savings account, a health savings account, and a Coverdell education savings account. While the Department uses the term "Retirement Investor" throughout this document, the exemption is not limited only to investment advice fiduciaries of employee pension benefit plans and IRAs. Relief would be available for investment advice fiduciaries of employee welfare benefit plans as well.

[6] 85 FR 40838 ("The Department seeks comment on the definition of Financial Institution in general and whether any other type of entity should be included. The Department also seeks comment as to whether the definition is overly broad, or whether Retirement Investors would benefit from a narrowed list of Financial Institutions. In addition, the Department requests comment on whether the definition of Financial Institution is sufficiently broad to cover firms that render advice with respect to investments in Health Savings Accounts (HSA), and about the extent to which Plan participants receive investment advice in connection with such accounts.") In finalizing PTE 2020–02, the Department determined to not expand the scope of the exemption.

as a mere clarification that advice provided to a Plan or IRA fiduciary must be in the Best Interest of the Plan or IRA, and not the Best Interest of the fiduciary. The Department requests comment on whether additional clarifications are necessary.

Exclusions

PTE 2020–02 Section I(c) provides that the exemption does not apply in certain situations. The Department is proposing changes to expand the availability of this exemption, to facilitate more Financial Institutions and Investment Professionals providing high quality advice to Retirement Investors.

Pooled Employer Plans (PEPs)

PTE 2020–02 Section I(c)(1) currently provides an exclusion from the exemption if the Plan is covered by Title I of ERISA and the Investment Professional, Financial Institution or any Affiliate is (A) the employer of employees covered by the Plan, or (B) a named fiduciary or plan administrator with respect to the Plan that was selected to provide advice to the Plan by a fiduciary who is not independent of the Financial Institution, Investment Professional, and their Affiliates. In 2020, the Department received comments requesting additional guidance and clarification regarding the exemption's application to PEPs, which were authorized by the Setting Every Community Up for Retirement Enhancement Act of 2019 (SECURE Act).[7] In finalizing PTE 2020–02, the Department explained its belief that it was premature to address issues related to PEPs, given their recent origination, unique structure, and likelihood of significant variations in potential business models, as the Pooled Plan Providers (PPPs) were still deciding how to structure their operations.[8] Based on PEP developments since December 2020, including the Department's final rule establishing registration requirements for PPPs under 29 CFR 2510.3–44, the Department is now proposing to change the exclusions so that PTE 2020–02 clearly would cover investment advice provided by an Investment Professional, Financial Institution, or any Affiliate that is a PPP. The proposal amends the existing exclusion to clearly provide that a PPP can provide investment advice to a PEP within the framework of the exemption. This would allow PEPs to receive investment advice in the same manner as other ERISA plans. The proposed text would allow Investment Professionals, Financial Institutions, or any Affiliates to be a named fiduciary or plan administrator of the PEP, if that named fiduciary or plan administrator is a PPP that is registered with the Department under 29 CFR 2510.3–44. However, it would not provide relief for a PPP's decision to hire an affiliated or related party as an advice provider.

To ensure PEPs are properly covered, the Department is also proposing certain changes to the definitions in Section V. The proposed amendment would add the defined terms ''PEP'' and ''PPP'' by referencing ERISA section 3(43) and 3(44), the statutory provisions defining PEPs and PPPs that were added to ERISA by the SECURE Act. The Department seeks comment on how PEPs and PPPs may use this exemption. For example, will advice be provided directly to the PEP, or will it be provided to the PPP in connection with the PEP? Will the exemption be used to provide advice to employers participating in the PEP?

Robo Advice

The Department is proposing to remove PTE 2020–02 Section I(c)(2), which excludes investment advice generated solely by an interactive website in which computer software-based models or applications provide investment advice based on personal information each investor supplies through the website, without any personal interaction or advice with an Investment Professional (robo-advice). As explained in the preamble to PTE 2020–02, the statutory exemption in ERISA section 408(b)(14), (g), and Code section 4975(d)(17) and 4975(f)(8), includes specific conditions that are tailored to computer-generated investment advice. PTE 2020–02, by contrast, was tailored to investment advice that is provided through a human Investment Professional who is supervised by a Financial Institution. The Department is now proposing to amend PTE 2020–02 to allow Financial Institutions providing investment advice through computer models to rely on the exemption. The Department understands that Financial Institutions may use a combination of computer models and individual Investment Professionals to provide investment advice and may wish to have a single set of policies and procedures that can govern all recommendations, regardless of whether a Retirement Investor speaks with an Investment Professional. Including computer-generated advice in this exemption would simplify Financial Institutions' compliance, so that a Retirement Investor could request an Investment Professional's assistance with a particular transaction, or an Investment Professional could review the computer model's recommendations, without separate analysis as to whether an Investment Professional has provided fiduciary investment advice.

Like any other advice arrangement, Financial Institutions relying on computer models would have to satisfy the exemption's best interest standard and other protective conditions in order to satisfy PTE 2020–02. For example, a computer model that preferentially recommends that a Retirement Investor purchase products that generate more income to the Financial Institution would not be permitted under this exemption. The Department is not, however, proposing to require Financial Institutions to comply with the conditions of the statutory exemption in ERISA 408(g)[9] in order to rely on PTE 2020–02. The Department believes that the additional conditions of this exemption, particularly the retrospective review and ineligibility provisions, would provide strong protections that are not a part of the statutory exemption. However, complying with the statutory exemption conditions could form the basis for policies and procedures that effectively mitigate Conflicts of Interest. To enhance their policies and procedures, it would be reasonable for a Financial Institution to incorporate some, but not all, of the statutory exemption conditions when relying on PTE 2020–02, although a Financial Institution could not merely pick and choose among the conditions of both exemptions in an attempt to avoid the meaningful conflict mitigation requirements each exemption provides. In other words, a Financial Institution must determine that its policies and procedures are, in fact, prudently designed to ensure compliance with the Best Interest standard, regardless of whether the policies and procedures include conditions taken from the statutory exemption.

The Department requests comment on amending PTE 2020–02 to provide relief for Financial Institutions that provide investment advice through computer models without the involvement of an

[7] The SECURE Act was enacted as Division O of the Further Consolidated Appropriations Act, 2020 (Pub. L. 116–94, 133 Stat. 2534 (Dec. 20, 2019)). The SECURE Act amended ERISA section 3(2) to authorize PEPs and added new ERISA sections 3(43) which establishes requirements for PEPs and 3(44), which establishes requirements for PPPs.

[8] 85 FR 82798, 82819 (Dec. 18, 2020).

[9] ERISA section 408(g) and the regulations thereunder provide prohibited transaction relief for certain investment advice arrangements that use fee leveling or use computer models. *See* 29 CFR 2550.408g–1 and Code section 4975(f)(8).

Investment Professional. The Department also requests responses to the following questions:

- Are Financial Institutions currently relying on the statutory exemption in ERISA section 408(g)?
- Are Financial Institutions that use computer models providing advice in a manner that does not require a prohibited transaction exemption?
- Would expanding PTE 2020–02 to include investment recommendations by computer models allow more conflicted investment advice?
- Are Financial Institutions providing rollover advice via computer models?
  - If so, would those Financial Institutions be able to provide the required Rollover disclosure in Section II(b)(5)?
  - If not, are there other ways the Financial Institution can ensure that the Retirement Investor receives a full explanation of why the recommended product is in their Best Interest?
- Are Financial Institutions using artificial intelligence to provide investment advice? If so, how are those Financial Institutions compensated for advice provided in this manner and do they rely on PTE 2020–02 or on the statutory exemption in ERISA section 408(g)? Would recommendations that relied in whole or part on artificial intelligence require additional or separate conditions?

Investment Discretion

Section I(c)(3) of PTE 2020–02 currently excludes transactions that involve the Investment Professional acting in a fiduciary capacity other than as an investment advice fiduciary within the meaning of the regulations issued by the Department and the Department of the Treasury/IRS,[10] which set forth the definition of fiduciary investment advice. In the preamble to PTE 2020–02, the Department explained it was citing the Department's five-part test as the governing authority for status as an investment advice fiduciary.[11]

Now that the Department is proposing to amend the regulation defining an investment advice fiduciary, the Department is also proposing to simplify the language in the exemption. Specifically, the proposed amendment redesignates Section I(c)(3) as Section I(c)(2), which would exclude from the exemption advice provided in a fiduciary capacity other than as an investment advice fiduciary within the meaning of ERISA section 3(21)(A)(ii)) and Code section 4975(e)(3)(B) and the regulations issued thereunder. While the Department does not intend to change the substance of this exclusion, the Department is proposing to clarify that Financial Institutions and Investment Professionals cannot rely on the exemption if they act in a fiduciary capacity other than as an investment advice fiduciary.

Impartial Conduct Standards

Best Interest

The Best Interest standard in PTE 2020–02 currently requires investment advice to be, at the time it is provided, in the Best Interest of the Retirement Investor. As defined in current Section V(b), Best Interest advice (1) 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 (2) does not place the financial or other interests of the Investment Professional, Financial Institution or any Affiliate, Related Entity, or other party ahead of the interests of the Retirement Investor, or subordinate the Retirement Investor's interests to their own.

The proposed amendment would retain the Best Interest standard from PTE 2020–02. To provide additional clarity, the Department is proposing to add an example to the operative text from the 2020–02 preamble specifying that it is impermissible for the Investment Professional to recommend a product that is worse for the Retirement Investor because it is better for the Investment Professional's or the Financial Institution's bottom line. In other words, the requirement for Investment Professionals not to subordinate the Retirement Investor's interests to their own is not satisfied if the Investment Professional merely considers the Retirement Investor's interests along with its own and the Financial Institution's in choosing which product to recommend to a Retirement Investor. The Department notes this standard is consistent with the SEC's standards for both registered investment advisers and broker-dealers.

As the Department stated in the preamble to PTE 2020–02, this Best Interest standard allows Investment Professionals and Financial Institutions to provide investment advice despite having a financial or other interest in the transaction, so long as they do not place their own interests ahead of the interests of the Retirement Investor or subordinate the Retirement Investor's interests to their own. For example, in choosing between two investments offered and available to the investor from the Financial Institution, it is not permissible for the Investment Professional to advise investing in the one that is worse for the Retirement Investor but better for the Investment Professional's or the Financial Institution's bottom line. It bears emphasis, however, that this standard should not be read as somehow foreclosing the Investment Professional and Financial Institution from being paid on a transactional basis, nor does it foreclose investment advice on proprietary products or investments that generate Third-Party Payments, or advice based on investment menus that are limited to such products, in part or whole. Financial Institutions and Investment Professionals are entitled to receive reasonable compensation fairly disclosed for their work, as long as they do not subordinate the Retirement Investor's interests to their own and have appropriate policies and procedures to safeguard against imprudent or disloyal advice.

Certainly, in many cases, it is in the Retirement Investor's best interest to receive advice from Investment Professionals that are compensated through commissions incurred on a transactional basis, rather than as part of an ongoing fee-based relationship (for example, pursuant to an advisory relationship subject to a recurring charge based on assets under management). In such cases, the fact that the Investment Professional received a commission for their services is not inconsistent with the principles set forth herein. Conversely, a recommendation to enter into a fee-based arrangement may, in certain cases, be inconsistent with the Best Interest standard. For example, "reverse churning," or recommending that a Retirement Investor continue to receive advice and hold assets subject to an ongoing advisory fee, in circumstances where the investor has low trading activity and little need for ongoing advice, would constitute a violation of the Impartial Conduct Standards and ERISA section 406(b)(1) that is not covered by this exemption. In the discussion of the policies and procedures requirement under Section II(c), the Department provides additional guidance on how Financial Institutions that construct their investment menus with reference to proprietary products or Third-Party

[10] 29 CFR 2510.3–21(c)(1)(i) and (ii)(B) or 26 CFR 54.4975–9(c)(1)(i) and (ii)(B).

[11] 85 FR 82798, 40842 (Dec. 18, 2020).

payments can comply with the exemption.

Finally, it should be noted that this Best Interest standard also does not impose an unattainable obligation on Investment Professionals and Financial Institutions to somehow identify the single ''best'' investment for the Retirement Investor out of all the investments in the national or international marketplace, assuming such advice were even possible at the time of the transaction.

Reasonable Compensation and Best Execution

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

No Misleading Statements

The Department is also maintaining the requirement in Section II(a)(3), which prohibits Financial Institutions and Investment Professionals from making materially misleading statements to Retirement Investors. It is not sufficient for such statements to be technically accurate; therefore, the Department is clarifying that this condition is not satisfied if a Financial Institution or Investment Professional omits information that is needed to make the statement not misleading in light of the circumstances under which it was made. The Financial Institution and Investment Professional must consider whether the information provides data the Retirement Investor likely would need or want to know about the recommended investment and provide that information in a manner the Retirement Investor can understand.

Disclosure

Section II(b) of PTE 2020–02 currently requires Financial Institutions to provide certain disclosures to Retirement Investors before engaging in a transaction pursuant to the exemption. The Financial Institution must provide a written acknowledgment that the Financial Institution and its Investment Professionals are fiduciaries under Title I of ERISA and the Code, as applicable, with respect to any investment recommendations provided by the Financial Institution or Investment Professional to the Retirement Investor. The Financial Institution must also provide an accurate written description of the services to be provided to the Retirement Investor and the Financial Institution's and Investment Professional's material Conflicts of Interest that is not misleading in all material respects. In addition, under current Section II(c)(3) of PTE 2020–02, before engaging in a rollover recommended pursuant to the exemption, the Financial Institution must provide Retirement Investors with documentation of specific reasons why the rollover recommendation is in the Retirement Investor's best interest.

As part of this amendment to PTE 2020–02, the Department is proposing additional disclosures described below, which the Department has determined will help ensure that Retirement Investors have sufficient information to make an informed decision about the costs of the transaction and the significance and severity of the Financial Institution's Conflicts of Interest. The Department requests comment on these disclosures and is particularly interested in receiving information regarding whether additional or alternative information would be helpful to Retirement Investors. Since many Financial Institutions are already complying with PTE 2020–02, the Department is interested in hearing from those Financial Institutions and from investors about the helpfulness of the current disclosures and what information might provide additional protections.

Pre-Transaction Disclosure

Before engaging in a transaction pursuant to this exemption, PTE 2020–02 Section II(b)(1) currently requires the Financial Institution to provide a written acknowledgment that the Financial Institution and its Investment Professionals are fiduciaries under Title I of ERISA or the Code, or both, as applicable, with respect to any investment recommendations provided by the Financial Institution or Investment Professional to the Retirement Investor. The Department has become concerned that some parties misinterpret this condition and claim to satisfy it through artful phrasing that does not, in fact, tell the Retirement Investor if the recommendation is made by a fiduciary (for example, by saying they ''may'' be fiduciaries or that they are fiduciaries to the extent they meet the definition of fiduciary investment advice under the ERISA or the Code). Before executing a recommended transaction, however, a Retirement Investor should know whether the recommendation is coming from a Financial Institution or Investment Professional who is subject to the ERISA/Code fiduciary standard. Similarly, if the Financial Institution and Investment Professional are to comply with the law and meet the exemption's conditions, they should decide if they are acting as a fiduciary, inasmuch as their legal obligations and exemption conditions turn on fiduciary status under ERISA, the Code, or both.

The proposed amendment would clarify the fiduciary acknowledgment requirement so that the Financial Institution must provide a written acknowledgment that the Financial Institution and its Investment Professionals are providing fiduciary investment advice to the Retirement Investor and are fiduciaries under Title I, the Code, or both when making an investment recommendation. If Financial Institutions and Investment Professionals are unwilling to meet this exemption condition, they must restructure their operations to avoid prohibited transactions.

The Department is proposing to add a requirement in Section II(b)(2) that the Financial Institutions include with the initial disclosure a written statement of the Best Interest standard of care owed by the Investment Professional and Financial Institution to the Retirement Investor. PTE 2020–02 Section II(b)(2) currently requires a written description of the services to be provided and the Financial Institution's and Investment Professional's material Conflicts of Interest that is accurate and not misleading in all material respects. The Department is proposing to re-designate this provision as Section II(b)(3), replace ''all material respects'' with ''any material respect,'' and add a clarification that this description will include the amount the Retirement Investor will directly pay for such services and the amounts the Financial Institution and Investment Professional receive from other sources, including through Third-Party Payments. If, for example, the Retirement Investor will pay through commissions or transaction-based payments, the written statement must clearly disclose that fact. This description must be written in plain English, taking into consideration a Retirement Investor's level of financial experience. As explained previously in the preamble to final PTE 2020–02 published in 2020, the Department anticipates Financial Institutions are able to satisfy this disclosure requirement in part through disclosures required by other regulators.[12] The Department requests comment whether additional specificity is needed, particularly as to the type of Third-Party Payments or other incentives provided to the Financial Institution.

The Department is also proposing a new Section II(b)(4) which would require Financial Institutions to inform Retirement Investors of their right to obtain specific information regarding costs, fees, and compensation that is described in dollar amounts, percentages, formulas, or other means reasonably designed to present materially accurate disclosure of their scope, magnitude, and nature. The Financial Institution must provide the information in sufficient detail for the Retirement Investor to make an informed judgment about the costs of the transaction and the significance and severity of Conflicts of Interest. This includes the total compensation that the Financial Institution and Investment Professional receive, not just the costs directly paid by the Retirement Investor. This disclosure also must describe how the Retirement Investor can receive the information free of charge. The Department is not proposing to require Financial Institutions to maintain records of every transaction or be able to quickly provide specific information regarding costs or fees generated by specific transactions. However, the Department is proposing to require Financial Institutions to maintain sufficient records to allow them to meaningfully respond to Retirement Investors' requests to demonstrate how the Financial Institution and its Investment Professionals are compensated in connection with their recommendations.[13]

To assist Financial Institutions and Investment Professionals in complying with this exemption condition, the Department is providing the following model language that will satisfy Section II(b)(1), (2), and (4).

When we make investment recommendations to you regarding your retirement plan account or individual retirement account, we are fiduciaries within the meaning of Title I of the Employee Retirement Income Security Act and/or the Internal Revenue Code, as applicable, which are laws governing retirement accounts. The way we make money creates some conflicts with your interests, so we operate under a special rule that requires us to act in your best interest and not put our interest ahead of yours. Under this special rule's provisions, we must:

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

You can ask us for more information explaining costs, fees, and compensation, so that you may make an informed judgment about the costs of the transaction and about the significance and severity of the Conflicts of Interest. We will provide you with this information at no cost to you.

Please note that the Department is not proposing to include model language for Section II(b)(3) because many different types of Financial Institutions will rely on this exemption and provide a wide range of services to Plans and Retirement Investors.

Rollover Disclosure

The proposed amendment would clarify the rollover disclosure. While the current requirement is a part of both the disclosure conditions in Section II(b)(3) and the policies and procedures condition in Section II(c)(3) of PTE 2020–02, the proposed amendment would consolidate this into one condition in amended Section II(b)(5). This requirement extends to recommended rollovers from a Plan to another Plan or IRA as defined in Code section 4975(e)(1)(B) or (C), from an IRA as defined in Code section 4975(e)(1)(B) or (C) to a Plan, from an IRA to another IRA, or from one type of account to another (*e.g.,* from a commission-based account to a fee-based account).

Before engaging in a rollover or making a recommendation to a Plan participant as to the post-rollover investment of assets currently held in a Plan, the Financial Institution, and Investment Professional must consider and document their conclusions as to whether a rollover is in the Retirement Investor's Best Interest and provide that documentation to the Retirement Investor. Relevant factors to consider must include but are not limited to:

(i) the alternatives to a rollover, including leaving the money in the Plan or account type, as applicable;

(ii) the comparative fees and expenses;

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

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

When considering the alternatives to a rollover recommendation, the Financial Institution and Investment Professional should not focus solely on the Retirement Investor's existing investment allocation without considering other investment options in the existing Plan or IRA.[14]

Investment Professionals and Financial Institutions should make diligent and prudent efforts to obtain information about the fees, expenses, and investment options offered in the Retirement Investor's Plan account. In general, such information should be readily available to the Retirement Investor as a result of Department regulations mandating disclosure of plan-related information to the plan's participants that is found at 29 CFR 2550.404a–5. If the Retirement Investor refuses to provide such information, even after a full explanation of its significance, and the information is not otherwise readily available, the Financial Institution and Investment Professional should make a reasonable estimate of a Plan's expenses, asset

[12] ''While the exemption does not include specific safe harbors, the Department confirms that Financial Institutions may rely, in whole or in part, on other regulatory disclosures to satisfy certain aspects of this disclosure requirement, for example, the disclosures required under Regulation Best Interest and Form CRS, applicable to broker-dealers; Form ADV including Form CRS, applicable to registered investment advisers; and disclosures required under insurance and banking laws when such disclosures cover services to be provided and the Financial Institution's and Investment Professional's material Conflicts of Interest. Avoiding duplication of disclosures is important and the Department reiterates that the disclosure standard under this exemption may be satisfied in whole, or in part, by using other required disclosures to the extent those disclosures include information required to be disclosed by the exemption. Allowing the use of other disclosures to meet the disclosure standard under this exemption should serve to harmonize this exemption's conditions with those of other disclosure regimes.'' 85 FR at 82830.

[13] In addition, Section IV already requires Financial Institutions to ''maintain[ ] for a period of six years records demonstrating compliance with this exemption and make[ ] such records available, to the extent permitted by law including 12 U.S.C. 484, to any authorized employee of the Department or the Department of the Treasury.''

[14] The Department included very similar language in its April 2021 FAQs, Q15. When this policy was challenged in litigation, the court determined that that policy was a procedurally proper interpretive rule, and it was not arbitrary and capricious, because it is ''the type of documentation that . . . is precisely of the nature that a prudent investment advisor would undertake. Accordingly, it neither contradicts the 2020 Exemption nor goes beyond it.'' *Am. Securities Asso'n* v. *Dep't of Labor,* No. 8:22–cv–330, 2023 WL 1967573, at *21 (M.D. Fla. Feb. 13, 2023).

values, risk, and returns based on publicly available information. The Financial Institution and Investment Professional should document and explain the assumptions used in the estimate and their limitations. In such cases, the Financial Institution and Investment Professional could rely on alternative data sources, such as the Plan's most recent Form 5500 or reliable benchmarks on typical fees and expenses for the type and size of the Plan that holds the Retirement Investor's account. The Department welcomes comments on reliable benchmarks that could be used for this purpose.

The Department notes it would be permissible under this exemption for a Financial Institution to charge a discrete fee for the rollover analysis and charge separately for advice following the rollover. Like all other service providers and investment advice fiduciaries, the Financial Institution may only charge reasonable compensation for the rollover analysis and must satisfy all other conditions of the exemption.

Web Disclosure

The Department also seeks comment on whether Financial Institutions should be required to provide additional disclosures to Retirement Investors and the investing public. In particular, the Department is interested in receiving comments regarding whether it should require Financial Institutions to maintain a public website containing the pre-transaction disclosure, a description of the Financial Institution's business model, associated Conflicts of Interest (including arrangements that provide Third-Party Payments), and a schedule of typical fees. The website could be formatted as a separate website, a web page on an existing website, or in some other way that is publicly accessible. If the Department were to add a web disclosure requirement, the Department would also require Financial Institutions to provide Retirement Investors with a link to the web disclosure (or a printed web address) as part of the pre-transaction disclosures currently required by Section II(b)(1)–(4).

The Department is interested in receiving data and other information regarding the benefits of such a disclosure. The Department estimates that, if such a disclosure were required, it would require eight hours of labor annually from a computer programmer, on average, resulting in an annual cost of approximately $20.5 million.[15] The Department welcomes comments on the accuracy of Department's estimates on the required time to maintain the disclosure, and how many Financial Institutions currently have the technology infrastructure to post a web disclosure. The Department is also interested in receiving any data that commenters may have that can inform an estimate of the extent to which Retirement Investors, investment consultants, and third-party intermediaries would visit and use a web page that includes such disclosures, and the extent to which such disclosures could drive better investor outcomes.

The Department contemplates that, to the extent applicable, the website would list all product manufacturers and other parties with whom the Financial Institution maintains arrangements that provide Third-Party Payments to the Investment Professional, the Financial Institution, or Affiliates with respect to specific investment products or classes of investments recommended to Retirement Investors; a description of the arrangements, including a statement on whether and how these arrangements impact Investment Professionals' compensation, and a statement on any benefits the Financial Institution provides to the product manufacturers or other parties in exchange for the Third-Party Payments.

The website may describe the above arrangements with product manufacturers, Investment Professionals, and others by reference to dollar amounts, percentages, formulas, or other means reasonably calculated to present a materially accurate description of the arrangements. Similarly, the Financial Institution may group disclosures on the website based on reasonably defined categories of investment products or classes, product manufacturers, Investment Professionals, and arrangements, and it may disclose reasonable ranges of values, rather than specific values as appropriate. Regardless of how it is constructed, the website should fairly disclose the scope, magnitude, and nature of the Financial Institution's compensation arrangements and Conflicts of Interest in sufficient detail to permit visitors to the website to make an informed judgment about the significance of the compensation practices and Conflicts of Interest with respect to transactions recommended by the Financial Institution and its Investment Professionals.

Good Faith

Section II(b)(6) of the proposal would provide that the Financial Institution will not fail to satisfy the conditions in Section II(b) solely because it, acting in good faith and with reasonable diligence, makes an error or omission in disclosing the required information, or if the disclosure is temporarily inaccessible through no fault of the Financial Institution, provided that the Financial Institution discloses the correct information as soon as practicable, but not later than 30 days after the date on which it discovers or reasonably should have discovered the error or omission.

Under proposed Section II(b)(7) of the amendment, Investment Professionals and Financial Institutions may rely in good faith on information and assurances from the other entities that are not Affiliates as long as they do not know that such information is incomplete or inaccurate. The proposed exemption makes clear in Section II(b)(8) that Financial Institutions will not be required to disclose information pursuant to this Section II(b) if such disclosure is otherwise prohibited by law.

Policies and Procedures

Under PTE 2020–02, Section II(c), a Financial Institution must currently establish, maintain, and enforce written policies and procedures that it prudently designs to ensure that the Financial Institution and its Investment Professionals comply with the Impartial Conduct Standards. The proposed amendment clarifies, by adding examples to the operative text, some actions that Financial Institutions may not take because a reasonable person could conclude that they are likely to encourage Investment Professionals to make recommendations that are not in the Retirement Investors' Best Interest. The Department is not proposing changes to the underlying requirements applicable to these policies and procedures but is proposing to require Financial Institutions to provide their complete policies and procedures to the Department upon request within 10 business days of request.[16]

The Financial Institution's policies and procedures must mitigate Conflicts of Interest to such an extent that a reasonable person reviewing the Financial Institution's policies and procedures and its incentive practices as

[15] The burden is estimated as: (19,290 entities × 8 hours) = 154,320 hours. A labor rate of $133.05 is used for a computer programmer professional. The labor rate is applied in the following calculation: (19,290 entities × 8 hours) × $133.05 = $20,532,276.

[16] Except where specified, as here, ''days'' refers to calendar days.

a whole would conclude that they do not create an incentive for the Financial Institution or Investment Professional to place its interests ahead of the Retirement Investor's interest.[17] The policies and procedures must be prudently designed to protect Retirement Investors from recommendations to make excessive trades; to buy investment products, annuities, or riders that are not in the Retirement Investor's Best Interest; or to allocate excessive amounts to illiquid or risky investments. To satisfy Section II(c), Financial Institutions may not use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives that are intended, or that a reasonable person would conclude are likely, to encourage Investment Professionals to make recommendations that are not in Retirement Investors' Best Interest. A Financial Institution should not offer incentive vacations, or even paid trips to educational conferences, if the desirability of the destination is based on sales volume and satisfaction of sales quotas.

The Financial Institution must pay close attention to any Conflicts of Interest that may exist within the Financial Institution itself. For example, it is not enough merely to pay Investment Professionals the same percentage of the Financial Institution's compensation for a recommended investment product, as for other products, if the Financial Institution receives more compensation from recommending that product rather than other products. In such cases, the ''level'' compensation percentage effectively directly transmits the Financial Institution's conflict of interest to the Investment Professional, as the Investment Professional's compensation is increased in direct proportion to the profitability of the investment to the firm. Thus, Section II(c) requires the Financial Institution to look carefully at its own incentives and ensure that all recommendations are focused on the Retirement Investor's Best Interest rather than the Financial Institution's interests.

This is not to say the exemption is limited to certain types of Financial Institutions or investment products. Financial Institutions that offer a restricted menu of proprietary products or products that generate Third-Party Payments can establish, maintain, and enforce written policies and procedures that satisfy these requirements. For example, the Department would view a Financial Institution that authorizes a limited universe of investment recommendations as satisfying the policies and procedures requirement if it prudently does the following:

- Documents in writing its limitations on the universe of recommended investments, the Conflicts of Interest associated with any contract, agreement, or arrangement providing for its receipt of Third-Party Payments or associated with the sale or promotion of proprietary products.
- Documents any services it will provide to Retirement Investors in exchange for Third-Party Payments, as well as any services or consideration it will furnish to any other party, including the payor, in exchange for the Third-Party Payments.
- Reasonably concludes that the limitations on the universe of recommended investments and Conflicts of Interest will not cause the Financial Institution or its Investment Professionals to receive compensation in excess of reasonable compensation for Retirement Investors as set forth in Section II(a)(2).
- Reasonably concludes that these limitations and Conflicts of Interest will not cause the Financial Institution or its Investment Professionals to recommend imprudent investments; and documents in writing the bases for its conclusions.
- Informs the Retirement Investor clearly and prominently in writing that the Financial Institution limits the types of products that it and its Investment Professionals recommend to proprietary products and/or products that generate Third-Party Payments.
  - In this regard, the notice should not simply state that the Financial Institution or Investment Professional ''may'' limit investment recommendations based on whether the investments are proprietary products or generate Third-Party Payments, without specific disclosure of the extent to which recommendations are, in fact, limited on that basis.
- Clearly explains its fees, compensation, and associated Conflicts of Interest to the Retirement Investor in plain English.
- Ensures that all recommendations are based on the Investment Professional's considerations of factors or interests such as investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor.
- At the time of the recommendation, the amount of compensation and other consideration reasonably anticipated to be paid, directly or indirectly, to the Investment Professional, Financial Institution, or their Affiliates or Related Entities for their services in connection with the recommended transaction is not in excess of reasonable compensation within the meaning of ERISA section 408(b)(2) and Code section 4975(d)(2).
- The Investment Professional's recommendation reflects the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims, based on the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor; and the Investment Professional's recommendation is not based on the financial or other interests of the Investment Professional or on the Investment Professional's consideration of any factors or interests other than the investment objectives, risk tolerance, financial circumstances, and needs of the Retirement Investor.

The Department intends this as an example of one way a Financial Institution could satisfy the policies and procedures requirement, but not the only way. The Department requests comment on whether additional guidance is needed regarding a Financial Institution or Investment Professional's recommendations of proprietary products to a Retirement Investor, and, if so, the type of guidance that would be most useful.

Retrospective Review

The Department is proposing to retain the retrospective review in PTE 2020–02, Section II(d) with certain modifications. The review must be reasonably designed to detect and prevent violations of, and achieve compliance with, the conditions of the exemption, including the Impartial Conduct Standards, and the policies and procedures governing compliance with the exemption. The Department is clarifying that as part of the review, it expects Financial Institutions to determine whether they have complied with each exemption condition. This expectation is based in part on the premise that PTE 2020–02 currently requires the Financial Institution's Senior Executive Officer to certify that the Financial Institution has policies and procedures in place that are prudently designed to achieve compliance with the exemption conditions as part of the retrospective review. In order to make that

[17] The Department provided further guidance on the policies and procedures in Questions 16 and 17 of a set of Frequently Asked Questions *available at https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/faqs/new-fiduciary-advice-exemption.pdf.*

certification, the retrospective review must be reasonably designed to detect and prevent violations of, and achieve compliance with, all conditions of the exemption itself. Consistent with this expectation, the Department has received self-correction notifications summarizing the Financial Institution's annual retrospective review and identifying its failure to comply with a range of conditions.

The Department is also adding a clarification that, as part of its retrospective review, the Financial Institution must update its policies and procedures as business, regulatory, and legislative changes and events dictate, and to ensure they remain prudently designed, effective, and compliant with Section II(c). This is intended as clarification of the current PTE 2020–02, which requires Financial Institutions ''maintain'' their policies and procedures and also requires the Senior Executive Officer's certification to include that the Financial Institution has in place a prudent process to modify the policies and procedures. The Department is proposing to add this language to Section II(d)(1) for clarity.

In the Department's view, an annual review will generally be appropriate. However, Financial Institutions may choose to conduct their reviews more frequently and should do so as circumstances dictate. For example, if a Financial Institution knows or should know that non-exempt prohibited transactions or violations of either the Impartial Conduct Standards or policies and procedures conditions have occurred, the Financial Institution cannot wait until the next annual review to correct transactions or revise its policies and procedures.

As the Department described in the preamble to PTE 2020–02 when it was finalized in 2020, an appropriate retrospective review would be aimed at detecting non-compliance across a wide range of transaction types and sizes, large and small, identifying deficiencies in the policies and procedures, and rectifying those deficiencies. For large Financial Institutions that conduct large numbers of transactions each year, sampling may not be the sole means of testing compliance, but it is an important and necessary component of any prudent review process and should be performed in a manner designed to identify potential violations, problems, and deficiencies that need to be addressed.[18]

The methodology and results of the retrospective review must be reduced to a written report that is provided to a Senior Executive Officer. The Department is proposing some edits to the Senior Executive Officer's report. The Department is making minor edits to reflect the clarifications to the retrospective review described above. In addition, the Department is proposing to amend Section II(d)(3) to require the Senior Executive Officer to certify that the Financial Institution has filed (or will file timely, including extensions) Form 5330 to report to the IRS any non-exempt prohibited transactions discovered by the Financial Institution in connection with investment advice covered under Code section 4975(e)(3)(B). The certification must also include that the Financial Institution has corrected those transactions and paid any resulting excise taxes owed under Code section 4975. As further described below, the Department is proposing to amend other sections of PTE 2020–02 to ensure Financial Institutions pay the excise taxes owed on non-exempt prohibited transactions. In its decision vacating the 2016 rulemaking, the Fifth Circuit wrote that ''ERISA Title II only punishes violations of the 'prohibited transactions' provision by means of IRS audits and excise taxes.''[19] Consistent with this reasoning, the Department is proposing to require the Senior Executive Officer to carefully review transactions, correct violations, and pay any required excise taxes.

The review, report, and certification must be completed no later than six months following the end of the period covered by the review. The Financial Institution must retain the report, certification and supporting data for six years, and provide such information to the Department within 10 business days of request, to the extent permitted by law including 12 U.S.C. 484 (regarding limitations on visitorial powers for national banks).

Self-Correction

The Department is proposing to retain the self-correction in Section II(e) in amended PTE 2020–02. The exemption allows self-correction in certain cases when either the violation did not result in investment losses to the Retirement Investor, or the Financial Institution made the Retirement Investor whole for any resulting losses. In this context, ''losses'' are not limited to recommendations that leave the Retirement Investor with fewer assets than originally invested. For example, if the Financial Institution's fees are excessive, the Financial Institution cannot keep the fees just because the Retirement Investor did not lose money in the transaction.

Since finalizing PTE 2020–02, the Department has received several self-correction emails under Section II(e). Most of these emails describe late disclosures (including both fiduciary acknowledgments and rollover analyses) which may be corrected under PTE 2020–02 as long as all of the required information was provided to the Retirement Investor, even if not in writing, so that the Financial Institution is confident that the Retirement Investor had the information needed to make an informed investment decision before a transaction was executed pursuant to the Financial Institution or Investment Professional's recommendation.

The Department has also received questions about the types of transactions that can be corrected under PTE 2020–02, Section II(e). If a recommendation satisfies all conditions of the exemption, but due to a clerical error the wrong asset is purchased or sold, the Financial Institution must correct this error as quickly as possible by ensuring the Retirement Investor's account is in the same position it would have been if the correct transaction had occurred. However, if an Investment Professional has recommended a transaction that was not in the Retirement Investor's Best Interest, the Retirement Investor may be prohibited from returning money to an ERISA account after it has been rolled over into an IRA. Even if the IRA investments have performed well since the rollover, the Retirement Investor may have been harmed by the loss of ERISA Title I's protections. The Department requests comment on whether additional clarifications are needed as to the types of transactions eligible for correction under Section II(e).

Eligibility

The Department is proposing to retain the eligibility provision in Section III, which identifies circumstances under which an Investment Professional or Financial Institution will become ineligible to rely on the exemption for a period of 10 years. The Department continues to maintain that the eligibility provisions ensure that Financial Institutions provide reasonable oversight of Investment Professionals and that both adopt a culture of compliance. The Department is proposing certain changes to Section III, mostly for clarity. The Department requests comment on these proposed

[18] 85 FR 82798, 82839 (Dec. 18, 2020).

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

changes and whether additional clarity is needed.

The Department is proposing to expand ineligibility to include Financial Institutions that are Affiliates, rather than a more limited definition of ''Controlled Group.'' The Department remains concerned that a Financial Institution facing ineligibility for its actions affecting Retirement Investors could merely change its corporate form and continue to rely on the exemption. The Department understands there has been some confusion about what entities would be considered Financial Institutions in the same Controlled Group and has determined that by including Affiliates as opposed to Financial Institutions in the same Controlled Group, the provision will be better understood by the parties involved. Moreover, the inclusion of Affiliates ensures that Financial Institutions would be diligent in their obligation to monitor the actions of their Affiliates and foster a culture of compliance throughout the organization.

The proposed amendment also would set forth the specific crimes (including foreign crimes) that could cause ineligibility in Section III(a). Under current PTE 2020–02, a Financial Institution or Investment Professional only becomes ineligible upon conviction of ''crimes arising out of such person's provision of investment advice to Retirement Investors.'' The Department is proposing to broaden this to include the enumerated crimes, regardless of the conduct under which they arose. The Department is concerned that the limitation of ''arising out of . . . provision of investment advice'' is too narrow. Like the addition of Affiliates, this will help foster a culture of compliance throughout the organization in recognition of the importance of investment advice to Retirement Investors. The Department requests comment on this change.

Similar to the amended retrospective review provision, the Department is proposing to add ineligibility for a systematic pattern or practice of failing to correct prohibited transactions, report those transactions to the IRS on Form 5330 and pay the resulting excise taxes imposed by Code section 4975 in connection with non-exempt prohibited transactions involving investment advice under Code section 4975(e)(3)(B) to Section II(a)(2). This proposed amendment would ensure that IRAs and other Title II plans actually report and pay an excise tax that they owe. A single missed excise tax would not make the Financial Institution ineligible for 10 years, but Financial Institutions that regularly disregard their legal obligation to pay excise taxes on prohibited transactions would need to find alternative relief.

The Department is also making clarifying changes to the timing of the ineligibility designation set forth in Section III(b). While PTE 2020–02 provides for different amounts of time before ineligibility, and then provides a one-year winding down period, the Department is proposing to simplify this process and create uniformity so that all entities would become ineligible six months after the conviction date, the date of the Department's written determination regarding a foreign conviction, or the date of the Department's written ineligibility notice regarding other misconduct, as applicable. In the Department's view, the one-year wind down created a long period in which noncompliance and inappropriate conduct could continue. This six-month period will take the place of the winding down period and provide ample time for Financial Institutions and Investment Professionals to inform Retirement Investors of their ineligibility and/or find alternative means of complying with ERISA. During the six months, the Financial Institution and Investment Professionals are still fiduciaries that are subject to all of the fiduciary requirements and prohibited transaction rules. Thus, Financial Institutions and Investment Professionals must continue to comply with the exemption during those six months, and any transactions that do not meet the terms of the exemption will be subject to excise tax and ERISA penalties.

Furthermore, the Department has clarified that the ineligibility remains in effect until the earliest of: (A) a subsequent judgment reversing a person's conviction, (B) 10 years after the person became ineligible or is released from imprisonment, if later, or (C) the Department grants an individual exemption permitting reliance on this exemption, notwithstanding the conviction.

The Department is proposing changes to Section III(c), which provides an opportunity to be heard. In a change from PTE 2020–02, Financial Institutions and Investment Professionals that become ineligible due to a conviction under Section III(a)(1)(A) would not have a separate opportunity to be heard by the Department following conviction by a U.S. Federal or state court of competent jurisdiction. A convicted advice provider has been provided due process by the U.S. court, and the criminal conduct underlying the conviction cannot be cured. Financial Institutions and Investment Professionals are required to act in the Best Interest of the Retirement Investor and in doing so, the Department expects them to act with a high degree of integrity and foster a culture of compliance. The criminal conduct underlying the conviction calls into question the advice provider's ability to act in the Retirement Investor's Best Interest, although a convicted Financial Institution or Investment Professional may be able to use other exemptions or apply for an individual exemption. The Department is proposing to provide an opportunity to be heard when the conviction is by a foreign court. Section III(c)(1) would allow Financial Institutions and Investment Professionals to submit a petition informing the Department of the conviction and seeking a determination that continued reliance on the exemption would not be contrary to the purposes of the exemption.

Proposed Section III(c)(2) of the exemption would allow Financial Institutions and Investment Professionals that have engaged in conduct described in Section III(a)(2) to have the opportunity to cure the behavior and to be heard in an evidentiary hearing by the Department. Under this provision, before issuing a written ineligibility notice, the Department will issue a written warning to the Investment Professional or Financial Institution, as applicable, identifying the specific conduct, and provide a six-month period to cure the misconduct. At the end of the six-month period, if the Department determines that the Investment Professional or Financial Institution has not taken appropriate action to prevent recurrence of the disqualifying conduct, it will then provide an opportunity to be heard and present evidence, in person (including by phone or videoconference), or in writing, or a combination thereof. The evidentiary hearing will be limited to one conference unless the Department determines in its sole discretion to allow additional conferences. Following the hearing, the Department's determination whether to issue the ineligibility notice will be based solely on its discretion. If the Department issues a written ineligibility notice, the notice will articulate the basis for the determination that the Investment Professional or Financial Institution engaged in conduct described in Section III(a)(2).

For all hearings under Section III(c), the Department will consider the following when making its determination:

- the gravity of the offense;

• the degree to which the underlying conduct concerned individual misconduct, or, alternately, corporate managers or policy;
• recency of the conduct at issue;
• any remedial measures the Investment Professional or Financial Institution has taken upon learning of the underlying conduct; and
• other factors the Department determines in its discretion are reasonable in light of the nature and purposes of the exemption.

The Department is also proposing to add the heading ''Alternative exemptions'' in Section III(d), which describes how a Financial Institution may continue business after becoming ineligible. The Department requests comments on the process described above, including whether it would be helpful to provide greater details about the evidentiary hearing and the written ineligibility notice, and, if so, what details are necessary.

Recordkeeping

The Department is considering amending the recordkeeping provisions in Section IV to allow more parties to review the records necessary to determine whether the exemption is satisfied. The recordkeeping provisions of PTE 2020–02 allow only the Department and the Department of the Treasury to inspect books and records. The Department originally proposed that records should be available for review by additional parties but limited that access in the final exemption in response to comments. Commenters expressed concern that parties might ''overwhelm'' Financial Institutions with requests for use in litigation.

Since PTE 2020–02 became effective, the Department has worked with Financial Institutions seeking to comply. The Department is of the view both that Financial Institutions could easily share their documentation of compliance and that Retirement Investors would benefit from access to that information. As described above, the Department is proposing additional disclosure requirements, which means some of this information would be provided to Retirement Investors without them needing to request to review records. In addition, the Department believes that most parties will likely not request records, and, when they do, the Department believes it is important that plans, unions and employee organizations, and participants and beneficiaries can access information they need to determine whether the exemption is satisfied and to understand how the Financial Institution and Investment Professional are acting in the Retirement Investor's Best Interest.

The Department seeks feedback on whether to replace Section IV with the following:

(a) The Financial Institution maintains the records necessary to enable the persons described in subsection (a)(2) below to determine whether the conditions of this exemption have been met with respect to a transaction for a period of six years from the date of the transaction in a manner that is reasonably accessible for examination. No prohibited transaction will be considered to have occurred solely on the basis of the unavailability of such records if they are lost or destroyed due to circumstances beyond the control of the Financial Institution before the end of the six-year period:

(1) No party, other than the Financial Institution responsible for complying with this section IV, will be subject to the civil penalty that may be assessed under ERISA section 502(i) or the excise tax imposed by Code section 4975(a) and (b), if applicable, if the records are not maintained or available for examination as required by this section IV.

(2) Except as provided in subsection (3) or precluded by 12 U.S.C. 484 (regarding limitations on visitorial powers for national banks), and notwithstanding any provisions of ERISA section 504(a)(2) and (b), the records are reasonably available at their customary location during normal business hours for examination by:

(A) Any authorized employee of the Department or the IRS or another state or Federal regulator;

(B) Any fiduciary of a Plan that engaged in a transaction pursuant to this exemption;

(C) Any contributing employer and any employee organization whose members are covered by a Plan that engaged in a transaction pursuant to this exemption; or

(D) Any participant or beneficiary of a Plan or beneficial owner of an IRA acting on behalf of the IRA that engaged in a transaction pursuant to this exemption.

(3) None of the persons described in subsection (2)(B)–(D) above are authorized to examine records regarding a transaction involving another Retirement Investor, privileged trade secrets or privileged commercial or financial information of the Financial Institution, or information identifying other individuals.

(4) If the Financial Institution refuses to disclose information to a person described in subsection (2)(B)–(D) above on the basis that the information is exempt from disclosure, the Financial Institution must provide a written notice advising the requestor of the reasons for its refusal and that the Department may request that such information be produced to the Department by the end of the thirtieth (30th) day following the Department's request.

(b) A Financial Institution's failure to maintain the 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. Such failure does not affect the relief for other transactions if the Financial Institution maintains required records for such transactions in compliance with this section IV.

The Department requests comment on both the burden to Financial Institutions and the benefits to Retirement Investors of being able to access this information on request.

Executive Order 12866 and 13563 Statement

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 costs and benefits, reducing costs, harmonizing rules, and promoting flexibility.

Under Executive Order 12866, as amended by Executive Order 14094, ''significant'' regulatory actions are subject to review by the Office of Management and Budget (OMB). Section 3(f) of the Executive Order 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 $200 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; (2) creating a 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 legal or policy issues for which centralized review would meaningfully further the President's priorities, or the principles set forth in the Executive Order. It has been determined that this proposal is a ''significant regulatory action'' within the scope of section 3(f)(1) of the Executive Order.

Therefore, the Department has provided an assessment of the proposal's potential costs, benefits, and transfers, and OMB has reviewed this proposed amendment pursuant to the Executive Order.

Paperwork Reduction Act

As part of its continuing effort to reduce paperwork and respondent burden, the Department conducts a preclearance consultation program to allow the general public and Federal agencies to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA). This helps ensure that the public understands the Department's collection instructions, respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood,and the Department can properly assess the impact of collection requirements on respondents.

The Department is soliciting comments regarding the information collection request (ICR) included in the proposed amendments to the ICR. To obtain a copy of the ICR, contact the PRA addressee below or go to *RegInfo.gov.* The Department has submitted a copy of the rule to the Office of Management and Budget (OMB) in accordance with 44 U.S.C. 3507(d) for review of its information collections. The Department and OMB are particularly interested in comments that:

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

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

PRA Addressee: Address requests for copies of the ICR to James Butikofer, Office of Research and Analysis, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue NW, Room N–5718, Washington, DC 20210, or *ebsa.opr@dol.gov.* ICRs also are available at *http://www.RegInfo.gov* (*http://www.reginfo.gov/public/do/PRAMain*).

As discussed above in the preamble, the Department proposes to amend PTE 2020–02 to require the provision of additional disclosures to retirement investors receiving advice and to provide more guidance for financial institutions and investment professionals complying with the Impartial Conduct Standards and implementing the policies and procedures. This proposal is intended to align with other regulators' rules and standards of conduct.

These requirements are ICRs subject to the PRA. Readers should note that the burden discussed below conforms to the requirements of the PRA and is not the incremental burden of the changes.[20]

1.1 Preliminary Assumptions

In the analysis discussed below, a combination of personnel would perform the tasks associated with the ICRs at an hourly wage rate of $63.45 for clerical personnel, $133.05 for a computer programmer, and $159.34 for a legal professional, and $219.23 for a financial advisor.[21]

The Department does not have information on how many retirement investors, including plan beneficiaries and participants and IRA owners, receive disclosures electronically from investment advice fiduciaries. For the purposes of this analysis, the Department assumes that the percent of retirement investors receiving disclosures electronically would be similar to the percent of plan participants receiving disclosures electronically under the Department's 2020 electronic disclosure rules.[22] Accordingly, the Department estimates that 94.2 percent of the disclosures sent to retirement investors would be sent electronically, and the remaining 5.8 percent would be sent by mail.[23] The Department requests comment on these assumptions.

The Department assumes any documents sent by mail would be sent by first class mail, incurring a postage cost of $0.66 for each piece of mail.[24] Additionally, the Department assumes that documents sent by mail would incur a material cost of $0.05 for each page.

1.2 Affected Entities

The Department expects the same 19,290 entities that are affected by the existing PTE 2020–02 would be affected by the proposed amendments to the PTE. The number of entities by type and size are summarized in the table below.[25]

TABLE 1—AFFECTED ENTITIES BY TYPE AND SIZE

	Small	Large	Total
Broker-Dealer	395	1,499	1,894
Retail	287	1,034	1,321
Non-Retail	108	465	573
Registered Investment Adviser	2,996	12,986	15,982
SEC	220	7,350	7,570
Retail	74	4,570	4,644
Non-Retail	146	2,780	2,926
State	2,776	5,636	8,412
Retail	2,166	4,399	6,566
Non-Retail	610	1,237	1,847

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

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

[22] 67 FR 17263.

[23] The Department estimates approximately 94.2% of retirement investors receive disclosures electronically, which is the sum of the estimated share of retirement investors receiving electronic disclosures under the 2002 electronic disclosure safe harbor (58.2%) and the estimated share of retirement investors receiving electronic disclosures under the 2020 electronic disclosure safe harbor (36.0%).

[24] U.S. Post Office, *First-Class Mail,* (2023), *https://www.usps.com/ship/first-class-mail.htm.*

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

TABLE 1—AFFECTED ENTITIES BY TYPE AND SIZE—Continued

	Small	Large	Total
Insurer	151	32	183
Robo-Adviser	10	190	200
Pension Consultant	930	81	1,011
Investment Company Underwriter	20	0	20
Total	4,502	14,788	19,290

In addition, the proposed amendments may affect banks and credit unions selling non-deposit investment products. There are 4,672 federally insured depository institutions in the United States, consisting of 4,096 commercial banks and 576 savings institutions.[26] Additionally, there are 4,686 federally insured credit unions.[27] Moreover, in 2017, the U.S. Government Accountability Office estimated that approximately two percent of credit unions have private deposit insurance.[28] Based on this estimate, the Department estimates that there are approximately 96 credit unions with private deposit insurance and 4,782 credit unions in total.[29]

The Department understands that banks most commonly use ''networking arrangements'' to sell retail non-deposit investment products, including equities, fixed-income securities, exchange-traded funds, and variable annuities.[30] Under such arrangements, bank employees are limited to performing only clerical or ministerial functions in connection with brokerage transactions. However, bank employees may forward customer funds or securities and may describe, in general terms, the types of investment vehicles available from the bank and broker-dealer under the arrangement. Similar restrictions on bank employees' referrals of insurance products and state-registered investment advisers exist.

Because of these limitations, the Department believes that, in most cases, such referrals would not constitute fiduciary investment advice within the meaning of the proposal. Due to the prevalence of banks using networking arrangements for transactions related to retail non-deposit investment products, the Department believes that most banks would not be affected by PTE 2020–02 with respect to such transactions.

The Department currently estimates that no banks or credit unions would be impacted by the proposed amendments to PTE 2020–02 but requests comments on this assumption. The Department is requesting comment on how frequently these entities use their own employees to perform activities that would otherwise be covered by the prohibited transaction provisions of ERISA and the Code. The Department seeks comment on the frequency with which bank or credit union employees recommend bank products to retirement investors and how they currently ensure such recommendations are prudent to the extent required by ERISA. The Department invites comments on the magnitude of any such costs and solicits data that would facilitate their quantification in the proposal.

1.3 Production and Distribution of Required Disclosures for Investors

1.3.1 Disclosure Requirements Under the Current PTE 2020–02

Section II(b) currently requires financial institutions to provide certain disclosures to retirement investors before engaging in a transaction pursuant to the exemption. These disclosures include:

- a written acknowledgment that the financial institution and its investment professionals are fiduciaries;
- a written description of the services to be provided and any material conflicts of interest of the investment professional and financial institution; and
- documentation of the financial institution and its investment professional's conclusions as to whether a rollover is in the retirement investor's best interest, before engaging in a rollover or offering recommendations on post-rollover investments.

The following estimates reflect the ongoing paperwork burdens of the affected entities. Broker-dealers, registered investment advisers, and insurance companies were required to prepare these disclosures under the existing PTE 2020–02. The estimates below reflect paperwork burden these entities would incur to modify such exemption, but the Department assumes that these entities have already incurred costs related to drafting such disclosures.

The Department estimates that preparing a disclosure indicating fiduciary status would take a legal professional at affected robo-advisors, pension consultants, and investment company underwriters 30 minutes, resulting in an hour burden of 616 hours and a cost burden of $98,074.[31]

The proposed amendment makes minor edits to the written acknowledgment that the financial institution and its investment professional are fiduciaries. The Department does not have data on how many financial institutions would need to modify their disclosures in response to this amendment; however, the Department expects that the disclosures required under the existing form of PTE 2020–02 likely satisfy this requirement for most financial institutions covered under the existing exemption. For the purposes of this analysis, the Department assumes that 10 percent of financial entities under the existing exemption would need to update their disclosures and that it would take a legal professional at a financial

[26] Federal Insurance Deposit Corporation, *Statistics at a Glance—as of March 31, 2023, https://www.fdic.gov/analysis/quarterly-banking-profile/statistics-at-a-glance/2023mar/industry.pdf.*

[27] National Credit Union Administration, *Quarterly Credit Union Data Summary 2023 Q2, https://ncua.gov/files/publications/analysis/quarterly-data-summary-2023-Q2.pdf.*

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

[29] The total number of credit unions is calculated as: 4,686 federally insured credit unions/(100%–2% of credit unions that are privately insured) = 4,782 total credit unions. The number of private credit unions is estimated as: 4,782 total credit unions − 4,686 federally insured credit unions = 96 credit unions with private deposit insurance.

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

[31] The burden is estimated as: [(200 robo-advisers + 1,011 pension consultants + 20 investment company underwriters) × 30 minutes] ÷ 60 minutes = 616 hours. The burden is estimated as: [(200 robo-advisers + 1,011 pension consultants + 20 investment company underwriters) × 30 minutes] ÷ 60 minutes × $159.34 = $98,074.

institution, on average, 10 minutes to update existing disclosures. Robo-advisers, pension consultants, and investment company underwrites, who are not covered under the existing exemption would need to draft the acknowledgement. Updating the acknowledgement is estimated to result in an hour burden of 301 hours with an equivalent cost of $47,961.[32]

TABLE 2—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE FIDUCIARY ACKNOWLEDGEMENT

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	917	$146,035	0	$0
Total	917	146,035	0	0

The Department estimates that preparing a disclosure identifying services provided and conflicts of interest would take a legal professional at affected robo-advisers, pension consultants, and investment company underwriters one hour at small financial institutions and five hours at large financial institutions, resulting in an hour burden of 2,315 hours and an equivalent cost burden of $368,872.[33]

The proposed amendments would also expand on the existing requirement for a written description of the services provided to also require a statement on whether the retirement investor would pay for such services, directly or indirectly, including through third-party payments. The Department assumes it would take a legal professional at a financial institution under the existing exemption 30 minutes to update existing disclosures to include this information. This results in an hour burden of 9,030 hours and an equivalent cost burden of $1,438,761 in the first year.[34]

TABLE 3—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE WRITTEN DESCRIPTION OF SERVICES PROVIDED

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	11,345	$1,807,633	0	$0
Total	11,345	1,807,633	0	0

According to Cerulli Associates, in 2022, almost 4.5 million defined contribution (DC) plan accounts with $779 billion in assets were rolled over to an IRA. Additionally, 0.7 million DC plan accounts with $66 billion in assets were rolled over to other employer-sponsored plans.[35] It is challenging to obtain reliable data on other types of rollovers such as IRA-to-IRA and defined benefit (DB) plan-to-IRA. The Department uses Internal Revenue Service (IRS) data from 2020 on overall rollovers into IRAs, which is 5.7 million taxpayers and $618 billion.[36] Adding in the figures for plan-to-plan rollovers, the Department estimates the total number of rollovers at 6.4 million accounts with $684 billion in assets. The Department requests comment on this estimate.

Only rollovers overseen by an ERISA fiduciary would be affected by the proposed amendments to PTE 2020–02. The Department does not have compelling data on the percentage of rollovers that are overseen by an ERISA fiduciary. In 2022, 49 percent of DC plan-to-IRA rollovers, accounting for 63 percent of DC plan rollover assets, were intermediated by an adviser.[37] For purposes of this analysis, the Department assumes that advisers intermediating rollovers are ERISA fiduciaries, which means the estimate is an upper bound. The Department applies the estimate made for DC plan-to-IRA rollovers to all types of rollovers. Accordingly, the Department estimates that 3.1 million rollovers and $431 billion in rollover assets would be affected by the proposed amendments to PTE 2020–02.[38] The Department requests comments on these assumptions.

[32] The number of financial entities needing to update their written acknowledgement is estimated as: (1,894 broker-dealers × 10%) + (7,570 SEC-registered investment advisers × 10%) + (8,412 state-registered investment advisers × 10%) + (183 insurers × 10%) = 1,806 financial institutions updating existing disclosures. [(1,806 financial institutions × 10 minutes) ÷ 60 minutes] = 301 hours. The equivalent cost is estimated as: 301 hours × $159.34 = $47,961.

[33] The burden is estimated as: [(930 small pension consultants + 10 small robo-adviser + 20 small investment company underwriters) × 1 hour] + [(81 large pension consultants + 190 large robo-advisers) × 5 hours] = 2,315 hours. The equivalent cost is estimated as: {[(930 small pension consultants + 10 small robo-adviser + 20 small investment company underwriters) × 1 hour] + [(81 large pension consultants + 190 large robo-advisers) × 5 hours]} × $159.34 = $368,872.

[34] The number of financial entities needing to update their written description of services is estimated as: 1,894 broker-dealers + 15,982 registered investment advisers + 183 insurers = 18,059 financial institutions updating existing disclosures. The burden is estimated as follows: [(18,059 financial institutions × 30 minutes) ÷ 60 minutes] = 9,030 hours. The equivalent cost is estimated as: [(18,059 financial institutions × 30 minutes) ÷ 60 minutes] × $159.34 = $1,438,761.

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

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

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

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

The current PTE required rollover documentation from plans to IRAs. As a best practice, the SEC already encourages firms to record the basis for significant investment decisions, such as rollovers, although doing so is not required. In addition, some firms may voluntarily document significant investment decisions to demonstrate compliance with applicable law, even if not required. A report commissioned by this commenter found that slightly more than half (52 percent) of respondents will ''require best interest rationale documentation for rollover recommendations.'' [39] The Department estimates that documenting each rollover recommendation will require 30 minutes for a personal financial advisor whose firms currently do not require rollover documentations and five minutes for financial advisors whose firms already require them to do so. The Department estimates that this will result in an hour burden of 883,953 hours with an equivalent cost of approximately $193.8 million.[40] The Department requests comment on the time it would take to document the rollover recommendation.

TABLE 4—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE ROLLOVER DOCUMENTATION

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Financial Adviser	883,953	$193,788,961	883,953	$193,788,961
Total	883,953	193,788,961	883,953	193,788,961

1.3.2. New Disclosure Requirements Under the Proposed Amended PTE 2020–02

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

(1) a written statement of the best interest standard of care owed; and

(2) a written statement that the retirement investor has the right to obtain specific information regarding costs, fees, and compensation.

Under the Investment Advisers Act of 1940 and SEC Regulation Best Interest, most SEC-registered investment advisers and broker-dealers with retail investors already provide disclosures that the Department expects would satisfy these requirements.

The proposed amendments would add a requirement for financial institutions to provide a written statement of the Best Interest standard of care owed. Under the Investment Advisers Act, the SEC's Regulation Best Interest, and Form CRS, most SEC-registered investment advisers and broker-dealers with retail investors are already required to provide disclosures that the Department expects would satisfy these requirements.

The Department expects that the written statement of the Best Interest standard of care owed would not take a significant amount of time to prepare and would be uniform across clients. The Department assumes it would take a financial institution 30 minutes to prepare the statement, resulting in an hour burden of 10,352 hours and an equivalent cost burden of $1,649,488 in the first year.[41]

TABLE 5—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE BEST INTEREST STANDARD DISCLOSURE

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	10,352	$1,649,488	0	$0
Total	10,352	1,649,488	0	0

For the added requirement of a written statement informing the investor of their right to obtain a written description of the financial institution's policies and procedures and information regarding costs, fees, and compensation, the Department expects that many financial institutions' disclosures, as required by the existing PTE 2020–02, already substantially comply with this regulation or would require modest adjustments to do so. The Department estimates that, on average, it would take a legal professional at broker-dealers and registered investment advisers, on average, 30 minutes to modify existing statements and that it would take insurers, robo-advisers, pension consultants, and investment company underwriters, on average, one hour to prepare the statement. This results in an hour burden of 10,352 hours and a cost burden of $1,649,488 in the first year.[42]

[39] Deloitte, *Regulation Best Interest: How Wealth Management Firms are Implementing the Rule Package,* (March 6, 2020). This report was released before Regulation Best Interest was effective, so more broker-dealers may now document rollover recommendations. As such, this may represent an overestimate of the cost incurred to comply with this requirement.

[40] The burden is estimated as follows: (3,119,833 rollovers × 48% × 30 minutes) + (3,119,833 rollovers × 52% × 5 minutes) = 883,953 hours. A labor rate of $219.23 is used for a personal financial adviser. The labor rate is applied in the following calculation: {[(3,119,833 rollovers × 48% × 30 minutes) + (3,119,833 rollovers × 52% × 5 minutes)] ÷ 60 minutes} × $219.23 = $193,788,961.

[41] The burden is estimated as follows: [(19,290 financial institutions × 30 minutes) ÷ 60 minutes] = 10,352 hours. A labor rate of $159.34 is used for a lawyer. The labor rate is applied in the following calculation: [(19,290 financial institutions × 30 minutes) ÷ 60 minutes] × $159.34 = $1,649,488.

[42] The burden is estimated as follows: [(1,894 broker-dealers + 15,982 registered investment advisers) × 30 minutes] + [(183 insurers + 200 robo-advisers + 1,011 pension consultants, and 20 investment company underwriters) × 1 hour] = 10,352 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: {[(1,894 broker-dealers + 15,982 registered investment advisers) × 30 minutes] + [(183 insurers + 200 robo-advisers + 1,011 pension consultants, and 20 investment company underwriters) × 1 hour]} × $159.34 = $1,649,488.

The Department does not have data on how often investors would request a written description of the financial institutions' policies and procedures and information regarding costs, fees, and compensation. The Department assumes that, on average, each financial institution would receive 10 such requests annually and that most financial institutions already have such information available. The Department requests comment on these assumptions. The Department estimates it would take a clerical worker five minutes to prepare and send the disclosure, regardless of whether it is sent electronically or by mail. This results in an annual hour burden of 16,075 with an equivalent cost of $1,019,959.[43]

TABLE 6—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE WRITTEN DESCRIPTION STATEMENT OF THE RIGHT TO OBTAIN A WRITTEN DESCRIPTION OF THE FINANCIAL INSTITUTION'S POLICIES AND PROCEDURES AND PROVISION OF REQUESTED POLICIES AND PROCEDURES

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	10,352	$1,649,488	0	$0
Clerical	16,075	1,019,959	16,075	1,019,959
Total	26,427	2,669,447	16,075	1,019,959

As discussed above, the Department assumes that 5.8 percent, or 11,188, of these disclosures would not be sent electronically. Financial institutions would incur $0.66 for postage and $0.10 for the paper and printing costs of two pages for each of the disclosures that would not be sent electronically, which the Department estimates to cost $8,503.[44]

TABLE 7—MATERIAL AND POSTAGE COST ASSOCIATED WITH THE WRITTEN DESCRIPTION STATEMENT OF THE RIGHT TO OBTAIN A WRITTEN DESCRIPTION OF THE FINANCIAL INSTITUTION'S POLICIES AND PROCEDURES AND PROVISION OF REQUESTED POLICIES AND PROCEDURES

Activity	Year 1		Subsequent years	
	Pages	Cost	Pages	Cost
Material Cost	2	$8,503	2	$8,503
Total	2	8,503	2	8,503

1.3.3. Provision of Disclosures

Similar to the 2020 analysis, the Department assumes most required disclosures will be electronically delivered to plan fiduciaries. As discussed above, the Department assumes that approximately 5.8 percent of participants who roll over their plan assets to IRAs would not receive required disclosures electronically. The Department estimates that approximately 3.2 million retirement investors[45] have relationships with financial institutions and are likely to engage in transactions covered under this PTE. Of these 3.2 million retirement investors, it is estimated that 5.8 percent, or 184,643 retirement investors, would receive paper disclosures.[46] The Department estimates that preparing and sending each disclosure would take a clerical worker, on average, five minutes, resulting in an hour burden of 15,387 hours with an equivalent cost of $976,301.[47]

[43] The burden is estimated as follows: [(19,290 financial institutions × 10 disclosures × 5 minutes) ÷ 60 minutes] = 16,075 hours. A labor rate of $63.45 is used for a clerical worker. The labor rate is applied in the following calculation: [(16,075 financial institutions × 10 disclosures × 5 minutes) ÷ 60 minutes] × $63.45 = $1,019,959.

[44] ((19,290 financial institutions × 10 disclosures × 2 pages × $0.05) + (19,290 financial institutions × 10 disclosures × $0.66)) × 5.8% = $8,503.

[45] According to Cerulli, in 2022, there were 707,104 DC plan-to-DC plan rollovers. (*See* Cerulli Associates, *U.S. Retirement End-Investor 2023: Personalizing the 401(k) Investor Experience,* Exhibit 6.02. The Cerulli Report.) The Department also uses Internal Revenue Service (IRS) data from 2020 on overall rollovers into IRAs, which is 5,659,901 taxpayers. (*See Internal Revenue Service, SOI Tax Stats—Accumulation and Distribution of Individual Retirement Arrangement (IRA),* Table 1: Taxpayers with Individual Retirement Arrangement (IRA) Plans, By Type of Plan, Tax Year 2020. (2023).) The Department estimates the number of affected plans and IRAs to be equal to 50 percent of rollovers from retirement plans to IRAs. The total number of retirement investors that have relationships with financial institutions and are likely to engage in transacted covered under this PTE is estimated as: (707,104 DC plan-to-DC plan rollovers + 5,659,901 taxpayer with IRA rollovers) × 50 percent = 3,183,503.

[46] This is estimated as: 3,183,503 rollovers × 5.8% = 184,643 disclosures.

[47] This burden is estimated as: [(184,643 disclosures × 5 minutes) ÷ 60 minutes] = 15,387 hours. [(184,643 disclosures × 5 minutes) ÷ 60 minutes] × $63.45 = $976,301.

TABLE 8—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED PREPARING AND SENDING DISCLOSURES

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Clerical	15,387	$976,301	15,387	$976,301
Total	15,387	976,301	15,387	976,301

The Department assumes that the disclosures would require four pages in total, resulting in a material and postage cost of $158,793.[48]

TABLE 9—MATERIAL AND POSTAGE COST ASSOCIATED WITH SENDING DISCLOSURES

Activity	Year 1		Subsequent years	
	Pages	Cost	Pages	Cost
Material Cost	4	$158,793	4	$158,793
Total	4	158,793	4	158,793

1.4 Costs Associated With Disclosures for PEPs

Financial institutions providing investment advice for PEPs must provide to each participating employer an additional disclosure detailing any amounts the financial institution pays to or receives from the PPP or its affiliates in addition to any conflicts of interest that arise in connection with the investment advice it provides to a PEP. According to filings submitted to the Department, the Department estimates that there are 382 PEPs.[49]

The Department does not have data on what percent of PEPs would be affected by the exemption. The Department assumes that on average, one financial institution would need to prepare one disclosure for each PEP. The Department estimates that, on average, it would take legal staff for each entity two hours to draft the disclosure, resulting in an hour burden of 764 hours with an equivalent cost of $121,736 in the first year.[50] The Department requests comment on this assumption and how frequently PPPs would provide investment advice to a PEP within the framework of the exemption. According to filings submitted to the Department, the Department estimates that there are 955 employers in PEPs.[51] The Department assumes that all of these disclosures will be sent electronically. Distributing the disclosures is estimated to take clerical personnel one minute per disclosure. This results in an hour burden of 16 hours, and assuming an hourly wage rate for clerical personnel of $63.45, the estimated equivalent cost burden is $1,010.[52]

TABLE 10—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH PREPARING AND SENDING DISCLOSURES

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	764	$121,736	0	$0
Clerical	16	1,010	16	1,010
Total	780	122,746	16	1,010

1.5 Costs Associated With Annual Report of Retrospective Review

The proposed amendment would require financial institutions to conduct a retrospective review at least annually. The review would be required to be reasonably designed to detect and prevent violations of, and achieve compliance with, (1) the conditions of this exemption, (2) the Impartial Conduct Standards, and (3) the policies and procedures governing compliance with the exemption. The Department is clarifying that the Financial Institution must update the policies and procedures as business, regulatory, and legislative changes and events dictate, to

[48] The material and postage cost is estimated as: (184,643 disclosures × 4 pages × $0.05) + (184,643 disclosures × $0.66 postage) = $158,793.

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

[50] The burden is estimated as follows: 382 PEPs × 2 hours = 764 hours. A labor rate of $159.34 is used for a lawyer. The labor rate is applied in the following calculation: 382 PEPs × 2 hours × $159.34 = $121,736.

[51] Based on 2021 EFAST filings as of August 22, 2023, the Department estimates that there were 955 employers in 382 PEPs. The Department does not have data on the number of employers since October 2022. To estimate the number of employees, the Department applies the ratio of employers to PEPs in October 2021 (955/382 ~2.5) to the updated number of PEPs. Accordingly, the Department estimates that there are 955 employers in PEPs (382 × 2.5 = 955). The inaugural filing deadline for Form 5500 filings for PEPs with plan years beginning after January 1, 2021 was July 31, 2022. The Department based its estimates on those filings it had received by August 22, 2023. However, since this is the first year PEPs could file, the Department anticipates that this understates the true number of PEPs affected by this proposed rule.

[52] The burden is estimated as follows: [(955 employers × 1 minute) ÷ 60 minutes] = 16 hours. A labor rate of $63.45 is used for a clerical worker. The labor rate is applied in the following calculation: [(955 employers × 1 minute) ÷ 60 minutes] × $63.45 = $1,010.

ensure they remain prudently designed, effective, and compliant with the exemption. This report would need to be certified by a Senior Executive.

Many of the entities affected by PTE 2020–02 likely already have retrospective review requirements. Broker-dealers are subject to retrospective review requirements under FINRA Rule 3110,[53] FINRA Rule 3120,[54] and FINRA Rule 3130;[55] SEC-registered investment advisers are already subject to retrospective review requirements under SEC Rule 206(4)–7; and insurance companies in many states are already subject to state insurance law based on the NAIC's Model Regulation.[56] Accordingly, in this analysis, the Department assumes that these entities will incur minimal costs to meet this requirement.

In 2018, the Investment Adviser Association estimated that 92 percent of SEC-registered investment advisers voluntarily provide an annual compliance program review report to senior management.[57] The Department assumes that state-registered investment advisers exhibit similar retrospective review patterns as SEC-registered investment advisers. Accordingly, the Department estimates that eight percent, or 1,279 investment advisers advising retirement plans will incur costs associated with producing a retrospective review report.

The Department assumes that only ten percent of financial institutions will incur the total costs of producing the retrospective review report. This is estimated to take a legal professional five hours for small firms and 10 hours for large firms. This results in an annual hour burden of 3,715 hours and an equivalent cost burden of $591,948.[58]

Financial Institutions that already produce retrospective review reports voluntarily or in accordance with other regulators' rules likely will spend additional time to fully comply with this exemption condition such as revising their current retrospective review reports. This is estimated to take a financial professional one hour for small firms and two hours for large firms. This results in an annual hour burden of 33,335 hours and an equivalent cost burden of $5,311,672.[59]

The proposed amendments would add a requirement to review policies and procedures at least annually and to update them as needed to ensure they remain prudently designed, effective, and current. This includes a requirement to update and modify the policies and procedures, as appropriate, after considering the findings in the retrospective review report. For entities currently covered by PTE 2020–02, the Department estimates that it would take a legal professional an additional 30 minutes for all entities covered under the existing and amended exemption. The Department estimates this would result an annual hour burden of 9,645 with an equivalent cost of $1,536,834.[60]

In addition to conducting the audit and producing a report, financial institutions also will need to review the report and certify the exemption. This is estimated to take the certifying officer two hours for small firms and four hours for large firms. This results in an hour burden of 68,156 and an equivalent cost burden of $12,992,578.[61]

TABLE 11—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH THE RETROSPECTIVE REVIEW

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Legal	46,695	$7,440,454	46,695	$7,440,454
Senior Executive Staff	68,156	12,992,578	68,156	12,992,578
Total	114,851	20,433,032	114,851	20,433,032

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

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

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

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

[57] *2018 Investment Management Compliance Testing Survey,* Investment Adviser Association (Jun. 14, 2018), *https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/publications/2018-Investment-Management_Compliance-Testing-Survey-Results-Webcast_pptx.pdf.*

[58] The burden is estimated as: [(395 small broker-dealers + (2,996 small registered-investment advisers × 8%) + 151 small insurers + 10 small robo-advisers + 930 small pension consultants + 20 small investment company underwriters) × 10% × 5 hours] + [(1,499 large broker-dealers + (12,986 large registered-investment advisers × 8%) + 32 large insurers + 190 large robo-advisers + 81 large pension consultants) × 10% × 10 hours] = 3,715 hours. The equivalent cost is estimated as: {[(395 small broker-dealers + (2,996 small registered-investment advisers × 8%) + 151 small insurers + 10 small robo-advisers + 930 small pension consultants + 20 small investment company underwriters) × 10% × 5 hours] + [(1,499 large broker-dealers + (12,986 large registered-investment advisers × 8%) + 32 large insurers + 190 large robo-advisers + 81 large pension consultants) × 10% × 10 hours]} × $159.34 = $591,948.

[59] The burden is estimated as: [(395 small broker-dealers + (2,996 small registered-investment advisers × 92%) + 151 small insurers + 10 small robo-advisers + 930 small pension consultants + 20 small investment company underwriters) × 90% × 5 hours] + [(1,499 large broker-dealers + (12,986 large registered-investment advisers × 92%) + 32 large insurers + 190 large robo-advisers + 81 large pension consultants) × 90% × 10 hours] = 33,335 hours.

The equivalent cost is estimated as: {[(395 small broker-dealers + (2,996 small registered-investment advisers × 92%) + 151 small insurers + 10 small robo-advisers + 930 small pension consultants + 20 small investment company underwriters) × 90% × 5 hours] + [(1,499 large broker-dealers + (12,986 large registered-investment advisers × 92%) + 32 large insurers + 190 large robo-advisers + 81 large pension consultants) × 90% × 10 hours]} × $159.34 = $5,311,672.

[60] The burden is estimated as follows: [(19,290 × 30 minutes) ÷ 60 minutes] = 9,645 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: [(19,290 × 30 minutes) ÷ 60 minutes] × $159.34 = $1,536,834.

[61] The burden is estimated as: [(395 small broker-dealers + (2,996 small registered-investment advisers) + 151 small insurers + 10 small robo-advisers + 930 small pension consultants + 20 small investment company underwriters) × 2 hours] + [(1,499 large broker-dealers + (12,986 large registered-investment advisers) + 32 large insurers + 190 large robo-advisers + 81 large pension consultants) × 4 hours] = 68,156 hours. The equivalent cost is estimated as: {[(395 small broker-dealers + (2,996 small registered-investment advisers) + 151 small insurers + 10 small robo-advisers + 930 small pension consultants + 20 small investment company underwriters) × 2 hours] + [(1,499 large broker-dealers + (12,986 large registered-investment advisers) + 32 large insurers + 190 large robo-advisers + 81 large pension consultants) × 4 hours]} × $190.63 = $12,992,578.

1.6 Costs Associated With Written Policies and Procedures

Under the original exemption, financial institutions were already required to maintain their policies and procedures. Robo-advisers, pension consultants, and investment company underwriters, who are not covered under the existing exemption may need to develop policies and procedures. The Department estimates that initially establishing, maintaining, and enforcing written policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards will take a legal professional five hours for small entities and 10 hours for large entities. The Department estimates the requirement would have an hour burden of 7,510 hours with an equivalent cost of $1,196,643 in the first year.[62]

TABLE 12—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH DEVELOPING POLICIES AND PROCEDURES

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Clerical	7,510	$1,196,463	0	$0
Total	7,510	1,196,643	0	0

The proposed amendments would require financial institutions to provide their complete policies and procedures to the Department upon request. Based on the number of cases in the past and current open cases that would merit such a request, the Department estimates that the Department would request 165 policies and procedures in the first year and 50 policies and procedures in subsequent years. The Department estimates that it will take a clerical worker 15 minutes to prepare and send their complete policies and procedures to the Department resulting in an hourly burden of approximately 41 hours in the first year. Assuming an hourly wage rate for clerical personnel of $63.45, the estimated cost burden in the first year is $2,617.[63] In subsequent years, the Department estimates that the requirement would result in an hour burden of approximately 13 hours with an equivalent cost of $793.[64] The Department assumes financial institutions would send the documents electronically and thus would not incur costs for postage or materials.

TABLE 13—HOUR BURDEN AND EQUIVALENT COST ASSOCIATED WITH PROVIDING POLICIES AND PROCEDURES TO THE DEPARTMENT

Activity	Year 1		Subsequent years	
	Burden hours	Equivalent burden cost	Burden hours	Equivalent burden cost
Clerical	41	$2,617	13	$793
Total	41	2,617	13	793

1.7 Overall Summary

The paperwork burden estimates are summarized as follows:

Type of Review: Revision of an existing collection.

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Fiduciary Proposed Transaction Exemption.

OMB Control Number: 1210–0163.

Affected Public: Business or other for-profit institution.

Estimated Number of Respondents: 19,290.

Estimated Number of Annual Responses: 6,504,119.

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

Estimated Total Annual Burden Hours: 1,044,050.

Estimated Total Annual Burden Cost: $167,296.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA)[65] imposes certain requirements on rules subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act or any other law.[66] Under section 603 of the RFA, agencies must submit an initial regulatory flexibility analysis (IRFA) of a proposal that is likely to have a significant economic impact on a substantial number of small entities, such as small businesses, organizations, and governmental jurisdictions. This proposed amended exemption, along with related amended exemptions and a proposed rule amendment published elsewhere in this issue of the **Federal Register**, is part of a rulemaking regarding the definition of fiduciary investment advice, which the Department has determined likely will have a significant economic impact on a substantial number of small entities. The impact of this proposed amendment on small entities is included in the IRFA

[62] The burden is estimated as follows: [(930 small pension consultants + 10 small robo-adviser + 20 small investment company underwriters) × 5 hours] + [(81 large pension consultants + 190 large robo-advisers) × 10 hours] = 7,510 hours. A labor rate of $159.34 is used for a legal professional. The labor rate is applied in the following calculation: {[(930 small pension consultants + 10 small robo-adviser + 20 small investment company underwriters) × 5 hours]} × $159.34 = $1,196,643.

[63] The burden is estimated as follows: [(165 policies and procedures × 15 minutes) ÷ 60 minutes] = 41 hours. A labor rate of $63.45 is used for a clerical worker. The labor rate is applied in the following calculation: [(165 policies and procedures × 15 minutes) ÷ 60 minutes] × $63.45 = $2,617.

[64] The burden is estimated as follows: [(50 policies and procedures × 15 minutes) ÷ 60 minutes] = 13 hours. A labor rate of $63.45 is used for a clerical worker. The labor rate is applied in the following calculation: [(50 policies and procedures × 15 minutes) ÷ 60 minutes] × $63.45 = $793.

[65] 5 U.S.C. 601 *et seq.*

[66] 5 U.S.C. 601(2), 603(a); *see* 5 U.S.C. 551.

for the entire project, which can be found in the related notice of proposed rulemaking found elsewhere in this edition of the **Federal Register**.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 [67] requires each Federal agency to prepare a written statement assessing the effects of any Federal mandate in a proposed or final rule that may result in an expenditure of $100 million or more (adjusted annually for inflation with the base year 1995) in any 1 year by state, local, and tribal governments, in the aggregate, or by the private sector. For purposes of the Unfunded Mandates Reform Act, as well as Executive Order 12875, this proposed amended exemption does not include any Federal mandate that will result in such expenditures.

Federalism Statement

Executive Order 13132 outlines fundamental principles of federalism. It also requires Federal agencies to adhere to specific criteria in formulating and implementing policies that have ''substantial direct effects'' on the states, the relationship between the national government and states, or on the distribution of power and responsibilities among the various levels of government. Federal agencies promulgating regulations that have these federalism implications must consult with State and local officials, and describe the extent of their consultation and the nature of the concerns of State and local officials in the preamble to the final regulation. Notwithstanding this, Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA.

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

[67] Public Law 104–4, 109 Stat. 48 (Mar. 22, 1995).

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 act prudently and discharge his or her duties respecting the Plan solely in the interests of the participants and beneficiaries of the Plan. Additionally, the fact that a transaction is the subject of an exemption does not affect the requirement of Code section 401(a) that the Plan must operate for the exclusive benefit of the employees of the employer maintaining the Plan and their beneficiaries; (2) Before the proposed exemption may be granted under ERISA section 408(a) and Code section 4975(c)(2), the Department must find that it 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 the Plan and IRA owners; (3) If granted, the proposed exemption is applicable to a particular transaction only if the transaction satisfies the conditions specified in the exemption; and (4) The proposed exemption, if granted, is supplemental to, and not in derogation of, any other provisions of ERISA and the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction.

The Department is proposing the following amendment on its own motion, pursuant to its authority under ERISA section 408(a) and Code section 4975(c)(2) and in accordance with procedures set forth in 29 CFR part 2570, subpart B (76 FR 66637 (October 27, 2011)).[68]

[68] Reorganization Plan No. 4 of 1978 (5 U.S.C. App. 1 (2018)) generally transferred the authority of the Secretary of the Treasury to grant administrative exemptions under Code section 4975 to the Secretary of Labor.

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

Section I—Transactions

(a) In General

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

The exemption provides relief from the prohibitions of ERISA section 406(a)(1)(A), (D), and 406(b), and the sanctions imposed by Code section 4975(a) and (b), by reason of Code section 4975(c)(1)(A), (D), (E), and (F), if the Financial Institutions and Investment Professionals provide fiduciary investment advice in accordance with the conditions set forth in Section II and are eligible pursuant to Section III, subject to the definitional terms and recordkeeping requirements in Sections IV and V.

(b) Covered Transactions

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

(1) The receipt of reasonable compensation; and

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

(c) Exclusions

This exemption does not apply if:

(1) The Plan is covered by Title I and the Investment Professional, Financial Institution, or any Affiliate providing investment advice is

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

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

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

Section II—Investment Advice Arrangement

Section II(a) requires Investment Professionals and Financial Institutions to comply with Impartial Conduct Standards, including a best interest standard, when providing fiduciary investment advice to Retirement Investors. In addition, Section II(b) requires Financial Institutions to acknowledge fiduciary status under Title I and/or the Code, and provide investors with a statement of the best interest standard of care, a written description of the services they will provide and their Conflicts of Interest, rollover disclosure (as applicable), Financial Institution, and additional disclosure with respect to Pooled Employer Plans (as applicable). Section II(c) requires Financial Institutions to adopt policies and procedures prudently designed to ensure compliance with the Impartial Conduct Standards when providing fiduciary investment advice to Retirement Investors regarding compliance with the Impartial Conduct Standards. Section II(d) requires the Financial Institution to conduct a retrospective review of compliance with the Impartial Conduct Standards and the policies and procedures. Section II(e) allows Financial Institutions to correct certain violations of the exemption conditions and continue to rely upon the exemption for relief.

(a) Impartial Conduct Standards

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

(1) Investment advice is, at the time it is provided, in the Best Interest of the Retirement Investor. As defined in Section V(b), such advice: (A) 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 (B) does not place the financial or other interests of the Investment Professional, Financial Institution or any Affiliate, Related Entity, or other party ahead of the interests of the Retirement Investor, or subordinate the Retirement Investor's interests to their own. For example, in choosing between two investments offered and available to the Retirement Investor from the Financial Institution, it is not permissible for the Investment Professional to advise investing in the one that is worse for the Retirement Investor but better or more profitable for the Investment Professional or the Financial Institution.

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

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

(b) Disclosure

Prior to engaging in a transaction pursuant to this exemption, the Financial Institution provides the disclosures set forth in (1)–(4) to the Retirement Investor:

(1) A written acknowledgment that the Financial Institution and its Investment Professionals are providing fiduciary investment advice to the Retirement Investor and are fiduciaries under Title I, the Code, or both when making an investment recommendation;

(2) A written statement of the Best Interest standard of care owed by the Investment Professional and Financial Institution to the Retirement Investor;

(3) A written description of the services to be provided and the Financial Institution's and Investment Professional's material Conflicts of Interest that is accurate and not misleading in any material respect. This description will include a statement on whether the Retirement Investor will pay for such services, directly or indirectly, including through Third-Party Payments. If, for example, the Retirement Investor will pay through commissions or transaction-based payments, the written statement must clearly disclose that fact. This statement must be written in plain English, taking into consideration a Retirement Investor's level of financial experience;

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

(5) *Rollover disclosure.* Before engaging in a rollover, or making a recommendation to a Plan participant as to the post-rollover investment of assets currently held in a Plan, the Financial Institution and Investment Professional must consider and document the basis for their conclusions as to whether a rollover is in the Retirement Investor's Best Interest, and must provide that documentation to the Retirement Investor. Relevant factors to consider must include but are not limited to:

(A) the alternatives to a rollover, including leaving the money in the Plan or account type, as applicable;

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

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

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

(6) The Financial Institution will not fail to satisfy the conditions in Section II(b) solely because it, acting in good faith and with reasonable diligence, makes an error or omission in disclosing the required information, provided that

the Financial Institution discloses the correct information as soon as practicable, but not later than 30 days after the date on which it discovers or reasonably should have discovered the error or omission.

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

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

(c) Policies and Procedures

(1) The Financial Institution establishes, maintains, and enforces written policies and procedures prudently designed to ensure that the Financial Institution and its Investment Professionals comply with the Impartial Conduct Standards in connection with covered fiduciary advice and transactions.

(2) The Financial Institution's policies and procedures mitigate Conflicts of Interest to the extent that a reasonable person reviewing the policies and procedures and incentive practices as a whole would conclude that they do not create an incentive for a Financial Institution or Investment Professional to place their interests ahead of the interests of the Retirement Investor. Financial Institutions may not use quotas, appraisals, performance or personnel actions, bonuses, contests, special awards, differential compensation, or other similar actions or incentives that are intended, or that a reasonable person would conclude are likely, to result in recommendations that are not in Retirement Investors' Best Interest.

(3) Financial Institutions must provide their complete policies and procedures to the Department upon request within 10 business days of request.

(d) Retrospective Review

(1) The Financial Institution conducts a retrospective review, at least annually, that is reasonably designed to assist the Financial Institution in detecting and preventing violations of, and achieving compliance with, this exemption, including the Impartial Conduct Standards and the policies and procedures governing compliance with the exemption. The Financial Institution updates the policies and procedures as business, regulatory, and legislative changes and events dictate, and to ensure they remain prudently designed, effective, and compliant with Section II(c).

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

(3) A Senior Executive Officer of the Financial Institution certifies, annually, that:

(A) The officer has reviewed the report of the retrospective review;

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

(C) The Financial Institution has written policies and procedures that meet the conditions set forth in Section II(c)(1); and

(D) The Financial Institution has in place a prudent process to modify such policies and procedures as set forth in Section II(d)(1).

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

(5) The Financial Institution retains the report, certification, and supporting data for a period of six years and makes the report, certification, and supporting data available to the Department, within 10 business days of request, to the extent permitted by law including 12 U.S.C. 484 (regarding limitations on visitorial powers for national banks).

(e) Self-Correction

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

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

(2) The Financial Institution corrects the violation and notifies the Department of Labor of the violation and the correction via email to *IIAWR@dol.gov* within 30 days of correction;

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

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

Section III—Eligibility

(a) General

Subject to the timing and scope provisions set forth in subsection (b) and the opportunity to be heard as set forth in subsection (c), an Investment Professional or Financial Institution will be ineligible to rely on the exemption with respect to any transaction, if the Financial Institution, its Affiliate, or Investment Professional is described in (1) or (2):

(1) The Investment Professional or Financial Institution has been convicted either:

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

(B) by a foreign court of competent jurisdiction as a result of any crime, however denominated by the laws of the relevant foreign or state government, that is substantially equivalent to an offense described in (A).

For purposes of this section (a)(1), a person shall be deemed to have been convicted of a crime as of the "conviction date," which is the date of the judgment of the trial court (or the date of the judgment of any court in a foreign jurisdiction that is the equivalent of a U.S. Federal or state trial court), regardless of whether that judgment remains under appeal.

(2) The Investment Professional or Financial Institution has received a written ineligibility notice issued by the Department for:

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

(B) intentionally violating the conditions of this exemption in connection with otherwise non-exempt prohibited transactions;

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

(D) providing materially misleading information to the Department in connection with the conditions of the exemption.

(b) Timing and Scope of Ineligibility

(1) Ineligibility shall begin six months after:

(A) the conviction date defined in Section (a)(1);

(B) the date of the Department's written determination under Section (c)(1)(C) for a petition regarding a foreign conviction; or

(C) the date of the written ineligibility notice described in subsection (a)(2).

(2) A person shall become eligible to rely on this exemption again only upon the earliest of the following:

(A) the date of a subsequent judgment reversing such person's conviction described in (a)(1);

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

(C) the date, if any, the Department grants an individual exemption (which may impose additional conditions) to the person permitting its continued reliance on this exemption notwithstanding the conviction.

(c) Opportunity To Be Heard

(1) Foreign Convictions.

(A) A Financial Institution, its Affiliate, or an Investment Professional that has been convicted by a foreign court of competent jurisdiction as provided in subsection (a)(1)(B)), the Financial Institution or Investment Professional may submit a petition to the Department that informs the Department of the conviction and seeks the Department's determination that the Financial Institution's continued reliance on the exemption would not be contrary to the purposes of the exemption. Petitions must be submitted to the Department within 10 business days after the conviction date by email to *IIAWR@dol.gov.*

(B) Following receipt of the petition, the Department will provide the Investment Professional or Financial Institution with the opportunity to be heard in person (including by phone or videoconference), in writing, or a combination thereof. The opportunity to be heard will be limited to one conference unless the Department determines in its sole discretion to allow additional conferences.

(C) Following the hearing, the Department will issue a written determination to the Financial Institution or Investment Professional, as applicable, articulating the basis for its determination whether or not to allow the Financial Institution or Investment Professional to continue relying on PTE 2020–02.

(2) Written Ineligibility Notice. Prior to issuing a written ineligibility notice, the Department will issue a written warning to the Investment Professional or Financial Institution, as applicable, identifying specific conduct implicating subsection (a)(2) and providing a six-month opportunity to cure. At the end of the six-month period, if the Department determines that the Investment Professional or Financial Institution has not taken appropriate action to prevent recurrence of the disqualifying conduct, it will provide the Investment Professional or Financial Institution with the opportunity to be heard, in person (including by phone or videoconference), in writing, or a combination, before the Department issues the written ineligibility notice. The opportunity to be heard will be limited to one conference unless the Department determines in its sole discretion to allow additional conferences. The written ineligibility notice will articulate the basis for the determination that the Investment Professional or Financial Institution engaged in conduct described in subsection (a)(2).

(3) Department's Considerations. For hearings under (c)(1) and (c)(2), the Department will consider: the gravity of the offense; the degree to which the underlying conduct concerned individual misconduct, or, alternately, corporate managers or policy; recency of the conduct at issue; any remedial measures taken; and other factors the Department determines in its discretion are reasonable in light of the nature and purposes of the exemption.

(d) Alternative Exemptions

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

Section IV—Recordkeeping

The Financial Institution maintains for a period of six years records demonstrating compliance with this exemption and makes such records available, to the extent permitted by law including 12 U.S.C. 484, to any authorized employee of the Department or the Department of the Treasury.

Section V—Definitions

(a) ''Affiliate'' means:

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

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

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

(b) Advice is in a Retirement Investor's ''Best Interest'' if such advice (A) 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 (B) does not place the financial or other interests of the Investment Professional, Financial Institution or any Affiliate, Related Entity, or other party ahead of the interests of the Retirement Investor, or subordinate the Retirement Investor's interests to their own.

(c) A ''Conflict of Interest'' is an interest that might incline a Financial Institution or Investment Professional—consciously or unconsciously—to make a recommendation that is not in the Best Interest of the Retirement Investor.

(d) A ''Covered Principal Transaction'' is a principal transaction that:

(1) For sales to a Plan or an IRA:

(A) Involves a U.S. dollar denominated debt security issued by a U.S. corporation and offered pursuant to a registration statement under the Securities Act of 1933, a U.S. Treasury Security, a debt security issued or guaranteed by a U.S. federal government agency other than the U.S. Department of the Treasury, a debt security issued or guaranteed by a government-sponsored enterprise, a municipal security, a certificate of deposit, an interest in a Unit Investment Trust, or any investment permitted to be sold by an investment advice fiduciary to a Retirement Investor under an individual exemption granted by the Department after the effective date of this exemption that includes the same conditions as this exemption; and

(B) A debt security may only be recommended in accordance with written policies and procedures adopted by the Financial Institution that are reasonably designed to ensure that the security, at the time of the recommendation, has no greater than moderate credit risk and sufficient liquidity that it could be sold at or near carrying value within a reasonably short period of time; and

(2) For purchases from a Plan or an IRA, involves any securities or investment property.

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

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

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

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

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

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

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

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

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

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

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

(h) ''Investment Professional'' means an individual who:

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

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

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

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

(j) A ''Pooled Employer Plan'' or ''PEP'' means a pooled employer plan described in ERISA section 3(43).

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

(l) ''Riskless Principal Transaction'' means a transaction in which a Financial Institution, after having received an order from a Retirement Investor to buy or sell an asset, purchases or sells the asset for the Financial Institution's own account to offset the contemporaneous transaction with the Retirement Investor. A Riskless Principal Transaction is not a Covered Principal Transaction.

(m) A ''Related Entity'' is any party that is not an Affiliate, but which either has, or in which the Investment Professional or Financial Institution has, an interest that may affect best judgment as a fiduciary.

(n) ''Retirement Investor'' means:

(1) A participant or beneficiary of a Plan with authority to direct the investment of assets in their account or to take a distribution;

(2) The beneficial owner of an IRA acting on behalf of the IRA; or

(3) A fiduciary acting on behalf of a Plan or an IRA.

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

(p) ''Third-Party Payments'' include sales charges when not paid directly to the Financial Institution by the Plan, from a participant or beneficiary's account, or from an IRA; gross dealer concessions; revenue sharing payments; 12–1 fees; distribution, solicitation or referral fees; volume-based fees; fees for seminars and educational programs; and any other compensation, consideration, or financial benefit provided to the Financial Institution or an Affiliate or Related Entity by a third party as a result of a transaction involving a Plan, participant or beneficiary account, or IRA.

Signed at Washington, DC, this 24th day of October, 2023.

Lisa M. Gomez,

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